June 26, 2012

Ms. Barcy F. McNeal, Secretary
Public Utilities Commission of Ohio
180 East Broad Street, 11th Floor
Columbus, Ohio 43215-3793

Re: *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the form of an Electric Security Plan,* Case No. 12-1230-EL-SSO

Dear Ms. McNeal:

The Office of the Ohio Consumers' Counsel (OCC) is filing corrected pages to its Joint Brief filed on June 22, 2012. OCC has learned that it misinterpreted the meaning of certain percentage figures that FirstEnergy provided to the parties in its response to a discovery request from AEP Retail. (The information became marked as OCC Exhibit 8.) Using those figures, OCC misstated the potential increases that residential customers may expect to see under FirstEnergy's proposals in this case. Therefore, OCC and Citizen Power are re-filing their Joint Initial Brief to make the corrections that appear on pages 1, 3, 8, 16, 18, 19, 77, 86 and 87. OCC apologizes for this circumstance.

Very truly yours,

/s/ Larry S. Sauer
Larry S. Sauer
Counsel of Record
Assistant Consumers' Counsel

cc: Parties of Record

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 12-1230-EL-SSO

CORRECTED
JOINT INITIAL BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
CITIZEN POWER

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Corrected June 26, 2012

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CORRECTED
JOINT INITIAL BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
CITIZEN POWER

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") and Citizen Power, on behalf of residential utility customers, jointly submit their initial brief in the above-captioned proceeding

Without support from a single consumer advocate representing broad-based residential interests,[2] Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively, "FirstEnergy" or "Companies") seek approval of a Stipulation and Recommendation.

1

[2] Such as OCC, the Northeast Ohio Public Energy Council and the Northwest Ohio Aggregation Coalition.

The Stipulation is FirstEnergy's third standard service offer ("SSO") in the form of an Electric Security Plan ("ESP") which will determine -- through a competitive bid process -- the generation prices consumers are asked to pay. The ESP plan ("ESP 3") was filed on April 13, 2012, two years before the current ESP ("ESP 2")[3] expires. The Companies filed their Application on the same day that a stipulated agreement with a number of intervenors was filed in these proceedings[4] -- where the signatory parties represent, at best, a small portion of FirstEnergy's residential customers. The stipulating parties asked the Public Utilities Commission of Ohio ("PUCO" or "Commission") to approve the Stipulation, and the ESP, on an expedited timeline.

The Companies' service territories have undergone enormous changes in the past year. These developments have resulted in extraordinary uncertainty about future market conditions and prices for the Companies in the American Transmission System Incorporated ("ATSI") locational Deliverability Area ("LDA"). This uncertainty will not be resolved in a matter of months or a year, and creates unusual risks for potential bidders in the auctions to be held in October 2012 and January 2013, which could reduce competition and raise offer prices. Under these circumstances, expedited approval of the Application without thorough evaluation, including by parties that did not sign the Stipulation, would be unwise.

The extent of the uncertainty in FirstEnergy's service territory was outlined by OCC witness James Wilson. Mr. Wilson stated:

> The FE Companies' transmission affiliate, American Transmission Systems, Incorporated ("ATSI"), was integrated into the transmission system operated by PJM Interconnection, L.L.C.

[3] *In re FirstEnergy ESP 2 Case*, Case No. 10-388-EL-SSO Application (March 23, 2010).

[4] Stipulation and Recommendation (April 13, 2012) ("Stipulation").

> ("PJM") as of June 1, 2011, bringing the FE Companies, and their affiliate Penn Power, into PJM. Since then, PJM determined that the ATSI zone will be a separate pricing zone for RPM purposes. Most important, since the beginning of this year, the retirement of several major power plants serving the region has been announced.
>
> These retirements will substantially reduce the supply to the zone beginning September 1, 2012, which would be expected to raise energy, ancillary services and capacity prices. The retirements already resulted in much higher capacity prices for the zone for the 2015-2016 delivery year in the RPM base residual auction held earlier this month, for which the results were posted on May 18, 2012.[5] The clearing price for Annual resources located in the ATSI zone was $357.00/MW-day, compared to $136.00/MW-day for such resources located in the surrounding PJM region.[6] As a result of the definition of the ATSI zone in the RPM auction, consumers in the ATSI zone will pay much more for capacity, and generation located in the zone, the majority of which is owned by the FE Companies' affiliate, FirstEnergy Solutions Corp. ("FES"), will earn much higher capacity prices than power plants in surrounding areas.[7]

It has been estimated that FES may be in a position to earn as much as $550 million between June 1, 2015 and May 31, 2016, which may ultimately be passed on to customers.[8] As a result of the uncertainty in the ATSI zone and the higher capacity and energy charges anticipated during the term of the ESP 3, FirstEnergy's residential customers may expect to see increases

Before approving the Stipulation in this case, the Commission should make certain that this "rush to judgment" strategy employed by FirstEnergy was intended to bring value to consumers, and not about

[5] PJM, *2015/2016 RPM Base Residual Auction Results*, (May 18, 2012).

[6] *Id.* at 1.

[7] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 4-5 (May 21, 2012), citing PJM, *2015/2016 RPM Base Residual Auction Results* (May 18, 2012).

[8] Tr. Vol. II at 18-19 (Hays) (June 5, 2012) Proffered: *Wholesale Power Prices in Northeast Ohio Will Go Up*, by John Funk, The Cleveland Plain Dealer (May 22, 2012) ("At least one Wall Street analyst on Monday estimated FirstEnergy would pull in an extra $550 million between June 1, 2015 and May 31, 2016 because of the auction."); See also Tr. Vol. I at 203 (Ridmann) (June 4, 2012).

[9]

locking in high generation prices to benefit the Companies' unregulated generation affiliate. Because from outside the Stipulation looking in, it appears that FirstEnergy's customers will get nowhere near the benefits the Companies' unregulated generation affiliate will reportedly receive, under the Companies' proposal.

Moreover, the PUCO Staff acknowledges that, on a strict dollars basis, the Companies fail the statutory test that the Ohio General Assembly adopted to protect customers—that the result here must be more favorable in the aggregate than under a potential market-rate offer. Therefore, the Commission should reject or modify the Stipulation in order to provide more benefits for the Companies' consumers.

II. BACKGROUND

On April 13, 2012, FirstEnergy filed the Application pursuant to R.C. 4928.141 to provide for a SSO commencing as early as May 2, 2012, but no later than June 20, 2012, and ending May 31, 2016.[10] The Application is for an ESP, filed pursuant to R.C. 4928.143. The Application included a Stipulation agreed to by various parties regarding the terms of the proposed ESP 3. The Companies sought an expedited timeline for the approval of the Stipulation. FirstEnergy also filed a Motion for Waiver of Rules in an attempt to avoid compliance with the standards under Ohio Adm. Code 4901:1-35-03(C).

Six days later, on April 19, 2012, the Attorney Examiner issued an Entry establishing a procedural schedule for this case.[11] On April 17, 2012, the Consumer Advocates[12] filed a Joint Motion to Bifurcate and a Joint Memorandum Contra

[10] Stipulation at 6 (April 13, 2012).

[11] Entry at 2-3 (April 19, 2012).

[12] For purposes of this pleading, the Consumer Advocates were comprised of the following parties in this case: Environmental Law and Policy Center ("ELPC"), Natural Resources Defense Council, Northeast Ohio Public Energy Council ("NOPEC"), NOAC and OCC.

FirstEnergy's Motion for Waiver of Rules. In addition, on April 23, 2012, the Consumer Advocates filed an Interlocutory Appeal of the April 19 Entry.

On April 25, 2012, the Commission issued a ruling on FirstEnergy's Motion for Waiver of Rules ("April 25 Entry"). The Commission's Entry thereby granted some of FirstEnergy's waiver requests and denied others.[13] In denying certain of the requests, the PUCO obligated the Companies to file additional materials with the Commission by May 2, 2012. On May 2, 2012, FirstEnergy filed supplemental information in the docket. Part of that information was a typical bill analysis comparing certain rates of the existing ESP 2 with years one and two of the ESP 3. The Companies' typical bill comparison did not include a comparison of the generation rates that customers will pay under the proposed ESP 3 compared to ESP 2 plan.

On April 23, 2012, the Companies filed Supplemental Testimony of William Ridmann.[14] The stated purpose of Mr. Ridmann's supplemental testimony was to describe the efforts the Companies expended in order to qualify and quantify the PJM-qualifying energy efficiency resources that could be available to offer into the PJM Base Residual Auction, to further describe the qualitative benefits Mr. Ridmann described in his initial direct testimony, and to provide additional support regarding WRR Attachment 1 included with his initial direct testimony.[15]

[13] Entry at 5-6 (April 25, 2012).

[14] FirstEnergy Hearing Ex. No. 4.

[15] *Id.* at 1.

On April 26, 2012, the Consumer Advocates filed a Joint Motion for an extension of the procedural schedule for this matter, and to continue the evidentiary hearing. On May 2, 2012, the Attorney Examiner issued an Entry to revise the procedural schedule. The procedural schedule was not modified to the extent requested by the Consumer Advocates, but under the revised schedule non-signatory parties' testimony was due on May 21, 2012 and the evidentiary hearing was to commence on June 4, 2012.[16] The case proceeded under that schedule.

On May 7, 2012 the Commission Staff filed the Direct Testimony of Peter Baker[17] and Robert Fortney.[18] On May 21, 2012, OCC filed the Direct Testimony of James Wilson,[19] Daniel Duann[20] and Wilson Gonzalez.[21] Also filing testimony were Mark Frye,[22] Teresa Ringenbach,[23] Stephen Bennett,[24] David Fein,[25] Vincent Parisi,[26] and Christopher Neme.[27]

On the final day of hearing, June 8, 2012, the Attorney Examiners established the briefing schedule for this case. Initial Post-Hearing Briefs are due June 22, 2012 and

[16] Entry at 5 (May 2, 2012).

[17] Staff Hearing Ex. No. 2 (May 7, 2012).

[18] Staff Hearing Ex. No. 3. (May 7, 2012).

[19] OCC Hearing Ex. No. 9 (May 21, 2012).

[20] OCC Hearing Ex. No. 10 (May 21, 2012).

[21] OCC Hearing Ex. No. 11 (May 21, 2012).

[22] Joint NOPEC and NOAC Hearing Ex. No. 1 (May 21, 2012).

[23] Retail Energy Suppliers Association ("RESA") Hearing Ex. No. 3 (May 21, 2012).

[24] RESA Hearing Ex. No. 4. (May 21, 2012).

[25] Exelon Hearing Ex. No. 1 (May 21, 2012).

[26] IGS Hearing Ex. No. 1 (May 21, 2012).

[27] Sierra Club Hearing Ex. No. 5 (May 21, 2012).

Reply Briefs are due June 29, 2012.[28] OCC and Citizen Power hereby files their Initial Post-Hearing Brief in accordance with the schedule established in this case.

III. BURDEN OF PROOF

In this ESP Case, Ohio law places the burden of proof on the Companies. R.C. 4928.143(C)(1) states: "The burden of proof in the proceeding shall be on the electric distribution utility." Therefore, the burden of proof is not on OCC, Citizen Power or any other non-signatory party in this case.

IV. ARGUMENT

The Companies have promoted their ESP 3 Case as an "extension" of their ESP 2 Case.[29] OCC and Citizen Power take exception to this characterization of an extension. The General Assembly's ESP framework is for plans to be established for time periods. What the Companies call an extension for their new plan is masking the point of their effort to obtain, among other things, additional funding from customers in the amount of hundreds of millions of dollars.

There are significant issues within the ESP 3 proposal that should give the Commission ample reason to reject or modify the Stipulation as presented by the Companies. First, there are significant due process issues with the manner that this case has been conducted. Second, the Stipulation lacks support of all FirstEnergy residential customers. Third, the ESP 3 is not more favorable in the aggregate than a market rate offer ("MRO").

[28] Tr. Vol. IV at 156 (Price) (June 8, 2012).

[29] Application at 1 (April 13, 2012).

Fourth, the distribution capital recovery ("DCR") rider provision of the Stipulation does not meet statutory requirements. The DCR Rider provision is a significant provision of the ESP 3 because it allows the Companies to collect from customers up to $405 million in distribution investment cost recovery over the two-year term of the ESP 3, with a large proportion of those increases being collected from residential customers.

Fifth, the Stipulation provides for a three-year auction product (June 1, 2013 through May 31, 2016) intended, according to FirstEnergy, to blend anticipated higher prices in the future with current lower prices to stabilize generation prices over the three-year ESP 3 term. However, stable prices do not equate to lower prices, and given the uncertainty in the ATSI zone of PJM Interconnections, Inc. ("PJM"), it is not advisable to proceed with a three-year auction product at this time.[30] Finally, there are provisions of the Stipulation that violate Commission precedent (i.e., lost distribution revenues and significantly excessive earnings test ("SEET") provisions).

For all the above reasons, the Commission should reject the Stipulation. The effect of the Commission rejecting the Stipulation will be that the Companies' current ESP 2 will continue until the Commission approves either a new ESP proposal or a market-rate offer proposal from the Companies.[31]

[30] *See* OCC Hearing Ex. No. 8. Typical Bill Analysis prepared by FirstEnergy in response to AEP retail Discovery 7-146 and 7

[31] R.C. 4928.143(C)(2)(b).

A. The Stipulation Does Not Pass the Three-Prong Standard to Warrant Commission Approval.

The standard of review for consideration of a stipulation has been discussed in a number of Commission cases and by the Ohio Supreme Court. As the Ohio Supreme Court stated in *Duff*:

> A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.[32]

The Court in *Consumers' Counsel* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

> 1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
>
> 2. Does the settlement, as a package, benefit ratepayers and the public interest?
>
> 3. Does the settlement package violate any important regulatory principle or practice?[33]

In evaluating settlements in the ESP cases of electric distribution utilities ("EDUs"), the Commission should recognize the asymmetrical bargaining positions of the parties. As Commissioner Roberto noted in FirstEnergy's initial ESP case filed in 2008:

> When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes

[32] *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367.

[33] *Consumers' Counsel*, 64 Ohio St.3d at 126, 592 NE 2nd at 1373.

> that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.
>
> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully *all terms and conditions of this stipulation*.[34]

As reflected in Commissioner Roberto's opinion, the bargaining position of FirstEnergy relative to other parties in FirstEnergy's initial ESP proceeding was strengthened by the ability of FirstEnergy to reject the results from a fully litigated SSO proceeding. This should not be overlooked.

Furthermore, in the concurring opinions of Commissioners Centollella and Lemmie it was recognized that: "[t]he ability of an electric distribution utility to withdraw a Commission-modified and approved ESP and the Companies' prior withdrawal from an approved plan in this type of case need to be taken into account when

[34] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (March 25, 2009) at 1-2 .

considering the weight to be given to this stipulation. The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of the issues."[35] Therefore, the Commission must review carefully all terms and conditions of this Stipulation.

The ultimate question to be answered is whether, in light of the record, the Stipulation is reasonable and complies with Ohio law. As OCC and Citizen Power show, the Stipulation does not meet this standard. In addition, the Commission must ensure that the Stipulation meets provisions of the Ohio Revised Code relevant to ESPs.

1. The settlement is not a product of serious bargaining among capable, knowledgeable parties

a. The settlement lacked serious negotiations among all interested parties.

The uncontroverted evidence in this proceeding points to the first prong not being met. The parties invited to individual negotiations with the Companies that led to the filing of the ESP, were the parties to the prior ESP.[36] The time spent negotiating was short and supporting documents during the negotiations were lacking.[37] Unlike other proceedings, the parties to the case did not meet together as a group even once before the filing of the Stipulation.[38] Therefore, there was no opportunity for participants to hear the views of other parties and raise objections or otherwise determine the full effect of the Stipulation on their clients' interest.

---

[35] *Id.* at Concurring Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie at 2 (March 25, 2009).

[36] Tr. Vol. I. at 35-38 (Ridmann) (June 4, 2012).

[37] *See* OCC Ex. Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 7 (May 21, 2012).

[38] *Id.*

This process violates the spirit, if not the letter, of the Ohio Supreme Court's admonition of exclusionary settlement processes.[39] Although the Ohio Supreme Court acknowledged that not all parties need to participate in all settlement meetings,[40] the "shuttle negotiations" that took place in reaching this Stipulation are close enough to the types of exclusionary settlement discussions about which the Ohio Supreme Court had "grave concerns…."[41]

The Court's concern in the *Time Warner* case was that "Ameritech managed to either settle its competitive issues or defer them until a later date, all without having its competitors at the settlement table."[42] Here, FirstEnergy was able to bargain individually with only those parties who were participants in the Companies' last ESP case. Not only were those parties isolated from the views of other stakeholders, but interested stakeholders who were not participants in FirstEnergy's last ESP case were not approached. Thus, FirstEnergy was able to either settle its issues or defer them until a later date, all without having all stakeholders fully aware – or without awareness at all – of the content of the negotiations.

