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

REPLY BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF THEIR APPLICATION TO PROVIDE FOR A STANDARD SERVICE OFFER IN THE FORM OF AN ELECTRIC SECURITY PLAN

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Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") established in their Initial Brief that the Commission should approve the Companies' third Electric Security Plan ("ESP 3").[1] The substance of ESP 3 mirrors the Companies' current ESP. The record evidence demonstrates that the current ESP has been an unqualified success. The current ESP's

[1] The relevant parties are defined as follows: Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company ("the Companies"); Office of Consumers' Counsel and Citizens' Power ("OCC/CP"); AEP Retail Energy Partners, LLC ("AEPR"); EnerNOC, Inc. ("EnerNOC"); The Retail Energy Supply Association, Direct Energy Services, LLC and Direct Energy Business, LLC ("RESA"); The Northeast Ohio Public Energy Council and The Northwest Ohio Aggregation Coalition ("NOPEC/NOAC"); Interstate Gas Supply, Inc. ("IGS"); Exelon Generation Company, LLC and Constellation NewEnergy, Inc. ("Exelon and Constellation NewEnergy"); Sierra Club ("Sierra Club"); Ohio Schools Council ("OSC"); Environmental Law and Policy Center ("ELPC"); Nucor Steel Marion, Inc. ("Nucor"); Material Sciences Corporation ("Material Sciences"). The following citation formats are applied in this brief: direct testimony of a witness will be referred to by the witness's last name followed by "Testimony," *e.g.* "Ridmann Testimony;" rebuttal or supplemental testimony will be referred to by the witness's last name followed by "Testimony" or "Supp. Testimony," *e.g.* "Stoddard Rebuttal Testimony;" references to transcripts of the hearing in this case will be referred to as "Tr. Vol. __, p. __;" and exhibits will be identified by party name and exhibit number, *e.g.* "AEPR Ex. 1;" Initial Post-Hearing Briefs ("Br.") will be identified as follows: "______ Br., p.____.", *e.g.*, "OCC/CP Br., p. 6."

Competitive Bid Processes ("CBPs") to procure power for Standard Service Offer ("SSO") customers have attracted numerous bidders and have resulted in competitive – and reasonable – prices. At the same time, the current ESP has allowed shopping within the Companies' territories to flourish: shopping and governmental aggregation activity in these territories are the highest in the state.

The current ESP also furthers many state policies. It has encouraged the development of demand response and energy efficiency through Rider ELR, and through energy efficiency programs. The current ESP promotes economic development through approved programs aimed at the largest employers in the Companies' territories – namely, the Cleveland Clinic and domestic automobile manufacturers, shareholder funding commitments, as well as other rate design provisions that help mitigate rate impacts for large customers and other municipalities. The current ESP also protects "at risk" populations by providing customers receiving service under the Percentage of Income Payment Plan ("PIPP") a discount off of the SSO price. The current ESP also provides numerous grants, including shareholder contributions, to organizations serving low income customers to provide assistance to that population.

The current ESP offers a proper balance of diverse interests by prohibiting the Companies from seeking an increase in base distribution rates,[2] but allowing the Companies to obtain recovery for, among other things, expenditures relating to distribution system improvements (in Rider DCR), costs relating to meeting alternative energy requirements (in Rider AER) and lost distribution revenues as result of energy efficiency programs (in Rider DSE2).

ESP 3 seeks to continue the success of the current ESP. As demonstrated in the Companies' Initial Brief, one of the principal changes presented by ESP 3 is to modify the procurement currently scheduled for the last year of the current ESP, which would procure part of the SSO load for planning

[2] This prohibition is subject to the Companies' rights to seek an increase under R.C. § 4909.16.

year 2013-2014 into a multi-product auction reaching out into a new period, *i.e.*, through planning year 2015-2016.[3] Notably, this too mirrors the current ESP which began with similar laddered procurement, including a three-year product in the first year.[4]

The other main change to the current ESP presented by ESP 3 is the extension of the time to recover costs through Rider AER.[5] As demonstrated in the Companies' Initial Brief, this has the effect of lowering near term rates[6] – a fact that no party disputes.

Given that the Application at issue here merely seeks to continue the success of the current ESP, it is not surprising that a diverse array of interests quickly concluded that doing so would be in the best interests of all concerned. The Stipulation – and its near identity to the Stipulation in the Companies' previous ESP application[7] – attests to this fact.

The briefs filed by the parties opposing the Application are notable in several respects. First, many of the arguments lobbed against ESP 3 repeat the exact arguments leveled against the current ESP. For example, in Case No. 10-388-EL-SSO, the Office of the Ohio Consumers' Counsel ("OCC"), among others, argued: (a) there was not sufficient time to litigate the application; (b) settlement negotiations were overly rushed; (c) the Signatory Parties lacked the required diversity because OCC's opposition meant that there was no party representing all residential customers in support of the Stipulation; (d) the Commission could not take administrative notice of the prior record in a related case; (e) the agreement by FirstEnergy Solutions Corp. ("FES") to provide generation to

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[3] Companies' Br., pp. 8, 10-11.

[4] *Id.*, p. 8.

[5] *Id.*, p. 15. ESP 3 also includes a new commitment to bid energy efficiency resources into the PJM Base Residual Auction.

[6] *Id.*

[7] *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. 10-388-EL-SSO, Application and Stipulation (Filed: Mar. 23, 2010) ("Case No. 10-388-EL-SSO").

serve PIPP customers at a six percent discount off of the SSO price was not a benefit; (f) Rider DCR was improper; (g) recovery of lost distribution revenue as a result of energy efficiency efforts should not be allowed; and (h) credits provided to interruptible customers under Rider ELR should not be recovered from residential customers. These were properly rejected by the Commission. The Commission should reject them again.

Second, other arguments are not only not supported by any record evidence, but the "evidence" cited in support was specifically excluded from the record. AEPR points to its Exhibit 6 to claim that ESP 3 presents risks that don't exist.[8] OCC and Citizens Power ("OCC/CP") rely on NOAC Exhibit 1 to support a baseless assertion that FES will unduly benefit from the Stipulation.[9] Attempts to admit both exhibits into evidence were rejected by the Attorney Examiners.[10] The Commission should reject such unsupported claims too.

Third, parties opposing the Stipulation outright distort the evidence. For example, several parties assert that the price for capacity in the Companies' territories for planning year 2015-2016 will be, alternatively, $357,[11] $349[12] or $329[13] per MW-day. None of these is correct. As Mr. Stoddard testified, the capacity payments by load will be a blended average of the $357/MW-day price for Annual Resources within the ATSI zone, the $305/MW-day price for ATSI-zone Limited Resources and the $322/MW-day price for ATSI-zone Extended Summer Resources.[14] The weighted average price paid to resources in the ATSI zone is $342/MW-day.[15] The weighted average price is

[8] AEPR Br., p. 20.

[9] OCC/CP Br., p. 3 n.8.

[10] Tr. Vol. IV, pp. 153-154; Tr. Vol. II, p. 56.

[11] NOPEC/NOAC Br., p. 14; OCC/CP Br., p. 23.

[12] AEPR Br., p. 16.

[13] NOPEC/NOAC Br., p. 14 n.35.

[14] Stoddard Rebuttal Testimony, p. 11.

[15] *Id*.

then to be reduced by credits for Capacity Transfer Rights of $48 per MW-day, resulting in a starting price of $294 per MW-day.[16] Various scaling factors are to be added to that number.[17] But, contrary to statements appearing in some intervenor briefs, no witness from the Companies ever agreed that a certain price was correct.[18] Moreover, whatever the capacity prices may be for the proposed term of ESP 3, those prices are largely irrelevant to the merits of ESP 3. Capacity prices are, for the most part, unavoidable and thus do not affect the value of ESP 3 versus an MRO.

Fourth, some of the parties opposing the Stipulation do so to support new initiatives that frankly only benefit their parochial interests.[19] As the Companies previously demonstrated, none of these suggested new provisions has merit. They are merely opportunities to increase costs for customers with little, if any, benefit to anyone beyond the parties suggesting them here.

In sum, ESP 3 represents a reasonable approach to providing service to the Companies' customers. The Commission should reject the arguments against ESP 3 and approve it.

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[16] *Id*.

[17] *Id*.

[18] NOPEC and NOAC ("NOPEC/NOAC") incorrectly state that "FirstEnergy witness Ridmann acknowledges that the adjusted capacity price is closer to $329/MW-day." NOPEC/NOAC Br., p. 14, n.35. Mr. Ridmann, in fact, testified that the capacity price for the PJM BRA auction in the ATSI was "in the range of $294 per mega-watt-day." Tr. Vol. I, p. 94. When AEPR's counsel asked Mr. Ridmann whether the capacity price reflecting scaling factors would be "approximately $329 per megawatt-day," Mr. Ridmann responded merely that "as I indicated yesterday, that is in the range of reasonableness." Tr. Vol. II, pp. 21-22.

In addition, AEPR incorrectly claims that the Companies' witness Robert Stoddard's testimony supports its claim that "the costs of capacity within the ATSI zone during the 2015-16 delivery year have been determined by PJM's Base Residual Auction to equal a fully loaded, loss adjusted $349.43 per MW/Day." AEPR Br., p. 16. But Mr. Stoddard's testimony shows just the opposite. The $349.43 figure relied on by AEPR is found on AEPR Exhibit 3. During cross-examination, AEPR's counsel asked Mr. Stoddard whether the capacity price for load on AEPR Exhibit 3 was "the capacity price load [sic] will pay in the ATSI zone." Tr. Vol. IV, p. 75. Mr. Stoddard responded, "No. This is the preliminary capacity price adjusted for losses." *Id*. He explained, "The results of the incremental auctions and any further adjustments made to any of the scaling factors, which can change up to final delivery, will result in a final capacity zonal clearing price." *Id*.

[19] The rationale of certain other opposing parties – namely, OCC/CP and AEPR – is inexplicable. For example, OCC/CP opposes provisions that unquestionably benefit residential customers. AEPR, which should have an interest in retail competition, deals mostly with issues having nothing to do with competitive suppliers.

<u>**ARGUMENT**</u>

I. ESP 3 IS MORE FAVORABLE THAN THE EXPECTED RESULTS OF AN MRO.

There is little dispute about how the Commission should judge an ESP. The Commission is commanded to determine whether the ESP at issue here is "more favorable in the aggregate as compared with the expected results of" a Market Rate Offer ("MRO") under R.C. § 4928.142.[20] As demonstrated by the testimonies of the Companies' witness William Ridmann and Staff's witness Robert Fortney, ESP 3 passes this test using any of one of three accepted methodologies. First, using the methodology accepted by the Commission in Case No. 10-388-EL-SSO, Mr. Ridmann showed that ESP 3 benefitted customers over an MRO by over $200 million in present value dollars.[21] Second, taking out one of the benefits used by Mr. Ridmann (the Companies' agreement to forego recovery of Legacy Regional Transmission Expansion Project ("RTEP") costs and other regional transmission organization ("RTO") related costs), but using the methodology accepted in AEP's ESP 2 case, Case No. 11-346-EL-SSO, particularly the treatment of the recovery of infrastructure costs as a "wash" appearing in both an ESP or an MRO, ESP 3 still benefits customers by over $21 million.[22]

Third, simply removing the benefit of the Companies' agreement to forego recovery of Legacy RTEP and other RTO-related costs, and realizing ESP 3's net cost of $7 million relative to an MRO, ESP 3 still passes the statutory test because ESP 3 provides numerous qualitative benefits. These benefits include by way of example: the three-year auction product; the additional two-year base distribution rate increase "stay-out;" the continuation of the rate options provided in the current

[20] *See* R.C. § 4928.143(C)(1); *see also* OCC/CP Br., pp. 48-49; AEPR Br., p. 6; RESA Br., p. 5; NOPEC/NOAC Br., p. 6; EnerNOC Br., p. 3; Material Sciences Br., p. 10.

[21] Companies Br., pp. 25-26.

[22] *Id.*, p. 26.

ESP; economic development; rate design provisions; energy efficiency funding; support for customer shopping; and price certainty and stability for customers.[23]

Below, the Companies address in order the quantitative and qualitative benefits of ESP 3 and the error of the arguments raised in opposition.

A. The Quantitative Benefits Of ESP 3 Are More Favorable Than An MRO.

As demonstrated by Mr. Ridmann's testimony, a proper quantitative analysis of ESP 3 versus an MRO includes consideration of the following aspects of the Stipulation: (1) the Companies' agreement to forego recovery of Legacy RTEP and other RTO-related costs; (2) the effect (or lack thereof) of distribution infrastructure improvement cost recovery; (3) the benefit provided to PIPP customers by providing SSO service to them at a discount of six percent; (4) the benefit of the Companies' Fuel Fund contributions; and (5) the benefit of economic development provisions.[24] At least one of the parties opposing the Stipulation challenges each aspect of this analysis. As demonstrated below, these challenges are without merit.

1. Foregoing Legacy RTEP cost recovery should be considered as a quantitative benefit of ESP 3.

The parties that urge that the Companies' agreement to forego Legacy RTEP cost recovery should be disregarded. They largely argue that this agreement was made as part of the last ESP and thus should not be considered a benefit of this ESP.[25] Yet, at the same time, these parties argue that ESP 3 should not be considered an extension of the current ESP. NOPEC/NOAC, for example, claim that the Companies' position that ESP 3 is an "extension" of the current ESP is "misleading" and that ESP 3 "must be judged solely on its own merits."[26] OCC/CP, for their part, "take exception" to the

[23] *Id.*, pp. 34-36.

[24] Ridmann Testimony, Attachment WRR-1.

[25] OCC/CP Br., pp. 49-50; NOPEC/NOAC Br., p. 7; AEPR Br., pp. 6-7; RESA Br., p. 5.

[26] NOPEC/NOAC Br., pp. 1-2.

characterization of ESP 3 as an "extension" of the current ESP.[27] OCC's witness Gonzalez agreed that each settlement was unique and that the parties to earlier Stipulations were free to reach new agreements and were not bound by earlier positions.[28]

The logical conclusion to the assertions that the Commission here is looking at a "new deal" is that each part of that deal must be evaluated anew. As Mr. Gonzalez recognized, the Signatory Parties were free to come up with a totally new framework for an agreement.[29] That framework could have included modifying the current ESP's deal about what the Companies would not recover in light of the migration of American Transmission System Inc. ("ATSI") from MISO to PJM. The fact that the Companies agreed not to alter the deal should not be held against them. Thus, the agreement should be considered a quantitative benefit of ESP 3.

Alternatively, as the Companies demonstrated in their Initial Brief, in Case No. 10-388-EL-SSO, the Companies did not include in their quantitative analysis of the current ESP versus an MRO approximately $39 million of the full $360 million of the Legacy RTEP costs that the Companies ultimately agreed to forego. Thus, the Companies should be allowed, at the very least, to include that amount as a benefit to ESP 3 the $39 million of foregone Legacy RTEP costs not included as a quantitative benefit of the current ESP.[30] If that amount is considered in Mr. Ridmann's analysis, ESP 3 shows a benefit of over $23 million on a net present value basis.[31]

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[27] OCC/CP Br., p. 7.

[28] Tr. Vol. III, pp. 128-129.

[29] *Id.*

[30] *Id.*

[31] Companies' Br., p. 28. This $23 million benefit assumes a regulatory lag associated with Rider DCR (further discussed below), which if removed, consistent with Staff witness Fortney's testimony, would result in a net present value benefit of ESP 3 of approximately $49 million.

2. Rider DCR should be included in the ESP versus MRO comparison with recognition of a regulatory lag, or in the alternative, considered a "wash."

Apparently understanding that if the Commission were to depart from the ESP versus MRO analysis that it used in Case No. 10-388-EL-SSO, the parties opposing the ESP 3 Stipulation realize that it is likely that the Commission would use, instead, the analysis discussed in Case No. 11-346-EL-SSO -- particularly with regard to how to treat the presence of a rider like Rider DCR. As has been noted, the Commission in that case determined that since the revenues that would be recovered under such a rider in an ESP would also be recovered in a rate case if there was an MRO, the presence of a rider like Rider DCR has no effect on the ESP versus MRO test.[32]

After making some unwarranted attacks on the Companies,[33] the parties opposing the ESP 3 Stipulation launch an attack on the rationale used by the Commission in Case No. 11-346-EL-SSO as applied to this case.[34] For the most part, these parties argue that the recovery of any dollars in a rate case is speculative, especially when compared to the amounts that the Companies recovered in their last distribution rate case.[35] Yet, these parties fail to understand – or simply misrepresent – the

[32] *In the Matter of the Application of Columbus Southern 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, Case No. 11-346-EL-SSO*, Case No. 11-346-EL-SSO, Opinion and Order, p. 31 (Entry date: Dec. 14, 2011) ("Case No. 11-346-EL-SSO").

