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 to Provide 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

APPLICATION FOR REHEARING BY THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL

Pursuant to Ohio Revised Code Section 4903.10, and Ohio Administrative Code Rule 4901-1-35, the Northeast Ohio Public Energy Council respectfully submits this Application for Rehearing of the Public Utilities Commission of Ohio's Opinion and Order issued in the above-captioned case on July 18, 2012 (the "Order"). The Order is unreasonable and unlawful in the following respects:

1. The ESP 3 Stipulation approved by the Commission is not "more favorable in the aggregate as compared to the expected results that otherwise apply under [an MRO]," in violation of R.C. 4928.143(C)(1);

2. The Commission erred in concluding that the Commission would award FirstEnergy a $405 million distribution rate increase during the two-year period of the ESP 3 Proposal for purposes of the MRO portion of the statutory ESP vs. MRO test without any evidentiary support;

3. The Commission erred in developing non-existent qualitative benefits associated with the ESP 3 Proposal to satisfy the statutory ESP vs. MRO test under R.C. 4928.143(C)(1);

4. The Commission erred in concluding that the ESP 3 Stipulation satisfies the Commission's three-part test for determining the reasonableness of a stipulation;

5. The Commission erred in concluding that the ESP 3 Stipulation is the product of serious bargaining because the three primary residential customer advocates, including NOPEC, were effectively excluded from the bargaining process;

6. The Commission erred in approving the ESP 3 Stipulation because the terms in the ESP 3 Stipulation violate important regulatory principles and practices, including but not limited to allowing the collection of deferred carrying charges to be excluded from the Significantly Excessive Earnings Test ("SEET") calculation;

7. The Commission violated the due process rights of NOPEC and other non-signatory parties when it unreasonably forced the ESP 3 case to a decision without affording the non-signatory parties adequate time to prepare for the case;

8. The Commission violated the due process rights of NOPEC and other non-signatory parties when it unlawfully took administrative notice of portions of the record from the MRO Case and the ESP 2 Case despite the fact that NOPEC and other non-signatory parties to the ESP 3 Stipulation did not have knowledge of and/or an opportunity to explain and rebut the facts administratively noticed;

9. The Commission erred by approving FirstEnergy's corporate separation plan as part of the ESP 3 Stipulation without a formal, detailed review of said corporate separation plan as required by R.C. 4928.17 and OAC Chapter 4901:1-37;

10. The Commission's approval of Rider DCR as part of the ESP 3 Proposal violates R.C. 4928.143(B)(2)(h); and

11. The Commission's approval of the ESP 3 Proposal violates R.C. 4905.22 by approving unjust and unreasonable rates.

NOPEC respectfully requests that the Commission grant this Application for Rehearing, and modify the Order as set forth in greater detail in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF THE
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S
APPLICATION FOR REHEARING

I. INTRODUCTION

On April 13, 2012, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and Toledo Edison Company ("TE") (collectively, "FirstEnergy," or the "Companies") filed an application for approval of its third electric security plan ("ESP") in the form of a Stipulation and Recommendation (the "ESP 3 Stipulation," and the entire filing hereinafter referred to as the "ESP 3 Proposal"). Despite strong opposition from the Northeast Ohio Public Energy Council ("NOPEC"), the Office of the Ohio Consumers' Counsel ("OCC"), Northwest Ohio Aggregation Coalition ("NOAC") and other intervening parties, and a serious lack of evidence supporting the ESP 3 Proposal, the Public Utilities Commission of Ohio (the "Commission") approved it in an Opinion and Order issued on July 18, 2012 (the "Order"). The Commission's decision is unreasonable and unlawful.

NOPEC is not opposed to a new ESP plan taking shape after the completion of the existing ESP on May 31, 2014. In fact, NOPEC supported the second supplemental stipulation in Case No. 10-388-EL-SSO (the "ESP 2 Case"). This ESP 3 Proposal approved by the Commission, however: (i) fails the ESP vs. MRO test under R.C. 4928.143(C)(1); (ii) fails the

Commission's own three-prong test for determining the reasonableness of a stipulation; (iii) lacks the support of residential customer representatives, including NOPEC, OCC and NOAC; (iv) encouraged a constitutionally-deficient process whereby NOPEC and other intervening parties were denied fundamental due process rights, including the right to critically examine the ESP 3 Proposal; (v) is supported by a ruling on administrative notice that violates Ohio law, and general principles of due process and fairness; (vi) includes terms and conditions that violate R.C. 4928.17, R.C. 4928.143, and R.C. 4905.22.

When the ESP 3 Proposal is analyzed in light of the lack of evidence before the Commission, and serious due process concerns raised by the parties, the Commission's decision to reject the ESP 3 Proposal should have been easy. The Commission, however, ignored these fatal flaws in FirstEnergy's ESP 3 Proposal. For these reasons, and those set forth below, NOPEC respectfully requests that the Commission grant this Application for Rehearing and reject FirstEnergy's ESP 3 Stipulation. In the alternative, NOPEC respectfully requests that the Commission modify the ESP 3 Proposal as follows:

(a) Eliminate the continuation of the DCR Rider after May 31, 2014, and require any distribution-related investments to be accounted for in a separately filed distribution rate case;

(b) Eliminate FirstEnergy's proposal to exclude deferrals from the SEET calculation;

(c) Require FirstEnergy to bid all of its eligible demand response and energy efficiency resources into all future PJM capacity auctions;

(d) Continue to hold the proposed energy auctions in October 2012 and January 2013 in accordance with the terms of the combined stipulation from the ESP 2 Case (the use of a one-year auction product covering the final year of the current ESP from June 1, 2013 through May 31, 2014), while modifying the ESP 3 Proposal to provide for a second auction product covering the two-year time period of the ESP 3 Proposal (June 1, 2014 through May 31, 2016); and

(e) Require FirstEnergy to comply with the corporate separation requirements in R.C. 4928.17, and order a detailed review of its existing corporate separation plan to determine whether it complies with Ohio law.

II. LEGAL ARGUMENT

A. The ESP 3 Stipulation is not "more favorable in the aggregate as compared to the expected results that otherwise apply under [an MRO]," thereby failing the ESP vs. MRO test in R.C. 4928.143(C)(1).