As a result of FirstEnergy's exclusionary settlement process, some interested parties in this case who did not participate in FirstEnergy's prior ESP (such as AEP Retail and the Sierra Club) were excluded from the negotiations, and their perspectives

[39] *Time Warner AxS v. Public Util. Comm'n.* (1996), 75 Ohio St.3d 229, 1996 Ohio 224, 661 N.E.2d 1097, n. 2.

[40] *Id.*

[41] *Id.*

[42] *Id.*

could not be reflected in the Stipulation's results. Further, it should be noted that 16 parties who did not sign the Stipulation have intervened since then.[43]

Because of the exclusionary nature of the settlement discussions, the Stipulation in this proceeding was not the result of serious bargaining among interested parties. The Stipulation fails the first prong of the test.

The Stipulation fails the first prong for another reason. FirstEnergy alleges that there is a "broad range of interests" represented by the signatories to the Stipulation.[44] But there is not a broad residential interest represented in the Stipulation. Without a signatory party that represents all residential customers, by far the largest number of the Companies' customers, the Stipulation fails to represent the interests of most of FirstEnergy's customers and thus fails to meet the first prong of the Commission's standard for judging stipulations.

The only signatory parties to the Stipulation that even remotely represent the interests of a group of residential customers are the Cleveland Housing Network, that is also a board member of another signatory party, Ohio Partners for Affordable Energy. Ohio Partners for Affordable Energy is a 501(c)(3) nonprofit membership organization made up of 60 member agencies mainly providing for low income weatherization and

[43] These parties and the dates they intervened are as follows: The Office of the Ohio Consumers' Counsel, Interstate Gas Supply, Inc., Exelon Generation Company, LLC, Constellation NewEnergy, Inc, Natural Resources Defense Council. (April 16, 2012), Direct Energy Services, LLC , Direct Energy Business, LLC, Dayton Power and Light Company, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition (April 18, 2012), AEP Retail Energy Partners, (April 20, 2012), The Sierra Club (April 23, 2012), Ohio Power Company, Ohio Environmental Council (April 25, 2012), Retail Energy Supply Association (April 27, 2012), Cleveland Municipal School District (May 3, 2012).

[44] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at 11 (April 13, 2012).

energy efficiency ,[45] the Empowerment Center and the Consumer Protection Association. These organizations, while providing a valuable service to their communities, are focused primarily on the needs of low-income customers and not all 1.9 million residential consumers. [46] In fact, OPAE's interest as stated in their motion to intervene is "OPAE's primary interests in this case is to protect the interests of low and moderate income Ohioans and OPAE members whose provision of electric service will be affected by this proceeding."[47] And the Citizens Coalition's interest as stated in their motion to intervene is: "Thus the Citizens Coalition and the low-income families represented by the Coalition have a real and substantial interest' in the outcome of this current set of cases, as required by OAC 4901-1-11(A). And then it says, "While other parties to this proceeding may also be concerned about the issues that affect low-income families, they have other sets of customer groups which they must also represent, which may impact their legal assistance to low-income families." [48]

. With regard to their signing the settlement, FirstEnergy provided an annual $1.4 million fuel fund contribution for low-income consumers for the years 2012 through

[45] *See* http://www.ohiopartners.org/index.php?page=board-members. Ohio Partners for Affordable Energy is a 501(c)(3) nonprofit membership organization made up of 60 member agencies mainly providing for low income weatherization and energy efficiency. *See* OCC Ex. 11 at 10.

[46] OCC Hearing Ex. No. 13, Motion to Intervene by The Empowerment Center of Greater Cleveland, Cleveland Housing Network. And The Consumer Protection Association (Collectively "The Citizens Coalition")("Thus the Citizens Coalition and the low-income families represented by the Coalition have "a real and substantial interest" in the outcome of this current set of cases * * * The Coalition's distinguished history of serving low-income families warrants its involvement in this case. Coalition has been in existence for over thirty years, working especially in neighborhoods surrounding the industrial valley of Cuyahoga County").

[47] Tr. Vol. III at 156-157 (Gonzalez) (June 6, 2012).

[48] Tr. Vol. III at 156-157 (Gonzalez) (June 6, 2012). ("Q. And in the paragraph starting, "the Citizens Coalition," you understand the Citizens Coalition to be the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, and the Consumer Protection Association? A. Yes.).

2016, that was documented in a side-deal disclosed by FirstEnergy in discovery conducted by NOAC pursuant to R.C. 4928.145.[49] [50]

However, there is much more at stake for residential customers in this proceeding. As noted by OCC witness Gonzalez, residential customers will be partly responsible for paying for the increased Rider DCR costs that will result from the Stipulation.[51] Rider DCR alone will increase FirstEnergy's collection of a distribution charge from customers by up to $405 million during the term of the ESP 3.[52] The inclusion of this detriment to residential customers, without an offsetting benefit, shows that residential customers were not adequately represented by the signatories to the Stipulation.

The Stipulation fails to meet the first prong of the Commission's standard for judging stipulations because the Stipulation in this case arose from negotiations that were exclusionary and in violation of the *Time Warner Case*. Furthermore, the Signatory Parties, in this case, lack the necessary diversity because the Stipulation does not include a signatory party that represents **all** of FirstEnergy's residential customers. Therefore, the Commission should reject or modify the Stipulation in this case.

[49] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at Attachment 1 FirstEnergy Response to Request – NOAC Set1 - INT-1 (May 21, 2012);.See also FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann, Attachment WRR-1 (April 23, 2012).

[50] R.C. 4928.145 states: "During a proceeding under sections 4928.141 to 4928.144 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission."

[51] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 9 (May 21, 2012).

[52] *Id.*

2. The settlement, as a package, does not benefit ratepayers and is not in the public interest.

b. It is not just or reasonable to subject FirstEnergy's customers to higher rates so that price stability may be accomplished at the expense of lower prices.

i. Switching to a three-year auction product creates risks that will raise costs paid by FirstEnergy's customers.

The ATSI[57] zone is constrained.[58] FirstEnergy's transmission affiliate, ATSI, was integrated into PJM as of June 1, 2011.[59] Later in 2011, PJM decided to define the

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[56] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Opinion and Order at 10-12 (May 25, 2011).

[57] American Transmission System Incorporated ("ATSI").

[58] AEPR Hearing Ex. No. 1.

ATSI zone as a separate zone for purposes of its Reliability Pricing Model ("RPM"). In January and February 2012, FirstEnergy Solutions and GenOn announced plans to retire, as early as September 2012, several large generating units located in the ATSI zone.[60] These planned retirements amount to approximately 20% of the total quantity of capacity needed for reliability in the ATSI zone.[61]

OCC witness James Wilson testified that this past spring, PJM scrambled to evaluate the potential reliability impacts of the requested retirements and to identify needed transmission upgrades to accommodate the retirements. These impending retirements and the necessary transmission upgrades result in extraordinary uncertainty about energy, ancillary services and capacity supply conditions, and resulting prices, in the ATSI zone for the coming months and years.[62]

Switching to a three-year auction product at this time creates risks that will result in expected risk premiums for market participants and which in turn raise costs that are paid by FirstEnergy's customers. "Future generation supply and prices for the ATSI zone must be considered highly uncertain at this time, due to the large amount of plant retirements, the numerous planned transmission upgrades, and the uncertain market reaction to provide new generation, demand response and energy efficiency capacity."[63] The ATSI zone is constrained[64] and will have generally higher prices than the

[59] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 11.

[60] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 11.

[61] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 12.

[62] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 11.

[63] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 17.

[64] AEPR Hearing Ex. No. 1.

surrounding areas of the grid.[65] But the extent to which this will occur is unknown at this time.[66]

These risks that are three or more years ahead are difficult to hedge.[67] And as hedging becomes more difficult, suppliers include larger risk premiums in their bids or decline to participate in the auctions.[68] Larger risk premiums mean higher rates for customers.[69] Accordingly, going to a three-year product, under these circumstances, does not benefit FirstEnergy's customers who will have to pay for the higher risk premiums in rates for their electric service.

[65] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 17.

[66] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 17.

[67] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 23.

[68] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 23.

[69] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 23.

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ii. FirstEnergy’s customers do not need the Stipulation for price stability—they can obtain price stability in the market

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through a contract with a competitive retail electric service provider.

FirstEnergy appeared to be still figuring out the theory of its case at the end of the case, on rebuttal. The case ended with FirstEnergy calling a rebuttal witness who testified that blending different auction results was good. But earlier FirstEnergy's witness testified that the auction was about locking in low prices. So the case began with a premise of low prices for customers and ended with the notion of price stability.

Initially, FirstEnergy wanted the Commission to believe that current low prices can be locked in for future years. Specifically, FirstEnergy Witness Ridmann, while acknowledging that "no one can know with certainty," testified that with the change to a three-year product, "we are trying to lock in those expected lower prices."[77] But FirstEnergy was wrong that current low prices can be locked in for future years. The testimony of OCC Witness James Wilson discredited this proposition by FirstEnergy. Specifically, Mr. Wilson testified that "[f]uture movements of the forward curve cannot be predicted and can go either way, up or down."[78] And such a premise ignores the enormous uncertainty and risk resulting from the impending generation retirements and the ATSI zone constraints resulting in higher energy and ancillary services prices over the coming years.[79]

FirstEnergy did not present any evidence to rebut Mr. Wilson's testimony that current low prices cannot be locked in for future years. Instead, FirstEnergy changed the alleged benefit resulting from a three-year auction product. In his rebuttal testimony, FirstEnergy's witness Robert Stoddard was asked to identify the benefits that would

[77] FirstEnergy Hearing Ex. No. 4, Supplemental Testimony of William Ridmann at 6.

[78] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 10.

[79] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 6.

accrue to the Companies' customers from using a three-year procurement instead of shorter terms.[80] His answer, in its entirety, was that "[t]he limited amount of three-year procurement proposed by the Companies in this proceeding will have the effect of mitigating rate impacts that may be caused by energy and capacity prices in the last year of the proposed ESP 3 period, by blending these later-year prices in with prices for the earlier part of the proposed ESP 3 period."[81] His testimony does not support witness Ridmann's testimony that a benefit of the ESP 3 would be that the lower expected prices can be "locked" in.

PUCO Staff witness Fortney testified that customers always have the option of shopping.[82] If FirstEnergy's customers want price stability, they can shop and enter into a long-term contract with a competitive retail electric provider.[83] It is not just or reasonable to subject FirstEnergy's customers to higher rates so that price stability is accomplished. And price stability can already be accomplished by shopping and the increase rates that FirstEnergy's customers will have to pay for their electric service in 2015/2016.

[80] FirstEnergy Hearing Ex. No. 14 at 19.

[81] FirstEnergy Hearing Ex. No. 14 at 19.

[82] Hearing Transcript, Vol. II at page 270.

[83] *See* PUCO website regarding offers from competitive retail electric suppliers. (Administrative notice taken of the Commission's "Apples to Apples" comparison at Transcript Vol. II at pages 170-171.)

iii. The generation prices resulting from the proposed three-year auction product will benefit FirstEnergy's Affiliates (FirstEnergy Solutions) and is not in the public interest.

Who could be the unheralded beneficiary of the proposed three-year auction? That would be FirstEnergy Solutions Corp. ("FES"), the affiliate of the public utilities that filed this case. This answer can be found in the results of the 2015/2016 RPM Base Residual Auction. FES will be reaping the benefits from the RPM capacity pricing for the 2015-2016 delivery period. FES is a beneficiary of the proposed three-year auction product included in the Stipulation.

Under the PUCO's settlement test, customers are supposed to be the beneficiary. But here they're not. Look no further than the results of the 2015/2016 RPM Base Residual Auction results for support that FirstEnergy's customers will be paying more for energy for the next three years if that price is established at a time when the ATSI zone is constrained.[84] FirstEnergy maintains that the Companies (meaning the applicant public utilities) are not beneficiaries of the proposed three-year auction. However, the Companies' own witness testified that the generation price is simply a pass-through for them.[85] There is no settlement standard in the three-prong test that would elevate the generation affiliate to an intended beneficiary. And all this is in addition to the fact that the FirstEnergy cannot pass the statutory test (in R.C. 4928.143(C)(1)) on dollars alone.

The announcement that approximately 20% of the total quantity of capacity needed for reliability in the ATSI zone will be retired has already benefited FES. The retirement announcements resulted in much higher capacity prices for the zone for the

[84] AEPR Hearing Ex. No. 1.

[85] Tr. Vol. I at 203 (Ridmann) (June 4, 2012).

2015-2016 delivery year.[86] PJM has released a document containing the 2015/2016 RPM Base Residual Auction results and its overall effect on market outcomes. PJM concluded that, in regards to the auction, "[t]he only outlier is the ATSI LDA which experienced a large concentration of generator retirements and resulting transmission constraints with relatively little lead time for new resources to make entry decisions coupled with the need for retrofits at existing coal units resulting in much higher prices than last year. ATSI cleared with the RTO last year at $125.99/MW-day but Annual Resources this year cleared at $357.00/MW-day."[87] And customers in the ATSI zone will pay much more for capacity and generation located in the zone than for capacity and generation located in the surrounding PJM region that cleared at $136.00/MW/day.[88]

A majority of the generation in the ATSI zone is owned by the FES. What OCC's witness, Mr. Wilson, saw in FirstEnergy's application is that FirstEnergy Solutions will do well. FES will earn from much higher capacity prices for the ATSI zone than power plants in surrounding areas.[89]

Mr. Wilson explained that FES stands to benefit because of the enormous changes in the zone and uncertainty about future supply conditions. These risks are especially acute for potential bidders with resources located outside of the FirstEnergy's service area. With transmission constraints in the ATSI zone, such bidders will be exposed to congestion costs to serve loads in that zone.[90] As previously discussed, the uncertainty and risk of congestion costs will likely lead such bidders to raise their offer prices into

[86] FirstEnergy Hearing Ex. No. 8.

[87] AEPR Hearing Ex. No. 1 at 28.

[88] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 5.

[89] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 5.

[90] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 7-8.

the generation auctions, or even decline to participate, leading to higher clearing prices in the auctions.[91] Entities with resources located in the ATSI zone—like FES—are less affected by the possibility of transmission constraints and congestion costs.

Accordingly, the beneficiary of the three-year auction product is FirstEnergy's affiliate—FES—which owns most of the generation located in the ATSI zone.[92] At the same time, FES stands to benefit further from the higher auction clearing prices that will result from these uncertainties and risks that cause other bidders to raise their offer prices.[93] By insisting the auctions occur as early as possible, competing generation sources have less information than FES regarding the cost of providing default service in the last year of the ESP. FES does not face the same degree of uncertainty because of their portfolio of generation assets are within ATSI. The three-year auction proposal is nothing more than the last step to fully maximizing the earnings of FES for providing energy to FirstEnergy's customers in the ATSI zone. And if the Commission approves the Stipulation, it will be to the detriment of FirstEnergy's customers and to electric competition in Ohio.

[91] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 8.

[92] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 8.

[93] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 7-8.

c. The delivery capital recovery ("DCR") rider in the Stipulation does not meet statutory requirements.

Ohio law provides an opportunity for EDUs to request recovery for distribution expenditures as part of an ESP proposal.[94] In this case, the Stipulation provides for the recovery of revenues through the Rider DCR of up to $405 million during the ESP 3 term.[95] The Stipulation states:

> For the 12 month period of June 1, 2014 through May 31, 2015 Rider DCR is in effect, the revenue collected by the Companies under Rider DCR shall be capped at $195 million and for the following 12 months the revenue collected by the Companies under Rider DCR shall be capped at $210 million.[96]

The revenue caps in Rider DCR for the ESP 3 Case represent a potential cost recovery of up to $405 million for the two year ESP 3 term..[97] Because, as discussed below, the Companies cannot meet the statutory requirements; therefore the Commission should not approve Rider DCR as proposed by the Companies in this Case.

Ohio law establishes that it is incumbent upon the Commission to review the reliability of the EDU's distribution system and ensure that the customers' and the EDU's expectations are aligned. R.C. 4928.143(B)(2)(h) states:

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[94] R.C. 4928.143(B)(2)(h). ("Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. * * *.").

[95] Stipulation at 19 ("Rider DCR ('Delivery Capital Recovery'), will continue to be in effect and provide the Companies with the opportunity to recover property taxes, Commercial Activity Tax and associated income taxes and earn a return on and of plant in service associated with distribution, sub-transmission, and general and intangible plant, including allocated general plant from FirstEnergy Service Company that supports the Companies, which was not included in the rate base determined in the Opinion and Order of January 21, 2009 in Case No. 07-551-EL-AIR, et al.").

[96] FirstEnergy Hearing Ex. No. 1, Stipulation at 20 (April 13, 2012).

[97] OCC Hearing Ex. No. 4.

> As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, **the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system**. (Emphasis added.)

The Companies have failed to establish that the future DCR spending to enhance distribution service is necessary to maintain existing reliability performance, and therefore, have not met the statutory requirements.