[33] For example, OCC/CP claim that, in recognizing that the effect of Rider DCR could be a wash using the Commission's analysis in Case No. 11-346-EL-SSO, Mr. Ridmann "alter[s]" his position. OCC/CP Br., p. 51. Of course, he did no such thing. Like Mr. Fortney, Mr. Ridmann merely presented alternative analyses, each of which showed that ESP 3 was more beneficial than an MRO.

Similarly, OCC/CP contend that the Companies "fail[ed] to mention" that the December 14, 2011 order in Case No. 11-346-EL-SSO was "rescinded" on rehearing when the Commission rejected the ESP, as proposed and then modified. OCC/CP Br., p. 52, n. 183. What OCC/CP fail to mention is that the Companies' counsel specifically discussed this issue with OCC/CP witness Gonzalez at the hearing. OCC/CP also fail to mention that the order that "rescinded" the earlier approval of the ESP at issue there did not do so on grounds that had anything to do with the treatment of a Rider DCR-type rider – a position that Mr. Gonzalez agreed to. Tr. Vol. III, pp. 131-132.

[34] One party, Ohio Schools Council ("OSC"), does not expressly deal with this issue at all. Instead, it merely baldly asserts that ESP 3 "costs consumers more than the expected results of a MRO." OSC Br., p. 4, citing to Mr. Ridmann's hearing testimony and Mr. Fortney's direct testimony. OSC never addresses how to treat Rider DCR and similar revenue recovery. Nor does it address any of the qualitative benefits of ESP 3.

[35] OCC/CP Br., pp. 52-53; RESA Br., p. 6; NOPEC/NOAC Br., pp. 7-9.

relevant comparison.[36] In comparing the recoverability of costs under an ESP with the recoverability of the same costs under an MRO, the fundamental question is this: for each case, would the costs be recoverable? If we assume that the Companies would make the proper showing to obtain recovery of distribution infrastructure costs under Rider DCR, then there is no reason to believe that the Companies would not make a similar showing to obtain recovery in a rate case. This is what the Commission understood with respect to AEP Ohio's similar distribution infrastructure cost rider in Case No. 11-346-EL-SSO.

OCC/CP and NOPEC/NOAC appear to think that the caps that would be established in Rider DCR are guaranteed sums that will be recovered, while recovery of similar costs in a rate case is uncertain. They are wrong. The caps in Rider DCR are just that – limits on how much the Companies can recover in any year. As Messrs. Gonzalez and Frye agreed, there is no guarantee to what the Companies can recover under this rider. The Companies must show that what they seek to recover was actually spent.[37] The rider will reconcile estimated plant in service balances to actual plant in service balances to be recovered. [38] The expenditures and recovery under Rider DCR will be audited.[39] Thus, there is nothing certain about how much the Companies can recover.

[36] AEPR's position is garbled, at best. After noting that Mr. Fortney's analysis removes foregoing Legacy RTEP cost recovery as a benefit and results in a $7.6 million cost, AEPR claims that it "cannot endorse Mr. Fortney's suggestion that the ESP may actually provide a $21 Million [sic] benefit to consumers if certain timing considerations are eliminated." AEPR Br., p. 7 & n.7. It is unclear why AEPR cannot make such an endorsement because in the very next sentence, AEPR states, "The fact is, as Mr. Fortney also testified, the elimination of timing considerations should be recognized to be a 'wash,' in reality [sic]." *Id.*, n.7. Of course, if the timing considerations are eliminated because they are a "wash," then, as Mr. Fortney notes, ESP 3 shows a benefit of over $21 million, even after the elimination of the benefit of foregoing Legacy RTEP cost recovery. Fortney Testimony, pp. 4-5.

[37] Companies' Br., p. 13.

[38] *Id.*

[39] *Id.*

Given that no one currently knows the exact figure that the Companies will, in fact, recover under Rider DCR,[40] since the caps are the only known figure, it makes sense to assume, for purposes of the ESP versus MRO calculation, that the Companies will recover an amount equal to the caps. Yet, to make sure that there is an "apples to apples" comparison, any analysis must also assume the same amount will be recovered in a rate case. As Mr. Ridmann noted, over time, the dollars recovered through Rider DCR would be recovered through a rate case.[41] Mr. Fortney similarly observed that ultimately the recovery of dollars will be the same, regardless of the method of recovery used.[42]

If the Companies are able to recover certain costs under Rider DCR, there is no basis to claim that those costs would not be recoverable in a rate case. Thus, the fact that there would be similar recoveries "over the long run" is sound. If the Commission's ESP versus MRO methodology in Case No. 11-346-EL-SSO is applied to this case, then the presence of Rider DCR is a non-event. If that is the case, then ESP 3 is more beneficial than an MRO by over $21 million, even without considering the benefit of the Companies' agreement to forego Legacy RTEP cost recovery.[43]

[40] Indeed, there is little historical data that can be used to estimate likely recovery. The Companies' current Rider DCR has only been in effect since the beginning of this year. Case No. 10-388-EL-SSO, Opinion and Order, p. 11.

[41] Tr. Vol. I, p. 182.

[42] Fortney Testimony, pp. 4-5.

[43] OCC/CP also argue that Rider DCR might have been "palatable" in the current ESP given the Companies' agreement to forego a certain amount of RTEP cost recovery. OCC/CP Br., p. 53. This is an especially odd comparison, given that one item deals with distribution costs and one item deals with transmission costs. In any event, OCC/CP never explain why this is so.

OCC/CP further claim that the fact that the Companies will potentially recover $405 million somehow makes the "characterization" of ESP 3 as an "continuation" of the current ESP "fold[] under its own weight." *Id.* This too is left unexplained. As demonstrated in the Companies' initial brief, it is also wrong. As OCC/CP's witness Gonzalez admitted, the potential cumulative increase in costs under Rider DCR over the current ESP is only $45 million over the two year period of ESP 3, not $405 million. Tr. Vol. III, pp. 41-42, 119-120. Moreover, ESP 3 ***extends*** the current ESP's rate of increase for the caps by $15 million on an annual basis. Ridmann Testimony, p. 14; Companies' Br., p. 33.

3. ESP 3 provides a quantitative benefit to customers by continuing to serve PIPP customers at a price that is six percent off of the SSO price for other customers.

Several parties opposing the ESP 3 Stipulation contend that it is improper to treat as a benefit of ESP 3 the six percent discount off of the SSO price that the Stipulation offers to PIPP customers.[44] As an initial matter, the Commission rejected these arguments in approving the current ESP in Case No. 10-388-EL-SSO.[45] It's hard to think how this provision could be a benefit in the current ESP, but not a benefit in ESP 3. Indeed, even apart from whether the PIPP discount was included as a benefit in the current ESP, it's hard to think why providing a discount to low income customers isn't a benefit. By lowering the rates charged to PIPP customers, the potential burden to pay the cost of service is lessened for PIPP customers (who might roll off of PIPP and become responsible for the arrearage) or for other customers (who might be required to pay the cost of unpaid arrearages otherwise accrued in PIPP accounts).[46]

The parties opposing the Stipulation contend that an auction for PIPP load could be included in a MRO.[47] For example, RESA and Direct Energy ("RESA") contend that there is no evidence that a similar auction in an MRO wouldn't have garnered a similar discount.[48] The problem with this argument is that there is no evidence that there is anyone, other than FES, willing to supply PIPP load at below market rates. For example, OCC asked CRES providers if they would be interested in

[44] OCC/CP Br., pp. 54-56; AEPR Br., p. 9; RESA Br., pp. 6-7.

[45] Case No. 10-388-EL-SSO, Opinion and Order, p. 33.

[46] Companies' Br., pp. 33-34.

[47] RESA Br., pp. 6-8; OCC/CP Br., p. 54.

[48] RESA Br., pp. 6-7. RESA also argues that since there would be some discount, that hypothetical discount should be deducted from the $10.4 million that Mr. Ridmann calculates as the value of the six percent discount in ESP 3. *Id.*

bidding in an auction for PIPP load. Only two CRES providers said that they "may have" considered participating.[49] That's a far cry from a commitment.

Additional proof that no other supplier would be willing to participate in an auction for PIPP load is the experience under the current ESP. The Stipulation creating that ESP acknowledged that the Ohio Department of Development ("ODOD") was empowered to auction off PIPP load.[50] To date, no such auction has taken place for electric load.[51] Certainly, given the obvious benefits that discounted service to PIPP customers would provide, if there was a market of suppliers willing to provide such discounts, ODOD would have attempted to exploit it by now.

RESA attempts to explain away the lack of any prior auction by arguing that there hasn't been time under the current ESP to explore such a bidding process.[52] This is nonsense. The current ESP was approved in August 2010. Since then, auctions have been held in October 2010, January and October 2011, and January of 2012. There is no reason why, if there was the interest RESA and others claim exists, such interest could not have manifested itself to the Companies, ODOD or the Commission. In essence, those taking the position that the PIPP discount is not a benefit ask the Commission to jettison the firm offer by FES for a speculative CBP without any assurance that anyone would participate.

Taking a different tack, AEPR argues that the PIPP discount is not a benefit because it is merely a pass-through for the Companies.[53] This is a non sequitur. If the cost to provide service to PIPP customers is less (even if it is a pass-through), how is that not a benefit to customers?

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[49] *See* Gonzalez Testimony, Attachment 3.

[50] Case No. 10-388-EL-SSO, Stip. § A.1.

[51] Tr. Vol. III, p. 135.

[52] RESA Br., p. 7.

[53] AEPR Br., p. 9.

The best that AEPR seems to argue is that if this is a benefit, then "anything in the plan that encourages shopping, as required by state policies, should be counted as a benefit under the ESP."[54] This too seems to be a non sequitur since the PIPP discount deals with a wholesale transaction, while shopping involves the retail market. Yet, on another level, this is a remarkable statement coming from a CRES provider; indeed, it can only be a product of AEP's corporate antipathy to shopping. It should be obvious (to perhaps all but AEP) that anything in an ESP that promotes shopping *is a benefit*! As AEPR implies, an ESP should promote state policies. As AEPR notes, one state policy is encouraging competition. Nevertheless, and more to the point, a provision in an ESP that protects at risk customers furthers state policy too. Even more to the point, a provision that provides lower cost service to PIPP customers benefits those customers and all other customers who may be required to pay the cost of PIPP arrearages.

AEPR complains that the PIPP discount provided in ESP 3 somehow fails to ensure a diversity of suppliers or otherwise is an exercise by the Companies, FES or perhaps just "FirstEnergy" of "market power."[55] This charge is at odds with logic and the facts. There is no evidence in the record of any market power by FES or anyone else. Indeed, it is undisputed that customers in the Companies' service territories have enjoyed a diversity of suppliers for both wholesale and retail supply. Numerous bidders (including AEPR's corporate affiliate) have successfully participated in the Companies' multi-product CBPs.[56] Retail shopping (including activity by AEPR) and governmental aggregation activity in the Companies' territories is the highest

[54] *Id.*

[55] *Id.*, pp. 9-11.

[56] *See, e.g., In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case No. 10-1284-EL-UNC, Updated Auction Manager Report, p. 4 (Feb. 16, 2012); *Id.*, Updated Auction Manager Report, p. 4 (Nov. 16, 2011); Companies' Br., p. 8;

in the state.[57] Further, with respect to PIPP load, as noted, ODOD has always had the ability to offer that load for competitive bid.[58] There is nothing that FES could do to prevent ODOD from exercising its authority. Claims otherwise are sheer fantasy.

The fact is that FES is the only supplier that has stepped up to offer service to PIPP customers at a discount. This benefits all customers. The Commission properly found that this was a benefit of the current ESP. It should do so with regard to ESP 3.

4. The Companies' contributions to Fuel Funds are a quantitative benefit of ESP 3.

OCC/CP contend that all of the Companies' contributions to Fuel Funds maintained by certain Signatory Parties should not be considered a benefit.[59] OCC/CP argue that the Companies benefit because, as Mr. Ridmann testified, some of the Fuel Fund monies will be used to pay the customers' bills.[60] Thus, OCC/CP argue, the benefit to customers should be discounted by the amount of funds received back by the Companies. It is simply wrong, however, to say that the Companies benefit from having low income customers pay their bills. Through the Companies' uncollectible expense riders and the Universal Service Fund riders, other customers – not the Companies – bear the burden of unpaid bills.[61] Thus, to the extent that the Companies' uncollectible expense is decreased, customers benefit. For this reason, the Companies' contributions to Fuel Funds are properly considered a quantitative benefit of ESP 3.

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[57] Companies' Br., p. 60; Tr. Vol II, p. 19; Tr. Vol. III, pp. 29-30.

[58] Case No. 10-388-EL-SSO, Order and Opinion, p. 33.

[59] OCC/CP Br., p. 56-57.

[60] *Id.*, p. 57 citing Tr. Vol. I, p. 57.

[61] *See 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Second Opinion and Order, pp. 11-12, 15 (Entry date: Mar. 25, 2009), for the establishment of various uncollectible recovery riders. These riders were continued under the Companies' current ESP from Case No. 10-388-EL-SSO. As noted on Attachment B to the Stipulation, the applicable riders (tariff sheets No. 99, Distribution Uncollectible; No. 110, Non-Distribution Uncollectible; No. 109 PIPP Uncollectibles; and No. 90, Universal service) would continue with no changes under ESP 3.

Moreover, the Commission determined that the Companies' shareholder contributions to fuel funds should be considered as a benefit of the current ESP.[62] The Commission should do so again.[63]

5. The economic development provisions of ESP 3 are a quantitative benefit.

OCC/CP contend that the economic development provisions of ESP 3 should not be considered a benefit of the ESP.[64] The Commission rejected the same arguments in Case No. 10-388-EL-SSO. In that case, the Commission observed that R.C. § 4928.143(B)(2)(i) specifically authorizes provisions relating to economic development to be included in ESPs.[65] Citing Staff Exhibit 3 and IEU-Ohio Exhibit 2 in that case, the Commission found, "there is sufficient evidence in the record of this proceeding to approve the economic development provisions of the proposed ESP."[66] Those exhibits are part of this record.[67] Accordingly, the Commission should similarly find here that the same provisions, supported by the same evidence, are appropriately benefits of ESP 3.

What's more, OCC/CP fail to consider that the economic development contributions included in Mr. Ridmann's ESP versus MRO analysis represent shareholder contributions.[68] Given that this is without cost to any customer, OCC/CP cannot credibly claim that these contributions should not be considered a benefit of ESP 3.

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[62] Case No. 10-388-EL-SSO, Opinion and Order, p. 44.

[63] Companies' Br., p. 22.

[64] OCC/CP Br., pp. 58-59.

[65] Case No. 10-388-EL-SSO, Opinion and Order, p. 39.

[66] *Id.*

[67] The Attorney Examiner took administrative notice of Staff Exhibit 3 and IEU-Ohio Exhibit 2. Tr. Vol. III, pp. 12, 170-171.

[68] Ridmann Testimony, p. 17, WRR Attachment 1; Companies' Br., p. 20.

B. The Qualitative Benefits Of ESP 3 Are More Favorable Than An MRO.

Only one brief – from NOPEC/NOAC – contends that qualitative benefits of an ESP should not be considered in comparing an ESP to an MRO.[69] On the stand, their witness, however, suggested otherwise. Mr. Frye testified that the Commission could approve an ESP that had rates higher than market rates.[70] Of course, given the statutory test, the Commission could only approve an ESP with rates higher than market rates if the Commission found that the qualitative aspects of the ESP outweighed the quantitative costs.

The other parties opposing the ESP 3 Stipulation, to the extent that they address qualitative benefits at all, present four principal arguments.[71] As demonstrated below, none carry the day.

1. Including a three-year product as part of a laddered procurement of SSO load is an appropriate risk-mitigation strategy that provides a benefit to customers.

As it has been in the current ESP, using a laddered procurement strategy is an accepted – and reasonable – way to manage the risks attendant in a CBP for SSO load. No party could argue that, at least as applied in the current ESP, this strategy has not been a success. Indeed, all of the witnesses who testified, including each of the witnesses sponsored by parties opposing the Stipulation, admitted this indisputable fact.[72]

Nevertheless, the parties addressing this issue in opposition to the Stipulation contend that the procurement plan proposed in ESP 3 is not a benefit. AEPR perhaps sums up this argument best

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[69] NOPEC/NOAC Br., pp. 10-11.

[70] Tr. Vol. III, p. 36.