In the Order, Commissioner Roberto's dissenting opinion correctly states that "[t]he burden of proof in this proceeding is on the Companies to establish that the ESP 3, including its pricing and all other terms and conditions is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Section 4928.143(C)(1), Revised Code. **The Companies have not met this burden**."[1] (Emphasis added). Plainly stated, the ESP 3 Proposal does not satisfy the statutory ESP vs. MRO test and the Commission's decision to the contrary is unreasonable and unlawful.

1. FirstEnergy's ESP 3 Stipulation fails a quantitative analysis under R.C. 4928.143(C)(1).

For purposes of the quantitative ESP vs. MRO analysis, the inputs FirstEnergy used for the ESP side of the calculation (which can be found in Attachment WRR-1 to FirstEnergy Exhibit 3)[2] included: "(1) estimated Rider DCR revenues from June 1, 2014 through May 31, 2016; (2) estimated PIPP generation revenues for the period of the ESP 3, reflecting the 6% discount provided by the Companies; (3) economic development funds and fuel fund commitments that the Companies' shareholders, not customers, will contribute; and (4) estimated RTEP costs that will not be recovered from customers."[3] The inputs FirstEnergy used on the MRO side of the calculation (also from Attachment WRR-1 to FirstEnergy Exhibit 3) included:

[1] Order, Commissioner Roberto's Dissenting Opinion (hereinafter "Dissenting Opinion") at p. 1.

[2] FirstEnergy Exhibit 3 is the Prefiled Direct Testimony of William R. Ridmann.

[3] Dissenting Opinion at p. 1.

"(1) estimated revenue from base distribution rate increases based on the proposed Rider DCR revenue caps; and (2) generation revenue from PIPP customers excluding the 6% discount."[4]

Rather than utilizing the agreed upon numerical inputs, and completing a simple mathematical exercise, the Commission unlawfully and unreasonably ignored the evidence and *sua sponte* manipulated the math to the sole advantage of FirstEnergy. A correct quantitative analysis demonstrates that the ESP 3 Proposal fails the ESP vs. MRO test under R.C. 4928.143(C)(1).

a. The Commission appropriately removed any benefits associated with the ESP 2 RTEP obligation from the MRO vs. ESP analysis in this case, but then failed to accurately complete its math.

As part of FirstEnergy's existing stipulation from the ESP 2 Case, FirstEnergy agreed not to recover "Legacy RTEP Costs for the longer of: (1) the five year period from June 1, 2011 through May 31, 2016 or (2) when a total of $360 million of Legacy RTEP Costs has been paid for by the Companies."[5] This obligation exists regardless of whether the ESP 3 Stipulation is accepted, modified or rejected by the Commission. As a result, the only thing unanimously agreed upon in the Order is that "the benefit of this [RTEP] credit was a result of the Commission's decision in the ESP 2 Case and cannot be considered a benefit of the ESP 3 to be reflected in the ESP v. MRO analysis."[6] Doing so results in the ESP 3 Proposal failing the quantitative ESP vs. MRO analysis by more than $7 million.[7] This fact was confirmed by

[4] *Id.* at pp. 24-25.

[5] Second Supplemental Stipulation, Case No. 10-388-EL-SSO (June 22, 2010) ¶6.

[6] Order at p. 55. See also Dissenting Opinion at p. 1.

[7] Joint NOPEC/NOAC Ex. 1 at p. 6.

FirstEnergy witness Ridmann,[8] and Commission Staff witness Fortney,[9] yet the Commission unreasonably ignored this undisputed evidence.

b. The Commission unlawfully and unreasonably ignored the evidence to conclude that the estimated results of a distribution rate case (on the MRO side of the calculation) and the proposed amounts to be recovered through Rider DCR (on the ESP side of the calculation) would result in a "wash" for Ohio ratepayers.

After removing the non-existent RTEP benefit from the ESP vs. MRO analysis, however, the Commission ignored the remaining evidence before it (namely the MRO vs. ESP calculation provided by FirstEnergy on Attachment WRR-1). In doing so, the Commission unlawfully "adjusted" the distribution portion of the ESP vs. MRO analysis in FirstEnergy's favor by approximately $29 million to allow the ESP 3 Proposal to "satisfy" a quantitative ESP vs. MRO analysis. Such a manipulated analysis for the sole purpose of allowing FirstEnergy to satisfy the quantitative analysis must be rejected because it is not supported by any evidence in this record.

Specifically, the Commission, without record support, concluded that the amounts proposed to be recovered through Rider DCR on the ESP side of the calculation (which the evidence demonstrated to be $405 million), and the estimated results of a Commission-approved distribution rate case on the MRO side of the calculation (which the evidence estimated to be $376 million) would be "substantially equal," and simply should be "removed from the ESP v. MRO analysis."[10]

[8] Tr. Vol. I, p. 129, lines 10-19.

[9] Prefiled Testimony of Robert B. Fortney ("Staff Ex. 1") at pp. 2-3.

[10] Order at p. 55.

This conclusion not only ignores the evidence, but actually allows the Commission to, after-the-fact, create evidence to support its unlawful and unreasonable decision.

From a practical standpoint, the Commission's decision gratuitously (and without evidentiary support) added $29 million to the MRO side of the quantitative analysis (increasing the estimated return under a Commission-approved distribution rate case from $376 million to $405 million). This is illogical, unreasonable and unlawful.[11] In reality, the evidence demonstrates that, at most, the distribution portion of the ESP vs. MRO analysis results in the MRO being more favorable than the ESP 3 Proposal by $29 million. When this amount is combined with the removal of the RTEP obligation, the ESP 3 Proposal fails the statutory test by at least $36 million (not adjusted for net present value).