The PUCO Staff offered the testimony of Mr. Baker to establish the statutory requirements. Mr. Baker testified that the purpose of his testimony was to "address whether the FirstEnergy Companies have met the requirements of R.C. 4928.143(B)(2)(h)."[98] Mr. Baker ultimately concluded that "[b]ased on the Companies' successful performance against their reliability standards, Staff believes that the Companies' and their customers' reliability expectations are in alignment and that the Companies are dedicating sufficient resources to the reliability of their distribution systems."[99] However, between the purpose and the conclusion of Mr. Baker's testimony, there is a lack of support for Mr. Baker's position. The Commission should not approve the Rider DCR recovery proposed in FirstEnergy's ESP 3.

i. The reliability standards were achieved in 2011, long before FirstEnergy filed its proposed ESP 3.

Mr. Baker describes a two-step analysis in his testimony that he used to accomplish the purpose of his testimony. Step one "is to work with the company and

[98] Staff Hearing Ex. No. 2 Direct Testimony of Peter K. Baker at 2 (May 7, 2012).

[99] *Id.* at 6.

other interested parties in establishing Commission approved reliability standards that incorporate a consideration of historical performance, customer survey results, and input from customer groups."[100] According to Mr. Baker, step one was accomplished in 2009 or 2010, in Case No. 09-759-EL-ESS.[101] Reliability standards were based on five years of historical experience (ending in 2008 or 2009), plus 10 percent for service degradation.[102] Step 2 "is once the performance standards are set, to monitor the utility's performance against its reliability standards to ensure that the standards are met."[103] In his testimony, Mr. Baker compares the performance standards from step one to the Companies' actual reliability performance from 2011.[104]

The chart contained in Mr. Baker's testimony compares the reliability standard for the two primary performance standards which are the customer average interruption duration index ("CAIDI") and the system average interruption frequency index ("SAIFI").[105] SAIFI reflects the average number of outages customers experience annually and CAIDI reflects the average duration of outages.[106] The results of Mr. Baker's analysis show that all the Companies bettered their SAIFl standard between nine and 36 percent, and bettered their CAIDI standard between one and 13 percent.[107] Mr. Baker's analysis fails to correlate the Companies reliability performance for 2011 to the

[100] *Id.* at 3.

[101] Tr. Vol , II at 219-220 (Baker) (June 5, 2012).

[102] Tr. Vol, II at 220-221 (Baker) (June 5, 2012).

[103] Staff Hearing Ex. No. 2 Direct Testimony of Peter K. Baker at 3 (May 7, 2012).

[104] *Id.* at 5 (May 7, 2012). See also Tr. Vol. II at 221-222 (Baker) (June 5, 2012).

[105] Staff Hearing Ex. No. 2 Direct Testimony of Peter K. Baker at 5 (May 7, 2012).

[106] *Id.*

[107] *Id.*

Rider DCR cost recovery being considered by the Commission in this case for the term June 1, 2014 through May 31, 2016.

ii. The information about customer expectations will be stale by the beginning of the ESP 3 Term.

The ESP 3 Case is for the term June 1, 2014 through May 31, 2016. The analysis Mr. Baker performed in this case was backward looking, and cannot be viewed as justification for the significant distribution system investments contemplated through the ESP 3 case before the Commission. Mr. Baker has compared reliability standards established in 2009 or 2010 to the Companies actual performance in 2011.[108] The Companies actual reliability performance in 2011 exceeded the established standards.[109] The Companies have not provided documentation of how the additional investments in the distribution system will impact reliability performance.

In addition, Mr. Ridmann on cross-examination testified that he was unaware of any requirement for the Companies to conduct a customer survey over the next several years.[110] There is no ability at this point in time to discern if customers find the additional investment spending excessive should the result be improvements to service quality. The record is void of any evidence that customers' expectations during the term of ESP 3 will be addressed.

[108] Staff Hearing Ex. No. 2 Direct Testimony of Peter K. Baker at 5 (May 7, 2012).Tr. Vol. II at 221-222 (Baker) (June 5, 2012).

[109] Staff Hearing Ex. No. 2 Direct Testimony of Peter K. Baker at 5 (May 7, 2012).Tr. Vol. II at 221-222 (Baker) (June 5, 2012).

[110] Tr. Vol. I at 213 (Ridmann) (June 4, 2012).

iii. The Companies' and customers' expectations are not aligned.

It is unclear how Mr. Baker's analysis can be utilized by the Commission to authorize the Companies' proposed DCR spending caps for the period June 1, 2014 through May 31, 2016. On cross-examination, Mr. Baker testified that he served no data requests on the Companies.[111] And he testified that the Companies had provided him no report or document to assist with his review regarding whether the FirstEnergy companies had met the requirements of R.C. 4928.143(B)(2)(h) -- other than their required reporting of reliability for the year 2011,[112] Mr. Baker had no recollection of whether the reliability standards were established before or after the Companies most recent distribution rate case,[113] He had no recollection of what level of distribution spending caps were established in FirstEnergy's ESP 1, ESP 2 or ESP 3 Cases.[114] There is a significant disconnect between the analysis performed by Mr. Baker and the statutory requirements of R.C. 4928.143(B)(2)(h).

An integral part of the statutory requirement is that the EDUs' and their customers' expectations are aligned. However, the alignment that Mr. Baker is testifying to is an alignment that existed in 2011. Despite Mr. Baker's conclusion that the alignment between EDUs' and their customers' expectations exist, the record in this case is void of evidence that shows such alignment for the ESP 3 period of June 1, 2014 through May 31, 2016. FirstEnergy has the burden of proof and failed in it.

[111] Tr. Vol. II at 224 (Baker) (June 5, 2012).

[112] Tr. Vol. II at 224 (Baker) (June 5, 2012).

[113] Tr. Vol. II at 222 (Baker) (June 5, 2012).

[114] Tr. Vol. II at 223-227 (Baker) (June 5, 2012).

iv. Resources dedicated to enhanced distribution service are excessive.

In January 2010, the Commission authorized a distribution rate increase of approximately $137 million for the FirstEnergy EDUs..[115] In addition, the Companies have proposed increased distribution revenue recovery through the Rider DCR in ESP 2 ($390 million) and ESP 3 ($405 million).[116] It is unclear what the influx of nearly $1.8 billion in additional distribution revenues between 2009 and May 31, 2016 will have on the Companies' actual reliability performance.[117] Certainly, Mr. Baker's analysis fails to take into consideration the potential impact these revenue sources may have upon further improvements to FirstEnergy's reliability performance, inasmuch as he had no knowledge of these revenue resources. Nevertheless, Mr. Baker was somehow able to conclude that the Companies were dedicating sufficient resources to the reliability of their distribution systems without consideration of these revenue resources that will be invested in FirstEnergy's distribution system prior to and during the term of the ESP 3. Therefore, the Commission should conclude that the record fails to provide evidence that will demonstrate that the FirstEnergy utilities have met the requirements of R.C. 4928.143(B)(2)(h), and deny recovery of the Rider DCR during the term of the ESP 3.

[115] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals,* Case No. 07-551-EL-AIR, e al. Opinion and Order at 48 (January 21, 2009).

[116] OCC Hearing Ex. No. 4.

[117] Increased Distribution Revenues from the Companies most recent distribution rate case: $137 million per year for 7 years (2009-2015) and $68 million for ½ of 2016 = $1.027 billion plus $390 million (for ESP 2) and $405 million (for ESP 3) = $1.822 billion.

v. There is no remedy to address excessive distribution-related spending in the annual DCR audit cases.

The Stipulation provides for an annual review of Rider DCR investment spending. The Stipulation states:

> The audit shall include a review to confirm that the amounts for which recovery is sought are not unreasonable and will be conducted following the Companies' January 31, 2015, and January 31, 2016 filings, and one final audit following the Companies' July 30, 2016 final reconciliation filing.[118]

Conformance with some important regulatory principles is missing from the Stipulation, and the evidence in this Case. And thus it's missing from the related settlement evaluation prong. One thing missing is an affirmative standard of reasonableness. Apparently, FirstEnergy's expenditures need not be found to be reasonable, but merely that they're not unreasonable, to get the green light to collect from customers.[119]

What also is missing is the fact that the audit does not include a review of the relationship between distribution investment spending and reliability performance to ensure that customers' and the Companies' expectations are aligned and that the EDU is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system. Until an application is filed in an annual reliability case, it is not clear whether the additional ($390 million for ESP 2 and the $405 million for ESP 3) distribution system investments spending levels are improving reliability performance in a cost-effective manner. OCC and Citizen Power are not opposed to increased reliability. We are opposed to increased reliability at any cost, especially when it is not aligned with customer interest.

[118] Stipulation at 22 (April 13, 2012).

[119] Tr. Vol. I at 213-214 (Ridmann) (June 4, 2012).

Companies' witness Brad Ewing, in a prior reliability case, made this reliability benefit-cost argument convincingly:

> It is necessary for each of the Companies to strike a balance between the responsibility to provide adequate electric service and the need to do so at an acceptable cost to customers. Improving reliability by just one hundredth of a percent would require significant expenditures over and above those now required simply to maintain the distribution system. CEI could rebuild its electrical system to greatly reduce line and equipment failures at an estimated cost of $3 billion. But customers are unlikely to approve such an expense -- the benefit to customers would simply be dwarfed by the cost.[120]

Through Rider DCR, the Companies propose to invest in additional distribution plant investments that customers will be asked to pay for. The Commission should ascertain that the proposed DCR investments will improve the Companies' reliability performance at a reasonable cost for FirstEnergy's customers. It is imperative that the Companies' dedication of resources to meet customers' reliability needs are in alignment with customer survey input. Mr. Baker's analysis fails to ensure that a balance between the responsibility to provide adequate electric service and the need to do so at an acceptable cost to customers is being met. There needs to be a nexus between the annual DCR audits and the Companies' annual reliability performance reviews in order to ensure that the Companies are not dedicating excessive resources to enhanced distribution service.

To that point, it is premature for the Commission to decide on authorization of distribution investment recovery from customers proposed in the ESP 3 Stipulation before the Companies have spent (and possibly collected from customers) the $390 million caps in the ESP 2 Case. Therefore, the Commission should not authorize the

[120] OCC Hearing Ex. No. 11, at 25 (May 21, 2012) citing, *.In re First Energy Reliability Case,* Case No. 09-759-EL-ESS, Direct Testimony of Brad Ewing at 2-3 (November 1, 2010).

Companies to invest up to $405 million in enhanced distribution service in this case, until such time as the Companies have made their Rider DCR filings associated with the ESP 2 DCR investment cost recovery and the requisite ESP 2 DCR audits have been performed in conjunction with the annual reliability study thereby documenting that the interests of the Companies and their customers are aligned.

A related regulatory principle discarded in this provision of the Stipulation, in violation of the 3-prong test for settlements, is that there is no standard of "used and useful" for whether customers can be asked to pay. And there is no standard of prudence for the DCR distribution-related investments. Furthermore, there is no utilization of the date certain concept familiar in rate making regulation.

d. The Stipulation provision for lost distribution revenues does not benefit consumers.

The Stipulation includes a provision for lost distribution revenues. Generally, lost distribution revenues are those revenues the Companies do not collect because of the implementation of energy efficiency programs.[121] The Signatory Parties agree that the collection of such lost distribution revenues by the Companies after May 31, 2016 is neither addressed nor resolved by the terms of this Stipulation."[122] The Stipulation states:

> During the term of this ESP 3, the Companies shall be entitled to receive lost distribution revenue for all energy efficiency ["EE"] and peak demand reduction ["PDR"] programs approved by the Commission.[123]

[121] OCC Hearing Ex. No. 11, at (May 21, 2012).

[122] Stipulation at 31 (April 13, 2012).

[123] Stipulation at 31 (April 13, 2012).

The OCC's and Citizen Power's concerns stem first from a principle that lost-revenue collections are a bad idea. Then there are concerns about the vagueness of the Stipulation language

concerning energy efficiency savings and the open-ended nature of the collection period that portends significant rate impacts that will cost money for residential customers.

First, the Stipulation language appears to allow the Companies to count *"all"* EE/PDR lost distribution revenue.[124] It does not bind the term "all" to any limits or constraints under existing PUCO rules in Ohio Adm. Code Chapter 4901:1-39, or to the results of the Draft Technical Reference Manual in Case No. 09-512-GE-UNC.[125] The lack of specificity with regards to the definition of lost distribution revenue may result in the Companies collecting higher amounts of such revenue to the detriment of their customers.

Second, the open-ended lost revenue collection period proposed in the Application is excessive and unprecedented when compared to historic electric utility cases addressing the lost distribution revenue issue and more recent treatment of this issue by the Commission. This is especially the case if one reviews the Commission's Order in the first Duke ESP case. Duke's collection of lost revenues from customers is "for a period of three years following program implementation in each vintage year."[126]

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[124] Stipulation at 31 (emphasis added). After all the controversy over the Commission's promulgation of the "Green Rules" (08-888-EL-ORD) and at the Joint Committee on Agency Rule Review concerning the "count all savings" language of R.C. 4928.66, it is disappointing that the term "all" related to distribution lost revenue is not clearly defined in the Stipulation.

[125] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 37-38 (May 21, 2012).

[126] *See* OCC Hearing Ex. No. 1, Direct Testimony of Wilson Gonzalez at 38 (May 21, 2012) citing Case No. 08-920-EL-SSO, Direct Testimony of Theodore Schultz at 3 (July 31, 2008). Also see Rider DR-SAW referenced in his testimony.

In addition, the problem arising from FirstEnergy's proposal is if the lost revenue calculation is not capped by either a dollar amount or a time period, the balances—that customers will be asked to pay--can grow quite large. These costs have been provided (partly estimated for Program Year 2012) by the Companies for Program Year 2011 and 2012 as $11.1 million.[127] What the Companies fail to estimate are the lost distribution revenues for the years 2013, 2014, 2015, and through May 31 of 2016:

> For 2013 – 2015 lost distribution revenue, the energy efficiency measures that will be employed during that period are currently being planned, and therefore an estimation of lost distribution revenue for that period based on the energy efficiency and demand reduction plan for years 2013 through 2015 is unavailable.[128]

If the Companies were to stop their energy efficiency programs on December 31, 2012, the estimated lost revenues would approach $50 million.[129] However, if the Companies continue their programs at increasing levels as required by Ohio law to meet the increasing energy efficiency benchmarks, the distribution lost revenues could be in the hundreds of millions of dollars that the Stipulation would allow the Companies to collect from customers. Witness Gonzalez elaborated on this point in the hearing.

> Q. And you focused on the years of this ESP III term and calculated, I believe, 22.2 million as the effect, and is it your opinion that that's a conservative result?
>
> A. Yes. Mine was very conservative because I just took the cumulative total through 2012 as in the exhibit. While we know 2013 the company has to meet a .9 percent of its total sales, you know, the three-year rolling average, in 2014, it has to meet another percent; in 2015 it has to meet another percent; and then in 20, you know, 16 it would be half of the 1 percent. So that's 3.5 percent of the company's total

[127] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at Attachment 4 (May 21, 2012).

[128] *Id.*

[129] OCC Hearing Ex. No. 11 Direct Testimony of Wilson Gonzalez at 39 (May 21, 2012) see also OCC Hearing Ex. No. 11A Corrections to Direct Testimony of Wilson Gonzalez (June 6, 2012).

> sales that it has to meet in energy efficiency, so that's a lot of lost revenues that the company has not -- the company has not documented in this particular case.[130]

In the AEP ESP case, the Commission spoke of the need for information when it rejected AEP's settlement based on what it found to be inadequate information. [131] This case similarly has a lack of information about the full impacts on customers.

Finally and importantly, two Commissioners have raised concerns with the recovery of lost distribution revenues. In the Opinion and Order in FirstEnergy's Energy Efficiency Portfolio Case, PUCO Chairman Snitchler stated in a concurring opinion that "I will be most reluctant to approve any future proposals which include the collection of lost distribution revenues resulting from the statutory mandates for energy efficiency savings and peak demand reduction."[132] That opinion was supported by Commissioner Roberto.[133] The Chairman's concern is that the collection of lost distribution revenues "presents a significant risk of undermining public support for the energy efficiency mandates, especially in light of the greater energy efficiency savings mandated by law in the future. We need to look no further than the unfortunate circumstances surrounding the failed original CFL program discussed in the Opinion and Order to see the risks of undermining public support for energy efficiency measures."[134]

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[130] Tr. Vol. III at 150-151 (Gonzalez) (June 6, 2012).

[131] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan ("AEP ESP Case")*, Case No. 11-346-EL-SSO, et al, Entry on Rehearing at 11 (February 23, 2012).

[132] OCC Hearing Ex. No. 11 Direct Testimony of Wilson Gonzalez at XX (May 21, 2012) citing Case No. 09-1947-EL-POR, Opinion and Order, Concurring Opinion of Chairman Todd A. Snitchler at 2 (March 23, 2011).

[133] *Id*., citing Concurring Opinion of Commissioner Cheryl L. Roberto.

[134] *Id*., citing Concurring Opinion of Chairman Todd A. Snitchler at 1-2. In addition, the Commission has demonstrated an interest in the distribution lost revenue issue. On December 29, 2010, the Commission

The Companies have disregarded the concerns raised by the Commissioners. On cross-examination from the bench, FirstEnergy's witness Mr. Ridmann explained the rationale for the Companies' actions.