[71] In addition to the arguments presented in this section, OCC/CP and AEPR also argue that the bidding DR and EE into the PJM BRA provided no benefits. *See* OCC/CP Br., pp. 39-40; AEPR Br., p. 8. OCC/CP further argues that the ESP 3 doesn't provide a benefit because of the Companies' failure to comply with the Significantly Excessive Earnings Test ("SEET"). OCC/CP Br., pp. 44-47. These arguments are addressed in Section II(B) *infra*.

[72] Tr. Vol. II, pp. 138-139, 163; Tr. Vol. III, pp. 48-49, 141-143.

when it states, "rate stability comes at a cost."[73] OCC/CP claim that costs are either unknown[74] or too high.[75] These claims are overblown.

As an initial matter, the uncertainties regarding ATSI that OCC/CP claim will exist – *i.e.*, about plant retirements and transmission[76] -- are not that uncertain for the period of ESP 3. As the Companies' witness Robert Stoddard testified, plant retirements for the planning years through 2015-2016 have been announced.[77] New generation facilities likely to come on line within ATSI by May 2016 have also been announced; new generation coming on line before June 2016 is unlikely.[78] The configuration of the transmission system to serve ATSI load through the same time (*i.e.*, through May 2016) is also fairly well known.[79] PJM has documented its plans for transmission system upgrades, which have been approved.[80]

OCC/CP's fears of high risk premiums caused by these alleged uncertainties are also unlikely, at least based on past experience. In 2009, OCC's witness Wilson predicted that similar calamities would befall the Companies' proposed CBPs that were to take place over the next three years.[81] He has been proven to be spectacularly wrong. Numerous bidders have participated in the Companies' CBPs which resulted in the procurement of reliable power at reasonable prices.[82] Given bidders'

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[73] AEPR Br., p. 14.

[74] OCC/CP Br., pp. 61-62.

[75] *Id.*, pp. 16-18.

[76] *Id.*, p. 17.

[77] Stoddard Rebuttal Testimony, pp. 3-4.

[78] *Id.*, pp. 13-15.

[79] *Id.*, pp. 9-10.

[80] *See* Company Ex. 8.

[81] Company Ex. 9 (Case No. 09-906-EL-SSO, Wilson Testimony), pp. 7-8; 26-27; Stoddard Rebuttal Testimony, pp. 4, 14.

[82] Companies Br., p. 33.

familiarity with the Companies' CBPs, and with the load to be served, there is simply no reason to believe that the experience going forward will be any different.

The notion that greater uncertainty means higher prices because of higher risk premiums is also flawed. As Mr. Stoddard testified, "[T]he product has a symmetric risk portfolio."[83] He explained that "[w]hile customers are receiving insurance against a bad outcome of prices rising, the suppliers are receiving a guarantee against a downside risk."[84]

Notably, OCC's witness Mr. Wilson presented no evidence that a three-year period was difficult to hedge or carried a significant premium. In contrast, Companies' witness Mr. Stoddard testified that a three-year product was widely used in similar auctions elsewhere.[85]

Indeed, as Mr. Stoddard observed, Mr. Wilson's suggested strategy of waiting to purchase power for planning year 2015-2016 has risks too.[86] Mr. Wilson's suggestion that now may not be "an advantageous time" to procure a three-year product presents risks of even higher prices, something even Mr. Wilson acknowledged.[87]

Moreover, OCC/CP's concerns about undue uncertainty and what should be done in the face of that uncertainty are 180 degrees wrong. As Mr. Stoddard stated, it is at times of the greatest uncertainty when risk hedging strategies, such as a multi-year, multi-event, multi-product CBP, are most appropriate.[88] Mr. Stoddard explained, "If we are in a very risky situation, that's exactly when insurance is most valuable. That's exactly when you want to hedge yourself."[89]

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[83] Tr. Vol. IV, p. 53.

[84] *Id*.

[85] Stoddard Rebuttal Testimony, pp. 5, 16-17.

[86] *Id.*, p. 4.

[87] Tr. Vol. II, p. 146.

[88] Stoddard Rebuttal Testimony, pp. 4, 16-17.

[89] Tr. Vol. IV, p. 52.

OCC/CP's concern about "screw[ing] up" by purchasing a three-year product now if it turns out prices go lower[90] misunderstands prudent risk management. If an individual buys homeowner insurance and his or her house never suffers any damage, that individual has not "screwed up." That person has acted prudently to hedge against a risk. "Screwing up" would happen if the individual decided that he or she wanted to realize short term savings and then did not buy insurance, only to have his or her house catch fire. Similarly here, "screwing up" would mean not following customary and reasonable risk management practices, such as pursuing a laddered procurement of SSO load.

Moreover, prudent risk management cannot be judged by an after-the-fact review. Prudent risk management should be considered by how it assesses risks beforehand and how those risks are addressed. Here, as was the case with the current ESP, the risk is price volatility. As even OCC's witnesses acknowledged, a way to manage that risk properly is through laddered procurement.

OCC/CP also contend that the customers can obtain price stability in the market if they so chose.[91] The answer is, "so what?" In fact, this point begs the question: if shopping customers can choose to obtain stable market prices, why shouldn't nonshopping customers get that benefit? They should be able to, especially in times of "extraordinary uncertainty."

OCC/CP further argue that the only beneficiary of a three-year product being included in a CBP is FES.[92] OCC/CP contend:

[90] OCC/CP Br., p. 62.

[91] *Id.*, p. 20.

[92] *Id.*, p. 22.

> Look no further than the results of the 2015/2016 RPM Base Residual Auction results [sic] for support that FirstEnergy's customers will be paying more for energy in the next three years if that price is established at a time when the ATSI zone is constrained. 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.[93]

OCC/CP go on to say, "Accordingly, the beneficiary of the three-year auction product is FirstEnergy's affiliate – FES – which owns the most generation in the ATSI zone.[94]

These statements reflect either a stunning ignorance of the RPM process or a studied attempt to mislead. Let's start with this basic point: the RPM BRA is for capacity, not energy. Further, the capacity prices set by the BRA are, subject to potential adjustment in incremental auctions, largely unavoidable. Bidders participating in a CBP for SSO load, being Load Serving Entities ("LSEs") under PJM's Reliability Assurance Agreement, will pay the capacity prices set by the BRA, as potentially adjusted, regardless of when the SSO auction is held. Thus, a bidder will pay the capacity price set by the RPM auctions for a particular planning year, regardless of whether that year is being bid as part of a one-year, two-year or three-year auction. The capacity price cannot be avoided by using a different or shorter product for a CBP procuring SSO load.

Further, the only evidence of record is that energy prices – the principal unknown in the upcoming CBPs – do not necessarily follow capacity prices. Mr. Stoddard was the only witness to provide testimony on this subject. According to Mr. Stoddard, energy prices generally track the prices for coal and natural gas, not the price of capacity.[95] Further, his studies of other constrained

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[93] *Id.* (footnotes omitted).

[94] *Id.*, p. 24.

[95] Tr. Vol. IV, p. 58.

areas led him to conclude that energy prices will not necessarily follow the increases for capacity prices.[96]

Still further, OCC/CP's discussion about the Companies' view that they were not beneficiaries of an auction that would include a three-year product was ***not*** contradicted by Mr. Ridmann's testimony. If, as has been and will be the case, the Companies merely pass-through the costs resulting from the CBP, the Companies do not have any financial interest in those costs – other than recovering them. The Companies receive no return or margin on those costs. OCC/CP's use of the word "however" in the quote set out above makes no sense.

Yet further, the fact that FES owns a majority of generation plants within ATSI is immaterial. As noted, the prices for capacity have largely been set. That deactivation request process – including the timing and amount of announced plant retirements – was reviewed by PJM and its market monitor.[97] Certainly, if FES had acted in any improper way, that fact would have been mentioned in PJM's report of the BRA for 2015-2016. A review of that report reveals no such claim.[98] In fact, the report supports the opposite conclusion. The retirements announced by FES were part of an "unprecedented" amount of retirements throughout PJM.[99] These retirements were necessitated by the promulgation of final regulations from the U.S. Environmental Protection Agency.[100] These regulations, and specifically the additional capital expenditures that they required for the plants to comply, rendered plants throughout PJM uneconomical.[101]

[96] *Id.*; Stoddard Rebuttal Testimony, pp. 16-17.

[97] Stoddard Rebuttal Testimony, pp. 8-9; Tr. Vol. II, pp. 121-123.

[98] AEPR Ex. 1.

[99] *Id.*, p. 1.

[100] Stoddard Rebuttal Testimony, p. 5.

[101] *Id.*, p. 6.

OCC/CP breathlessly claim that FES stands to gain $550 million.[102] But OCC/CP's only support for this specious assertion is NOAC Exhibit 1 – a local newspaper article, which was never admitted into the record.[103] It was not only irrelevant, but it constitutes double hearsay – a newspaper account quoting from a third party.[104]

Nor is OCC/CP any more successful in pointing to OCC/CP witness Wilson's testimony to effect that FES has some built in competitive advantage for the Companies' SSO CBPs because its facilities are located within ATSI.[105] When questioned about this, Mr. Wilson hastily retreated. He refused to agree that FES' alleged advantage, which he predicted would occur when he testified in 2009,[106] would have manifested itself in the Companies' CBPs since then: specifically, he refused to agree that if FES had such an advantage, one would expect to see that FES had procured more tranches for longer-term products than for shorter-term products.[107] Mr. Wilson's reluctance is understandable since he likely reviewed the auction manager's reports for the Companies' CBPs and saw that FES obtained fewer long-term products relative to the shorter-term products that were available.[108]

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[102] OCC/CP Br., pp. 3, 89.

[103] Tr. Vol. II, pp. 26-28.

[104] NOAC Ex. 1.

[105]OCC/CP Br. p. 24 citing Wilson Testimony, p. 8.

[106] Company Ex. 9, pp. 17-18.

[107] Tr. Vol. II, pp. 126-127.

[108] *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case No. 10-1284-EL-UNC ("Case No. 10-1284-EL-UNC"), Updated Auction Manager Report (Entry date: Feb. 16, 2012) attaching letter dated Jan. 24, 2012 from CRA International, Inc. ("Notification of CBP Auction Results") pp. 3-4; Case No. 10-1284-EL-UNC, Updated Auction Manager Report (November 15, 2011) attaching letter dated Oct. 25, 2011 from CRA International, Inc. ("Notification of CBP Auction Results"), pp. 3-4; Case No. 10-1284-EL-UNC, Auction Manager Report (Feb. 16, 2011) attaching letter dated Jan. 25, 2010 from CRA International, Inc. ("Notification of CBP Auction Results"), pp. 3-4; Case No. 10-1284-EL-UNC, Letter with Attached Redacted Version of the Post-Auction Letter (November 12, 2010) attaching letter dated Oct. 20, 2010 from CRA International, Inc. ("Notification of CBP Auction Results"), pp. 3-4.

Moreover, FES is not the only "beneficiary" of the clearing prices for capacity set by the RPM process. Numerous other types of resources, including demand response and energy efficiency resources, cleared the 2015-2016 BRA – in record amounts, according to PJM[109] – and will also be "beneficiaries" of the auctions for that planning year.[110]

Staff witness Fortney put the balance properly when he stated, "[S]taff concluded that the revenue stability and certainty that would come from the three-year product overrode the possibility that different types of auctions at different times might produce slightly lower prices."[111] According to Mr. Fortney, "[S]taff believes that the three-year bid was a reasonable approach in order to produce the rate certainty and rate stability that are needed by customers."[112] The record – and the Companies' experience under their CBPs – amply support Staff's view.

2. The Companies' agreement to a base distribution rate freeze is a benefit.

OCC/CP and AEPR contend that the Companies' agreement not to seek a base distribution rate increase is not a benefit.[113] These parties argue that because the Companies would be allowed to recover certain types of distribution costs through Rider DCR, the benefit of a rate freeze is, according to AEPR, "illusory."[114]

These parties overlook the fact that a rate case would involve recovery of costs beyond those permitted to be recovered under Rider DCR. Given that Rider DCR incentivizes the Companies to spend monies in areas such as may be necessary to maintain (or improve) reliability, ESP 3's provisions relating to the recovery of distribution costs keep those rates low while allowing the

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[109] AEPR Ex. 1, p 1.

[110] *Id.*, pp. 7-10.

[111] Tr. Vol. II, p. 256-257.

[112] *Id.*

[113] OCC/CP Br., p. 64; AEPR Br., p. 13.

[114] AEPR Br., p. 13.

Companies to provide reliable service. In short, these provisions strike a reasonable balance among the interests of all concerned.

OCC/CP and AEPR also overlook the fact the Commission has already held that a base distribution rate freeze provides a benefit that makes the ESP more favorable in the aggregate than an MRO.[115] In addition, the provisions in ESP 3 relating to Rider DCR, as is the case with the current ESP, establish additional consumer protections. As noted, the Companies cannot recover any monies unless they can show that the plant is in service.[116] The rider is further subject to quarterly reconciliations[117] and an annual audit.[118] Parties, such as OCC/CP can participate[119] (and indeed, have participated[120]) in the audit. These measures assure that the Companies' recovery is reasonable and for the purposes intended.

3. Extending the recovery of costs under Rider AER is a benefit of ESP 3.

OCC/CP, AEPR and RESA complain that ESP 3's proposed extension of the time to recover alternative energy costs under Rider AER is not a benefit. AEPR argues that the Companies should be required to show that the level of reduction of cost recovery is more than the increase in the total costs recovered by the Companies by virtue of any carrying costs.[121] The Companies did, in fact, include the estimated impact of the lower Rider AER charge in the Companies' supplemental filing in response to the Commission's rulings on the Companies' request for waivers.[122] As Companies'

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[115] Case No. 10-388-EL-SSO, Opinion and Order, p. 44.

[116] Companies' Br., p. 13.

[117] *Id.*

[118] *Id.*

[119] Stip., p. 22; Tr. Vol. III, p. 39.

[120] Tr. Vol. II, pp. 17-18; Case No. 11-5428-EL-RDR, OCC Comments (June 1, 2012).

[121] AEPR Br., p. 12.

[122] *See* Ex. 3 to the Companies' supplemental information filing in Case No. 12-1230-EL-SSO (May 2, 2012).

witness Ridmann testified, the known change of Rider AER decreasing was included in the supplemental filing.[123]

OCC/CP claim that extending the recovery of costs under Rider AER, while potentially decreasing rates, would be counterbalanced by the smoothing effect of increased costs from the CBPs.[124] Notably, OCC/CP say these things without providing any analysis or calculation. Given that OCC/CP admit that extending the recovery of costs under Rider AER would otherwise lower rates, that should be the end of the inquiry.

RESA contends that the extension of the recovery of the alternative energy costs unfairly and artificially lowers rates.[125] As the Companies showed in their Initial Brief, however, it is this position that is unfair. CRES providers have the same opportunity that the Companies seek to extend recovery of these costs.[126] This fact alone demonstrates that the Companies' proposal is competitively neutral.[127]

What's more, all of these parties overlook the rationale behind the proposal to extend this recovery. As Nucor observed in its brief, many of the Companies' customers expressed concern over the level of Rider AER charges.[128] As Nucor aptly puts it:

> The implication from RESA's position is that spreading the AER cost as FirstEnergy proposes would somehow artificially depress the Rider AER charge, but in reality, the current Rider AER is artificially *high* today.[129]

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[123] Tr. Vol. I, pp. 107-108.

[124] OCC/CP Br., p. 63.

[125] RESA Br., p. 10.

[126] Companies' Br., p. 16.

[127] The objections of RESA and AEPR ring especially hollow given that numerous other CRES providers were Signatory Parties or did not oppose the Stipulation.

[128] Nucor Br., p. 6.

[129] *Id*., p. 7.

Because the statutory alternative energy requirements are based on a historical baseline, if the Companies' customers shop, there is less SSO load over which to spread the recovery of a larger potential cost.[130] As Nucor concludes, "FirstEnergy's proposal to spread AER recovery over a longer period of time is simply a way to bring artificially high renewable energy costs more in line with the actual amount of SSO load being served by FirstEnergy today."[131] In short, the proposal regarding Rider AER is yet another example of the interests of customers and the Companies being placed into proper balance.

4. ESP 3 promotes shopping.

Like the current ESP, ESP 3 contains numerous provisions that encourage shopping. These include: no minimum stay provisions for residential and small commercial customers; no minimum default service charges; no standby charges; and no shopping credit caps.[132] The experience under the current ESP demonstrates the likely experience under ESP 3. As noted, shopping within the Companies' territories is the highest of any Ohio electric distribution company.[133]

RESA "take[s] issue" with the demonstrated fact that ESP 3 will encourage shopping.[134] Remarkably, RESA cites to the fact that "96% of all residential customers who are shopping do so through government aggregation."[135] It contends, "[t]here are virtually no residential customers who are contracting with CRES for service."[136]

These arguments are puzzling at best. Does RESA contend that customers who shop "through government aggregation" aren't "shopping"? Does RESA claim that the suppliers who are supplying

[130] *Id.*, p. 8; Tr. Vol. I, pp. 257-258.