Perhaps more importantly, the Commission unreasonably, unlawfully and without record evidence accepted the $376 million assumption in the distribution piece of Mr. Ridmann's ESP vs. MRO analysis. The assumption that the Commission would award a $376 million distribution rate increase during the two year period of the ESP 3 Proposal is outlandish, speculative and wholly unsupported.[12] As NOPEC emphasized in its initial brief, the $376 million assumption is unreasonable because: (1) "[w]hile the Companies could certainly request a distribution rate increase in those planning years there is no evidence or guarantee that the Commission would award such an increase;"[13] (2) "[e]ven if the Commission were to approve an

[11] As OCC correctly noted in its initial brief, the "ESP vs. MRO test is not an 'over the long run' analysis." Joint Initial Brief by the Office of the Ohio Consumers' Counsel and Citizen Power ("OCC Brief"), p. 54. The ESP 3 Proposal is for a period of two years. That two year period (not some unidentified period of time in the future) is the only time frame to be analyzed for purposes of the statutory ESP vs. MRO analysis. Within this two year time frame, it is apparent that Rider DCR is not a "wash" when compared to the results of an expected distribution rate case. Further, the statutory ESP vs. MRO analysis nowhere provides for quantitative provisions to be removed from the calculation simply because they might constitute a "wash" at some point in the future.

[12] Mr. Ridmann's assumption estimated that FirstEnergy would receive a Commission-approved $376 million increase in a future distribution rate case for the two year ESP 3 time period.

[13] Joint NOPEC/NOAC Ex. 1 at p. 5. The amounts for each of the three companies were $108,598,923 for CEI, $70,539,796 for TE, and $160,762,886 for OE.

increase in the Companies' distribution rates at that time, there is no indication that the Commission would award an increase of $376 million over two years;"[14] and (3) the $376 million assumption is nearly $40 million more than FirstEnergy even asked for in its most recent rate case—Case No. 07-551-EL-AIR (the "2007 Rate Case")—and more than two and one-half (2 ½) times the amount approved by the Commission in the 2007 Rate Case.[15] A more accurate MRO calculation, with a significantly reduced amount for a distribution rate increase, would result in an even greater failure of the quantitative ESP vs. MRO analysis. (Emphasis added).

2. Any alleged qualitative benefits associated with the ESP 3 Stipulation cannot overcome the failure of FirstEnergy to satisfy the quantitative ESP vs. MRO test.

As noted above, FirstEnergy's ESP 3 Proposal fails a quantitative analysis of the ESP vs. MRO test. Despite this fact, the Commission unreasonably and unlawfully claims that a series of amorphous, qualitative (non-monetary) benefits overcome the substantial failure of the quantitative ESP vs. MRO analysis. Such an argument is unpersuasive and not expressly provided for under the statute..

a. Any alleged qualitative benefits associated with the three year auction product in the ESP 3 Proposal are outweighed by the uncertainty in the energy market.

As Commissioner Roberto aptly explained in her dissenting opinion:

> In this instance, however, customers will enjoy whatever the prices are during the period prior to May 31, 2014, under the current terms of the ESP 2. Any benefit proposed by the ESP 3 requires the assumption that as opposed to customers enjoying those lower prices initially - as they are now entitled to do - we should ask them to relinquish them. To achieve any benefit, we must assume that a bidder for a three-year product will capture all of the benefit of the prices provided by the one-year product and offer them back to the customers and, in addition, offer a lower price than they would otherwise for the product covering years two and three. There is nothing in the record to suggest that this will be true. In fact, the

[14] *Id.*

[15] See NOPEC/NOAC Brief at pp. 9-10.

> only suggested benefit is averaging the lower prices (which customers would already receive) with the anticipated higher prices – in essence simply paying ahead for the ability to experience less of a price change on June 1, 2014. This proposal would then merely re-create the same phenomenon on June 1, 2016, at which time customers will again face a period in time when the products procured do not overlap. I find that this proposal provides too ambiguous of a benefit, if any benefit exists at all, to value.[16]

Amidst such uncertainty, there is no certain or provable benefit associated with the move from a one-year to a three-year auction product. In fact, the move to a three-year auction product is just as likely to prove disadvantageous to consumers as advantageous.

b. Other alleged qualitative benefits relied upon by the Commission are insufficient and unreasonable under Ohio law.

Commissioner Roberto's dissenting opinion in the Order demonstrates the unreasonableness of the other qualitative benefits thrown out by the Commission. For example, Commissioner Roberto concluded that:

- Allowing FirstEnergy to contract with its competitive affiliate, FirstEnergy Solutions ("FES"), for an un-bid contract to serve all PIPP customers in Ohio provides ambiguous benefits to ratepayers and undermines market development.[17]

- Paying above-market rates for demand response through Riders ELR and OLR provides less benefit at a higher cost than simply allowing the PJM demand response market to operate as intended.[18]

- Gifting obligation-free energy efficiency dollars to signatory parties to the ESP 3 Stipulation violates OAC Rule 4901:1-39-04(B) because FirstEnergy is required to develop a portfolio of energy efficiency programs that are cost-effective.[19] Yet, none of the recipients of the stipulation dollars (which are recovered under Rider DSE) is under any

[16] Dissenting Opinion at p. 2.

[17] *Id.*

[18] *Id.* at p. 7.

[19] *Id.* at p. 4.

> obligation to demonstrate that the funds will be used to deploy cost-effective energy efficiency measures.[20]

- FirstEnergy failed to satisfy its burden of demonstrating that both customers and FirstEnergy's own expectations are aligned with respect to the Rider DCR.[21] It should be noted that this failure violates R.C. 4928.143(C)(1).

- FirstEnergy's lost revenue recovery mechanism has out-lived its value to customers.[22]

For these reasons, there are no qualitative benefits that would allow the ESP 3 Proposal to satisfy either a quantitative or qualitative analysis under R.C. 4928.143(C)(1).

B. The Commission erred in concluding that the ESP 3 Stipulation satisfies the Commission's three-part test for determining the reasonableness of a stipulation.

In addition to failing the statutory ESP vs. MRO test, the Commission unlawfully and unreasonably concluded that FirstEnergy satisfied the Commission's three-part test for determining the reasonableness of a stipulation.[23]

1. The ESP 3 Stipulation was not the product of serious bargaining.

The Commission, in particular Commissioner Roberto, previously recognized the "asymmetrical bargaining positions of the parties" in the ESP context."[24] As Commissioner Roberto explained in a concurring/dissenting opinion from FirstEnergy's first ESP case:

> I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the

[20] *Id.*

[21] *Id.* at pp. 4-5.