> EXAMINER PRICE: Mr. Ridmann, are you familiar with FirstEnergy's portfolio proceeding, 09-1947-EL -- I think it's POR?
>
> THE WITNESS: Very generally.
>
> EXAMINER PRICE: Are you familiar with the chairman's concurring opinion in that decision?
>
> THE WITNESS: I am familiar with that.
>
> EXAMINER PRICE: Was it not the case that the chairman strongly discouraged future applications for lost distribution revenues?
>
> THE WITNESS: At that time.
>
> EXAMINER PRICE: At that time?
>
> THE WITNESS: Yes, in that case.
>
> EXAMINER PRICE: Did you consider any other mechanisms besides the recovery of the lost distribution revenue as part of the ESP.
>
> A. No, because we sought this ESP as part of an extension of ESP II in terms of concepts, so the only thing we tried -- the only thing we looked at changing, I think, for the most part, were those things that would provide benefits to our customers.[135]

Mr. Ridmann's explanation lacks plausibility. As is the case throughout the ESP 3, the Companies' have over-relied on their characterization that the ESP 3 Case is an "extension" of the ESP 2 Case. OCC and Citizen Power disagree with the

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issued an entry in Case No. 10-3126-EL-UNC asking for public comments on whether Ohio's electric distribution utilities' rate structures should be modified to include lost revenue rate designs to better align utility performance with Ohio's desired public policy outcomes.

[135] Tr. Vol. I at 178-179 (Ridmann) (June 4, 2012).

characterization of the ESP 3 Case is an extension of the ESP 2 Case. In any event, if the Companies were looking for benefits to offer customers from the ESP 2 to the ESP 3, ,they fell far short of a burden of proof on this point. They should have excluded lost revenues from the proposal. At a minimum, they should have capped their collection of lost distribution revenues from customers consistent with Commission precedent. But mainly they should have responded to Commissioners' stated concerns regarding collection lost distribution revenues provision. They didn't and therefore the prong of the settlement standard—that regulatory principles are not violated—is unsatisfied.

e. The Stipulation provision regarding the treatment of cost recovery associated with interruptible loads does not benefit residential consumers.

The Stipulation provides for FirstEnergy's proposed Peak Demand Reduction riders, ELR and OLR These riders are used to collect the costs incurred with the non-residential customer interruptible program offering. The programs would be used by the Companies to help meet their peak demand reduction requirements under R.C. 4928.66.[136] OCC's witness Gonzalez recommends that the Commission order that resolution of this issue be determined in a more appropriate venue for consideration of this program such as the Companies' EE/PDR portfolio filing (as mentioned earlier), and as provided in Ohio Adm. Code 4901:1-39-05.[137]

Furthermore, the Companies are seeking collection of the costs associated with ELR and OLR from all customers – including residential customers. That is unreasonable. Mr. Gonzalez recommended the program costs be assigned for collection

[136] Stipulation at 28 (April 13, 2012).

[137] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 41-42 (May 21, 2012).

purposes to the respective rate classes whose customers are eligible for the program.[138] Therefore, EE/PDR program costs for customers in a nonresidential customer class should not be collected from residential customers.[139]

Large customers are not required to pay for residential EE and PDR programs, such as the Companies' Direct Load Control Thermostat program. And residential customers should not be required to pay for large customer interruptible PDR programs that are used to meet the Companies' PDR requirements. However, the Stipulation in this proceeding continues the structure of Rider DSE1, which states that the costs of customers taking service under the ELR and OLR "will be recovered from all non-interruptible customers [including residential customers] as part of the non-bypassable demand management and energy efficiency rider ('DSE') under the provisions of DSE-1."[140] This collection device for costs associated with the ELR and OLR that benefit non-residential customers of the Companies would unfairly collect the costs from a broad number of customer classes (including residential customers), and should be eliminated in favor of full cost collection from non-residential customers.

f. The energy efficiency and demand response resources bid into the May 2012 base residual auction failed to achieve a reasonable level of benefits for consumers.

The Companies identified 65 MW of energy efficiency resources that could be bid into the PJM 2015/2016 BRA auction on May 7, 2012.[141] They actually bid in 36

[138] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 41-42 (May 21, 2012).

[139] OCC Hearing Ex. No. 11 Direct Testimony of Wilson Gonzalez at XX (May 21, 2012) citing the March 21, 2012 Opinion and Order in AEP Case No. 11-5568-EL-POR approved similar language on page 11.

[140] Stipulation at 12-13 (April 13, 2012).

[141] Stipulation at 33 (April 13, 2012).

MW.[142] Sierra Club witness Neme reviewed the Companies' existing EE portfolio and based on his understanding of the increasing EE benchmarks in Ohio estimated that the Companies could have bid in 339 MWs.[143]

The Companies have indicated they did not bid in more EE MWs because of certain perceived risks. Specifically these allege risk were listed by the Companies as the "limited magnitude of energy efficiency savings produced by those projects since June 2011, the lack of ownership authority to offer the resources into the PJM BRA, incremental EM&V costs, increased EM&V performance risks related to the projects and risks related to forecasting future installations through May 31, 2012."[144]

These purported risks are highly exaggerated. The 339 MWs of EE calculated by Witness Neme were not directly challenged by the Companies. The potential impact on capacity pricing the bidding in of over 300 MWs of EE into the BRA and the significant revenue that such a bid would generate, should have made the "EM&V costs a non-issue."[145]

Concerning the ownership rights issue, PJM rules regarding the ownership attributes of peak capacity have been widely available for several years.[146] The last-minute efforts by the Companies – hastily planned customer calls and a mailing to seek ownership rights for the EE resource[147]--are a deficient response to this important issue. Company witness Ridmann even admitted that he did not know "if any of the energy

[142] Tr. Vol. I, at 301 (Neme) (June 4, 2012).

[143] Tr. Vol. I at 347 (Neme) (June 4, 2012).

[144] Sierra Club Hearing Ex. No. 5, direct Testimony of Christopher Neme at 5 (May 21, 2012).

[145] *Id.* at 6.

[146] Sierra Club Hearing Ex. No. 5, Direct Testimony of Christopher Neme at 4 (May 21, 2012).

[147] .Tr. Vol. I at 301 (Ridmann) (June 4, 2012).

efficiency program administrators were enlisted to help contact the customers, particularly in follow-up calls that I talked about."[148]

The Companies eleventh hour efforts proved to be too little, too late, and should not legitimize the exaggerated level of this risk.[149] While ownership of the EE resource is a legitimate issue, "it is one that FirstEnergy should have addressed much earlier…."[150] Indeed, it is bizarre that in a case that was supposedly filed in haste for maximizing benefits to customers related to that auction, the FirstEnergy utilities did not avail themselves (and their customers) of this fundamental opportunity for the very benefits that are the supposed premise of the case.

Finally, if for some reason the Companies' were to fall short of procuring the necessary EE MWs from their EE programs, they could purchase the needed MWs through the incremental auctions, at probably a lower price.[151] The record in this case demonstrates that the Companies' efforts in bidding in EE were feeble at best, and negligent at worst, all to the detriment of their customers. As Sierra Club witness Neme concludes: "I find the Companies' proposal to be imprudent."[152]

[148] Tr. Vol. I at 334 (Neme (June 4, 2012).

[149] Sierra Club Hearing Ex. No. 5, Direct Testimony of Christopher Neme at 4 (May 21, 2012).

[150] *Id.* at 7.

[151] OCC Hearing Ex. No. 9 , Direct Testimony of James Wilson at 32-33 (May 21, 2012). See also Tr. Vol. 1 at 347-348 (Neme) (June 4, 2012).

[152] Sierra Club Hearing Ex. No. 5, Direct Testimony of Christopher Neme at 3 (May 21, 2012).

i. By Not Bidding in Up to 339 Megawatts of Energy Efficiency into the Base Residual Auction the FirstEnergy EDUs Cost their Customers Millions of Dollars. The Companies Should Be Held Accountable for this Financial Harm to their Customers.

The Companies' decision to limit the amount of energy efficiency into the BRA has two detrimental impacts for their customers:

1. Customers will lose a substantial revenue stream from an investment for which they are already committed to pay; and

2. Customers will pay much more for capacity than they would otherwise need to pay because the Companies will have to acquire additional generating capacity that will be redundant with the capacity savings produced by First Energy's efficiency programs and, more importantly, because the failure to bid efficiency resources into the market on a "price-taking basis" will cause the market clearing price for capacity – i.e. the price that will be paid to all capacity that clears the market – to be significantly higher than it otherwise would have been. The second impact – higher market-clearing prices for capacity paid by FirstEnergy's customers – is by far the larger of the two impacts.[153]

Company witness Stoddard has acknowledged that an additional 300 MW resource clearing the auction would have had a substantial impact on the capacity price resulting from the BRA.

Q. So would 300 megawatts count as substantial?

A. Yes.[154]

[153] Sierra Club Hearing Ex. No. 5, Direct Testimony of Christopher Neme at 12-13 (May 21, 2012).

[154] Tr. Vol. IV at 21-22 (Stoddard) (June 8, 2012).

Sierra Club witness Neme has estimated a lost revenue opportunity for customers when the Companies did not bid the additional energy efficiency at $22 to $39 million.[155] Witness Neme has also estimated the additional capacity costs for the ATSI zone of not bidding the incremental energy efficiency in the BRA at $600 million. A significant portion of that cost will be borne by the Companies' customers.[156]

The Companies should therefore be held financially accountable for the economic harm that their lack of action has caused.

ii. The Commission Should Require the Companies to Obtain Ownership of the Energy Efficiency Savings as Part of Program Participation and Require the Companies to File a Plan Demonstrating that They will Bid all Eligible Energy Efficiency in Future Auctions to Reduce Customer Bills.

The Commission should require the Companies to expedite mechanisms to assure its ownership of all the peak demand reductions generated by its energy efficiency programs.[157] Ownership is a prerequisite for bidding resources into the PJM BRA. For future BRAs, the Commission should establish a default requirement that the Companies bid all eligible energy efficiency capacity savings into future auctions.[158] The Companies should be required to file a PJM BRA energy efficiency Bidding plan with the Commission for approval along the lines recommended by witness Neme.[159]

[155] Sierra Club Hearing Ex. No. 5, Direct Testimony of Christopher Neme at 13 (May 21, 2012).

[156] *Id.* at 15.

[157] *Id.* at 16-17.

[158] *Id.* at 16.

[159] *Id.*

If the Commission decides to mitigate any remaining risk to the Companies of bidding their energy efficiency, transferring the net cost or benefit of the demand response and energy efficiency incremental auction sales to the customer is an approach likely to benefit customers.[160] These actions, if implemented, will most likely result in the lowering of FirstEnergy customer bills.

g. The Stipulation contains a provision that will erode the law that protects customers from paying rates that result in significantly excessive earnings and therefore, it does not benefit customers and the public interest.

In Senate Bill 221 ("S.B. 221") the 127th General Assembly determined that the PUCO must protect Ohio customers by requiring EDUs to return to customers the amount of any significantly excessive earnings.[161] Specifically, S.B. 221 requires the Commission, on an annual basis, to compare the earnings (return on equity or ROE) of Ohio investor-owned electric utilities with ESPs to the earnings (ROE)of publicly-traded companies with comparable risk.[162] If, after conducting such a comparison, the Commission determines that a utility's ESP rate "adjustments" resulted in "significantly excessive" earnings, then the utility must refund the excess earnings back to the utility's customers.[163] Through the SEET the Legislature determined that Ohio consumers cannot be made to fund significantly excessive electric utility profits resulting from an ESP plan.

Dr. Duann testified for OCC that the reported financial results (such as net income) should be used in calculating the ROE for the purpose of the SEET.[164] The use

[160] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 33 (May 21, 2012).

[161] *See* R.C. 4928.143(F).

[162] *See id.*

[163] *See id.*

[164] OCC Hearing Ex. No. 10, Direct Testimony of Dr. Daniel J. Duann at 8-9.

of the reported net income in the application of the SEET provides a consistent and representative measurement of the earnings of the EDU for comparison to publicly-traded companies with comparable risk. [165] Dr. Duann also testified that extraordinary items or one-time events may be excluded from the net income for SEET purposes. But Dr. Duann specifically indicated that "deferrals, and the deferred interest income in particular, are not extraordinary or one-time events."[166] Therefore, deferrals should be included in calculating the ROEs of FirstEnergy's three EDUs for the purpose of the SEET.

FirstEnergy's customers should have the protection of the SEET with the deferrals included in the SEET calculation. However, Paragraph B(3) of the Stipulation (pages 23-24) addresses how the ESP will be treated in regards to the SEET and excludes all deferred carrying charges from the ROE calculation. Specifically, the Stipulation provides that:

> Any charges billed through Rider DCR will be included as revenue in the return on equity calculation for purposes of SEET and will be considered an adjustment eligible for refund. For each year during the period of this ESP, adjustments will be made to exclude the impact: (i) of a reduction in equity resulting from any write-off of goodwill, (ii) **of deferred carrying charges,** and (iii) associated with any additional liability or write-off of regulatory assets due to implementing this ESP 3 or the ESP in Case No. 10-388-EL-SSO. The significantly excessive earnings test applicable to plans greater than three years and set forth in R.C. § 4928.143(E) is not applicable to this two-year ESP. (Emphasis added).

Dr Duann testified that, based upon the SEET filings made by FirstEnergy in prior years, "the exclusion of the deferred carrying charges can be a significant 'dilution' of

[165] *Id.* at 9.

[166] *Id.*

the effects of the SEET legislation."[167] And such treatment of deferrals is contrary to FirstEnergy's financial statement presentations. In those presentations, all deferred interest income is reported in the net incomes of FirstEnergy's three EDUs.[168]

Furthermore, such treatment is contrary to the Commission's holding on this subject. The Commission has ruled that deferrals should not be excluded from an electric utility's ROE for the purposes of the SEET.[169]

This provision in the Stipulation will erode the SEET statute (R.C. 4928.143(F)) that protects customers from unreasonable ESP rates and, therefore, it does not benefit customers and the public interest. If the Commission approves the Stipulation without modifying the SEET language, then the ROEs of the EDUs (for the purposes of the 2015 and 2016 SEET) may be much lower than the ROEs reported in the FirstEnergy EDUs' financial statements. Depending on the amounts of the deferred interest income being excluded, the lower calculated ROEs may not exceed the SEET threshold when the ROEs in the EDUs' financial statements would have. Thus, such an adjustment is only intended to erode the purpose of the SEET. That purpose is to ensure "that significantly excessive earnings resulting from an ESP will be returned to customers who paid what ultimately were determined to be excessive rates."[170]

The SEET provision in the Stipulation does not protect the customers of FirstEnergy. It protects FirstEnergy. It protects FirstEnergy by providing assurance that

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[167] *Id.* at 8.

[168] *Id.* at 8.

[169] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, January 11, 2011 Opinion and Order ("January 11, 2011 Opinion and Order") at 31.

[170] *Id.* at 6.

FirstEnergy will be able to keep its earnings and refund earnings to customers—even if the earnings are significantly excessive. Accordingly, deferrals (including deferred interest income) should be included in the calculation of the ROE for each EDU for the purposes of the SEET.

For all the reasons argued above, the Stipulation does not benefit ratepayers and is not in the public interest. The Companies have sought a resolution of this case on an expedited timeline in order to implement necessary auction changes to accommodate a three-year auction product. The Companies argue that they are doing this in order to stabilize prices. However, stable prices do not equate to lower prices. Because of all the uncertainty in the ATSI zone, now is not the time to conduct a three-year auction. In addition, the Rider DCR provision does not meet statutory requirements, and the Commission should not authorize the Companies to collect $405 million from customers during the term of the ESP 3. Also, the cost recovery from customers that is provided in the Stipulation for lost distribution revenues and costs associated with interruptible loads does not benefit FirstEnergy's residential customers. Furthermore, the energy efficiency resources bid into the base residual auction failed to achieve a reasonable level of benefits for customers. Finally, the SEET provision in the Stipulation violates Commission precedent and harms customers. Therefore, the Commission should reject or modify the Stipulation in this case.

3. The settlement, as a package, violates important regulatory principles or practices.

For all the reasons argued below, the Stipulation as a package violates important regulatory principles or practices. The challenge for the Companies is to demonstrate

that the ESP 3 proposal is more favorable in the aggregate than an MRO. The Companies cannot meet that challenge.

Companies' witness Ridmann reviewed both quantitative and qualitative factors that, in his opinion, demonstrate how FirstEnergy passes the statutory test. But his major quantitative factor – RTEP cost recovery forgiveness – is a double-count and not appropriate for consideration in this case because it was an obligation the Companies agreed to in the ESP 2 Case. The other quantitative and qualitative factors were demonstrated to be illusory or not a benefit for consumers. Therefore, the ESP 3 cannot be shown in the aggregate to be more favorable than an MRO, and the Commission should reject or modify the Stipulation in this case, in accordance with Ohio law.

a. The ESP is not more favorable in the aggregate than an MRO under a quantitative analysis.