[131] Nucor Br., p. 8.

[132] Ridmann Testimony, p. 12.

[133] Companies' Br., p. 60; Tr. Vol. II, p. 19; Tr. Vol. III, pp. 29-30.

[134] RESA Br., p. 8.

[135] *Id.*

[136] *Id.*

the retail generation service to governmental aggregation customers are not CRES suppliers? If so, RESA is wrong.

What seems to be the case is that RESA doesn't like governmental aggregation. The General Assembly had other thoughts. Governmental aggregation is not only an accepted means of promoting retail electric service, it is a method to be promoted and encouraged by the Commission.[137]

RESA also cites the relative number of current "Apples to Apples" offers in the Companies' territory on the PUCO's website versus the number of similar offers elsewhere.[138] They claim that this is evidence of an alleged lack of shopping.[139] But RESA's witness Ringenbach admitted as to the limited probative value of the "Apples to Apples" offers currently on the Commission's website. Specifically, she admitted that all suppliers do not post their offers on the website.[140] Moreover, even if they did, what's shown on the website reflects only *current* offers. It does not reflect the relative number of offers that have been made available at any other time since the advent of competitive retail electric service in Ohio. Thus, the criticism by RESA can be easily rejected.

II. THE STIPULATION SHOULD BE APPROVED BECAUSE IT IS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE AND KNOWLEDGEABLE PARTIES, BENEFITS RATEPAYERS AND THE PUBLIC INTEREST AND DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE.

The "three-pronged" test for the review and approval of a Stipulation in Commission proceedings is undisputed. How a specific issue may fit into the three-part analysis is not necessarily clear. Different parties opposing the Stipulation raise similar arguments under different parts of the

[137] *See* R.C. §4928.20(K); *see also*; Case No. 11-346-EL-SSO, Entry, p. 5 (Jan. 23, 2012) ("We further note that it is the policy of this state to promote retail competition irrespective of whether such competition takes place though government aggregation or shopping by individual retail customers.").

[138] Ringenbach Testimony, p. 5.

[139] *Id.*

[140] Tr. Vol. III, p. 63.

test, particularly with regard to the latter two parts of the test.[141] The Companies will not attempt to arbitrate which party is correct about which issue properly fits within which of the latter two parts of the Stipulation analysis. Instead, after addressing the arguments raised in the first prong of the Stipulation analysis, the Companies will address together all arguments raised by these parties opposing the Stipulation in both of the latter two parts.

A. The Stipulation Is The Product Of Serious Bargaining Among Capable And Knowledgeable Parties.

The Stipulation in this case was signed (or was not opposed) by the same range of parties, representing the same set of interests, that signed (or did not oppose) the Stipulation that led to the current ESP: industrial customers, small businesses, colleges and universities, hospitals, municipalities, residential customer groups, CRES providers and providers of wholesale energy. Like what happened with the Stipulation that led to the current ESP, the negotiations here were based on the proposals and evidence presented in a prior case. In both cases, given the similarity of the issues presented by the Stipulation with those faced by the prior case, there was no need for extended negotiations. In both cases, the issues were – and are – familiar to all. This diversity of the Signatory Parties and non-opposing parties combined with the ability of the parties to deal quickly with issues previously and extensively litigated led the Commission in Case No. 10-388-EL-SSO to conclude that there had been serious bargaining by capable and knowledgeable parties.[142] There is no reason why the Commission should reach a different result in this case.

[141] For example, OCC/CP discuss issues relating to Rider DCR under the second part of the three-part Stipulation analysis, OCC/CP Br., pp. 25-33, while AEPR discuss the same issue under the third part, AEPR Br., p. 13.

[142] Case No. 10-388-EL-SSO, Opinion and Order, p. 24.

OCC/CP and NOPEC/NOAC contend that there can be no settlement without them because, without their agreement, there was no signatory party that represented residential customers.[143] These arguments are wrong. As an initial matter, the Signatory Parties included groups representing residential customers. These groups were: OPAE, the Empowerment Center of Greater Cleveland and the Cleveland Housing Network.[144] Although OCC previously was none too shy about labeling these parties as "consumer advocates,"[145] now that it no longer serves OCC's purpose, OCC/CP denigrate these groups as "primarily" low income customer representatives.[146] Notably, OCC/CP never explain how the interests of low income customers differ from other residential customers with respect to ESP 3. Further, OCC/CP and NOPEC/NOAC overlook that the Staff is a Signatory Party. There can be no serious dispute that Staff considers the interests of residential customers, among others, in participating in this case.

OCC/CP give the game away, however, when they state that the Stipulation "does not include a signatory party that represents **all** of FirstEnergy's residential customers…"[147] Since only OCC apparently can claim to represent "**all** of FirstEnergy's residential customers," if OCC/CP's view of who must sign a stipulation is accepted, then OCC would have veto power over any settlement. Unfortunately for OCC, even its witness Mr. Gonzalez recognized that such a view goes too far. He candidly admitted that the Commission has approved – and can approve – a settlement in cases where OCC participates in the case but does not agree to the settlement.[148]

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[143] OCC/CP Br., p. 13; NOPEC/NOAC, p. 13. AEPR also weakly contends that the Stipulation was not signed by any customer receiving service under residential rates. AEPR Br., p. 4. While that fact may be literally true, as noted below, it ignores that groups representing residential customers were Signatory Parties.

[144] Tr. Vol. III, pp. 109-113.

[145] *Id.*, pp. 109-112.

[146] OCC/CP Br., p. 14.

[147] *Id.*, p. 15 (emphasis original).

[148] Tr. Vol. III, p. 107.

NOPEC/NOAC's claim about the lack of residential representation among the Signatory Parties is even weaker. NOPEC/NOAC's alleged representation of residential customers is derivative of the municipalities that serve as members of those organizations. It is only because NOPEC/NOAC's municipalities may represent the interests of residential customers that NOPEC/NOAC can assert that they represent such customers. The Signatory Parties include a municipality – the City of Akron. Thus, the interests supposedly represented by NOPEC/NOAC are represented among the Signatory Parties.[149]

OCC/CP and AEPR also argue that the agreement of various Signatory Parties should be discounted because of various benefits and side deals that some of these parties obtained.[150] Aside from mischaracterizing the benefits obtained,[151] it is unclear why the benefits identified by OCC/CP and AEPR aren't benefits.[152] Is making sure that the Companies are assisted by qualified administrators in carrying out energy efficiency programs antithetical to the interests of customers? Is making sure that Fuel Funds get to the people that need that type of assistance something that does not benefit those customers? Of course not. Put differently, do OCC/CP or AEPR point to anything that shows that any Signatory Party was unable to assess the total character of the Stipulation to

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[149] NOPEC/NOAC contend that the municipal Signatory Party, the City of Akron, should be discounted since that city is somehow beholden to FirstEnergy as the city's largest employer. NOPEC/NOAC Br., p. 13. The voters of the City of Akron – needless to say, all residential customers – would certainly be surprised to learn that the City somehow sold out their interests. NOPEC/NOAC's attempt to besmirch the reputation and motives of the officials from the City of Akron should be rejected.

[150] OCC/CP Br., p. 13-15; AEPR Br., pp. 2-4.

[151] For example, AEPR contends that certain parties are "guaranteed" certain payments as energy efficiency administrators. AEPR Br., pp. 2-3. Yet, as Mr. Ridmann pointed out when AEPR's counsel made the same statement at the hearing, "I say, I may quibble with the term 'guaranteed.' They are performing a service basically as administrators to bring forth energy efficiency projects, and we expect them to fulfill that part of the agreement." Tr. Vol. I, p. 55.

Further, AEPR suggests that interruptible customers get an unwarranted benefit because they can merely buy through and avoid interruption. AEPR Br., p. 2. While this may be true for the economic interruption provisions of Rider ELR, these customers may still be subject to emergency curtailment, if necessary for system reliability. Company Ex. 1, Tariff Sheet 101, pp. 3-4.

[152] Further, AEPR's list of Signatory Parties, shown on pages 3 and 4 of its brief, is not a complete list of the sixteen Signatory Parties to the Stipulation or of the parties not opposing the Stipulation.

determine that the Stipulation overall represented a good deal for that particular party and the interests that it represents? They don't and they can't. Given that fact, if a party makes an assessment that a particular deal is worth agreeing to, isn't that indicative of serious bargaining?

OCC/CP and NOPEC/NOAC attempt to argue that the negotiations were short-circuited and therefore not meaningful. OCC/CP claim that there were no "supporting documents" provided.[153] NOPEC/NOAC claim, without any support whatsoever, that they were given a "take it or leave it" ultimatum.[154] The testimony of their witnesses was otherwise. Both Mr. Gonzalez and Mr. Frye admitted that their parties were shown a draft of the Stipulation and given an opportunity to comment and discuss their concerns with the Companies.[155]

OCC/CP further complain that there was no group meeting.[156] As the Companies have previously discussed, OCC/CP have never explained why a group meeting was necessary.[157] Tellingly, OCC/CP fail to mention that they never even requested such a meeting. Nor does OCC/CP explain why, if they wanted to hear the views of other parties, OCC/CP could not have talked to those parties or called their own meeting.

NOPEC/NOAC contend that any "rush" to complete the negotiations was unjustified.[158] But NOPEC/NOAC don't dispute that the Companies were trying to get the rights to demand response through the extension of Rider ELR into planning year 2015-2016 and that such rights were necessary to assure that the Companies had those resources to bid into the PJM BRA for that

[153] OCC/CP Br., p. 11.

[154] NOPEC/NOAC Br., p. 15.

[155]Tr. Vol. III, pp. 26, 101

[156] OCC/CP Br., p. 11.

[157] Companies' Br., p. 48.

[158] NOPEC/NOAC Br., pp. 12-14.

planning year. Given that the BRA was to be held (and was held) commencing on May 7, 2012, the Companies attempted to get Commission approval of ESP 3 before then.[159]

In addition, the need for a quick resolution of this matter still remains. Under the current ESP, the Companies are scheduled to conduct a CBP in October.[160] If the Companies are to change the products to be bid in that CBP (and keep the October date), then the CBP Manager will need to begin his preparations by early August.[161] As explained in the Companies' Initial Brief, a decision by mid-July would likely still allow the auction manager to attend to his duties and hold the auction around the originally scheduled October 2012 date.[162] OCC Exhibit 6, the Companies response to OCC Set 6 Interrogatory No. 56, sets forth a timeline of all of the events that need to occur in order for the Companies to be able to hold an auction in October, 2012:

[159] NOPEC/NOAC claim that the Companies' filing failed to mention the date of the BRA for planning year 2015-2016 and the capacity prices that might have been expected from that auction. NOPEC/NOAC Br., p. 14. Yet both of these things were knowable to NOPEC/OAC. PJM's BRA was a matter of public record. Further, the date of the PJM BRA is specifically stated on pages 3, 4, 6 and 28 of the Stipulation. As the Companies have previously demonstrated, the likely range of capacity prices for ATSI in the 2015-2016 BRA was also well known. Companies' Br., p. 49; Stoddard Rebuttal Testimony, p. 9; Tr. Vol. IV, p. 16.

[160] Case No. 10-388-EL-SSO, Opinion and Order, p. 34.

[161] Companies' Br., p. 3.

[162] *Id.* As Mr. Ridmann testified, pushing the auction date into November or December should be avoided because, based on information received by the Companies from suppliers, that is not a good time for suppliers. Tr. Vol. II, p. 50.

Timeline for October 2012 Auction	
Date	**Activity**
• Thursday, August 09, 2012	WebEx Information Session
• Tuesday, August 21, 2012	Deadline: CRA announces tranche target and tranche size (% and MW)
• Tuesday, August 21, 2012	Part 1 Applications can be submitted
• Wednesday, September 05, 2012	Deadline to submit Part 1 Applications
• Tuesday, September 18, 2012	Deadline: CRA announces minimum and maximum starting prices
• Tuesday, September 18, 2012	Part 2 Applications can be submitted
• Wednesday, October 03, 2012	Deadline: CRA announces any update to the tranche size (MW)
• Wednesday, October 10, 2012	Deadline to submit Part 2 Applications
• Tuesday, October 16, 2012	Bidder User Manuals Distributed
• Thursday, October 18, 2012	Mock Auction for Registered Bidders
• Thursday, October 18, 2012	Deadline: CRA announces starting price to Registered Bidders
• Tuesday, October 23, 2012	Auction for Registered Bidders
• Tuesday, October 23, 2012	CRA notifies Companies and PUCO of results (tentative)
• Friday, October 26, 2012	Master SSO Supply Agreements Signed (tentative)
• Saturday, June 01, 2013	Power Flow

At bottom, however, OCC/CP, NOPEC/NOAC and AEPR miss some fundamental points. The Stipulation here involves a limited number of new issues compared to the current ESP. As noted, there are only two widely applicable changes to the current ESP proposed in ESP 3.[163] Almost all of the parties in this case were parties to Case No. 10-388-EL-SSO.[164] Any claim that those parties needed extended time to consider the merits of ESP 3 is literally incredible. That is especially

[163] Companies' Br., p. 2.

[164] Ridmann Testimony, p. 11; Tr. Vol. I, p. 35-36.

the case for NOPEC/NOAC, which were Signatory Parties to the Stipulation in Case No. 10-388-EL-SSO.[165]

As for the parties that did not participate in Case No. 10-388-EL-SSO, none of these parties even attempted to show that the Companies were unwilling to consider negotiating after the Stipulation was filed. Indeed, the history of Case No. 10-388-EL-SSO and the Companies' conduct in this case proves otherwise. In Case No. 10-388-EL-SSO, the Companies presented both a Supplemental Stipulation and a Second Supplemental Stipulation which resulted from negotiations that continued after the initial Application, Stipulation and supporting testimony were filed.[166] In this case, the Companies, Constellation and Exelon submitted an additional agreement that resulted from negotiations that culminated after the Companies filed the Stipulation – indeed, after Constellation and Exelon filed their testimony.[167] There is nothing in this record that shows that any of the parties opposing the Stipulation did not have a similar opportunity.

OCC/CP contend that the negotiations that led up to the ESP 3 Stipulation were exclusionary.[168] OCC, of course, does not have standing to claim that it was excluded in light of Mr. Gonzalez's admission that the Companies provided OCC the opportunity to negotiate the Stipulation at issue.[169] Realizing that all of the parties to Case No. 10-388-EL-SSO had the same opportunity that OCC had – namely, to see a draft of the Stipulation and to have had the chance to comment on it – OCC/CP assert that the Companies excluded the parties that are now in this case but that did not

[165] Case No. 10-388-EL-SSO, Second Supplemental Stipulation, p. 11.

[166] Case No. 10-388-EL-SSO, Opinion and Order, p. 7.

[167] *See Motion for Leave to Withdraw Testimony and to File Revised Testimony of David I. Fein on Behalf of Exelon Generation Company, LLC and Constellation NewEnergy, Inc.*, Case No. 12-1230-EL-SSO (June 4, 2012).

[168] OCC/CP Br., p. 12.

[169] Tr. Vol. III, p. 101.

participate in Case No. 10-388-EL-SSO.[170] As noted, OCC/CP never demonstrated that the Companies were unwilling to discuss settlement with such parties after the Stipulation was filed. More to the point, however, none of the parties that OCC/CP now claim were excluded even bothered to make that argument in their initial briefs.

B. The Stipulation Benefits Ratepayers and the Public Interest and the Stipulation Does Not Violate Any Important Regulatory Principle or Practice.

As demonstrated in the Companies' Initial Brief, and above here, ESP 3 is more favorable than an MRO and ESP 3 contains all of the benefits of the current ESP. ESP 3 seeks to continue these benefits and to add at least one more – the reduction of Rider AER charges.

Certain of the parties opposing the Stipulation trot out arguments that have been rejected before or are simply not supported by the evidence. The Companies address each of these arguments below.

1. Customers will benefit from a laddered, multi-year, multi-product procurement strategy.

OCC/CP and AEPR again argue that the procurement strategy proposed under ESP 3 does not benefit customers. As demonstrated above, that is simply not the case. The Companies will not repeat those arguments here.

2. Rider DCR provides benefits to customers.

OCC/CP, NOPEC/NOAC and OSC oppose the continuation of Rider DCR.[171] Even though OCC's witness Gonzalez admitted that certain features of Rider DCR – *e.g.*, the reconciliation of costs and the annual audit – were beneficial to customers, OCC/CP nevertheless continue to state their opposition to this rider. OCC/CP's view is based on a misreading of the statute. According to

[170] OCC/CP Br., pp. 12-13.