[22] *Id.* at p. 6.

[23] See *Office of Consumers' Counsel v. PUCO* (2005), 111 Ohio St.3d 300, 319.

[24] OCC Brief at p. 9.

> remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.[25]

Most importantly, Commissioner Roberto noted that "[i]n light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when a agreement arises within the context of other regulatory frameworks."[26] Ignoring these words (which are directly applicable to this case), the Commission unreasonably concluded that the ESP 3 Stipulation is somehow the product of serious bargaining.

First, and foremost, the ESP 3 Stipulation includes virtually no residential customer representation. The Commission mistakenly identifies OPAE and the Citizens Coalition as representatives of low and moderate income residential customers.[27] In reality, OPAE and the Citizens' Coalition are geographically limited and/or primarily focused on programs rather than utility rates (e.g., OPAE's weatherization program). Unlike NOPEC, OCC and NOAC, these signatory parties' limited interests simply are not focused on the electric rates of the nearly two million residential customers served by FirstEnergy.

Although the Commission refuses to adopt a bright-line rule requiring that OCC (or other residential customer representatives) be a signatory party to a stipulation prior to Commission approval,[28] the lack of support from NOPEC, NOAC, and/or OCC is telling. Without them, an entire customer class representing nearly two million residential customers served by

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[25] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Provide 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. 08-935-EL-SSO, (Second Finding and Order dated March 25, 2009, Concurring in Part and Dissenting in Part Decision of Commissioner Cheryl Roberto) at pp. 1-2.

[26] *Id*. at p. 2.

[27] Order at p. 26.

[28] *Id.* at p. 27.

FirstEnergy has been consciously omitted from the bargaining process—strong evidence that the bargaining process was anything but serious, transparent or fair.

In addition, and unlike FirstEnergy's prior SSO proceedings—including Case No. 08-935-EL-SSO (FirstEnergy's first SSO case following the enactment of Senate Bill 221), the MRO Case, and/or the ESP 2 Case—FirstEnergy chose not to conduct comprehensive settlement meetings with all interested parties. Instead, FirstEnergy held individualized and compartmentalized negotiations with certain parties from the ESP 2 Case. Although NOPEC was approached by FirstEnergy in the week or two immediately prior to the filing of the ESP 3 Proposal, NOPEC did not have an appropriate amount of time to review the proposal, conduct discovery, provide comments and requests for substantive changes to the proposal, or otherwise seriously bargain with FirstEnergy. There simply cannot be serious bargaining when one side intentionally ignores the representatives of the nearly two million residential customers (NOPEC, NOAC and OCC), and they are not provided with the opportunity to bargain.

Based on the foregoing, the Commission erred by finding that the ESP 3 Stipulation was the product of serious bargaining.

2. The ESP 3 Stipulation does not, as a package, benefit ratepayers and the public interest.

Simply stated, FirstEnergy's ESP 3 Stipulation does not benefit ratepayers. In addition to failing the ESP vs. MRO test in R.C. 4928.143(C)(1), any alleged "qualitative" benefits relied upon by the Commission are a fiction. For the convenience of the Commission, NOPEC simply incorporates by reference the arguments raised in Section II.A.2 above.

3. The ESP 3 Stipulation violates important regulatory principles and practices.

a. The Commission unlawfully and unreasonably modified the terms of a Commission-approved stipulation by changing the one year auction product approved in the ESP 2 Case to a three year product in the ESP 3 Case, without justification.

As a signatory party to the stipulation in the ESP 2 Case, NOPEC actively participated in, and negotiated the terms of, the combined stipulation ultimately approved by the Commission. One component of the stipulation in the ESP 2 Case was the inclusion of a one-year product in the auctions currently scheduled for October 2012 and January 2013. Rather than seek approval from all (not just some) of the signatory parties to the stipulation in the ESP 2 Case, the Commission approved the changing of the bid product from a one-year product to a three-year product, without any justification. This clearly is not the deal struck by the signatory parties to the stipulation in the ESP 2 Case, including NOPEC.

The Commission, however, states that it "is well-established that the Commission may change or modify previous orders as long as it justifies the changes."[29] The Commission, however, did not (and cannot) justify such a change. In fact, the Commission's own Staff testified that: "Much ink will be spilled concerning the question of whether the use of single year products or multi-year laddering would result in overall lower prices. The debate is pointless. There is no objective answer."[30] Without any possible justification for modifying the stipulation from the ESP 2 Case, the Commission violated Ohio law in doing so anyway.

[29] Order at p. 45.

[30] Staff Post Hearing Brief at p. 5.

b. The SEET provisions in the Stipulation violate R.C. 4928.143(E), the Commission's regulatory precedent and common sense.

The Commission abused its discretion by accepting FirstEnergy's claim that the provision in the ESP 3 Stipulation allowing for the exclusion of deferred carrying charges from the SEET calculation is permissible.[31] The exclusion of deferred carrying charges from the SEET calculation violates: (i) R.C. 4928.143(E); and (ii) the Commission's precedent in Case No. 10-1261-EL-UNC (the "AEP SEET Case"),[32] which even the Commission acknowledges as standing for the proposition that "deferrals, including carrying charges, generally should not be excluded from SEET."[33] There is no reason to treat the deferrals in this case any differently than they were in the AEP SEET Case.

Further, the Commission confusingly and inaccurately states that the exclusion of the deferred charges are justified because they are somehow tied to distribution investments provided under Rider DCR.[34] In reality, the treatment of Rider DCR is entirely unrelated to the treatment of deferred carrying charges in the context of the SEET analysis. Page 23 of the ESP 3 Stipulation reads as such: "Any charges billed through Rider DCR will be included as revenue in the return on equity calculation for purposes of SEET and will be considered an adjustment eligible for refund. For each year during the period of this ESP, adjustments will be made to

[31] Initial Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy Brief") at p. 53.

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

[33] Order at p. 48.