The Commission in evaluating the record evidence in this case must make a determination as to whether, in the aggregate, the ESP is more favorable to FirstEnergy's customers than an MRO. The proposed ESP fails the test.

R.C. 4928.143(C)(1) states:

> The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, **the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.** Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall

> ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application. (Emphasis added).

Mr. Ridmann included a quantitative analysis in his direct testimony that attempted to demonstrate that the net present value of the benefits from the ESP were more favorable in the aggregate than an MRO.[171] The benefits that Mr. Ridmann included in his analysis were 1); Regional Transmission Expansion Plan ("RTEP") cost recovery forgiveness; 2) the Rider DCR compared to a distribution rate case; 3) the six percent Percentage of Income Payment Plan ("PIPP") discount provided for in the ESP compared to no discount for PIPP customers under an MRO; 4) Fuel Funds; and 5) Economic Development funds. The evidence dispels the notion that each of the quantified benefits under Mr. Ridmann's quantitative analysis is what is claimed. In the aggregate the ESP **is not** more favorable than the expected results under an MRO.

i. The alleged RTEP benefit is a double-count and should be excluded from the ESP vs. the MRO analysis.

The Stipulation includes a provision that insulates FirstEnergy's customers from the collection of certain MISO exit fees or PJM integration costs. The Stipulation states:

> The Companies collectively agree to not seek recovery through retail rates from Ohio retail customers of Legacy RTEP Costs for the longer of: (1) the five year period from June 1, 2011 through May 31, 2016 or (2) when a total of $360 million of Legacy RTEP Costs has been paid for by the Companies and has not been recovered by the Companies in the aggregate through retail rates from Ohio retail customers.[172]

[171] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at Attachment WRR-1 (April 13, 2012).

[172] Stipulation at (April 13, 2012).

However, this provision is identical to a provision in the ESP 2 Supplemental Stipulation.[173] And, FirstEnergy has confirmed that if the Commission rejected the Companies' ESP 3 proposal, FirstEnergy would not change the terms of the ESP 2 Stipulation.[174] Inasmuch as the Companies' obligation under the ESP 2 Stipulation is not contingent upon approval of the ESP 3 proposal, it is disingenuous of the Companies to treat this as a benefit of the ESP 3 Stipulation.

As a result, the counting of the RTEP cost recovery forgiveness as a benefit of the ESP 3 Stipulation, from Mr. Ridmann's quantitative analysis, was opposed by a number of witnesses in this case. In fact, Wilson Gonzalez,[175] Mark Frye,[176] and PUCO Staff witness Robert Fortney[177] all testified in favor of excluding the RTEP adjustment from Mr. Ridmann's quantitative analysis. These witnesses all concurred that when the RTEP benefit is excluding from Mr. Ridmann's analysis, the present value of the remaining benefits shows the MRO to be more favorable in the aggregate than the ESP by approximately $7.6 million.[178]

[173] Second Supplemental Stipulation at 5 (July 22, 2010).

[174] NOPEC and NOAC Joint Hearing Ex. No. 1, Direct Testimony of Mark Frye at 5 (May 21, 2012) citing MRF-1 (FirstEnergy's response to NOPEC Set 1 INT-11).

[175] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 28 (May 21, 2012).

[176] NOPEC and NOAC Joint Hearing Ex. No. 1, Direct Testimony of Mark Frye at 5 (May 21, 2012).

[177] Staff Hearing Ex. No. 3 at 2 (May 7, 2012). ("Simply put, Staff believes that the benefit of this credit was a result of the Commission's decisions in Case No. lO-388-EL-SSO (ESP 2) and is not a direct benefit of ESP 3, thus should not be reflected in the ESP 3 vs. MRO analysis.").

[178] Staff Hearing Ex. No. 3 at 3 (May 7, 2012). See OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at Exhibit WG-2 (May 21, 2012), See also NOPEC and NOAC Joint Hearing Ex. No. 1, Direct Testimony of Mark Frye at 5 (May 21, 2012).

ii. The DCR Rider cannot be equated to a distribution rate case outcome.

In Mr. Ridmann's quantitative analysis contained in his direct testimony, the DCR causes the ESP to be less favorable in the aggregate than an MRO by $29 million, in which the MRO includes estimates of what might occur should FirstEnergy file two distribution rate cases during the term of the ESP 3.[179] In his Supplemental testimony, Mr. Ridmann alters his position, and takes the DCR out of the analysis, by making an assumption that the DCR and distribution rate case would achieve the same result so as to treat them as a wash for purposes of the ESP versus MRO test.[180] Mr. Ridmann's altered position was also shared by Staff witness Fortney who stated:

> I believe that it would not be inconsistent with previous Staff analyses to consider that the costs to consumers of the Delivery Capital Recovery (DCR) Rider, which are included in Mr. Ridmann's ESP analysis and the costs of a distribution rate case, which are included in Mr. Ridmann's MRO analysis would simply be a "wash." The DCR gives the company recovery of certain distribution-related costs that they actually incur. If the companies do not recover those costs through the DCR, it is probable that they would file distribution rate cases (in an AIR) to recover those same costs. While there may be some variation in the amounts recovered due to the timing of rate cases and the concept of "date certain," in the long run, the companies would recover the equivalent of the same costs. Plus, in the Commission's O&O of 12/14/11 in the AEP ESP cases (11-346 and 11-348), regarding this same issue, the Commission found "Further, we note that the Non-Signatory Parties concerns about the DlR not being present in the price analysis are unwarranted, because AEP-Ohio would otherwise be entitled to seek an increase in distribution rates pursuant to Section 4909.19, Revised Code."[181]

There are several problems with the analysis that Mr. Ridmann and Mr. Fortney are espousing.

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[179] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at WRR-1 (April 13, 2012).

[180] FirstEnergy Hearing Ex. No. 4, Supplemental Testimony of William Ridmann at 7 (April 23, 2012).

[181] Staff Hearing Ex. No. 3, Direct Testimony of Robert Fortney at 4-5 (May 7, 2012).

First, it is not a wash. According to the Companies' own testimony, Rider DCR contained in the Stipulation is less beneficial to customers (i.e., more costly to customers) than if the Companies sought to increase rates through a fully litigated distribution rate case.[182] Companies' witness Ridmann's WRR Attachment 1 lists collection from customers of $405.0 million over two years through Rider DCR whereas the same attachment lists the collection of $376.0 million if FirstEnergy filed a separate distribution rate case. According to witness Ridmann, the $29.0 million net cost attributed to this element of the ESP in comparison to the MRO is due to the lag in distribution cost recovery because of two assumed distribution rate cases with dates certain of August 2013 and 2014, respectively.[183]

As OCC witness Gonzalez points out in his direct testimony, this is a conservative estimate of savings attributed to the result of an MRO, as a distribution rate case would afford all parties and the PUCO an extensive period to review any rate increase request, including inquiries in discovery, the consideration of expert testimony, and the presentation of argument by all affected persons to assure that the resulting distribution rates approved by the Commission are just and reasonable.[184] For example, this deliberative process in the last FirstEnergy distribution rate case considered an application filed in June 2007 and resulted in a Commission order in January 2009. In

[182] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at WRR-1 (April 13, 2012).

[183] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at 18 (April 13, 2012). Both Companies' witness Ridmann in his Supplemental Testimony (page 7) and Staff witness Fortney in his Prefiled Testimony (page 5) cite the Commission's December 14, 2011 Opinion and Order in the AEP ESP cases (11-346 and 11-348) to dismiss the regulatory lag dollar impacts in Attachment WRR-1 to FirstEnergy Hearing Ex. No. 3. They fail to mention that the Commission has rescinded that order in their February 23, 2012 Entry on Rehearing where they state on page 12, "[t]hus, we find that the Stipulation must be rejected and the application, as modified by the Stipulation, must be disapproved."

[184] R.C. 4909.15. See also Tr. Vol. II at 265 (Fortney) (June 5, 2012) (In this respect, witness Fortney personally agrees with witness Gonzalez regarding rate cases. "I like rate cases. I believe that that's what the Commission staff, especially the utility department of the Commission staff, does best.").

the past, such a deliberative process has most often led to an eventual reduction of the Companies' original rate increase request. The distribution rate case filed in 2007 -- the first in a decade for each company -- requested $340 million in annual rate increases. The Commission awarded $137 million in annual rate increases,[185] and even that increase included amounts not normally awarded in rate cases according to standard regulatory principles and practices.[186]

The Companies unreasonably use the characterization of the ESP 3 as a continuation of the ESP 2. However, when it comes to the Rider DCR provision of the Stipulation, this characterization folds under its own weight. In the ESP 2 Case, the Companies were authorized to collect through the Rider DCR up to $390 million in enhanced distribution investments.[187] That level of expenditures may have been perceived as palatable in light of the $360 million of RTEP cost recovery forgiveness. In

[185] *In re FirstEnergy 2007 Distribution Rate Case*, Case No. 07-551-EL-AIR, Order at 48, paragraph (23) (January 21, 2009).

[186] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 22-23 (May 21, 2012) citing.

The Order in *In re FirstEnergy RCP Case*, Case No. 05-1125-EL-ATA, at 9 (January 4, 2006) stated:

> [W]e find that *exigent circumstances exist* to deviate in a controlled way from the above stated public utility regulatory principles. * * * We are mindful that such deferrals must be scrutinized to assure that the costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of the Companies, and in excess of expense amounts already included in the rate structures of each of the Companies. We will approve the deferral concept in this case premised upon the understanding that the expenses related to infrastructure improvement and the increased expenses for maintenance of infrastructure and reliability will yield necessary improvements that otherwise would have been realized, for company financial reasons, over a much longer period of time.

(Emphasis added.) This 2006 Order resulted in the increased distribution rates above those that would have otherwise been approved in the 2007 distribution rate case. *In re FirstEnergy 2007 Distribution Rate Case*, Case No. 07-551-EL-AIR, Order, at 11 (January 21, 2009). No claim of "exigent circumstances" has been made that would provide similar increases in a newly filed rate case.

[187] OCC Hearing Ex. No. 6.

the ESP 3; however, the Companies may recover $405 million through Rider DCR, but there is no additional RTEP cost recovery forgiveness to point to as an offset.

Finally, to suggest that "in the long run" the Companies would recover an equivalent of the same costs under the DCR or through distribution rate proceedings is disingenuous. The ESP 3 term is for two years. The DCR Rider caps provide the Companies with the opportunity to recover from customers $405 million. The ESP versus the MRO test is not an "over the long run" analysis, and Mr. Ridmann's direct testimony most accurately makes the point that the quantitative assessment of the DCR is that it is detrimental to FirstEnergy's customers. The DCR significantly contributes to the determination that the ESP **is not** more favorable in the aggregate than an MRO, and the Commission should reject or modify the Stipulation in this case.

iii. The PIPP auction benefit is not unique to an ESP.

The Stipulation provides for separate treatment of PIPP customers by carving out their load and sole-sourcing their generation supply through a contract with FirstEnergy Solutions at a 6 percent discount from the price to compare for these customers.[188] In Mr. Ridmann's quantitative analysis, this arrangement provides a savings of $10.4 million over the MRO.[189] However, such an arrangement is not prohibited in an MRO, meaning the arrangement is not a favorable outcome that is unique to the ESP.

OCC witness Gonzalez notes in his Direct Testimony that OPAE made this very point in its ESP 2 Post Hearing Brief. Mr. Gonzalez stated

[188] Stipulation at 9-10 (April 13, 2012).

[189] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at Attachment WRR-1 (April 13, 2013).

> Ohio law provides the Ohio Department of Development ("ODOD") with the ability to bid out the PIPP load competitively, and the stipulation and recommendation filed in this case cannot waive ODOD's authority. Ohio Revised Code §4928.54 states: Beginning on the starting date of competitive retail electric service, the director of development may aggregate percentage of income payment plan program customers for the purpose of competitively auctioning the supply of competitive retail electric generation service to bidders certified under section 4928.08 of the Revised Code. The objectives of the auction shall be to provide reliable retail electric generation service to customers based on selection criteria that the winning bid provide the lowest cost and best value to customers.
>
> Given that this provision is in the statute, the Commission has no authority to ignore it, a fact that the stipulation recognizes by actually citing the law as quoted above.[190]

The Companies did not solicit bids from other suppliers to determine if there was interest in serving the PIPP load. It is therefore not known whether another marketer not included in the negotiations, such as AEP Retail, could have provided a lower discount than 6 percent, further reducing the benefits of this provision of the ESP. In fact, IGS and Direct Energy did indicate in their response to OCC discovery that they may have considered competitively bidding for the PIPP load.[191] On this point, the arrangement seems once again designed to benefit the competitive affiliate of the Companies, FirstEnergy Solutions

Because the very same outcome achieved for PIPP customers -- a 6 percent discount in FirstEnergy's ESP 3 proposal -- could be achieved in an MRO case, it is therefore inappropriate for the Companies to include the PIPP benefit in Mr. Ridmann's

[190] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 30-31 (May 21, 2012) citing Case No. 10-388-EL-SSO, OPAE Post Hearing Brief, at 3 (April 30, 2010).

[191] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at Attachment 3 (May 21, 2012).

IGS and Direct Energy responses to OCC INT-1. IGS and Direct Energy also responded that they had not been asked by the Companies whether they were interested in bidding on the PIPP load. (IGS and Direct Energy responses to OCC INT-3).

quantitative analysis on WRR-1 as a benefit of the ESP 3 only. Mr. Gonzalez concluded that upon adjusting Mr. Ridmann's quantitative analysis for the RTEP cost recovery forgiveness and the PIPP 6 percent discount, the ESP 3 in the aggregate **is not** more beneficial to consumers than an MRO.[192] Mr. Gonzalez' analysis shows the MRO, in the aggregate, to be more beneficial than the ESP 3 by $16 million.[193]

iv. The alleged benefits of the fuel funds ignore the benefit derived by FirstEnergy.

The Stipulation provides $8 million during the term of the ESP 3 for funding a fuel fund to assist low-income customers[194] with bill payment assistance. The Stipulation stated:

> In order to assist low-income customers (defined as customers at or below 200 percent of the Federal Poverty Guideline) in paying their electric bills from the Companies, a fuel fund provided by the Companies shall be continued consisting of $4 million to be spent in each calendar year from 2015 through 2016. Any unspent funds from the $4 million annual fuel fund provided herein will be carried over through the following calendar year.[195]

In addition, the Stipulation provided an additional $1 million funding to OPAE for its fuel fund program.[196] The $9 million fuel fund was provided by FirstEnergy shareholders, and as such, Mr. Ridmann included the $9 million fuel fund dollars as a benefit of the ESP 3 in his qualitative analysis on Schedule WRR-1 to his direct testimony.[197]

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[192] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 30-31 (May 21, 2012).

[193] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at Exhibit WG-3 (May 21, 2012).

[194] Stipulation at 41 (April 13, 2012).

[195] Stipulation at 41 (April 13, 2012).

[196] Stipulation at 40 (April 13, 2012).

[197] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at WRR-1 (April 13, 2012).

Arguably, recognizing the shareholder contribution to a fuel fund as a benefit of the ESP 3 Case is not completely inappropriate because customers are not contributing directly to the benefit. However, including the full $9 million overstates the benefit, because Mr. Ridmann's analysis fails to recognize the benefit the Companies receive from the fuel fund contribution. On cross-examination, Mr. Ridmann was asked whether the Companies had an indirect method of recovering the fuel fund contributions, and Mr. Ridmann admitted the following:

> To the extent the fuel funds are used to support any payment of bills, possibly. To the extent they are used for other purposes, no.[198]

The contribution to the fuel fund was used solely for the payment of electric bills, except for the administration costs of the fuel funds.

The Companies, in discovery, had stated that 10 percent of the fuel fund would be allocated to administering the fuel fund.[199] In that event, $450,000 per year would be allocated to administration of the fuel fund. The remaining $4,050,000 per year represents a benefit to the Companies for ensuring revenues and that should, therefore, be excluded from Mr. Ridmann's quantitative analysis.

[198] Tr. Vol. I at 57 (Ridmann) (June 4, 2012).

[199] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at Attachment 1 (May 21, 2012). See also FirstEnergy Response to NOAC Set 1 INT No. 1 ("For each of the years 2013, 2014, 2015 and 2016 10 % of the aforementioned funds will be allocated use in administering the fuel fund.").

v. The costs associated with the economic development provisions of the Stipulation are transfer payments and should not be considered a quantitative benefit of the ESP 3 Case.

The Stipulation includes economic development provisions that Mr. Ridmann included in his quantitative analysis.[200] The economic development provisions contain dollar amounts the Companies will give to other parties for signing the Stipulation, [201] as well as, non-bypassable discounts that are collected from customers under Rider EDR.[202] OCC Witness Gonzalez explained in his direct testimony why these provisions should have been excluded from Mr. Ridmann's quantitative analysis. Mr. Gonzalez stated:

> They are gross benefits in that these payments are merely transfer payments made at the expense of other customers who are required to pay either through delta revenue collection or through collection from the DSE rider.[203]

Because the cost of the benefits provided to the Cleveland Clinic and to the domestic automakers are ultimately recovered from other customers, the economic development provisions should not be considered a quantitative benefit of the ESP 3 proposal.