[171] OCC/CP Br., pp. 25-30; NOPEC/NOAC Br., p. 11. Notably, NOPEC/NOAC provide no rationale for their view.

OCC/CP, under R.C. § 4928.143(B)(2)(h), the Companies have to show that "future DCR spending to enhance distribution service is necessary to maintain existing reliability performance."[172] The statute, however, says no such thing. The statute lists a number of types of distribution costs for which recovery under an ESP would be permitted. Among those permissible costs are those for "distribution infrastructure and modernization incentives." The statute then goes on, at the conclusion of the list of permissible distribution costs, with a new sentence:[173]

> 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.

Thus, the statute requires the Commission to review the Companies' reliability performance and "ensure" two things: (1) the alignment of the Companies' reliability performance and customers' expectations regarding reliability; and (2) the Companies are placing sufficient emphasis and resources to assure reliability on the Companies' systems. The statute does not tie any specific costs (and the recovery of the same) to reliability. The statute merely requires that if riders are going to be established for distribution cost recovery, then a reliability review, with emphasis on the two issues identified, is necessary.

Given OCC/CP's misinterpretation of the statute, the rest of OCC/CP's arguments in opposition to Rider DCR fall away. For example, OCC/CP argue that Staff witness Peter Baker failed to correlate the Companies' reliability performance in 2011 to Rider DCR recovery.[174] Mr. Baker didn't have to do that. Mr. Baker reviewed the Companies' reliability performance relative to

[172] OCC/CP Br., p. 25.

[173] R.C. § 4928.143(B)(2)(h).

[174] OCC/CP Br., pp. 27-28.

(a) the standards approved for the Companies and (b) the customers' expectation of reliability as demonstrated by reasonably current customer surveys.[175] He concluded, "Based 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."[176] That's all that he was required to do.

OCC/CP claim that the reliability information that Mr. Baker reviewed was "stale."[177] OCC/CP point out that the reliability standards were established in 2009 or 2010 and were compared to the Companies' performance in 2011. But OCC witness Gonzalez admitted, the Companies' reliability performance standards do not need to be updated.[178] The standards have been determined to be appropriate and there has been no reason provided why those need to be changed or even revisited.

Further, OCC/CP say that the Companies didn't show "how the additional investments in the distribution system will impact reliability performance."[179] The Companies aren't required to do that either. There is nothing in the statute that requires the Companies to correlate any specific amount spent to its impact on reliability. Instead, the statute envisions that if the Companies want to recover distribution costs through an ESP, the Commission must be satisfied that the Companies are paying proper attention to reliability performance. (This provides the necessary incentive for the Companies

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[175] Baker Testimony, pp. 3-5.

[176] *Id.*, p. 6.

[177] OCC/CP Br., p. 28.

[178] Tr. Vol. III, pp. 117-118. According to the Stipulation in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Proposed Reliability Standards,* Case No. 09-759-EL-ESS, the Companies' reliability standards case, the Companies would be required to file a new application if the Companies did not meet two of six criteria based on historical performance. See Case No. 09-759-EL-ESS, Opinion and Order, pp. 3-4 (Dec. 15, 2010). The Companies have not failed to meet at least two of those criteria. Tr. Vol. III, pp. 118-119.

[179] OCC/CP Br., p. 28.

to spend on reliability-related infrastructure improvements.) The statute sets out the scope of that inquiry, an inquiry that Mr. Baker followed to the letter.

OCC/CP further contend that "the record in this case is void of evidence that shows such alignment [of the Companies' reliability performance and customers' expectations] for the ESP 3 period of June 1, 2014 through May 31, 2016."[180] Again, the statute contains no such requirement. In fact, the statute commands only that the Commission determine that the Companies' reliability performance and customers' expectations "***are*** aligned," *i.e.*, at the present time. Indeed, the notion that the Companies should be required to project their future reliability performance and then ask customers to do the same is absurd on its face.

OCC/CP next claim that Rider DCR recoveries will be excessive. Specifically, OCC/CP note that the Companies have proposed to recover $405 million as "increased distribution revenue recovery."[181] OSC makes this claim, too.[182] This is wrong. As noted, ESP 3 proposes that recoveries under Rider DCR be capped. The caps are proposed to increase by $15 million on an annual basis.[183] This is the same as what was approved in the current ESP.[184] As also noted, the increase in caps represent a cumulative $45 million increase over the caps allowed in the current ESP.[185] The Companies will be required to show what they spent and why it is appropriate to recover these investments through Rider DCR.[186] This recovery will be audited.[187] There is nothing that guarantees that the Companies will recover any specified level of revenue.

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[180] *Id.*, p. 29.

[181] *Id.*, p. 30.

[182] OSC Br., p. 5

[183] Companies' Br., p. 13.

[184] Ridmann Testimony, p. 14; Companies' Br., p. 33.

[185] Companies' Br., p. 33.

[186] *Id.*, p. 13.

[187] *Id.*

OCC/CP state that Mr. Baker failed to consider the potential impacts of the recoveries under Rider DCR "upon further improvements to FirstEnergy's reliability performance."[188] OCC/CP complain:

> 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.[189]

The only mystery is why OCC/CP think that Mr. Baker's conclusions were a mystery. Mr. Baker reviewed the Companies' reliability performance. He found that the Companies were doing better than all of the reliability standards that he reviewed.[190] In light of this performance, it was (and is) reasonable to conclude that the Companies were doing what they should be doing to maintain reliable service, as expected by their customers.

In fearing that Rider DCR will lead to excessive spending, OCC/CP apparently forget that there is an audit process in which OCC/CP can participate (and has participated).[191] Oddly, OCC/CP point to the Stipulation provision which notes that the auditor must confirm that "the amounts for which recovery is sought are not unreasonable," and argues that this means that the auditor will not be looking at whether the amounts sought are reasonable.[192] In OCC/CP's view, there is a difference between determining that something is "not unreasonable" and determining that something is "reasonable." To state OCC/CP's position is to refute it.

OSC, in its opposition to Rider DCR, apparently believes that recovery for distribution system improvements is unwarranted and points to the amount of increases in annual revenues that the

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[188] OCC/CP Br., p. 30.

[189] *Id.*

[190] Baker Testimony, pp. 4-5.

[191] Tr. Vol. II, pp. 17-18; Tr. Vol. III, p. 139.

[192] OCC/CP Br., p. 31.

Companies were allowed in the Companies' most recent base distribution rate case.[193] That comparison is not only irrelevant, it is misleading. Because any monies recovered through Rider DCR will have to be justified through the reconciliation and audit processes going forward, the Companies' historical rate case results have no bearing on what can and should be recovered through Rider DCR.

3. Recovery of lost distribution revenues benefits customers.

OCC/CP oppose the recovery of lost distribution revenue ("LDR") as a result of the Companies' energy efficiency efforts. OCC/CP's arguments generally are a repeat of the opposition to the same provisions in the current ESP. The Commission rejected these arguments previously.[194] It should do so again.

Further, OCC/CP's arguments are refuted by the record. For example, OCC/CP claim that LDR recovery does not benefit customers.[195] Mr. Gonzalez testified, however, that he had previously testified in favor of lost revenue recovery because recovery of such revenues provided an incentive for utilities to participate in energy efficiency efforts.[196] It is not a stretch to assume that Mr. Gonzalez felt that way because energy efficiency efforts benefit residential customers.

OCC/CP claim that the Stipulation provides "no limits" for LDR recovery or, specifically, to the results of the Draft Technical Reference Manual ("TRM") in Case No. 09-512-GE-UNC.[197] Yet, Mr. Ridmann testified that the Companies' PJM Measurement and Valuation ("M&V") plan reflects

[193] OSC Br., pp. 5-6. OSC erroneously attempts to compare the potential recovery of investments under Rider DCR – OSC's $405 million figure – with the revenue increase allowed in the Companies' last distribution rate case. OSC Br., pp.5-6. Of course, the former reflects two years while the later reflects a single year.

[194] Tr. Vol. III, p. 103; *see also* Case No. 10-388-EL-SSO, Opinion and Order, p. 45.

[195] OCC/CP Br., p. 33.

[196] Tr. Vol. III, p. 121.

[197] OCC/CP Br., p. 34.

Draft TRM provisions.[198] Further, as shown in Sierra Club Exhibit 6, which is a copy of the Companies' Response to an interrogatory, the Companies state that they are using a M&V plan approach that is consistent with Draft TRM.

OCC/CP argue that the LDR recovery will be $50 million or perhaps "hundreds of millions."[199] This is a gross exaggeration. As Mr. Gonzalez admitted, using the Companies' currently available information, the amount of LDR recovery associated with current energy efficiency programs that would be added as a result of ESP 3 would be $22.2 million.[200] Further, ESP 3's term is set until May 31, 2016. The Commission will have to revisit recovery of these revenues in whatever SSO application the Companies file for generation service starting June 1, 2016.

OCC/CP point to the observations of individual Commissioners questioning LDR recovery.[201] As interesting as those views might be, what matters most is whether such recovery is permitted under Ohio law. R.C. § 4928.143(B)(2)(h) plainly contemplates that recovery of such revenues should be permitted. The statute provides that "provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. . . 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."[202]

The Commission also looked at this issue in Case No. 10-388-EL-SSO and determined that recovery of LDR was reasonable. And with good reason. If, as the current ESP provides, the

[198] Tr. Vol. I, pp. 304-306.

[199] OCC/CP Br., p. 35.

[200] Tr. Vol. III, p. 124.

[201] OCC/CP Br., p. 35.

[202] R.C. § 48928.143(B)(2)(h) (emphasis added).

Companies agreed not to seek an increase in base distribution rates, it is fair to allow the Companies to recoup revenues lost as a result of energy efficiency programs. The same balance of equities applies here.

4. ELR interruptible load programs benefit all customers.

OCC/CP recommend that the Commission reject continuation of the provisions in the current ESP that allow for the costs arising from the Companies' peak reduction riders, Riders ELR and OLR, to be recovered from all customers.[203] Their principal complaint is that these costs should not be recovered from residential customers.[204] Notably, OCC/CP do not contend that the interruptible service provisions of the Companies' tariffs—including the ability to bid demand response into the PJM RPM auctions—do not benefit residential customers. In fact, OCC/CP witness Gonzalez admitted that these riders benefit residential customers.[205] Accordingly, OCC/CP offer no rationale why residential customers should be excluded from contributing to the recovery of these costs.

At bottom, the arguments raised by OCC/CP were the same arguments raised by OCC and others in Case No. 10-388-EL-SSO. The Commission rejected those arguments. The Commission should do so again.

EnerNOC argues that the Stipulation allows customers to continue under Rider ELR only if they signed an Addendum to the Contract for Electric Service on or before May 3, 2012.[206] EnerNOC argues that the Commission should enforce this provision.[207] EnerNOC misapprehends the applicability of that provision of the Stipulation; specifically, it ignores the condition precedent of Commission approval of ESP 3 by May 2, 2012 in order to trigger the requirement of ELR customers

[203] OCC/CP Br., pp. 38-39.

[204] *Id.*

[205] Tr. Vol. III, p. 99.

[206] EnerNOC Br., p. 2.

[207] *Id.*

signing up for the approved tariff by May 3, 2012.[208] The Commission should reject EnerNOC's arguments in this regard.

Before the May 3, 2012 signing deadline for continuing service under Rider ELR could become operative, the Stipulation first had to be approved by May 2, 2012, to allow the Companies to bid the demand response arising from the ELR tariff into the PJM BRA on May 7, 2012. The Stipulation envisioned that, to be able to bid any demand response resources into the 2015/2016 BRA, the Companies would need both (a) the Commission's approval to extend Rider ELR until May 31, 2016 and (b) a signed commitment from customers that they would continue service under Rider ELR until May 31, 2016. Since this case has taken longer to resolve and has gone past the May BRA date, there is no need for a May 3, 2012 deadline for interruptible customers to commit to receive service through May 31, 2016, effectively the May 3, 2012 deadline never became operative. In fact, on May 3, 2012, there was no approved ELR tariff to which customers could sign up.

The only reason that EnerNOC puts forward for keeping the May 3 commitment date is that allowing more customers to participate in Rider ELR would potentially decrease the number of customers that might otherwise do business with curtailment service providers – like EnerNOC.[209] That is not a valid reason to lock out interruptible customers from continuing to receive the benefits or Rider ELR (and from other customers receiving the benefits provided by those interruptible customers).

The Companies may still have the opportunity to bid demand response resources into PJM incremental auctions if the Commission Order is issued prior to such auctions and the Companies are able to get signed commitments from current ELR customers to commit to receive service under Rider ELR through May 31, 2016. But it would certainly be inequitable to order the Companies to

[208] Stipulation, pp. 28-29.

[209] EnerNOC Br., p. 8

bid demand response resources into the PJM BRA without Commission approval of the underlying tariff that gives rise to the demand response resources without also allowing the Companies to recover any resulting penalties and all other associated costs should such an approach fail to provide the necessary demand response resources.

5. The Stipulation's proposed exclusion of deferred carrying charges from SEET calculations is reasonable and consistent with Commission precedent.

NOPEC/NOAC and OCC/CP oppose the Stipulation's provision that would exclude the impact of deferred carrying charges from the calculations for the SEET reviews during the period during which ESP 3 would be in effect. NOPEC/NOAC, however, only devote a scant page and a half of its brief to the issue[210] and OCC/CP (with OCC's witness Duann raising the issue) even less than that,[211] both essentially parroting Dr. Duann's view that the AEP Ohio 2009 SEET decision is "precedent" in support of their position. The Companies' Initial Brief[212] (demonstrated this view is erroneous both because the AEP Ohio 2009 SEET proceeding is distinguishable on its facts[213] and because the Commission has determined that it will address the question of deferrals *vis-a-vis* its SEET reviews on a case by case basis. Moreover, while NOPEC/NOAC make the bald assertion that under this provision of the Stipulation the Companies' SEET earnings will be "much lower" than their reported financial results, it cites no record support.[214] Indeed, the record is to the contrary.[215]

[210] NOPEC/NOAC Br., pp. 17-19.

[211] OCC/CP Br., pp. 65-66.

[212] Companies' Br., pp. 56-57.

[213] In the Companies' earlier ESPs (as well as here in ESP 3), the negotiated Stipulations subsequently approved by the Commission underlying those ESPs expressly provided for the exclusion of the impact of deferred carrying charges for SEET purposes. In contrast, the AEP Ohio ESP which gave rise to the 2009 SEET review was silent as to the treatment of deferrals or any component element.

[214] NOPEC/NOAC Br., p. 19.

[215] Companies' Br., pp. 56-57.

In summary, these intervenors offer nothing on brief on this issue that has not already been fully addressed and rebutted by the Companies.

Almost as an afterthought, at the very end of its brief, AEPR suggests that approval of the ESP 3 Stipulation would trigger the applicability of R.C. § 4928.143(E), thus necessitating an additional ESP "re-evaluation" requirement as well as an "advance SEET" review, both of which would be wasteful of Commission time and resources, contrary to the interests of "judicial economy" and, as a result, a reason to reject the Stipulation.[216] AEPR's reasoning is as flawed as it is farfetched.

AEPR's argument is entirely dependent on imputing an unwarranted connotation to the notion that ESP 3 is an "extension" of the existing ESP approved in 2010.[217] Certainly given the similarity, if not virtual identity, of many of the provisions in ESP 3 with the terms of the current ESP, it has been reasonable to speak colloquially of, and in a practical sense to consider, the Stipulation as essentially an "extension" of those existing provisions for an additional two years. That common sense characterization, however, does not, from a legal perspective, convert the existing ESP into a five year plan, thus triggering applicability of R.C. § 4928.143(E). What is before the Commission is a *newly* proposed ESP, with a *new* term of applicability, filed under a *new* docket number, and subject to a *new* review process and approval by the Commission. To be sure, much of its content will be familiar to the Commission and the parties given its similarity to the existing ESP, but that only means that the review and approval process should be able to proceed more smoothly and expeditiously than if a completely new and different set of terms and benefits had been proposed.

[216] AEPR Br., pp. 22-23.

[217] Interestingly, and contrary to AEPR's posture, NOPEC/NOAC and OCC/CP expressly take issue with the characterization of ESP 3 as an extension of the Companies' current ESP. NOPEC/NOAC Br., pp. 1-2; OCC/CP Br., p. 7.

Such similarity alone, however, is not enough to trigger the applicability of a statutory provision, R.C. § 4928.143(E), that does not otherwise apply in these circumstances.