[34] Page 48 of the Order states: "Section 4928.143(F), Revised Code, specifically requires that consideration 'be given to the capital requirements of future committed investments in this state.' Rider DCR will recover investments in distribution, subtransmission, and general and intangible plant. Therefore, the Commission finds that, in order to give full effect to this statutory requirement, we may exclude deferred carrying charges from the SEET where, as in the instant proceeding, such deferred carrying charges are related to capital investments in this state and where the Commission has determined that such deferrals benefit ratepayers and the public interest."

exclude the impact: (i) of a reduction in equity resulting from any write-off of goodwill, (ii) of deferred carrying charges, and (iii) associated with any additional liability or write-off of regulatory assets due to implementing this ESP 3 or the ESP in Case No. 10-388-EL-SSO." The deferred carrying charges are not tied to Rider DCR under the ESP 3 Stipulation's express provisions. Therefore, the Commission's alleged justification for excluding the deferred carrying charges from the SEET analysis is without merit and unlawful.

c. The Commission's support of FirstEnergy's "rush to judgment" violates the statutory requirement that each ESP be adjudicated independently.

FirstEnergy's "rush to judgment" in this case violates the statutory requirement that each ESP be adjudicated independently. OCC accurately noted in its brief that the "General Assembly's ESP framework is for plans to be established for time periods."[35] As a separate ESP filing, the ESP 3 Stipulation should be judged exclusively on its own merits. When compared to the stipulation in the ESP 2 Case, the ESP 3 Stipulation seeks Commission approval of a new ESP involving new substantive provisions, and covering a new two-year time period (from June 1, 2014 through May 31, 2016).[36] The ESP 3 Stipulation is subject to a separate and independent stand-alone analysis as to whether it satisfies: (i) the statutory ESP vs. MRO test set forth in R.C. 4928.143(C)(1); and (ii) the Commission's three-prong test for considering the reasonableness of stipulations. The Commission's attempt to do otherwise runs contrary to Ohio law.

Commissioner Roberto's dissenting opinion in the Order notes that, "the urgency that seemed to accompany this matter seems out of proportion to any real need to act. The ESP 2 is in effect until May 31, 2014. The Commission has up to 275 days after an application is filed to

[35] OCC Brief at p. 7.

[36] See generally FirstEnergy Ex. 1 (ESP 3 application, ESP 3 Stipulation, and accompanying exhibits).

act."[37] Commissioner Roberto's statement is correct and the Commission should have taken more time to critically evaluate FirstEnergy's ESP 3 Stipulation—a simple decision that protects the public interest.

C. The Commission erred when it took administrative notice of portions of the record from the MRO Case and the ESP 2 Case.

The Attorney Examiners unreasonably and unlawfully took administrative notice of piecemeal portions of the record from two entirely separate proceedings to allow FirstEnergy (with the assistance of Nucor) to try to satisfy its burden of proof.[38] The Commission's approval of this decision by the Attorney Examiners not only violates Ohio law, but sets a dangerous precedent in future Commission proceedings.

1. The Commission's version of the facts is insufficient.

On page 19 of the Order, the Commission stated:

> In this proceeding, the Companies requested in the application filed on April 13, 2012, that administrative notice be taken of the full record of FirstEnergy's last SSO proceeding, the ESP 2 Case. In the ESP 2 Case, the Commission had taken administrative notice of an earlier proceeding, In re FirstEnergy, Case No. 09-906-EL-SSO (MRO Case); thus, the record of the ESP 2 Case includes the full record of the MRO Case. No party filed a memorandum contra or any other pleading in opposition to the request in the application in this case. At the hearing, the attorney examiners requested that the Companies provide a list of the specific documents for which administrative notice was sought (Tr. I at 29). The Companies complied with the attorney examiners' request (Tr. Ill at 11-12), and Nucor moved for administrative notice to be taken of one document (Tr. Ill at 19). Subsequently, the examiners took administrative notice of the enumerated documents (Tr. Ill at 171).

This version of the facts, however, provides only a part of the whole story, and is entirely insufficient for purposes of the administrative notice analysis.

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[37] Dissenting Opinion at p. 7.

[38] See NOPEC/NOAC Initial Brief at 19-24; OCC Brief at pp. 77-87; AEP Retail Energy Partners LLC's Initial Post-Hearing Brief ("AEP Retail Brief") at pp. 17-20.

When the ESP 3 Proposal was filed on April 13, 2012, FirstEnergy did add a brief statement at the end of its lengthy ESP 3 filing 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."[39] There was not a specific request from FirstEnergy to incorporate the entire record from the MRO Case.[40]

The Commission then makes the irrelevant statement that "[n]o party filed a memorandum contra or any other pleading in opposition to the request." Technically, the Commission is correct because no party filed a specific pleading challenging the administrative notice request. Instead, NOPEC and other intervening parties filed a number of pleadings objecting to the **entire** ESP 3 Proposal and the due process concerns in the case.[41] The specific challenge to the administrative notice issue was raised by NOPEC and others only after its attempts to slow down the steamroller process (and provide the parties with an adequate opportunity to review the ESP 3 Proposal) were denied. Suggesting that NOPEC and others somehow approved the request (or waived the opportunity to contest it) is disingenuous.

Perhaps most importantly, FirstEnergy renewed its request that the entire ESP 2 Case be incorporated into the record of this proceeding on the first day of the evidentiary hearing. The Attorney Examiner properly rejected this request, stating: "I am uncomfortable incorporating

[39] FirstEnergy Ex. 1 (the ESP 3 application) at p. 5. Notably, the ESP 2 Case dealt with establishing the form of SSO for an entirely different three-year time period, and involved different parties from those in this case.

[40] As discussed in greater detail below, the fact that the attorney examiners in the ESP 2 Case chose to incorporate the record from the MRO Case has no bearing on this case. Two incorrect legal decisions do not somehow render the conclusion sufficient.