Mr. Gonzalez in his testimony speculated as to whether there were net benefits to the public to be derived from the economic development provisions of the ESP 3 Stipulation. Mr. Gonzalez concluded that "the answer to that question is unknown."[204] However, he went on to explain:

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[200] FirstEnergy Hearing Ex. No. 1. Stipulation at 34-37 (April 13, 2012).

[201] Cleveland Clinic.

[202] Domestic Automakers.

[203] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 33 (May 21, 2012).

[204] *Id.* at 33.

> There is no record in this case demonstrating that the economic benefits of the payments to individual signatory parties are greater than the economic loss generated by the increased rates charged by the Companies to all customers. Increased rates lead to less disposable income for residential customers and increased costs for small and large businesses who will have less income or profit respectfully to hire additional employees or purchase additional goods and services therefore weakening economic demand. The Companies have not provided any evidence in the record to answer this question. They have not provided an economic impact study using a sophisticated structural model that can incorporate rate impacts on the local economy, such as Regional Economic Models, Inc.[205] or equivalent models to lend insight to the question posed. These models are most appropriate in determining the full economic impact of the transfer payments included in the FirstEnergy ESP.[206]

Because the Companies have failed to produce any evidence that might support the proposition that the net benefits of the economic development provisions outweigh the costs of those provisions; therefore, the Companies have not met their burden of proof in answering this question. And it is inappropriate for the Commission to consider the economic development provisions of the Stipulation a quantitative benefit.

For all the reasons argued above, the quantitative analysis demonstrates that in the aggregate, the ESP **is not** more favorable than an MRO. Therefore, the Commission should reject or modify the Stipulation in this case.

b. The ESP is not more favorable in the aggregate than an MRO under a qualitative analysis.

Mr. Ridmann, in his direct testimony, looked beyond his quantitative analysis, and reviewed what he considered to be the qualitative benefits of FirstEnergy's ESP 3 proposal. Mr. Ridmann stated:

[205] http://www.remi.com/.

[206] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 33-34 (May 21, 2012).

> The qualitative benefits of implementing this Stipulation on the accelerated timeline as proposed include [1] enabling the Companies to bid demand response into the PJM 2015-2016 Base Residual Auction on May 7, 2012 * * *, [2] modifying the bid schedule previously approved in the Companies' current ESP so that the bids to occur in October 2012 and January 2013 will be for a three year product rather than a one year product * * *, [3] to extend the recovery period for renewable energy credit costs over the life of the Stipulation. [4] When coupled with keeping the current base distribution rates in place through May 31, 2016, ESP 3 will allow customers to better proactively plan and budget for their electricity needs. [5] A significant continuing benefit of ESP 3, as in the existing ESP, is that the Companies agree not to seek cost recovery from customers of MISO exit fees, PJM integration costs, and RTEP charges for the longer of the five year period of June 1, 2011 through May 31, 2016 or when a total of $360 million of Legacy RTEP costs have been paid for by the Companies but not recovered 3 through retail rates.[207]

The qualitative benefits are illusory, and should not be considered benefits when looking at the benefits of the ESP 3 compared to an MRO.

i. The benefits of bidding demand response and energy efficiency resources into the base residual auction were under-whelming.

As argued previously in the brief, the Companies bid 36 MW of energy efficiency resources into the PJM 20125/16 BHRA auction on May 7, 2012. This was below the 65 MW identified by the Companies that could have been bid. And significantly below the 339 MW that the Sierra Club stated the Companies should have bid into the auction. Sierra Club witness Neme has estimated a lost revenue opportunity for not bidding the additional EE at from $22-$39 million.[208] Witness Neme has also estimated the additional capacity costs for the ATSI zone of not bidding the incremental EE at the BRA

[207] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at 15-16 (April 13, 2012).

[208] Sierra Club Hearing Ex. No. 5, Direct Testimony of Christopher Neme at 13 (May 21, 2012).

at $600 million of which a significant portion of that cost will be borne by the Companies' customers.[209] Because of the failure of the Companies to adequately bid an appropriate level of energy efficiency resources into the BRA, the Companies' consideration of this as a qualitative benefit should be disregarded by the Commission.

ii. Modifying the bid schedule to accommodate a three-year auction product does not constitute a qualitative benefit.

What seems certain in this case is the level of uncertainty that surrounds the ability to project generation energy prices for the period June 1, 2015 through May 31, 2016. As was argued earlier in the brief, the upcoming retirement of FirstEnergy Solutions' generation plants, as well as the degree to which substituted generation resources can be imported into the ATSI zone in light of the transmission constraints, creates doubt that the time is right to conduct an auction in October 2012 and January 2013 for a three-year product that will lock into the price FirstEnergy charges its customers for generation service. Mr. Fortney on cross-examination acknowledged the uncertainty that exists:

> Q. You testified, as I understand it, that there are three qualitative benefits to the stipulation. One is the capture of current low prices to be blended with anticipated higher prices; is that fair?
>
> A. Yes.
>
> Q. Could you achieve some of the purposes of rate stability and capturing current low prices if we bid a two-year product rather than a three-year product in this ESP?
>
> A. I imagine you could, yes.

[209] *Id.* at 15.

Q. And with the concerns that exist regarding the ATSI zone and the constraints that are predicted for the '15-16 planning year, is it possible that it would be better to wait another year to see what sorts of responses are being developed to that constraint?

A. Well, I was also present during your cross of Mr. Fein, and he listed several risk factors that come into play in the bid. You understand that the capacity charge is only one component of a competitive bid price. I believe that staff signed the stipulation because they believed that the three-year option was the best option available.

Q. And I understand your position, sir, and I understand that staff has signed the stipulation, but that wasn't my question. My question is, is it possible?

A. It is possible. It's always easy to be a Monday morning quarterback, and in three years I might be saying -- well, I won't be saying it in three years. Somebody might be saying it, "We screwed up." I won't be saying it in three months.[210]

Under these circumstances – where the Staff witness acknowledges that looking back with 20/20 hindsight it may be a possibility that the Companies and signatory parties "screwed up" – and given the fact that the auction results in retrospect could go either way -- and no witness in this case disputes that fact -- then the three-year auction product cannot be counted as a benefit of the ESP – not even a qualitative benefit.[211]

[210] Tr. Vol. II at 263-264 (Fortney) (June 5, 2012).

[211] It is interesting to note that similar to OCC witness Gonzalez, witness Fortney questions the so-called qualitative economic development benefits of the Stipulation. See Tr. Vol II at 275 (Fortney) (June 5, 2012) ("Q. So would you consider that to be of a benefit to the stipulation? A. Well, it's an economic benefit to the automakers who take advantage of it, but other customers pay, so I would say it's kind of a wash.").

iii. A One- or Two-Year Generation Product as Recommended by OCC Witness Wilson will Mitigate the Impact of Generation Costs on Customer Bills and eliminate the Need for Alternative Energy Resource Rider ("AER") Rider Deferrals.

As stated earlier, the Stipulation proposes a three-year product for one third of the tranches to be auctioned off in October and January to smooth out the expected increase in rates in 2015/2016 that reflect the higher capacity rates of the 2015/2016 PJM BRA. Therefore, the Companies' proposal will bring higher future energy costs forward as demonstrated in AEP Retail Hearing Exhibit 2 (AEP Retail Set 1-INT-11.7 Attachment 1). At the same time, the Companies propose paradoxically to take current higher AER Rider customer charges and defer them into the future with corresponding carrying charges collected by the Companies. Therefore, on the one hand the Companies propose moving higher future energy costs forward through the three-year generation product, and on the other hand, they are moving higher current AER Rider charges into the future with deferrals.

Since Company witness Ridmann has stated that "I'll agree a dollar bill is a dollar bill,"[212] that is, a dollar bill used to pay the AER Rider is the same as a dollar bill used to pay for auction-determined energy charges, these two separate impacts on rates appear to be working at cross purposes. Instead, auctioning a one- or two-year product as recommended by OCC witness Wilson and keeping the AER Rider as is, would accomplish a similar price-smoothing effect without customers having to pay the Companies' carrying charges. This convoluted accounting treatment should not be mistaken as a qualitative benefit of the Companies' ESP 3 proposal.

[212] Tr. Vol. 1 at 275 (Ridmann) (June 4, 2012).

iv. The distribution rate freeze cannot be considered a benefit.

Mr. Ridmann, in his direct testimony, asserts that the Stipulation provision that establishes a distribution rate freeze is a qualitative benefit for consumers.[213] The Stipulation states:

> Except as expressly set forth elsewhere in this ESP 3, the Signatory Parties agree that, during the ESP 3 period, no proceeding will be commenced by the Signatory Parties, and recommend that no proceeding be commenced by the Commission, whereby an adjustment to the base distribution rates of the Companies would go into effect prior to June 1, 2016.[214]

If customers indeed saw no increase in costs associated with their distribution service the Companies' characterization of this Stipulation provision as benefit might be acceptable.

However, under the Stipulation, FirstEnergy will be allowed to collect costs associated with investments in enhanced distribution service through Rider DCR up to $195 million and $210 million in years one and two of the ESP, respectively, or $405 million in total.[215] Customers will see an increase in collections through the Rider DCR between ESP 2 and ESP 3 of $45 million.[216] It is disingenuous for FirstEnergy to state the ESP 3 provides for a distribution rate freeze when the Stipulation provides for such a significant collection from customers for distribution-related investments. The Commission should not endorse this misleading characterization that Rider DCR will result in a distribution rate freeze during the ESP 3 and should not count it as a benefit to consumers when comparing the ESP to an MRO.

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[213] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at 15-16 (April 13, 2012).

[214] Stipulation at 18-19 (April 13, 2012).

[215] OCC Hearing Ex. No. 4.

[216] OCC Hearing Ex. No. 4.

v. The RTEP cost recovery forgiveness is not a benefit of the ESP 3 Case.

As noted earlier in the brief, the RTEP cost recovery forgiveness arose from the FirstEnergy ESP 2 Case, and is an obligation that will remain unchanged by a Commission decision in this case. It is a FirstEnergy double-count between its ESP cases. Therefore, the identification of the RTEP provision in the Stipulation as a quantitative or qualitative benefit is disingenuous and should be disregarded by the Commission in this case.

For all the reasons argued above, the qualitative analysis demonstrates that in the aggregate, the ESP **is not** more favorable than an MRO. Therefore, the Commission should reject or modify the Stipulation in this case.

c. The Stipulation fails to adhere to Commission precedent with regards to the Significantly Excessive Earnings Test.

The Stipulation provision that provides for the exclusion of deferred interest income from the SEET calculation is inconsistent with the Commission's current treatment of deferrals in the application of the SEET. The Commission has acknowledged that the purpose of the SEET is to be a statutory check on rates that result in excessive earnings.[217] The Commission applied the SEET for the first time, through a fully litigated proceeding, when it reviewed the 2009 earnings of Columbus Southern Power Company ("CSP"). [218] In that case, the 2009 earnings of CSP were found to

[217] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order (January 11, 2011) "January 11, 2011 Opinion and Order" at 25.

[218] *See* Case No. 10-1261-EL-UNC, generally.

constitute "significantly excessive" earnings under R.C. 4928.143(F).[219] Furthermore, the Commission held that deferrals, including deferred interest income, should not be excluded from the electric utility's ROE calculation for the purposes of the SEET. Specifically, the Commission held that:

> Unlike OSS or extraordinary or non-recurring items, deferrals should not be excluded from the electric utility's ROE as requested by AEP-Ohio. Consistent with generally accepted accounting principles, deferred expenses and the associated regulatory liability are reflected on the electric utility's books when the expense is incurred. Subsequently, with the receipt of deferred revenues, there is an equal amortization of the deferred expenses on the electric utility's books, such that there is no effect on earning in future years. Accordingly, we are not persuaded by the arguments of AEP-Ohio to adjust CSP's 2009 earnings to account for certain significant deferred revenue.[220]

And as illustrated by the Commission's January 11, 2011 Opinion and Order and the testimony of Dr. Duann, the Commission relied on regulatory principle and practice and specifically held that deferrals must be included in the calculation of the ROE for the year of the deferral (for purposes of the SEET).[221] Accordingly, any Stipulation that provides for the exclusion of deferred interest income from the SEET must be modified or rejected.

B. Procedural Due Process Has Been Denied in This Case.

From the moment this case was filed, the Companies have maintained the need for the Commission to issue a decision on an expedited timeline. The Companies stated in their Application that

> [t]ime is of the essence; the Commission must act quickly on this Application by May 2, 2012 as such expedited approval, as

[219] Case No. 10-1261-EL-UNC, January 11, 2011 Opinion and Order at 36.
[220] *Id.* at 31.
[221] *Id.* and OCC Hearing Ex. No. 10, Direct Testimony of Dr. Daniel J. Duann at 10.

> discussed more fully in the Stipulation, is expected to permit the Companies to bid demand response resources and PJM-qualifying energy efficiency resources into the 2015/2016 PJM Base Residual Auction ("BRA") commencing on May 7, 2012. If approval cannot be achieved by May 2, 2012, approval should be granted no later than June 20, 2012, which would be too late to bid demand response resources and energy efficiency resources into the 2015/2016 PJM BRA on May 7, 2012, but should still permit adequate time to implement changes to the competitive bidding process for a three year bid period to take advantage of historically low market prices for wholesale electric generation, all to the benefit of customers.[222]

The Companies' desire to move this case through the Commission hearing process as quickly as possible does not comport with Ohio law. Ohio law establishes the 275 days as the period of time for the Commission to review an ESP filing.[223] While the law provides for a 275-day period of time for the review of FirstEnergy's ESP 3 plan the Attorney Examiner ultimately established a procedural schedule in this case that fell short of the period of time allotted under the statute and Commission precedent.[224]

In a May 2, 2012 Entry, the extension provided for non-signatory parties' testimony to be filed on May 21, 2012 (38 days after the Application was filed), and commencement of the evidentiary hearing was continued until June 4, 2012 (52 days after the Application was filed).[225] The established timelines do not come close to the time allotted under R.C. 4928.143(C)(1).[226] Although the Commission is not required to use the entire 275 days found in R.C. 4928.143(C)(1), allowing just 52 days between the filing of the Application and the commencement of the hearing in this proceeding clearly

[222] FirstEnergy Ex. 1 at 3.

[223] R.C. 4928.143(C)(1).

[224] Entry at 2 (April 19, 2012).

[225] Entry at 5 (May 2, 2012).

[226] It is noteworthy that parties had just 31 days longer to prepare for the hearing than to brief it.

is against the intent of the Legislature and unduly prejudiced the non-signatory parties. This is especially true given that the primary stated reason for needing an expedited process – so that FirstEnergy could bid demand response resources and PJM-qualifying energy efficiency resources into the 2015/2016 PJM Base Residual Auction commencing on May 7, 2012 – was invalidated by the original procedural schedule setting the hearing for May 21, 2012, fifteen days after the auction.

FirstEnergy also provided no basis in its Application, the Stipulation or the supporting testimony for an expedited procedural schedule to support the Companies' secondary reason for hastening the process, i.e., to have adequate time to implement changes to the competitive bidding process. Although this reason is repeated numerous times in these filings,[227] at the time the procedural schedule was set for this proceeding, there was no explanation as to why the Commission would need to issue an order in this case by June 20, 2012, as the Companies insisted, so the competitive bidding process could be changed. An explanation was not forthcoming until FirstEnergy witness Ridmann was cross-examined on the first day of the hearing[228] – 46 days after the first Entry setting a procedural schedule in this proceeding was issued. Thus, there was no basis for setting an expedited procedural schedule for this proceeding.

Recognizing that the procedural schedule did not provide adequate time for discovery[229] and was deficient in other ways, several non-signatory parties asked the Commission for more time to prepare for the hearing. On April 24, 2012, the Consumer Advocates filed a joint application for an interlocutory appeal of the April 19 Procedural

[227] *See* FirstEnergy Hearing Ex. No. 1, Stipulation at 3, 6, 43 (April 13, 2012).

[228] Tr. Vol. I at 21-22 (Ridmann) (June 4, 2012).

[229] R.C. 4903.082.

Entry. The Consumer Advocates argued that the timeline established in the Procedural Entry would not allow the case to be processed in a way that would provide the contemplated opportunity for all parties to advocate their positions to the PUCO for informed PUCO decision-making.[230] The Consumer Advocates asked the Commission to modify the procedural schedule in order for there to be at least three months of discovery before a deadline for non-signatory parties to file testimony and prepare for a hearing.[231]

On April 26, 2012, the Consumer Advocates filed a joint motion asking for an extension of the procedural schedule and a continuance of the hearing. While making many of the same arguments found in the interlocutory appeal application, the Consumer Advocates sought a more modest modification of the procedural schedule that would make testimony by non-signatory parties due on June 1, 2012 and would continue the hearing until June 18, 2012.[232] On May 2, 2012, the Attorney Examiner issued an Entry denying the interlocutory appeal and certification to the Commission. The Entry also modified the procedural schedule, with May 21, 2012 the new deadline for non-signatory parties' testimony and June 4, 2012 the new hearing date.