6. The absence of a purchase of receivables program or supplier consolidated billing is appropriate.

a. A purchase of receivables program is unnecessary.

What business wouldn't want someone else picking up the tab for part of its business expenses? That is RESA's and IGS's proposal related to a purchase of receivables ("POR") program – to have someone other than them cover the cost of their uncollectible expense. This is wrong. Having nonshopping customers pay the cost of a competitive supplier's uncollectible expense (or even part of it) is a subsidy and is contrary to the policy of the State of Ohio and should be rejected by the Commission.

Because a POR program is not included in the Stipulation, the burden is on those proposing one to show that having one is necessary, reasonable and in the public interest, including the interests of customers. In this regard, RESA and IGS have failed miserably. They have provided no concrete proposal; they just make vague assertions about having a POR program. They present no quantitative analyses of the costs or benefits of such a program. These parties offer only assertions of policy reasons why a POR program might be a good idea. Specifically, they contend: (1) a POR program is necessary to jumpstart shopping; and (2) relatedly, without a POR program, there are barriers to competition. As demonstrated below, not only are RESA and IGS wrong on both counts, but a POR program would be: (a) more costly to customers; (b) of no benefit to the Companies; and (c) wholly unnecessary in light of the current Partial Payment Posting Priority ("PPPP") and the very high levels of shopping in the Companies' service territories. Indeed, the utter lack of merit to this proposal is demonstrated by the fact that other CRES providers failed to support it.[218] Each of these issues is addressed separately below.

(1) A POR program is unnecessary to jumpstart shopping.

RESA and IGS suggest a POR program is needed to jumpstart competition in the Companies' service territories.[219] This is laughable. The Companies have over 1.4 million customers shopping, with residential customers being the greater majority of that.[220] As demonstrated in the Companies' Initial Brief, shopping levels in the Companies' territories are not only the highest in the state, they are double the nearest EDU.[221] There are 30 to 35 registered suppliers authorized to provide competitive retail electric service in the Companies' territories.[222] In addition, there are at least five suppliers actively making ongoing offers to customers on the Commission's "Apples to Apples" website.[223]

RESA and IGS point to POR programs in other states.[224] But the experience in other states is irrelevant. In those states, a POR program was implemented in order to jumpstart competition.[225] As IGS admits:

> As Mr. Parisi pointed out, according to the migration statistics published by the Office of Retail Market Development of the Illinois Commerce Commission ("ICC"), the percentage of ComEd residential customers taking service from retail electric suppliers *went from*

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[218] *See, e.g.,* Exelon and Constellation NewEnergy's Initial Post-Hearing Brief.

[219] RESA Br., p. 15; IGS Br., pp. 13-14.

[220] Parisi Testimony, Ex. 3.

[221] Companies' Br., p. 61.

[222] Tr. Vol. I, pp. 38-39. IGS mischaracterizes Mr. Ridmann's testimony. IGS Br., p. 20.

[223] Ringenbach Testimony, Attachment A; *See also* "Electric Apples to Apples Chart" http://www.puco.ohio.gov/puco/index.cfm/apples-to-apples/electric-apples-to-apples-chart/ (retrieved June 27, 2012).

[224] RESA Br., p. 21; Parisi Testimony, p. 10.

[225] Tr. Vol. I, p. 250.

> *virtually zero* to ten percent in the year the ComEd POR program has been in place.[226]

But the situation before the POR program was established for ComEd is not comparable to the situation in the Companies' service territories, given the extraordinarily high shopping there. RESA is left to argue that the level of shopping in the Companies' territories somehow isn't really indicative of the true level of shopping or competition.[227] Notably, when IGS points to the experience of other states (as the above quote from IGS brief regarding ComEd shows) shopping levels are cited. Indeed, IGS witness Parisi admitted that shopping levels are a valid indicator of a competitive market.[228] RESA's preferred indicator – the number of CRES providers posting offers on the Commission's "Apples to Apples" website – is flawed. As noted, even RESA witness Ringenbach admitted that not all CRES providers post offers on that website.[229]

(2) The lack of a POR program is not a barrier to competition.

RESA and IGS argue that the lack of a POR program is a barrier to competition.[230] This begs the question: a barrier to competition to whom? As demonstrated above, the Companies have the state's highest levels of shopping, numerous registered CRES providers, and several CRES providers actively making offers. Given the level of shopping in the Companies' territories and the lack of support for their POR proposal from other CRES providers, it appears that the perception that the lack of a POR program is a barrier to competition is a perception held only by RESA and IGS. The provisions of and policies embodied in Ohio Revisde Code Chapter 4928, which is the genesis of

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[226] IGS Br., p. 14 (emphasis added).

[227] Tr. Vol. III, pp. 62-63.

[228] Tr. Vol. II, pp.185-186.

[229] Tr. Vol. III, p. 63.

[230] RESA Br., pp. 11-12; IGS Br., p. 14.

retail electric competition in Ohio, are designed to support competition not individual competitors. In sum, there is no evidence that competition is hindered in any way in the Companies' territory.

(3) A POR program adds unnecessary costs to customers.

Under RESA and IGS's proposal, the burden of administering and collecting a competitive suppliers' uncollectible expenses would fall to the Companies and ultimately their customers through a nonbypassable rider. At the same time, their proposal would allow CRES suppliers to be guaranteed to collect 100% of the amount of their bills regardless of whether any of the competitive suppliers' customers ever pay a nickel.[231] Indeed, both RESA witness Ringenbach and IGS witness Parisi agreed they were indifferent whether their customers ever paid for their service – that payment by the customer would no longer need to be taken into account when they solicited offers.[232] IGS claims on brief that the transfer of cost for a CRES provider's uncollectible expense to nonshopping customers will come with a commensurate drop in CRES price. But this claim is just an unsupported claim. IGS presented no studies or analyses from Ohio or any other state to support its assertion.[233]

IGS attempts to equate the obligations and collection process of the Companies with that of IGS, complaining IGS is not permitted to disconnect when it isn't paid and it is unique that it has to deliver its product before payment.[234] This is simply a red herring. There are several differences between a CRES provider and an EDU. First, a CRES provider can choose which customers it wants to serve and which customers it doesn't want to serve. Second, competitive businesses do not typically have an unrelated third party paying part of their business expenses, as is proposed here.[235]

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[231] Tr. Vol. III, pp. 67-68; Tr. Vol. II, pp. 187-188.

[232] Tr. Vol. II, p. 194; Tr. Vol. III, pp. 68-69

[233] IGS Br., p. 25.

[234] *Id*., pp. 26-27.

[235] Both IGS and RESA agreed that uncollectible expense is a normal legitimate business expense. Tr. Vol. II, p. 183; Tr. Vol. III, pp. 65-66.

Third, CRES providers, while they are not permitted to directly disconnect for nonpayment, can nonetheless drop the customer – so they are not without remedies other than suing in court.

RESA proposes to convert a bypassable generation rider into a non-bypassable generation rider. The Companies' current Rider NDU is bypassable, meaning shopping customers can avoid this charge by shopping. Under RESA's approach, shopping customers will now have to pay this charge, and non-shopping customers will be paying, at least in part, the uncollectible expense of shopping customers.

RESA's and IGS's proposal is, at its core, simply a subsidy – to transfer the cost otherwise incurred by CRES providers to the Companies and their customers. But as IGS witness Parisi admitted, subsidies are antithetical to competition.[236]

(4) A POR Program is not a benefit for the Companies.

IGS and RESA try to spin their request for a POR program to make it sound as though it is a benefit for the Companies.[237] Their arguments turn logic on its head. These parties' view is that it is a "benefit" for Companies to jettison their existing system of tracking arrearages and uncollectible expense, and to incur the time and expense of establishing a new system. These efforts would include: designing and implementing a new system to track both supplier and EDU arrearages; implementing processes to seek collections of those amounts; retraining employees to operate within those new systems; and dealing with all of the customer confusion and complaints from customers or from the Commission. The only benefit that is produced from a POR program is a benefit for CRES providers since they would be able to avoid all of these costs and receive 100% of whatever they bill regardless of whether the customer pays.

[236] Tr. Vol. II, pp. 186-187.

[237] IGS Br., p. 17.

(5) The Stipulation and Order established in Case No. 02-1944-EL-CSS should not be abrogated.

RESA and IGS ask the Commission to ignore its own Order in the Case No. 02-1944-EL-CSS and, in fact, to abrogate that settlement agreement that otherwise remains in full force and effect today.[238] While it may be the view of IGS's counsel that a lot has changed since that case,[239] the IGS witness had a different view. Mr. Parisi testified:

By Examiner Price:

Q. Do you know whether this is the first time this issue whether FirstEnergy should offer a receivables programs has been presented to this Commission?

A. Your Honor, I don't believe it is. I believe back in 2000 there was a series of cases, first set of cases, and ultimately I think an entry by the Commission ordering FirstEnergy to have a purchased receivable program, and then subsequently a complaint case, I think in 2003, that I believe was WPS and Green Mountain ultimately -- initially trying to compel a purchase of receivables that was ultimately settled with different provisions.

Q. Okay. What has changed since the Commission's adoption of the stipulation in the WPS case?

A. I think one of the things that's occurred since then is more providers in the markets in Ohio and I think, you know, IGS being one of those.

Q. More providers in which market?

A. Generally in the other markets in Ohio, not necessarily in the FirstEnergy service territory.

Q. What's changed in the FirstEnergy service territory?

A. From a competitive standpoint? Other than government aggregation, I don't think a lot, your Honor.

Q. Nothing has changed?

A. I don't think so.[240]

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[238] IGS Br., p. 34.

[239] *Id*., p. 8.

[240] Tr. Vol. II, pp. 213-214.

No basis has been provided by IGS through evidence that circumstances have so changed as to compel the Commission to abrogate the agreement reached in Case No. 02-1944-EL-CSS. The agreement and Stipulation in that case should be preserved by the Commission.

RESA and IGS urge the Commission to impose a POR program in the Companies' territories like the one that Duke Energy currently has. But the Duke Energy situation is not comparable. Duke Energy agreed to that program as part of a settlement of an ESP.[241] That is not the case here. A POR program is not a provision in the Companies' Stipulation. Notably, IGS points to Duke's POR program as having leveled the playing field in Duke's territory.[242] Within that company's territory, there appeared to be a concern about purchasing receivables under their old program with different discounts for different CRES providers. That is not the case with the Companies. The playing field in the Companies' territories is already level in this respect – no suppliers have a POR program. Even RESA admitted that CRES providers are not suffering a competitive disadvantage from the lack of a POR program.[243] IGS witness Vincent Parisi similarly admitted that "we're on equal footing with respect to other CRES providers, with or without [a POR program]."[244]

b. Supplier consolidated billing is unnecessary.

The arguments made by in favor of supplier consolidated billing were largely anticipated by the Companies' Initial Brief and will not be readdressed here.[245] Suffice it to say RESA primarily seeks to implement supplier consolidated billing as a means to increase sales of non-electric goods and services of Direct Energy's affiliates through the use of the electric bill.[246] Supplier

[241] *Id.*, pp. 196-197. Similarly the FirstEnergy utilities in Pennsylvania agreed to a POR program as part of a settlement to boost shopping. Tr. Vol. III, pp. 66-67; Tr. Vol. I, p. 250.

[242] IGS Br., p. 7.

[243] Tr. Vol. III, p. 64.

[244] Tr. Vol. II, p. 210.

[245] *See* Companies' Br., pp. 65-67.

[246] Tr. Vol. III, pp. 76-77.

consolidated billing is inefficient and costly. Importantly, would require the Commission to change the current system and allow CRES providers to disconnect a customer's electric service.[247] It would require the Companies to maintain their existing billing system fully for both those CRES providers who do not opt to participate in the program and for those who change their mind and want to switch back to utility consolidated billing, effectively requiring the Companies to stand by as the biller of last resort.[248] Notably, this type of billing is only offered in Texas, where the retail competition model is strikingly different than that of Ohio.[249] The differences between Texas's utility model and Ohio's model, however, are striking.[250] Unlike Ohio, Texas does not designate a utility as the default service provider.[251] In Texas, the RTO serves as a "middleman that you don't have in Ohio today."[252] In addition, there are "smart meters all across Texas . . . so some of these things wouldn't apply in Ohio because we don't have the meter structure for it."[253] The Commission should reject supplier consolidated billing.

7. Enhanced EDI is unnecessary.

In the settlement between the Companies and Exelon Generation LLC, the Companies agreed to adopt certain Electronic Data Interchange ("EDI") standards.[254] Nevertheless, RESA recommends that the Companies' supplier website be upgraded to allow data to be automatically downloaded or

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[247] *Id.*, p. 78.

[248] *Id*., pp. 79-80.

[249] *Id.*, p. 77.

[250] *Id.*, pp. 77-78.

[251] *Id.*, p. 85.

[252] *Id.*, p. 86.

[253] *Id.*

[254] Tr. Vol. II, pp. 73-76; Company Ex. 7. As part of that settlement, the Companies also agreed to support Exelon's and Constellation's efforts to obtain Commission approval to have the Companies be responsible effective June 1, 2014 for all economic demand response settlements as a result of economic demand response activity pursuant to PJM's compliance with FERC Order No. 745, so long as the Companies receive full cost recovery through Rider NMB.

"scraped."[255] It is undisputed that the Companies already have a supplier website which permits suppliers to download eligibility lists and interval data. As Mr. Bennett admitted, the website allows his employer to compete in the Companies' territory.[256] Yet, without any evidentiary support, RESA claims that the "original intent" of Attachment C to the Stipulation in Case No. 10-388-EL-SSO,[257] a product of comprehensive settlement discussions, was for the Companies "to create a secure web-based system in which suppliers could access customer information one customer at a time using the same customer number a supplier would utilize for enrollment purposes (the 20 digit customer number)."[258] Further, RESA argues[259] that the eligibility list currently available on the Companies' website should include a customer number similar to the customer number in the eligibility list in Pennsylvania.[260]

The Commission should disregard these unsupported suggestions. Attachment C to the Stipulation here, which is substantially similar to the Stipulation in Case No. 10-388-EL-SSO, need not be modified. There are several reasons why. First, RESA has provided no evidence regarding the "original intent" of RESA or any other party in settling Case No. 10-388-EL-SSO. Assuming that RESA is attempting to demonstrate its intent during settlement negotiations through the testimony of Mr. Bennett (even though RESA doesn't cite it), Mr. Bennett is not qualified to discuss the intent of RESA or any other party to the Stipulation in Case No. 10-388-EL-SSO because he was not involved in the negotiations of that Stipulation.[261] Further, Mr. Bennett's testimony is unhelpful, even to RESA. When asked to identify which RESA member's intent was at odds with the current state of

[255] RESA Br., p. 26.

[256] Tr. Vol. II, p. 86.

[257] In this case, the RESA Parties are requesting that the Commission modify Attachment C.

[258] RESA Br., p. 26.

[259] Tr. Vol. II, p. 82.

[260] RESA Br., p. 27.

[261] Tr. Vol. II, p. 70.

the Companies' supplier website, Mr. Bennett first identified MC Squared[262] and later Direct Energy.[263] He then admitted that he didn't know any of the parties to the Stipulation in Case No. 10-388-EL-SSO.[264] Still later, when shown the signatory pages to the 10-388-EL-SSO Stipulation, he admitted that neither Direct Energy nor MC Squared was a signatory party to the Stipulation.[265]

Next, even if RESA had presented reliable evidence regarding the intent of the settling parties in Case No. 10-388-EL-SSO, this evidence should be barred by the parol evidence rule. Under the parole evidence rule, where parties enter into a final written agreement, a party may not present evidence that contradicts that agreement.[266] This is especially improper when the agreement in unambiguous.[267] Here, RESA is attempting to proffer evidence extrinsic to Attachment C of the Stipulation in Case No. 10-388-EL-SSO, *i.e.,* that the settling parties agreed to something that is simply not in the written agreement. But, there is nothing ambiguous about Attachment C. It states that the Companies were to develop a web-based data system. The Companies have done so. Therefore, any "evidence" as to the intent of the settling parties is inappropriate and should be disregarded. For these reasons, the Commission should not modify Attachment C to the Stipulation.

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[262] *Id.*, p. 79.

[263] *Id.*

[264] *Id.*, pp. 79-80.

[265] *Id.*, p. 80. In any event, Mr. Bennett's testimony about intent should be disregarded because it is, at best, hearsay. The sole basis for Mr. Bennett's belief of the intent of the RESA Parties during settlement negotiations is through discussions in preparing for this testimony where it was communicated to him that these parties don't feel that the supplier website is implemented in a way that is workable or matches their expectations from the settlement. *Id.*, p. 79.