[41] See e.g., Joint Consumer Advocates' Interlocutory Appeal from the June 6, 2012 Attorney Examiner's Ruling Regarding Administrative Notice filed June 11, 2012.

wholesale the entire record from 10-388. If you have a document-by-document request for administrative notice of matters in 10-388, please make it then."[42]

It was another two days after FirstEnergy's request to incorporate the entire record was denied (and on the third day of the evidentiary hearing) that FirstEnergy finally provided a "List of Documents for Administrative Notice" to the parties. The "List of Documents for Administrative Notice" included: (i) FirstEnergy's application for a market rate offer in the MRO Case (more than 600 pages); (ii) two specific pages out of a total of approximately 830 pages from six separate volumes of testimony from the evidentiary hearing in the MRO Case;[43] (iii) FirstEnergy's application in the ESP 2 Case (including approximately 290 pages of exhibits and testimony); (iv) five specific pages out of a total of approximately 941 total pages from four separate volumes of testimony from the evidentiary hearing in the ESP 2 Case; (v) the prefiled testimony of three witnesses who did not testify or otherwise participate in the ESP 3 case (Hisham Choueiki, Tamara Turkenton, and John D'Angelo); and (vi) the prefiled testimony of FirstEnergy witness Ridmann and Commission Staff witness Fortney from the ESP 2 Case.[44] Contrary to the statement on page 20 of the Order, this was not a "small number of documents."

Despite numerous objections from the non-signatory parties to the ESP 3 Stipulation, including those of NOPEC, NOAC and OCC,[45] the Attorney Examiner took administrative notice of all of the documents identified in FirstEnergy's "List of Documents for Administrative

[42] Tr. Vol. I at p. 29.

[43] It should be noted that the MRO Case dealt with different statutory requirements, and a different form of SSO that was never actually ruled upon by the Commission.

[44] See Tr. Vol. III at pp. 10-12.

[45] Other non-signatory parties which objected to the Companies' request for administrative notice at the hearing included AEP Retail, the Environmental Law and Policy Center, Sierra Club, and the Retail Energy Supply Association.

Notice." This ruling took place on the very same day FirstEnergy provided NOPEC/NOAC with the "List of Documents for Administrative Notice."[46]

Compounding matters, counsel for Nucor Steel Marion ("Nucor") also asked the Attorney Examiners to take administrative notice of the direct prefiled testimony of Nucor witness Dennis Goins from the MRO Case,[47] despite Nucor's conscious decision not to present testimony in this case.[48] Over the objections of NOPEC, NOAC, OCC and other parties, the Attorney Examiner took administrative notice of Mr. Goins' testimony as well.[49]

The effect of FirstEnergy's tactic, and the rulings of the Attorney Examiner and Commission, prevented the non-signatory parties in this case from having an adequate opportunity to review and rebut such "evidence." The United States and Ohio constitutions, Ohio law and the Commission's rules demand a more orderly and fair process.

2. NOPEC did not have knowledge of and/or an opportunity to explain and rebut the facts administratively noticed.

In affirming the ruling on administrative notice, the Commission initially relied upon the May 10, 2010 Entry on Rehearing from the ESP 2 Case. This ruling, however, is based on the incorrect legal conclusion that the taking of administrative notice of random portions of prior Commission proceedings satisfies Ohio law. This incorrect assumption (and the improper legal analysis and conclusion in the Entry on Rehearing) cannot justify the same improper legal analysis and conclusion in this case.

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[46] Tr. Vol. III at. pp. 170-173.

[47] *Id.* at p. 19.

[48] As a signatory part to the ESP 3 Stipulation, Nucor had every opportunity to participate in this case and present testimony. Nucor, however, chose not to present testimony. Instead, without notice to FirstEnergy, the Commission, NOPEC, NOAC, or any other interested parties, Nucor sprung the request for administrative notice on the parties on the third day of the evidentiary hearing in this case, thereby denying all of the parties the opportunity to review such testimony and cross-examine the unavailable witness. Further, the testimony of the unavailable Mr. Goins involved a separate case (the MRO Case), and a different form of SSO.

[49] Tr. Vol. III at p. 171.

Next, the Commission turns to Ohio Supreme Court decisions on the issue of administrative notice in Commission proceedings.[50] Together, those cases establish that certain factors should be reviewed in determining whether administrative notice is proper, including: "whether the complaining party had prior knowledge of, and had an opportunity to explain and rebut, the facts administratively noticed."[51] In this case, however, NOPEC did not have prior knowledge of the facts administratively noticed, and were not (and still have not) been provided with the opportunity to explain and rebut those facts.

In fact, NOPEC did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012,[52] and the Attorney Examiner did not take administrative notice of the documents until the end of the hearing that same day.[53] FirstEnergy did ask to incorporate the record through a brief statement at the end of its ESP 3 application,[54] but such a far-reaching request was not ruled upon by the Commission before the hearing. At the evidentiary hearing, Attorney Examiner Price specifically rejected the incorporation of the entire record in the ESP 2 Case; instead, asking FirstEnergy to submit a specific list of documents.[55] Thus, it was only at the close of the third day of the evidentiary hearing that the Attorney Examiner finally ruled on FirstEnergy's request (and that of Nucor, for which NOPEC had absolutely no notice), and provided NOPEC with knowledge of the facts to be administratively noticed.

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[50] See *Canton Storage and Transfer Co. v. PUCO* (1995), 72 Ohio St.3d 1; and *Allen v. PUCO* (1988), 40 Ohio St.3d 184).

[51] *Canton Storage and Transfer* at p. 8.

[52] Tr. Vol. III at pp. 10-12.

[53] *Id.* at pp. 170-173.

[54] FirstEnergy Ex. 1 at p. 5.

[55] Tr. Vol. I at p. 29 (explaining "I am uncomfortable incorporating wholesale the entire record from 10-388").

Since NOPEC and others did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012, they had no opportunity to explain and/or rebut such facts. The reason is simple: until the Attorney Examiner took administrative notice on June 6, 2012, there were not any facts administratively noticed, and therefore no opportunity to explain or rebut them existed. Moreover, there has been no opportunity granted to the parties after June 6, 2012 to explain or rebut the facts administratively noticed.

The Commission, however, unreasonably claims that NOPEC had ample opportunity to explain or rebut the evidence because: (i) the "parties had the opportunity to conduct further discovery on FirstEnergy and any other party regarding any evidence presented in the ESP 2 Case or the MRO Case;"[56] (ii) the "parties had the opportunity to request a subpoena to compel witnesses from the ESP 2 Case or the MRO Case to appear for further cross-examination;" and (iii) the "parties had the opportunity to present testimony at hearing in this proceeding to explain or rebut any evidence in the record of the ESP 2 Case or the MRO Case."