As issues developed in the case, two other modifications to the procedural schedule were sought. On May 29, 2012, AEP Retail Services ("AEP Retail") – an intervenor in this proceeding but not a participant in the FE ESP 2 case – requested a continuance of the hearing because of issues related to the May 18 PJM BRA, which was critical to FirstEnergy's claim that an expedited process was necessary to capture low

[230] Interlocutory Appeal Application, Memorandum in Support at 4 (April 24, 2012).

[231] *Id.* at 5.

[232] April 26 Joint Motion, Memorandum in Support at 6.

market prices.[233] That request was denied in an Entry issued on June 1, 2012. Also on June 1, NOPEC, NOAC and OCC asked for a continuance in order for discovery and testimony from all sides regarding the issue of bill impacts. This motion was precipitated by FirstEnergy's failure to respond to discovery on the issue.[234] The motion was denied at hearing.[235]

Another deficiency in the procedural schedule deals with intervention. Concomitant with its Application, FirstEnergy filed a motion for waiver of several rules, including Ohio Adm. Code 4901:1-34-06.[236] Section (B) of the rule provides that "[i]nterested persons wishing to participate in the hearing shall file a motion to intervene no later than forty-five days after the issuance of the entry scheduling the hearing, unless ordered otherwise by the commission, legal director, deputy legal director, or attorney examiner." FirstEnergy had asked that interested persons be able to intervene within only **seven days from the filing of the Application**.[237] Given that FirstEnergy requested an expedited ruling,[238] the Attorney Examiner needed to wait seven days before ruling on the waivers, to ensure that there were no objections.[239]

Recognizing that the waiver could adversely affect the rights of interested persons, the Consumer Advocates opposed this request on April 17, 2012.[240] Noting that

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[233] See AEP Retail Motion to Continue Hearing, Memorandum in Support at 3 (May 28, 2012).

[234] Joint Motion, Memorandum in Support at 3 (June 1, 2012).

[235] Tr. Vol. I at 25-26 (Ridmann) (June 4, 2012).

[236] FirstEnergy Motion for Waiver at 5 (April 13, 2012).

[237] *Id.*

[238] *Id.* at 2.

[239] Ohio Adm. Code 4901-1-12(C).

[240] Joint Motion to Bifurcate Issues and Joint Memorandum Contra FirstEnergy's Motion for Waiver of Rules (April 17, 2012) at 12.

new parties should have an opportunity to respond to the newspaper notice required for ESP applications under the Commission's rules,[241] the Consumer Advocates urged the Commission to deny the waiver request in order to protect the substantial right of interested persons to intervene.[242]

Nevertheless, on April 19, 2012 – six days after the Application was filed and the day before responses to the waiver request were due[243] – the Attorney Examiner issued the first procedural Entry essentially granting FirstEnergy's request regarding intervention. The Entry gave interested persons seven days from the date of the Entry – rather than the 45 days provided under the rules – to file a motion to intervene.[244] This unduly short timeframe may have deterred some interested persons from participating in this proceeding.[245]

The Ohio Supreme Court has stated that "intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."[246] Liberal intervention is necessary not only for interested persons to be represented and heard in PUCO proceedings, but also because intervention status affects the ability of interested persons to pursue an appeal to the Ohio Supreme Court, since only a "party" (i.e., one who has been granted

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[241] *Id.* at 11.

[242] *Id.* at 12.

[243] Although the Consumer Advocates and Direct Energy Services, et al. had filed separate memoranda contra the request for waivers before the April 19 Entry was issued, AEPRS made a timely filing opposing the waivers on April 20, 2012, the day after the Entry.

[244] April 19 Entry at 2.

[245] One party, the Cleveland Municipal Schools, sought and was granted intervention out of time. Entry (May 15, 2012) at 2. This, however, is not an indication that no other party would have sought intervention, since it is not unusual for parties to file motions to intervene in ESP cases 30 or more days after the procedural entry is issued.

[246] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 20 (2006).

intervention[247]) may appeal a PUCO decision.[248] The procedural schedule in this case was inconsistent with the Ohio Supreme Court's directive.

Also ongoing, were efforts intended to receive critical information from FirstEnergy through discovery. Direct Energy[249] and AEP Retail filed a motion to compel discovery against FirstEnergy in the short time between the filing of the Application and the commencement of the hearing.[250] The Companies were interested in obfuscating the facts about their ESP proposal and the generation rates that their customers will ultimately be asked to pay, by releasing critical information only if required. The non-signatory parties were at a distinct disadvantage as the Companies released information only if required, and the Attorney Examiners kept the case moving nearly at the pace the Companies desired.

The ultimate act of trampling on the non-signatory parties due process rights occurred on the third day of the evidentiary hearing and the final day of the direct case, when to assist the Companies in meeting their burden of proof, the Attorney Examiners took administrative notice of large volumes of the record from FirstEnergy's ESP 1 and ESP 2 Cases. These incidents, discussed in greater detail below, all demonstrate a pattern of process abuse that should cause the Commission to reject the Stipulation and require the Companies to refile their ESP 3 Application in accordance with Ohio law and Commission rules.

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[247] Ohio Adm. Code 4901-10(A)(4).

[248] R.C. 4903.13; S.Ct.Prac.R. II(3)(B)(2). See *Ohio Consumers' Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 23.

[249] *See* Direct Energy's Motion to Compel (May 9, 2012).

[250] *See* Direct Energy's Motion to Compel (May 9, 2012); AEP Retail Motion to Compel (May 30, 2012).

1. Waiver of Standard Filing Requirements

In the trenches, there were ongoing battles being waged with the Companies to provide information critical to the review of the ESP 3 proposal. The Companies unreasonably sought waiver requests to limit information on their ESP 3 proposal filed in the docket. In its Application, FirstEnergy sought numerous waivers of the Commission's rules for filing ESP applications that included a broad-brush, catch-all waiver request: "to the extent waiver of the requirements of any other provisions of the Commission's rules may be required in order to accommodate the Commission's expeditious consideration of the Application, such waiver is also herein requested."[251]

In an Entry issued on April 25, 2012, the Commission granted the request in part and denied it in part. The Commission granted waiver of filing requirements dealing with the corporate separation plan and its compliance with state law and policy; information necessary for the significantly excessive earnings test; workpapers supporting the application; a proposed notice for newspaper publication, the 45-day period for intervention in the proceeding; and Rule 3(C)(9) requirements concerning automatic recovery of fuel, purchased power, and certain other specified costs; information regarding construction, generation, or environmental expenditures for electric generation facilities owned or operated by the Companies; information concerning automatic increases or decreases of any SSO component; information regarding phase-in deferred asset proposed to be securitized; and information related to transmission provisions.[252] As discussed below, the request regarding intervention was

[251] *See* FirstEnergy Motion for Waiver at 2-5 (April 13, 2012).

[252] Entry at 5-6 (April 25, 2012).

deemed moot.[253] The rest of the waiver requests were denied, and FirstEnergy was directed to update its Application by May 2, 2012.[254]

The waivers granted in this proceeding put the non-signatory parties at an even greater disadvantage. Although the Attorney Examiner stated some of the documents could be obtained through discovery,[255] because the Companies had ten days to respond to discovery, follow-up questions regarding discovery responses were extremely limited, even more so if the Companies objected to providing the responses on the first try.[256]

Further, as the Consumer Advocates noted in their Joint Motion to Bifurcate, the testimony submitted to support the Application and the Stipulation was woefully inadequate to meet the Commission's requirements.[257] Commission rules require "a complete description of the ESP **and testimony explaining and supporting each aspect of the ESP**."[258] In this proceeding, the Companies filed a five-page Application supported by Mr. Ridmann's 20-page testimony containing a single attachment. The documentation in its brevity did not meet the letter or the spirit of the rule, and thus the Companies failed to comply with the rule.

It should also be noted that the Companies sought a similar waiver request in the ESP 2 Case. That request resulted in a Commission Entry that granted in part and denied in part the waiver request.[259] The Entry stated:

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[253] *Id.* at 6-7.

[254] *Id.* at 6.

[255] *Id.* at 5.

[256] *See* discussion infra regarding discovery rights.

[257] Joint Motion to Bifurcate at 5.

[258] Ohio Adm. Code 4901:1-35-03(C)(1) (emphasis added).

[259] *ESP 2*, Entry at 5 (April 6, 2010).

> However, the financial projections, provided for in Rule 4901:1-35-03(C)(2), O.A.C, or other comparable information, do not appear to be available in the record in the MRO proceeding. Because the Commission believes that these financial projections are essential to our consideration of the application and stipulation, we will deny FirstEnergy's request for a waiver of Rule 4901:l-35-03(C)(2), O.A.C[260]

Therefore, it was disingenuous for the Companies to seek waiver requests for information that was not granted in the ESP 2 Case, and demonstrates the extent to which the Companies would go to deprive interested parties of critical information pertaining to their ESP 3 proposal. The gutting of the Commission's filing requirements in this proceeding exacerbated the violation of the due process rights of non-signatory parties. The Commission should deny the Application and require FirstEnergy to submit an appropriate ESP application.

2. AEP Retail's Motion to Compel was Granted in Part requiring FirstEnergy to Provide Analysis of Typical Customer Bills.

On May 29, 2012, AEP Retail filed a motion to continue the hearing date and modify the procedural schedule, as well as a request for an expedited ruling. On May 30, 2012, AEP Retail filed a Motion to Compel FirstEnergy to respond to certain discovery requests. AEP Retail's discovery sought "FirstEnergy to do no more than meet the obligation imposed upon it by this Commission's own Rule 4901:1-35-03(C), which obviously contemplates that an applicant will take the steps necessary to provide *meaningful* information that forecasts the impacts of its ESP proposals upon consumers' bills."[261] On June 1, 2012, the Attorney Examiner issued a ruling on AEP Retail's

[260] *Id.* at 4.

[261] Motion to Compel at 5 (May 29, 2012) (original emphasis included).

Motions. The Attorney examiner denied the Motion to Continue the hearing, and granted in part the Motion to Compel. The Entry stated:

> Consequently, the attorney examiner finds that FirstEnergy should provide AEP Retail with the information requested in Interrogatories 146 and 147, to the extent the information requested regards the impact on typical customer bills of the known change in capacity costs from the 2014/2015 BRA to 2015/2016 BRA. In light of the date the evidentiary hearing is scheduled to commence in this proceeding, FirstEnergy is directed to electronically serve responses to the specified discovery requests on AEP Retail by 9:00 a.m. on Monday, June 4, 2012. [262]

The typical bill information was transmitted to interested parties one hour before the evidentiary hearing was to begin on June 4, 2012.

The Companies provided typical bill analysis as part of the summary information that was filed as a result of the denial of the Companies waiver request on May 2, 2012. However, that analysis excluded any projections of the increase in generation costs anticipated in the period June 1, 2015 through May 31, 2016.[263] The analysis showed decreases for FirstEnergy's residential customers of between 0.8 and 3.5 percent comparing ESP 2 with Year One of the ESP 3.[264] However, the typical bill analysis only reflected the increase from the DCR and the extension of the Rider AER for the life of the Stipulation. The typical bill analysis did not include the impact from the projected increase in generation costs under the ESP 3.[265] That analysis was not indicative of the true bill impacts the Companies could reasonably expect consumers to be charged.

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[262] Entry at 5(June 1, 2012).

[263] Tr. Vol. I at 86 (Ridmann) (June 4, 2012).

[264] FirstEnergy Hearing Ex. No. 2, Supplemental Information Filing at Exhibit 3 see generally Typical Bill Analysis (May 2, 2012).

[265] Tr. Vol. I at 86 (Ridmann) (June 4, 2012).

At approximately 9:00 a.m. on June 4, 2012, the Companies complied with the Attorney Examiner's Entry granting the motion to compel, in part, by providing to the parties the typical bill analysis requested by AEP Retail in discovery. The typical bill analysis shows a increase to the charges that consumers might expect to pay as a result of the increased capacity and energy costs anticipated in the June 1, 2015 through May 31, 2016 time period.

3. The Commission should reverse the Attorney Examiner's ruling in this case to take administrative notice of the record from FirstEnergy's ESP 1 and ESP 2 Case pursuant to Ohio Adm. Code 4901-1-15(F)(2)

i. The Attorney Examiner's ruling with regards to the taking of administrative notice in this case was unreasonable and unlawful.

The Companies entered this case with the expectation that certain required elements of their case may be met through administrative notice of the ESP 2 proceeding. In their Application, the Companies stated: "[t]he Companies further request that the Commission take administrative notice of the evidentiary record in the Companies

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current ESP, Case No. 10-388-EL-SSO, and thereby incorporate by reference that record for the purpose of and use in this proceeding."[268]

Only after FirstEnergy's wholesale request was denied by the Attorney Examiner on June 4, 2012,[269] did FirstEnergy provide a "List of Documents for Administrative Notice" on June 6, 20012 (the third day of the evidentiary hearing and the final day of the direct case). The "List of Documents for Administrative Notice," which is attached hereto as Exhibit 1, included: (i) seven specific pages from four separate volumes of transcript testimony from the evidentiary hearing in the ESP 2 Case out of approximately 941 total pages; and (ii) prefiled testimony of three witnesses who did not even testify, who were not subject to cross-examination and who otherwise did not participate in the ESP 3 case (Hisham Choueiki, Tamara Turkenton, and John D'Angelo).[270]

Making matters worse, FirstEnergy also, for the first time, requested that administrative notice be taken of FirstEnergy's application for a market rate offer (not an ESP) in the MRO Case No 09-906-EL-SSO. Despite numerous objections from the non-signatory parties to the ESP 3 Stipulation, including those of NOPEC, NOAC and OCC,[271] at the end of the third day of hearings – the last day for hearings on the direct case – the Attorney Examiner took administrative notice of all of the documents identified in FirstEnergy's "List of Documents for Administrative Notice."[272] OCC, NOPEC and NOAC jointly filed an interlocutory appeal of this issue. The Legal Director

[268] Application at 5.

[269] Tr. Vol. I at 29 (Price) (June 4, 2012).

[270] Joint Interlocutory Appeal by OCC, NOPEC and NOAC at 5 (June 11, 2012); See also Tr. Vol. III at 10-12 (Kutic) (June 6, 2012).

[271] Other non-signatory parties which objected to the Companies' request for administrative notice at the hearing included AEP Retail, ELPC, Sierra Club, and RESA.

[272] Tr. Vol. I at 29.

issued an Entry denying certification of the interlocutory appeal to the Commission.[273]

[273] Entry at 6 (June 21, 2012).

In that the Legal Director failed to certify the appeal, the Commission's rules provide for a party adversely affected by a ruling to raise the propriety of the ruling with the Commission in the party's initial brief. Ohio Adm. Code 4901-1-15 (F) states:

> Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.

OCC, and Citizen Power, as parties in this case that were adversely affected by the ruling by the Attorney Examiner, hereby raises with the Commission the issue of the propriety of that ruling herein.

The PUCO may not take administrative notice of the record in another case if the decision lessens FirstEnergy's burden of proof. The United States Supreme Court has long noted that

> Courts take judicial notice of matters of common knowledge. 5 Wigmore, Evidence, §§ 2571, 2580, 2583; Thayer, Preliminary Treatise on Evidence, pp. 277, 302. … **Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence**. Wigmore, Evidence, § 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. "**It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable**." *Ibid*.[274]

The Attorney Examiner's ruling in this instance had the effect of precluding the non-signatory parties from disputing the materials of which administrative notice was taken.

[274] *Ohio Bell Tel. Co. v. Public Util. Comm. of Ohio*, 301 U.S. 292, 301-302; 57 S. Ct. 724, 729; 81 L. Ed. 1093, 1100; 1937 U.S. LEXIS 291 (1937) (emphasis added).

The non-signatory parties did not have knowledge of the specific documents which the Companies were requesting to be administratively noticed until the close of the evidentiary hearing on June 6, 2012,[275] and the Attorney Examiner did not take administrative notice of the documents until the end of the hearing that day.[276] FirstEnergy did seek to incorporate the record through a brief statement at the end of the ESP 3 Application asking that the "Commission take administrative notice of the evidentiary record established in the current ESP, Case No. 10-388-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding."[277] But, such a far-reaching request was not ruled upon by the Commission before the hearing.

Notably, the Attorney Examiner rejected the incorporation of the entire record in the ESP 2 Case on the first day of the hearing; instead, asking FirstEnergy to submit a specific list of documents, and assured the Companies that administrative notice would be "liberally taken."[278] Thus, it was only at the close of the third day of the evidentiary hearing – and after the direct cases had concluded – that the Attorney Examiner finally ruled on the request, and provided the non-signatory parties with knowledge of the facts administratively noticed.

The Attorney Examiner ruled:

> At this time we are going to rule on the companies' pending request to take administrative notice of a number of documents that are -- I am not going to read into the record but are enumerated on -- in the filing the company handed out today.

[275] Tr. Vol. III at 10-12 (Kutic) (June 6, 2012).

[276] *Id.* at 170-173 (Price).

[277] Application at 5.