[266] *See Ed Schory & Sons, Inc. v. Society Nat'l Bank* (1996) 75 Ohio St.3d 433, 440. The parol evidence rule is designed to protect the "integrity" of an integrated contract from attempts to avoid its contractual limitations by alleging extraneous, contradictory promises. *Id.*

[267] *TRINOVA Corp. v. Pilkington Bros., P.L.C.* (1994), 70 Ohio St.3d 271, 275 (holding that if "agreement is complete and unambiguous on its face, parol evidence is inadmissible to show a contrary intent of the parties.")

8. The Companies acted reasonably in bidding energy efficiency resources into the BRA.

In the ESP 3 Stipulation, the Companies agreed to bid up to 65 MWs of energy efficiency resources into the PJM May 2012 BRA provided that "the resources qualif[ied] under a PJM-approved [Measurement and Verification] plan" and "the Companies ha[d] ownership and/or control over the resources."[268] Based on these prerequisites, the Companies bid 36 MWs into the BRA, which were accepted by PJM. [269] No one disputes this, nor does anyone claim that the Companies did not adhere to the terms of the Stipulation. Instead, the Sierra Club and OCC/CP argue that the Companies were imprudent and should be held accountable because they did not bid 339 MWs into the BRA.[270] The fact that the Companies did not bid the amount desired by Sierra Club and OCC/CP does not make the Companies' actions imprudent. Indeed, the inclusion of the Companies' commitment to bid any amount of energy efficiency resources into the BRA was one of the few provisions changed from the current ESP and negotiated in the ESP 3 Stipulation.[271] The 65 MW was derived after the Companies explained potential risks of bidding energy efficiency resources that they did not have, both in a meeting with Staff on March 13, 2012, and in the Companies' comments submitted to the Commission in Case No. 12-814-EL-UNC on March 29, 2012.[272]

Moreover, the amount actually bid by the Companies is irrelevant for purposes of resolving the issues before this Commission in this case. The question before the Commission here is one dealing with the reasonableness of the Stipulation. The amount of energy efficiency resources bid – or not bid – into the BRA has no impact on the resolution of this issue. A bid into the PJM BRA

[268] Stip., § E.9.

[269] Tr. Vol. I, pp. 301-302.

[270] Sierra Club Br., pp. 16, 18; OCC/CP Br., pp. 40, 42.

[271] Ridmann Testimony, p. 9.

[272] *In re Commission's Review of the Participation of [the Companies] in the May 2012 PJM Reliability Pricing Model Auction*, Case No. 12-814-EL-UNC, Report (Mar. 29, 2012).

could occur under either an ESP or an MRO, thus arguably having no effect on the quantitative weighing of the ESP against an MRO. And, as Mr. Ridmann explained, the bidding of the 36 MWs into the auction provided a *qualitative* benefit.[273] Bidding additional energy efficiency resources simply would have increased this qualitative benefit. The fact is the Companies, *as a condition of the Stipulation*, expended significant efforts to qualify and quantify energy efficiency resources to bid into the PJM BRA. These actions provided benefits to customers and satisfied the Companies' commitments in the ESP 3 Stipulation. Accordingly, the arguments of both the Sierra Club and OCC/CP are misplaced in this proceeding.

Even assuming *arguendo* that the amount of energy efficiency resources bid into the BRA was relevant here, there is no evidence supporting any view that the Companies should be "held accountable" for failing to bid 339 MWs into the PJM auction. As Sierra Club's witness Neme conceded, his 339 MW estimate was developed using incomplete information and based on assumptions on top of estimates, ultimately reflecting merely a "ball park numbers."[274] In fact, he admitted that *he was not making any recommendations in this case regarding the Companies' accountability in the most recent BRA.*[275] Further, contrary to OCC/CP's assertion, the Companies' witness Stoddard did *not* acknowledge that an additional 300 MWs clearing the auction would have a substantial impact on the resulting capacity price.[276] What Mr. Stoddard in fact said was that it was just as possible that the available credits could have stayed on the flat part of the supply curve, thus

[273] *See* Ridmann Testimony, p. 15; Tr. Vol. I, pp. 301-302. Certainly, to the extent that the Companies bid energy efficiency resources into the BRA and those resources cleared the auction, the Companies' actions also provided a quantitative benefit to customers.

[274] Tr. Vol. I, p. 357.

[275] *Id.*, pp. 357-358.

[276] OCC/CP Br., p. 42.

having little or no change in price.[277] As he explained, "There's absolutely no public data from which to proceed on such an analysis. PJM has not released, nor do they intend to release, the shape of the demand or the supply in any of the zones."[278] Therefore, any calculations upon which either Sierra Club or OCC/CP rely for determining market clearing price impacts are purely speculative with no factual foundation in the record.

Sierra Club and OCC/CP both criticize the Companies for not having automatic ownership of the energy credits, arguing that these rights should be made a prerequisite to participation.[279] However, as Mr. Ridmann explained, the Companies are statutorily obligated to meet certain energy efficiency targets. Prior experience with mercantile customers suggested that these customers were reluctant to assign ownership rights to these credits for purposes of anything other than compliance with the energy efficiency/peak demand reduction targets set forth in R.C. § 4928.66 without knowing the true value of the credits. Therefore, the Companies feared that including such a prerequisite in the programs would have a chilling effect on participation.[280] Mr. Ridmann further explained that the Companies have since modified their program documents so that on a going forward basis, customers will be able to elect to grant their ownership rights to the Companies during the application process.[281]

Sierra Club also makes several suggestions for future BRAs. These include: (1) Commission approval of the Companies' bidding strategy with input from interested parties;[282] (2) a default

[277] Tr. Vol. IV, p. 23. It would be possible to compute this effect with the benefit of hindsight and non-public data, which the Commission may itself get from PJM.

[278] *Id.*, p. 24.

[279] Sierra Club Br., p. 14; OCC/CP Br., p. 43.

[280] Tr. Vol. I, pp. 298-299.

[281] Tr. Vol. I, p. 313.

[282] Sierra Club Br., pp. 18-19.

requirement to bid all eligible efficiency resources in future BRAs;[283] (3) a requirement to bid all cost effective energy efficient resources;[284] (4) a mechanism to assure ownership of future energy credits;[285] and (5) a prudence investigation into the Companies' bidding strategy.[286]

As noted, the amount of energy credits bid into the PJM BRA was a negotiated term in the Stipulation. Therefore, it would be improper to implement any of the Sierra Club's recommendations based on circumstances arising out of this case. Besides, as explained below, the Sierra Club's recommendations are not necessary.

In its first recommendation, Sierra Club suggests that the Companies' bidding strategy should be developed through a process with input from interested parties. What Sierra Club fails to recognize (or perhaps simply refuses to acknowledge) is that the Companies are subject to penalties should they not be able to deliver the amount of energy credits bid and accepted through the PJM auction. It would be inequitable to adopt Sierra Club's first recommendation without also allowing the Companies to recover any resulting penalties and all other associated costs should this "bid by committee" approach fail to provide the necessary energy credits.

It is difficult to discern the difference between Sierra Club's second and third recommendations: one being a requirement to bid "all eligible efficiency resources" and the other, to bid "all cost effective energy efficient resources." Regardless, these recommendations are simply a variation of the first recommendation, with Sierra Club substituting its judgment on what should be bid with that of the Companies' management.[287]

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[283] *Id.*, p. 19.

[284] *Id.*, p. 20.

[285] *Id.*

[286] *Id.*, pp. 21-22.

[287] Moreover, the Companies intend to address their bidding strategies for future auctions in their upcoming 2013–2015 Energy Efficiency and Peak Demand Reduction Portfolio filing ("EEPDR Case"), which will be submitted

Sierra Club's fourth recommendation is unnecessary. The Companies have already taken steps to improve the process for obtaining ownership rights to energy credits generated from customer activities – a process which they believe strikes the proper balance between obtaining those rights and avoiding the risk of customer non-participation in programs by mandating automatic ownership transfer as a prerequisite to participation in energy efficiency programs. Similarly, there is no need to implement the Sierra Club's last recommendation, partly because the circumstances surrounding the level of energy credits to be bid was a function of negotiations and partly because the Companies' future bidding strategy will be part of their EEPDR Case.

In sum, issues surrounding the bidding of energy credits into the PJM BRA are irrelevant for purposes of resolving the issues presented in this case. But assuming *arguendo* that they were relevant, neither the Sierra Club nor OCC/CP presented credible evidence to support: a finding (1) of imprudence on the part of the Companies; (2) that any of the recommendations made by Sierra Club are necessary; or (3) that the Companies should be held accountable for potential harm to customers based on "ball park" figures that are the result of speculation, assumptions, estimates and incomplete information.

9. All parties were afforded due process.

Certain opposing intervenors argue that they have been denied procedural due process. These arguments are factually inaccurate or they are simply recycled from Case No. 10-388-EL-SSO and have already been rejected by the Commission. Tellingly, none of these arguments is supported with any evidence showing that these parties have been (or any party has been) prejudiced in any way.

(continued…)

next month. If any party has concerns with the Companies' approach, the EEPDR Case will provide them a forum in which to voice those concerns.

The intervenor's briefs present five procedural complaints: (1) the parties were unnecessarily and improperly rushed to hearing; (2) relatedly, the parties were unable to conduct adequate discovery; (3) the Companies were improperly granted waivers from the filing requirements; (4) more specifically, the Companies should have been required to provide bill impact information; and (5) the Attorney Examiners improperly took administrative notice of portions of the record in other cases. Each of these arguments is addressed in order below.

a. The schedule provided in this case was appropriate to consider the issues in dispute.

OCC/CP argue that the time period between when the Companies filed their Application and Stipulation and Recommendation and when the hearing commenced "clearly is against the intent of the Legislature and unduly prejudiced the non-signatory parties."[288] OCC/CP rely on R.C. § 4928.143(C)(1) to suggest that the Commission should have taken closer to 275 days to review and hear this matter. This misreads the statute. Section 4928.143(C)(1) sets 275 days as the *maximum period* for which the Commission can consider an electric security plan ("ESP"). It does not establish a minimum period, much less a suggested period for review.[289]

In Case No. 10-388-EL-SSO, the Commission rejected this argument.[290] In that case, the Commission held that with respect to the 275-day timeframe provided by the General Assembly, Section 4928.143(C), Revised Code, states that the "Commission shall issue an order on a proposed ESP 'not later than' 275 days after the application's filing date."[291] The Commission observed that in the Companies' first ESP case, the Commission reviewed and approved a Stipulation within 34 days after the Stipulation was filed. In that instance, several parties, including OCC/CP and

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[288] OCC/CP Br., pp. 67-68.

[289] *See* R.C. § 4928.143(C)(1); Case No. 10-388-EL-SSO, Entry on Rehearing, p. 8.

[290] Case No. 10-388-EL-SSO, Entry on Rehearing, p. 8.

[291] *Id.*

NOPEC/NOAC, all agreed to that Stipulation's requests that the Commission approve the ESP within that time period.[292] Here, OCC/CP's complaints about a 52 day time period should similarly be rejected.

AEPR's complaints about the schedule set for this case[293] ring particularly hollow. In cases involving AEP Ohio, AEPR's EDU affiliate – cases in which AEPR participated**,** the hearings were scheduled in less time than the parties were given here. In AEP's capacity charge case, Case No. 10-2929-EL-UNC, a scheduling order entered on March 14, 2012 set hearings to begin on April 17, 2012, *i.e.*, within 34 days.[294] In AEP's most recent ESP proceeding, Case No. 11-346-EL-SSO, a scheduling order entered on April 2, 2012, set hearings to begin on May 14, 2012, *i.e.*, within 42 days.[295] AEPR was not heard to complain in those cases.

OCC/CP also complain that the period in which to intervene in this case was unduly short.[296] But OCC/CP again lack any standing to make this argument; OCC/CP, by virtue of their involvement in Case No. 10-388-EL-SSO, were granted intervention in this matter.[297] Nevertheless, OCC/CP fail to identify a single party that was unsuccessful in its efforts to intervene. Indeed, OCC/CP's brief proves just the opposite. They admit that at least one party, the Cleveland Municipal School District, filed a motion to intervene after the intervention filing deadline and that this party's motion was granted.[298]

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[292] *Id.* citing *In re FirstEnergy*, Case No. 08-935-EL-SSO, Second Opinion and Order, pp. 6-7 (Mar. 25, 2009).

[293] AEPR Br., pp. 14-15.

[294] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, p. 3 (Mar. 14, 2012).

[295] Case No. 11-346-EL-SSO, Entry, pp. 2-3 (Apr. 2, 2012).

[296] OCC/CP Br., pp. 70-71.

[297] Case No. 12-1230-EL-SSO, Entry, p. 3 (Apr. 19, 2012).

[298] OCC/CP Br., p. 71.

Notably, none of the parties now complaining about the scheduling of this case identifies how the schedule caused any prejudice to them or any non-signatory party. Other than merely claiming prejudice, none of these parties offers any evidence or explanation as to how the time period in this case actually caused any prejudice.[299] In short, their complaints are empty.

OCC/CP and NOPEC/NOAC argue that there was no basis for setting an expedited procedural schedule in this case.[300] But their arguments are belied by the record. The Companies repeatedly represented to the Commission and all parties that they would seek an expedited ruling to allow adequate time to make changes to the bidding schedule to offer a three-year auction product in the October 2012 auction:

- In the Stipulation, the Companies explained that approval no later than June 20, 2012 was needed to "permit adequate time to implement changes to the bidding schedule to capture a potentially greater amount of generation at historically lower prices for the benefit of customers. . ."[301]
- In his direct testimony, Mr. Ridmann testified, "[W]e ask for Commission approval by June 20, 2012 to allow sufficient time for the Companies to modify the October 2012 auction to allow for a three year product instead of the one year product currently contained in the Companies' existing ESP."[302]
- In response to OCC Set 6, Interrogatory No. 56, the Companies explained that "[a]n order issued on June 20 would provide adequate time to understand and implement any changes to

[299] AEPR Br., pp. 14-15; NOPEC/NOAC Br., p. 5.

[300] OCC/CP Br., p. 68; NOPEC/NOAC Br., p. 13.

[301] Stip., p. 3.

[302] Ridmann Testimony, p. 19.

the auction documents and process and adjust training materials due to the results of the Commission Order in this proceeding and applications for rehearing."[303]

- At the hearing, Attorney Examiner Price asked Mr. Ridmann whether "the June 20 date is because of the October auctions . . . is it possible that the October auctions could be moved to later in 2012, November or December?"[304] Mr. Ridmann responded that "there are downsides" for pushing the auction into late November or December 2012.[305] He testified that the late November or December time period is not good for suppliers and holding the auction during it should be avoided for the benefit of customers.[306]

Recognizing that the June 20, 2012 date has passed, in their Initial Brief, the Companies explained that the Signatory Parties originally requested a Commission Order approving ESP 3 by June 20, but the case did not progress quickly enough to achieve that timing.[307] The Companies, however, explained that an order by mid-July would still permit the planned auction process to occur on the existing schedule commencing on August 9 and to conclude with the auction on October 23. By seeking an original approval date of June 20, 2012, the Companies had hoped that any applications for rehearing would have been resolved prior to commencing the auction process.[308] In any event, an approval by mid-July will still allow the Commission to assure the benefits envisioned by ESP 3 are achieved. Thus, OCC/CP and NOPEC/NOAC's arguments regarding the procedural schedule in this case are unfounded.

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[303] OCC/CP Ex. 1.

[304] Tr. Vol. II, p. 50.

[305] *Id.*

[306] *Id.*, pp. 50-51.

[307] Companies' Br., p. 3. *See also*, p. 35 *supra* (proposed timeline of events) quoting OCC Ex. 6.

[308] Companies' Br., p. 3.

b. The parties had adequate opportunity to conduct discovery.

OCC/CP complain that they have not had adequate time for discovery.[309] But OCC/CP fail to identify what additional discovery they needed in this proceeding and were unable to obtain. In fact, the Companies timely responded to numerous discovery requests served by various intervening parties including OCC and AEPR.[310] To the extent that OCC/CP were not satisfied with the Companies' responses, OCC had the opportunity to timely move to compel any information that it deemed necessary for its case. Instead, OCC waited until June 1, 2012 (the Friday before the hearing) to do so. When the Attorney Examiner asked OCC's counsel about whether OCC could have asked for the information requested in its Motion to Compel sooner, OCC's counsel responded "potentially, AEP had asked for that information."[311] As a result of the Attorney Examiner's order granting in part AEPR's motion to compel, OCC received some of the additional information that it requested.