Generally, the Commission ignores the fact that, as a separate ESP filing, the ESP 3 Proposal must be judged solely on its own merits. The ESP 3 Proposal involves a new ESP with new substantive provisions, and covering a new two-year time period (from June 1, 2014 through May 31, 2016).[57] The ESP 3 Proposal is subject to a separate and independent stand-alone analysis. Requiring the intervening parties to analyze thousands of pages of documents from two prior cases with no bearing on the outcome of this case is entirely unreasonable. The burden of proof remained solely with FirstEnergy, and the Commission cannot and should not authorize a

[56] Order at p. 20.

[57] See generally the ESP 3 Application, ESP 3 Stipulation, and accompanying exhibits ("FirstEnergy Ex. 1").

process reducing FirstEnergy's burden of proof, while seemingly shifting that burden to the intervening parties.

Further, the Commission's statements that the parties had ample opportunity to conduct discovery, subpoena witnesses, and present testimony on "evidence" from the ESP 2 Case and MRO Case are ridiculous. As explained above, none of the parties (including FirstEnergy) had notice of the facts administratively noticed until the third day of the evidentiary hearing. Prior to this date, there were no administratively noticed facts to ask about in discovery or even on cross-examination at the evidentiary hearing. By the time NOPEC and others learned of the ruling on administrative notice, the Commission's rules for discovery and subpoenas were no longer applicable, and the deadlines for serving discovery requests and filing testimony had long expired. For these reasons, the Commission's arguments are unreasonable and unlawful.

3. The Commission erroneously claims that the parties were not prejudiced by the administrative notice ruling.

The Order baldly states that the "parties have not demonstrated that they were prejudiced by the taking of administrative notice,"[58] and that "all claims of prejudice have been vague and overly broad."[59] Nothing could be further from the truth.

First, and foremost, NOPEC and other intervening parties have contested the administrative notice ruling since the first day of the evidentiary hearing in this case. In addition to raising lengthy oral objections at the hearing, NOPEC and others joined together in filing a request for an interlocutory appeal on the issue. NOPEC subsequently featured the argument in both its initial and reply briefs.

[58] Order at p. 20.

[59] *Id.* at p. 21.

Second, the administrative notice ruling wasted valuable resources of NOPEC and other parties throughout the evidentiary hearing. Rather than focusing on the issues presented in the ESP 3 Proposal (and actually in evidence), NOPEC was left scrambling to review thousands of pages of documents after the pertinent FirstEnergy witness (Bill Ridmann) had completed his cross-examination.

Third, the Commission took administrative notice of the prefiled testimony of three witnesses who did not testify or otherwise participate in the ESP 3 case (Hisham Choueiki, Tamara Turkenton, and John D'Angelo). Such a ruling runs contrary to the due process protections afforded under the 14th Amendment of the United States' Constitution and Article I, Section 16 of the Ohio Constitution, as NOPEC and other parties were not presented with any opportunity whatsoever to cross-examine these witnesses or present contrary evidence at the evidentiary hearing.

Finally, the Commission engages in a dangerous game that establishes a far-reaching and troublesome precedent—namely that applications, stipulations, transcript testimony, and prefiled testimony from unrelated prior proceedings can freely serve as evidence in a subsequent proceeding. What will prevent FirstEnergy from filing an application in 2016 for a new ESP based solely on the "evidence" from its three prior ESP proceedings? Based on the ruling in this case, that will not only be acceptable, but seemingly encouraged.

4. The Commission erred by taking administrative notice of more than undisputed adjudicative facts.

The Commission's ruling on administrative notice completely ignores the fundamental requirement of judicial or administrative notice is that the notice relates to an adjudicative fact "not subject to reasonable dispute in that it is either (i) generally known within the territorial jurisdiction of the trial court or (ii) capable of accurate and ready determination by resort to

sources whose accuracy cannot reasonably be questioned." Ohio Evid. R. 201(B). Expanding on this rule, the Staff Notes to Ohio Evid. R. 201(B) explains:

> Rule 201(B)(1) applies to adjudicative facts generally known within the territorial jurisdiction. This category relates to the type of fact that any person would reasonably know or ought to know without prompting within the jurisdiction of the court and includes an infinite variety of data from location of towns within a county to the fact that lawyers as a group enjoy a good reputation in the community. A second class of facts subject to judicial notice is provided by Rule 201(B)(2). These are facts capable of accurate and ready determination. . . . The type of fact contemplated by 201(B)(2) includes scientific, historical and statistical data which can be verified and is beyond reasonable dispute.

The alleged "facts" for which administrative notice was granted are (and were) reasonably disputed in both the MRO Case and ESP 2 Case. Introduction of these administratively noticed documents also were subject to strong objections from numerous interested parties at the evidentiary hearing in this case.

Further, the information in a complex multi-billion dollar utility proceeding before the Commission assuredly is not the "type of fact that any person would reasonably know or ought to know," and therefore falls outside the scope of Ohio Evid. R. 201(B)(1).

Finally, the information included in the administratively noticed documents is neither "capable of accurate and ready determination," nor "scientific, historical and statistical data which can be verified and is beyond reasonable dispute," as required by Ohio Evid. R. 201(B)(1). Instead, the vast majority of the documents include opinions and testimony disputed and debated in the MRO Case, the ESP 2 Case and this proceeding.[60]

For these reasons, the "facts" subject to administrative notice are entirely outside the scope of the type of facts appropriate for administrative notice. Indeed, the scope of what was

[60] The Attorney Examiner stated: "All the documents that are listed we've taken administrative notice, whether it's facts or opinion. I think we – the rationale that I explained applies equally to facts as – to opinion as it would to facts." Tr. Vol. III at p. 172.

noticed goes far beyond the mere undisputed facts that can be considered for administrative notice.