[278] Tr. Vol. I at 29.

> Under existing case law, the Commission may take administrative notice of facts that the complaining parties have had an opportunity to prepare, respond to the evidence, and they are not prejudiced by its introduction.
>
> In this case, FirstEnergy provided notice to all parties in its application that it intended to seek administrative notice of all documents in 10-388-EL-SSO, which also had previously taken administrative notice of all the documents in 09-906-EL-SSO.
>
> **Therefore, all the parties have had the opportunity to conduct discovery of any evidence presented in those proceedings. They have had the opportunity to request FirstEnergy to specifically identify the evidence in the record of those proceedings that they intend to seek -- intend to rely upon in this proceeding. They had the ability to request a subpoena to compel witnesses from those proceedings to appear for further cross-examination of this hearing.** They had the opportunity to cross-examine the witnesses at this hearing regarding any issues raised in those proceedings, and they had the opportunity to present testimony at this hearing to explain or rebut any of the evidence in the record of that proceeding.
>
> Therefore, we find that the parties are not prejudiced by the taking administrative notice of the documents listed by FirstEnergy, and we will go ahead and take administrative notice at this time.[279]

Despite running this case through the hearing process at an unreasonably expedited timeline, the Attorney Examiner suggested that interested parties should have conducted discovery on evidence presented in the MRO (ESP 1) and ESP 2 Cases, identified evidence in the records of those proceedings, and subpoenaed witnesses from those prior proceedings – and who have not filed testimony in this case – to this hearing. That is not a reasonable expectation if the hearing had been scheduled for three or four months after the Application was filed, instead of the 52 days actually given to prepare for hearing.

[279] Tr. Vol. III at 170-173 (Price) (June 6, 2012) (emphasis added) (Attached hereto as OCC Exhibit No. 2).

ii. The Attorney Examiner unreasonably and unlawfully took administrative notice of opinions.

The Attorney Examiner, in this case did not limit administrative notice to facts, but rather extended administrative notice far outside factual boundaries. At the evidentiary hearing the Attorney Examiner clarified his ruling:

> MS. YOST: Your Honor, in regards to some of the documents that were listed on FE -- what they provided this morning, you spoke of facts in regards to Commission precedent. So that would exclude any opinions that are listed in regards to these –
>
> EXAMINER PRICE: All the documents that are listed we've taken administrative notice, whether it's facts or opinion. I think we -- the rationale that I explained applies equally to facts as -- to opinion as it would to facts.[280]

Such a ruling was unjust and unlawful, and provides the Companies an opportunity to meet their burden of proof, that otherwise could not be met.

Since the non-signatory parties did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012, they had no opportunity to explain and/or rebut such documents. Until the Attorney Examiner took administrative notice on June 6, 2012, there were not any facts administratively noticed, and therefore no opportunity to explain or rebut them existed. And, there was no opportunity granted to the parties after June 6, 2012 to explain or rebut the facts administratively noticed.

[280] Tr. Vol. III at 171-172 (Price) (June 6, 2012).

The matters that are proper subjects of administrative notice by the PUCO were examined by the Supreme Court of Ohio in *Canton Storage & Transfer Co. v. Public Util. Comm.*:

> We have . . . held that consolidation of cases and the exchange of testimony is *impermissible where it eliminates a portion of a party's burden of proof.*[281]

The *Canton Storage* Court quoted from an earlier case where "[t]he commission's procedure eliminated the necessity for Transit Homes making its own record before the commission."[282] As further argued below, the Commission's administrative notice of the record in the MRO (ESP 1) and ESP 2 Cases significantly reduces FirstEnergy's burden of proof regarding the ESP Application, and is both unreasonable and unlawful.[283]

Canton Storage is also informative regarding the relationship between prejudice to a party and the burden of proof under circumstances where administrative notice is taken of an existing record. In *Canton Storage*, the Court held that "[a]dministrative notice of the testimony . . . prejudiced the protestants because the applicant's burden of proof was reduced by this use of the testimony."[284] Again, the reduction in FirstEnergy's burden of proof regarding the ESP 3 Application is prejudicial to the cases of non-signatories to the Stipulation, and the administrative notice taken by the Commission is both unreasonable and unlawful.

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[281] *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 9, 647 N.E.2d 136, 144 citing *Motor Service. Co. v. Public Util. Comm.* (1974), 39 Ohio St.2d 5, 68 O.O.2d 3, 313 N.E.2d 803 (emphasis added).

[282] *Id.*, quoting from *Motor Service* at 12, 68 O.O.2d 7, 313 N.E.2d 808.

[283] The Supreme Court of Ohio has held that "trial courts may not take judicial notice of their own proceedings in other cases even when the cases involve the same parties." *State ex rel. Everhart v. McIntosh*, 115 Ohio St. 3d 195; 196, 2007-Ohio-4798; 874 N.E. 2d516, 517 (citations omitted).

[284] *Id.* at 8-9.

In ESP cases, R.C. 4928.143(C)(1), requires that the "burden of proof in the proceeding shall be on the electric distribution utility."[285] The ESP 3 Application, including all of its attachments and amendments, fails (among its failures) to document the proposed plan "relating to the supply and pricing of electric generation service" that is required of an ESP under R.C. 4928.143(B). FirstEnergy's direct testimony was filed on April 13, 2012 with the Application, and Supplemental Testimony was filed as required by the April 19 Entry and entered into the ESP 3 record, similarly fails to provide the required support.

FirstEnergy apparently intends to rely upon the record in the ESP 2 Case No. 10-388-EL-SSO and the MRO (ESP 1), Case No. 09-906-EL-SSO, to meet its burden of proof in this case. The Commission's administrative notice of the record of the ESP 2 and MRO (ESP 1) Cases is apparently intended to cure that problem of seeking expedited approval of the ESP 3 Application.

As stated in *Canton Storage*, the Commission's administrative notice may not "*eliminate[ ] a portion of a party's burden of proof.*[286] That is not only the effect, but apparently the purpose of the administrative notice in this case. As a result, the Attorney Examiner's ruling regarding taking administrative notice of the record in the ESP 2 and MRO (ESP 1) Cases is unreasonable and unlawful.

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[285] *Id.*

[286] *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 9, 647 N.E.2d 136, 144 citing *Motor Service. Co. v. Public Util. Comm.* (1974), 39 Ohio St.2d 5, 68 O.O.2d 3, 313 N.E.2d 803 (emphasis added).

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4. OCC and other non-signatory parties were denied "thorough and adequate preparation for participation in…" this Commission proceeding, in contravention of Ohio Adm. Code 4901-1-16(A) and other law.

R.C. 4903.082 provides that "[a]ll parties and intervenors shall be granted ample rights of discovery." In addition, Ohio Adm. Code 4901-1-16(A) states: "The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery **in order to facilitate thorough and adequate preparation for participation in commission proceedings**." The procedural schedule in this proceeding failed to meet either requirement.

As discussed above, non-signatory parties had just 52 days to prepare for the hearing in this proceeding. The consequence of the procedural schedule was that non-signatory parties have been limited in their ability to conduct follow up discovery on initial and later responses. Such follow-up discovery can be important, whether the respondent to the discovery is cooperative with the requests or not.

Adequate preparation allows for parties in PUCO cases to be able to present to the Commission recommendations and positions that are based on information and data obtained through the discovery process. A recent Commission decision in another ESP case recognized the importance of accurate information in the decision-making process:

> In the Opinion and Order, the Commission recognized that these rate impacts may be significant, based upon evidence indicating that total bill impacts may, in some cases, approach 30 percent. However, the evidence in the record inadvertently failed to present a full and accurate portrayal of the actual bill impacts to be felt by

> customers, particularly with respect to low load factor customers who have low usage but high demand.[291]

In this case, the non-signatory parties were not provided enough time for thorough and adequate preparation in accordance with Ohio law and Commission rules. In addition to the inordinately short timeframe between the filing of the Application and the hearing, the Companies filed a voluminous amount of material on May 2, 2012 – less than three weeks before non-signatory parties' testimony was to be filed. This severely limited the non-signatory parties' ability to conduct meaningful discovery on this material. The needlessly compressed timeframe in this proceeding has denied the non-signatory parties protection under Ohio law and Commission rules regarding ample discovery rights.

V. CONCLUSION

The Commission should reject or modify the Stipulation in this case. The expedited timeline has adversely affected the due process rights of the non-signatory parties. The Stipulation violates all three prongs of the Commission's standard for reviewing stipulations. The first prong was violated because the non-signatory parties were excluded from the negotiations and the participation lacks diversity in that none of the signatory parties represent all of FirstEnergy's residential customers. The second prong is violated because the stipulation does not benefit FirstEnergy's customers or the public interest. A key factor of the ESP 3 proposal was the Companies' claimed desire to conduct a three-year auction to blend the current lower prices with higher future prices to

[291] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan ("AEP ESP Case")*, Case No. 11-346-EL-SSO, et al, Entry on Rehearing at 11 (February 23, 2012). (In this case, the procedural schedule provided parties almost 6 months to draft testimony.).

stabilize the generation price over the term of the ESP 3. However, as was discovered, stable prices do not equate to lower prices, and in fact the increases for customers could be staggering.

An argument can be made that FirstEnergy's generation affiliate, FirstEnergy Solutions, which may make up to $550 million during the June 1, 2015 through May 31, 2016 time period,[292] is the true beneficiary in this case, and whose costs may be passed on to FirstEnergy's customers,.[293] Finally because the ESP is not more favorable in the aggregate than an MRO based upon the quantitative and qualitative factors relied on by the Companies, which have been shown to be illusory or not true benefits as touted by the Companies, the third prong of the Stipulation is violated. Therefore, the Commission should reject or modify the Stipulation.

[292] Tr. Vol. II at 18-19 (Hays) (June 5, 2012) Proffered: *Wholesale Power Prices in Northeast Ohio Will Go Up*, by John Funk, The Cleveland Plain Dealer (May 22, 2012) ("At least one Wall Street analyst on Monday estimated FirstEnergy would pull in an extra $550 million between June 1, 2015 and May 31, 2016 because of the auction.").

[293] Tr. Vol. I at 203 (Ridmann) (June 4, 2012).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Corrected* Initial Brief of the Office of the Ohio Consumers' Counsel* was served via Electronic Mail upon the following persons on this 26th day of June 2012.

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Exhibit 1

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Authority to Provide For a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of An Electric Security Plan	)))))))	Case No. 12-1230-EL-SSO

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S LIST OF DOCUMENTS FOR ADMINISTRATIVE NOTICE

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Exhibit 1

List of Documents for Administrative Notice

Doc. No.	Case No.	Docket Description	Date
1	09-0906-EL-SSO	In the matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a market rate offer to conduct a competitive bidding process for standard service offer electric generation supply, accounting modifications associated with reconciliation mechanism, and tariffs for generation service. Volume 1 (Company Exhibit 7 in 09-906).	10/20/2009
2	09-0906-EL-SSO	In the matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a market rate offer to conduct a competitive bidding process for standard service offer electric generation supply, accounting modifications associated with reconciliation mechanism, and tariffs for generation service.(volume 2-testimony & schedules) (Company Exhibits 1-7 in 09-906).	10/20/2009
3	09-0906-EL-SSO	Transcript for Hearing Vol. IV, p. 493	12/2009
4	09-0906-EL-SSO	Transcript for Hearing Vol. IV, p. 586	12/2009
5	10-0388-EL-SSO	In the matter of the application and stipulation and recommendation of Ohio Edison Company, The Cleveland Electric Illuminating and The Toledo Edison Company for authority to establish a standard service offer pursuant to R.C. 4928.143 in the form of an electric security plan. (Joint Exhibit 1 and Company Exhibit 1 in 10-388).	3/23/2010
6	10-0388-EL-SSO	Errata, exhibits for the application, and revised Schedule 1 on behalf of FirstEnergy Corp. and Ridmann, William R. (Company Exhibit 2 in 10-388).	3/30/2010
7	10-0388-EL-SSO	Direct Testimony of William Ridmann on behalf of FirstEnergy Corp. and Ridmann, William R. (Company Exhibit 4 in 10-388).	3/31/2010
8	10-0388-EL-SSO	Correspondence errata and the exhibits thereto, as well as the attached financial projections on behalf of FirstEnergy Corp. and Ridmann, William R. (Company Exhibit 3 in 10-388).	4/13/2010
9	10-0388-EL-SSO	Testimony of Hisham Choueiki, PH.d, P.E. on behalf of the Public Utilities Commission of Ohio (Staff Exhibit 1 in 10-388).	4/15/2010
10	10-0388-EL-SSO	Prepared testimony of John D'Angelo on behalf of the Cleveland Clinic Foundation (IEU Exhibit 2 in 10-388).	4/15/2010
11	10-0388-EL-SSO	Testimony of Robert B. Fortney on behalf of the Public Utilities Commission of Ohio (Staff Exhibit 3 in 10-388).	4/16/2010
12	10-0388-EL-SSO	Testimony of Tamara S. Turkenton on behalf of the Public Utilities Commission of Ohio (Staff Exhibit 2 in 10-388).	4/17/2010
13	10-0388-EL-SSO	Testimony of Robert Fortney with additional information on behalf of Public Utilities Commission of Ohio (Staff Exhibit 4 in 10-388).	6/10/2010
14	10-0388-EL-SSO	Testimony for Second Supplemental Stipulation on behalf of FirstEnergy Corp. and Ridmann, William R. (Company Exhibit 12).	7/23/2010
15	10-0388-EL-SSO	Transcript for Hearing Vol. I, p 137	4/2010
16	10-0388-EL-SSO	Transcript for Hearing Vol. III, p 579	4/2010
17	10-0388-EL-SSO	Transcript for Hearing Vol. II, p 483-484	4/2010
18	10-0388-EL-SSO	Transcript for Hearing Vol. III, p 775	4/2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of:	:	
	:	Case No. 12-1230-EL-SSO
The Application of The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R. C. Section 4928.143 in the Form of an Electric Security Plan.	:	

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PROCEEDINGS

before Mr. Gregory Price and Ms. Mandy L. Willey, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-C, Columbus, Ohio, on June 6, 2012, called at 10:00 a.m.

- - -

VOLUME III

- - -

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- - -

Therefore, all the parties have had the opportunity to conduct discovery of any evidence presented in those proceedings. They have had the opportunity to request FirstEnergy to specifically identify the evidence in the record of those proceedings that they intend to seek -- intend to rely upon in this proceeding. They had the ability to request a subpoena to compel witnesses from those proceedings to appear for further cross-examination of this hearing. They had the opportunity to cross-examine the witnesses at this hearing regarding any issues raised in those proceedings, and they had the opportunity to present testimony at this hearing to explain or rebut any of the evidence in the record of that proceeding.

Therefore, we find that the parties are not prejudiced by the taking administrative notice of the documents listed by FirstEnergy, and we will go ahead and take administrative notice at this time.

MR. LAVANGA: Your Honor --

EXAMINER PRICE: And we'll also take administrative notice of the document Mr. Lavanga referenced in the discussion this morning.

MR. LAVANGA: Thank you, your Honor.

MS. YOST: Your Honor, in regards to some

of the documents that were listed on FE -- what they provided this morning, you spoke of facts in regards to Commission precedent. So that would exclude any opinions that are listed in regards to these --

EXAMINER PRICE: All the documents that are listed we've taken administrative notice, whether it's facts or opinion. I think we -- the rationale that I explained applies equally to facts as -- to opinion as it would to facts.

MR. WARNOCK: Your Honor, NOPEC would like to renew its objection to the ruling and would also request -- you cited some Commission precedent. Was that reflected under specific references that you might be able to provide?

EXAMINER PRICE: Sure. You might want to look at In the Matter of the Application of The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 10-388-EL-SSO, Commission entry on rehearing dated May 13, 2010, at 6 and 7, which is citing to Canton Storage and Transfer Company versus Public Utilities Commission, (1995) 72 Ohio St. 3d 1 at 8, which was citing to

Allen versus Public Utilities Commission (1988) 40 Ohio St. 3d 184, 186.

MR. WARNOCK: Thank you, your Honor.

MR. SAUER: Your Honor, OCC would renew our objections to this as well.

EXAMINER PRICE: Thank you. Noted.

MR. DORTCH: Renewed --

EXAMINER PRICE: Thank you. Noted.

MR. DORTCH: -- our objections as well, your Honor.

MR. VICKERS: ELPC renews its objections.

EXAMINER PRICE: You all can raise them in your brief without renewing your objections. You are all free to raise this in your brief.

Okay. Let's go off the record

MR. SAUER: Before that, your Honor.

EXAMINER PRICE: Let's stay on the record.

MR. SAUER: Please. We had asked earlier that we have the opportunity to reserve the right to file rebuttal testimony that we are preparing -- or providing, would be willing to provide by the close of business on Monday, June 11, and resume the hearing on Tuesday at 1:00 o'clock, and we would filing surrebuttal to the company's rebuttal

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Summary: Brief Correction to Corrected Joint Initial Brief by the Office of the Ohio Consumers' Counsel and Citizen Power including cover letter, corrected brief and exhibits as one pdf electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.