AEPR and NOPEC/NOAC make similar complaints.[312] Like OCC/CP, they too fail to identify how they were prejudiced. These parties cannot deny that they had an ample opportunity to cross examine the Companies' witness William Ridmann at the hearing. Although these parties complain that certain information was provided, upon order by the Attorney Examiner, shortly before the hearing, only OCC/CP asked for more time.[313] However, given that, as OCC/CP's counsel admitted, nothing prevented OCC/CP (or any other party) from seeking the material at issue earlier, no party can credibly claim any prejudice. In fact, these materials were offered by OCC/CP and

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309 OCC/CP Br., p. 68.

310 *See, e.g.*, Tr. Vol. I, pp. 18-19, 236.

311 Tr. Vol. I, p. 19.

312 AEPR Br., p. 14.

313 Tr. Vol. I, pp. 17-18.

admitted into the record.[314] The Commission also should disregard the unsupported complaints by OCC/CP, AEPR and NOPEC/NOAC about the procedural schedule in this case.

c. The Commission properly granted the Companies certain waivers from the filing requirements.

OCC/CP complain that the Commission did not allow the parties seven days to respond to the Companies' Motion for Waiver of Rules, Expedited Treatment and Memorandum in Support Thereof ("Motion for Waiver"). But in its brief, OCC/CP acknowledge that OCC/CP had the opportunity to respond and, in fact, did file a brief in opposition to this motion.[315]

OCC/CP also contend that "it was disingenuous for the Companies to seek waiver requests for information that was not granted in the ESP 2 Case."[316] OCC/CP fail to appreciate, however, that the Companies were denied a waiver of certain information in Case No. 10-388-EL-SSO because the information at issue *had not been part of the prior case* upon which Case No. 10-388-EL-SSO was based, namely, Case No. 09-906-EL-SSO. Here, the information for which the Companies sought a waiver *was provided* by the Companies in Case No. 10-388-EL-SSO. The reason that the Commission denied the Companies' requests for waiver of financial projections in Case No. 10-388-EL-SSO does not apply to this proceeding.

d. The Commission properly ruled on what information the Companies should have provided regarding bill impacts.

OCC/CP and AEPR complain that the financial information provided by the Companies was insufficient. In particular, they complain that this information did not include projections of the increase in generation costs anticipated in the period June 1, 2015 through May 31, 2016.[317] AEPR

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[314] Tr. Vol. I, p. 236; Tr. Vol. II, pp. 52-53.

[315] OCC/CP Br., p. 70 citing *Joint Motion to Bifurcate Issues and Joint Memorandum Contra FirstEnergy's Motion for Waiver of Rules* (Apr. 17, 2012).

[316] *Id*., p. 75.

[317] OCC/CP Br., p. 76.

calls the Companies bill impacts a "mockery" of the Commission's rules and claims that the Companies' bill analysis "completely eschews any responsibility to provide meaningful information."[318]

But it is OCC/CP's and AEPR's arguments (not the Companies' financial information) that mock the Commission's prior rulings. Their inflammatory comments overlook the fact that the information that the Companies provided followed the same approach that the Companies used in Case No. 10-388-EL-SSO. The Commission found that approach to be sufficient.[319]

OCC/CP's and AEPR's arguments also overlook the reason that the Companies undertook the approach they did regarding projections of generation costs anticipated in the period June 1, 2015 through May 31, 2016. No one knows what the results of the CBP under ESP 3 will be.[320] Thus, the Companies have prudently based their billing impacts on the results of their last auction, reflected in tariff pricing as of April 1, 2012.

OCC/CP's and AEPR's complaints also are disingenuous. OCC/CP and AEPR had the opportunity to seek information regarding the bill impacts in discovery. They also had the opportunity to move to compel any discovery that they asked for and did not receive. In fact, AEPR made such motions which were ruled upon. The Companies provided all of the information that they were required to provide.

Again, OCC/CP and AEPR fail to show any prejudice. They had the opportunity to (and did) cross-examine the Companies' witness Mr. Ridmann regarding this information. The arguments by OCC/CP and AEPR that the Companies' failed to provide financial information are baseless.

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[318] AEPR Brief, p. 15.

[319] Case No. 10-388-EL-SSO, Opinion and Order, pp. 46–47.

[320] Contrary to AEPR's claim, AEPR Br., p. 15, energy prices and resulting generation rates going forward are currently unknown – a fact that several witnesses confirmed. Tr. Vol. I, pp. 162-163 (Ridmann); Tr. Vol. II, pp. 114-115 (Wilson); Frye Testimony, p. 8.

e. The Commission properly took administrative notice of the record in prior related cases.

OCC/CP, NOPEC/NOAC, AEPR and ELPC argue that they were denied due process because the Attorney Examiners took administrative notice of certain documents in the record of Case No. 10-388-EL-SSO and Case No. 09-906-EL-SSO.[321]

Their arguments parrot arguments that have been previously rejected by the Commission. In Case No. 10-388-EL-SSO, EnerNOC, Inc. ("EnerNOC") and a group of parties referred to as the Ohio Consumer and Environmental Advocates ("OCEA")[322] filed applications for rehearing, arguing, among other things, that the Attorney Examiner in Case No. 10-388-EL-SSO should not have taken administrative notice of the record in Case No. 09-906-EL-SSO. The Commission denied both applications for rehearing, finding that the Commission could take administrative notice of facts outside the record in a case "if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction."[323] Specifically, the Commission found that EnerNOC and OCEA had "an ample opportunity" to respond to the evidence that was administratively noticed, including the ability to "conduct discovery on the parties in the *MRO Case* regarding any evidence presented in that proceeding; request that parties specifically identify the evidence in the record of the *MRO Case* that the parties intend to rely upon in this proceeding; request a subpoena to compel witnesses from the *MRO Case* to appear for further cross-examination at hearing; cross-examine the witnesses at hearing regarding any issues in the *MRO Case* which were proposed to be resolved by the Stipulation; and present testimony at hearing in this

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[321] OCC/CP Br., pp. 77-87; NOPEC/NOAC Br., pp. 19-24; AEPR Br., pp. 17-20; ELPC Br., pp. 7-13.

[322] OCEA included Citizen Power, Citizens Coalition, OCC, Environmental Law & Policy Center, Natural Resources Defense Council, NOPEC, NOAC, and the Ohio Environmental Council.

[323] Case No. 10-388-EL-SSO, Entry on Rehearing, p. 6 (May 13, 2010).

proceeding to explain or rebut evidence in the record of the *MRO case*."[324] The Commission also found that EnerNOC and OCEA were not prejudiced by administrative notice of the record from Case 09-906-EL-SSO.[325]

Here, OCC/CP, NOPEC/NOAC and AEPR similarly argue that they have been denied due process because the Attorney Examiners took administrative notice. The Commission should similarly reject their arguments.

OCC/CP cite *Ohio Bell Tel. Co. v. Public Util. Comm. of Ohio*, 301 U.S. 292, 301-302 (1937), in support of its argument that due process has been denied.[326] But they fail to appreciate that the *Ohio Bell* court held that "[Administrative notice] does not mean that the opponent is prevented from disputing the matter by evidence if he believes disputable."[327]

In this case, OCC/CP, NOPEC/NOAC,AEPR, and ELPC had the opportunity to do just that. Despite their claims, they have presented no evidence that they were denied the opportunity to dispute the evidence for which the Attorney Examiners took administrative notice. In fact, none of these parties asked for the opportunity to dispute these records.[328] None of these parties took the opportunity to counter-designate evidence or any part of the record in Case No. 10-388-EL-SSO or Case No. 09-906-EL-SSO. None of the parties asked for more time to do either of these things. Instead, these parties simply objected.

[324] *Id*., pp. 6-7.

[325] OCEA sought rehearing on this issue again. Case No. 10-388-EL-SSO, OCEA's Application for Rehearing, p. 15-17 (Sep. 24, 2010). That Application was also denied. Case No. 10-388-EL-SSO, Entry on Rehearing, ¶ 12 (Feb. 9, 2011).

[326] OCC/CP Br., p. 80.

[327] OCC/CP Br., p. 80 citing *Ohio Bell Tel. Co. v. Public Util. Comm. of Ohio*, 310 U.S. 292, 301-302 (1937).

[328] Indeed, even in these parties' brief in support of their interlocutory appeal on this issue, they did not ask for the opportunity to dispute this evidence.

NOPEC/NOAC attempt to blame this omission on the timing of when the Attorney Examiners took administrative notice at the hearing.[329] The record demonstrates that NOPEC/NOAC are wrong. The Attorney Examiner noted on the first day of the hearing that if the Companies provided a list of specific documents, then "I'm sure that administrative notice will be liberally taken."[330]

Any claim that these parties were denied the opportunity to take discovery regarding the material on which the Commission took administrative notice is also false. The Companies provided notice to all parties in its Application filed on April 13, 2012 that they intended to take administrative notice.[331] Indeed, OCC/CP and AEPR acknowledge that they had notice that the Companies would seek administrative notice of the record in Case No. 10-388-EL-SSO.[332] OCC/CP and AEPR thus were aware that the Companies would seek administrative notice.[333] And despite this knowledge, they did not seek any discovery regarding the Companies' disclosed request. Their arguments that they had "no opportunity" to evaluate or explain the documents for which the Companies sought administrative notice[334]go begging. Nothing prevented AEPR and OCC/CP from asking for this information in discovery.

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[329] NOPEC/NOAC Br., pp. 19-20; *see also* ELPC Br., p. 12.

[330] Tr. Vol. I, p. 29.

[331] App., p. 5; Stip., p. 44.

[332] OCC/CP Br., p. 81 ("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.'"); AEPR Br., p. 19 (noting that the parties had received notice of the Companies' request in its Stipulation that the Companies would take administrative notice of the evidentiary record in Case No. 10-388-EL-SSO).

[333] AEPR also argues that it did not have notice that the Companies planned to seek administrative notice of the record in Case No. 09-906-EL-SSO. AEPR Br., p. 19. Yet, even a cursory review of the record in Case No. 10-388-EL-SSO would have revealed that the Commission took administrative notice of the record in Case No. 09-906-EL-SSO (indeed, as noted over several parties' objections) and thus the record in Case No. 09-906-EL-SSO was part of the record in Case No. 10-388-EL-SSO.

[334] AEPR Br., p. 19; OCC/CP Br., p. 83; ELPC Br., p. 12.

The Attorney Examiners correctly recognized that OCC/CP, NOPEC/NOAC and AEPR had the opportunity to dispute, take discovery on and cross-examine witnesses regarding the records for which they took administrative notice. At the hearing, Attorney Examiner Price explained:[335]

> They [the objecting parties] 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.

As a result, the Attorney Examiners found that "the parties were not prejudiced by the taking administrative notice of the documents listed by FirstEnergy. . ."[336]

OCC/CP and NOPEC/NOAC argue that administrative notice granted improperly shifts the Companies' burden of proof.[337] The Commission rejected this argument in Case No. 10-388-EL-SSO.[338] In that case, the opposing parties similarly argued that administrative notice of the record in Case No. 09-906-EL-SSO somehow lessened the Companies' burden in the case. They similarly relied on *Canton Storage* to support their argument. The Commission held that "although OCEA relies heavily upon the Court's holding in *Canton Storage*, the circumstances in this proceeding are not remotely analogous to those in *Canton Storage*."[339] The Commission explained that in *Canton Storage,* the court found that the Commission "never expressly took administrative notice" and that the Commission had relied on the testimony of the 22 motor carriers as a whole, rather than relying

[335] Tr. Vol. III, p. 171.

[336] *Id.*

[337] OCC/CP Br., pp. 84-85; NOPEC/NOAC Br., p. 21.

[338] Case No. 10-388-EL-SSO, Entry on Rehearing, p.7 (May 13, 2010).

[339] *Id*.

on the testimony of individual applications.[340] It noted that the *Canton* court rejected the Commission's reliance on the shipper testimony as a whole because it found this eliminated a portion of the individual motor carrier's burden of proof.[341]

The same distinctions apply to this case. Unlike *Canton Storage*, the Commission here has explicitly taken administrative notice of the documents specified by the Companies. OCC/CP and NOPEC/NOAC participated in Case No. 10-388-EL-SSO and Case No. 09-906-EL-SSO and, thus, had an opportunity to challenge the evidence that was administratively noticed. Indeed, NOPEC/NOAC were Signatory Parties to the Stipulation in Case No. 10-388-EL-SSO and thus helped create the record in support of the Stipulation there. More importantly, the Companies' burden of proof here is unchanged by the decision to take administrative notice of portions of the record in Case Nos. 10-388-EL-SSO and 09-906-EL-SSO.[342] The holding in *Canton Storage* is thus inapplicable to this case.

OCC/CP and NOPEC/NOAC also argue that the Commission cannot take administrative notice of opinions.[343] They cite no case that holds that administrative notice of opinions is inappropriate. They overlook the fact that administrative notice is a means of putting evidence in the record; it is not a finding that this evidence is undisputed. Indeed, the Ohio Supreme Court has repeatedly upheld the Commission's authority to take administrative notice of the records of prior and contemporaneous Commission hearings and investigations:

> [I]n *Schuster v. Pub. Util. Comm.* (1942), 139 Ohio St. 458,…. we affirmed an order in which the commission stated that it would have been derelict in its duty to the public not to have taken judicial notice of its own records, and in *J.V. McNicholas Transfer Co. v. Pub. Util.*

[340] *Id.*

[341] *Id.*

[342] *Id.* ("the circumstances in this proceeding are not remotely analogous to those in *Canton Storage* . . . which the Court rejected as an elimination of a portion of the applicant's burden of proof.").

[343] OCC/CP Br., p. 83; NOPEC/NOAC Br., pp. 23-24.

> *Comm.* (1975), 44 Ohio St. 2d 23,….we held that administrative notice of a zone enlargement petition proceeding was reasonable. In *Canton v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 76,…. we held that the commission's reference to a prior commission case was not improper, and in *County Commrs. Assn. v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 243,…. we concluded that it was not a denial of due process of law for the commission to take administrative notice of an investigative case in the appellants' complaint case.[344]

Under Rule 201(B) of the Ohio Rules of Evidence, administrative notice may be taken of a fact that is "not subject to reasonable dispute." Seizing upon that language, AEPR and NOPEC/NOAC claim that the Attorney Examiner violated Rule 201(B) by accepting disputed facts from 10-388-EL-SSO and 09-906-EL-SSO when he granted administrative notice of the documents on the Companies' list.[345] Not so. The Attorney Examiners did not find that any facts from Case Nos. 10-388-EL-SSO or 09-906-EL-SSO are conclusive here. They did not decide any issue, weigh the credibility of testimony, or rule on the validity of any evidence from those cases. To the extent the record contains disputed evidence, those disputes will be decided when the Commission renders its final decision. As a result, administrative notice in this case was appropriate.

10. The exclusion of AEPR Exhibit 6 was proper.

AEPR urges that the Commission reconsider the Attorney Examiners' ruling excluding AEPR Exhibit 6. That exhibit was properly excluded because it utterly lacked foundation. It contains assumptions of unknown origin – importantly, assumptions that are not in the record.[346] AEPR provided none at hearing; it's brief is similarly lacking.

At most, it appears that AEPR seeks to introduce the exhibit for the purpose of showing that the longer a particular CBP product is, the more potential there is for migration risk. Certainly,

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[344] *Allen v. Pub. Util. Comm'n,* (1988), 40 Ohio St.3d 184, 185-186.

[345] AEPR Br., p. 18; NOPEC/NOAC Br., p. 23.

[346] Tr. Vol. IV, pp. 152-154.

AEPR is free to argue this point—and it has. But in so doing, the absence of some calculation with assumptions, the basis of which are known only to AEPR, hardly prejudices AEPR.

What's more, the point AEPR is trying to make is simply wrong. As Mr. Stoddard testified, there is also a risk that customers would return to SSO service.[347] Bidders are familiar with these risks, know how to manage them, and formulate their bid prices accordingly.[348] As noted, Mr. Stoddard refuted the notion that simply because a product up for bid involves a longer period, prices for that product will be higher than they would be for shorter products.[349] For example, there are efficiencies in providing products over a longer period.[350] Bidders may also view the ability to lock in load at a certain price as a benefit even at a lower price.[351] Thus, the denial of the admission of AEPR Exhibit 6 into the record was not only correct, its admission would serve no purpose.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Companies' Initial Post-Hearing Brief, the Companies respectfully request that the Stipulation presently the Companies' ESP 3 be approved.

[347] *Id.*, pp. 55-56.

[348] *Id.*, p. 50.

[349] *Id.,* pp. 146-147.

[350] *Id.*, p. 132.

[351] *Id.*, pp. 52-53.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company in Support of Their Application to Provide for A Standard Service Offer in the Form of an Electric Security Plan was sent to the following by e-mail this 29th day of June, 2012:

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