D. The ESP 3 Stipulation is not the proper forum for approval of FirstEnergy's corporate separation plan.

The Commission erred by approving FirstEnergy's corporate separation plan as part of the ESP 3 Proposal, which still has not been reviewed in detail by the Commission or interested parties.[61] As Commissioner Roberto aptly stated in the Order, "the Commission should not be eager to re-approve and extend the Companies' current corporate separation plan without a more deliberate review."[62]

Initially adopted in 1999 as part of Senate Bill 3, R.C. 4928.17 required each electric distribution utility in Ohio to implement and operate under a corporate separation plan.[63] As such, FirstEnergy submitted an interim corporate separation plan in 1999, which was approved by the Commission as part of FirstEnergy's electric transition plan proceeding (Case No. 99-1212-EL-ETP) in 2000. For the next nine (9) years, FirstEnergy operated under this *interim* corporate separation plan.

Following the enactment of Senate Bill 221, however, the Commission updated and revised its corporate separation rules, and required each electric distribution to file an application for approval of a new corporate separation plan. On June 1, 2009, FirstEnergy filed its new corporate separation plan in Case No. 09-462-EL-UNC. To date, there has been no in-depth review or analysis of FirstEnergy's corporate separation plan because it has received a rubber-stamped approval as part of FirstEnergy's prior ESP proceedings.

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[61] Order at p. 15.

[62] Dissenting Opinion at p. 6.

[63] R.C. 4928.17(A).

At the current time, however, FirstEnergy's corporate separation plan is due for a full-scale review by the Commission and interested parties, as there are significant concerns about whether the existing plan satisfies R.C. 4928.17(A)(2) and/or (3). Accordingly, the Commission erred by automatically re-approving FirstEnergy's corporate separation plan.

As a result, and pursuant to R.C. 4928.17(D), the Commission should reject the approval of FirstEnergy's corporate separation plan, and establish a separate procedural schedule to provide NOPEC and other interested parties with the opportunity to raise specific objections and proposed modifications to the corporate separation plan in order to ensure compliance with R.C. 4928.17 and the Commission's rules.

E. The Commission's approval of Rider DCR as part of the ESP 3 Proposal violates R.C. 4928.143(B)(2)(h).

The Commission's approval of Rider DCR as part of the ESP 3 Proposal violates R.C. 4928.143(B)(2)(h), which requires that the Commission, prior to approval of such a provision, "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." As Commissioner Roberto explained in her dissenting opinion:

> In order for Rider DCR to be included appropriately within the ESP 3, the Companies have the burden to demonstrate that the Companies' and customers' expectations are aligned and the Companies are dedicating sufficient resources to reliability. Additionally, this provision must be judged as part of the aggregate terms and conditions of an ESP; e.g. if a similar or better result is achievable through an MRO, then it calls into question whether the ESP is beneficial.[64]

[64] Dissenting Opinion at p. 5.

Continuing on, Commissioner Roberto explained that the "record is insufficient to find that the Companies dedicated sufficient resources to reliability, particularly in the form of participation in the base residual auction whose very purpose is reliability. For this reason, I find that continuation of Rider DCR is not supported by this record."[65] For these reasons, the Commission's approval of the continuation of Rider DCR violates R.C. 4928.143(B)(2)(h).

F. The Commission's approval of the ESP 3 Proposal violates R.C. 4905.22 by approving unjust and unreasonable rates.

Ohio law requires the Commission to assure that public utilities' charges for service are just and reasonable. R.C. 4905.22 states:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

By approving the ESP 3 Proposal, the Commission violated R.C. 4905.22 by authorizing FirstEnergy to implement charges that are unjust and unreasonable, specifically the higher rates expected to be charged as a result of the switch from a one-year to a three-year auction product, as well as the charges to be recovered through Rider DCR.

Commissioner Roberto discussed the disadvantages of switching from a one-year auction product to a three-year auction product in her dissenting opinion:

> we must assume that a bidder for a three-year product will capture all of the benefit of the prices provided by the one-year product and offer them back to the customers and, in addition, offer a lower price than they would otherwise for the product covering years two and three. There is nothing in the record to suggest that this will be true. In fact, the only suggested benefit is averaging the lower prices (which customers would already

[65] *Id*.

> receive) with the anticipated higher prices – in essence simply paying ahead for the ability to experience less of a price change on June 1, 2014.[66]

It is unjust and unreasonable for the Commission to require customers to pay the higher costs of electricity associated with the two year ESP 3 time period (2015 and 2016) now. The only just and reasonable decision would be allowing customers to take advantage of the benefit of their bargain in the ESP 2 Case—namely the low generation rates in today's electric market (and associated with the one-year auction product approved in the ESP 2 Case).

For the reasons set forth above in Section II.E, the amounts proposed to be recovered through Rider DCR are unjust and unreasonable.

III. CONCLUSION

For the foregoing reasons, NOPEC respectfully requests that the Commission grant this Application for Rehearing and reject FirstEnergy's ESP 3 Stipulation. In the alternative, NOPEC respectfully requests that the Commission modify the ESP 3 Proposal as follows:

(a) Eliminate the continuation of the DCR Rider after May 31, 2014, and require any distribution-related investments to be accounted for in a separately filed distribution rate case;

(b) Eliminate FirstEnergy's proposal to exclude deferrals from the SEET calculation;

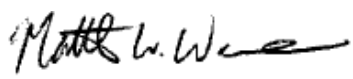
(c) Require FirstEnergy to bid all of its eligible demand response and energy efficiency resources into all future PJM capacity auctions;

(d) Continue to hold the proposed energy auctions in October 2012 and January 2013 in accordance with the terms of the combined stipulation from the ESP 2 Case (the use of a one-year auction product covering the final year of the current ESP from June 1, 2013 through May 31, 2014), while modifying the ESP 3 Proposal to provide for a second auction product covering the two-year time period of the ESP 3 Proposal (June 1, 2014 through May 31, 2016); and

[66] Dissenting Opinion at p. 2.

(e) Require FirstEnergy to comply with the corporate separation requirements in R.C. 4928.17, and order a detailed review of its existing corporate separation plan to determine whether it complies with Ohio law.

Respectfully submitted,



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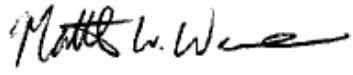
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties of record, by electronic mail, this 17th day of August 2012.



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Summary: Application for Rehearing and Memorandum in Support electronically filed by Teresa Orahood on behalf of Northeast Ohio Public Energy Council