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

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY CONTRA APPLICATIONS FOR REHEARING

James W. Burk, Counsel of Record
Arthur E. Korkosz
Kathy J. Kolich
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5861
(330) 384-3875 (fax)
burkj@firstenergycorp.com
korkosza@firstenergycorp.com
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 (fax)
dakutik@jonesday.com

Attorneys for Applicants, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

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I. INTRODUCTION

The third Electric Security Plan ("ESP 3") proposed by The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company (collectively, the "Companies"), agreed to by nineteen Signatory Parties[1] and approved, as modified, by the Commission, provides numerous benefits to customers and other stakeholders.[2] ESP 3 continues the competitive procurement of Standard Service Offer ("SSO") load through the use of a laddered system of multiple offerings for bid products at different lengths over a number of years. This procurement method has been approved in the Companies' prior ESPs with unquestionably successful – indeed, in the words of one party to this case, "great"[3] – results. The success of the Companies' ESPs is undisputed.[4] The method of procuring SSO load adopted as part of ESP 3 will also provide more stable rates by smoothing out the impact of increases in capacity and possibly energy prices over the life of the plan. This approach is a prudent method of procuring load to mitigate the risks associated with market uncertainties, a fact that is also undisputed.[5]

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[1] In addition to the nineteen Signatory Parties, there were an additional six parties that signed the Stipulation and Recommendation as non-opposing parties.

[2] The Application, Stipulation and Recommendation and its attachments are Company Exhibit 1. The Supplemental Information Filing from May 2, 2012 is Company Exhibit 2. The Direct Testimony of William R. Ridmann ("Ridmann Testimony") is Company Exhibit 3. The Supplemental Testimony of William R. Ridmann ("Ridmann Supp. Testimony") is Company Exhibit 4.

The following citation formats are applied in this Memorandum: 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 "Rebuttal 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. "Company Exhibit 1."

[3] Company Exhibit 13.

[4] Ridmann Testimony, p. 12; Tr. Vol. III, p. 143 (Mr. Gonzalez); Tr. Vol. II, p. 112 (Mr. Wilson); Tr. Vol. III, pp. 49-50 (Mr. Frye).

[5] Tr. Vol. II, p. 139 (Mr. Wilson: "[laddering] will provide more stable prices than buying on a year-by-year basis . . . because of averaging"); Tr. Vol. III, p. 49 (Mr. Frye: Q. "To the extent that the companies want to use a product or a series of products that minimizes risks and volatility, laddering would be a reasonable thing to do." A. "Yes."); Tr. Vol. III, p. 142 (Q. "[S]taggering or laddering is an accepted tool to reduce the risk of – to reduce the risk and volatility, correct?" A. "It has been used like that in the past, yes."); Stoddard Rebuttal Testimony, p. 14 ("One reason why laddering is considered a normal and prudent risk management approach is that no utility can know whether risks will increase or decrease over time, nor whether a future risk will resolve itself so as to result in lower prices.").

ESP 3 also includes many other benefits for a variety of customer groups while providing appropriate balance to the interests of the Companies. ESP 3 freezes distribution rates[6] but allows the Companies to recover costs related to the distribution system on a more timely basis in order to continue to help assure that the Companies meet their reliability targets.[7] ESP 3 offers certain customers the option to obtain interruptible power,[8] but allows the Companies to use the consequent demand response to meet peak load reduction targets and to bid into capacity auctions.[9]

ESP 3 helps "at risk" customers by providing funding for assistance to these customers to help pay their bills and to reduce their bills through the implementation of energy efficiency measures.[10] It also provides a six percent discount on generation prices for PIPP customers.[11]

ESP 3 continues to foster robust competition in the Companies' territories – as evidenced by the highest shopping rates in the state[12] – by, among other things, continuing the agreement to not include shopping caps and standby charges, as well as adopting modifications requested by suppliers to electronic data interchange ("EDI") processes in support of competition.[13] Thus, under ESP 3, all customers will receive the benefits of competition at both the wholesale and retail levels.

Those opposing ESP 3 and presenting applications for rehearing of the Commission's July 18, 2012 Opinion and Order (the "Order"),[14] in large part, merely repeat arguments that the Commission

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[6] Stip. § B.1; Ridmann Testimony, p. 6; Order, p. 56.

[7] Ridmann Direct Testimony, p. 6; Order p. 56.

[8] Stip. § D.1.

[9] Stip. § A.5(ii).

[10] Stip. § E.4; Ridmann Testimony, p. 7.

[11] Stip. § A.1; Ridmann Testimony, p. 4.

[12] Tr. Vol. II, p. 19; Tr. Vol. III, pp. 29-30.

[13] Stip. § A.3; *see also* Fein Testimony, Ex. 1, pp. 2-3.

[14] The following parties filed applications for rehearing: Office of Consumers' Counsel and Citizen Power ("OCC/CP"); The Retail Energy Supply Association, Direct Energy Services, LLC and Direct Energy Business, LLC ("RESA/Direct"); Interstate Gas Supply, Inc. ("IGS"); Sierra Club ("Sierra Club"); The Northeast Ohio Public Energy Council ("NOPEC"); and The Environmental Law and Policy Center ("ELPC").

has already fully addressed and rejected. As the Commission has held on countless occasions, a party's mere repetition of an argument that was previously thoroughly considered is not grounds for granting rehearing. *E.g., Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, *6-7 (Nov. 29, 2011) (rejecting an application for rehearing where "the application for rehearing simply reiterates arguments that were considered and rejected by the Commission"); *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, *7 (May 4, 2011) (rejecting an application for rehearing that "raises no new issue"); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 680, *19-20 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, *9-10 (Nov. 1, 2011) (denying application for rehearing because applicant "raised nothing new on rehearing that was not thoroughly considered" in the Commission order at issue).

To the extent that the parties filing applications for rehearing say anything new, they mostly rely on material that was not part of this case and may not appropriately be considered on this record. The fact that parties need to resort to materials beyond the scope of this case speaks volumes about the lack of merit of these parties' arguments ***based on this record***. In any event, as demonstrated below, even these "new" materials do not merit rehearing.[15] For these reasons and the reasons set out below, the Companies respectfully request that the applications for rehearing be denied.

[15] Given the numerous repetitive arguments made by the parties filing applications for rehearing, the Companies have not here attempted to address every argument restated by these parties in their application. Instead, to the extent that

II. ARGUMENT

A. ESP 3 Is More Favorable In the Aggregate Than an MRO.

1. ESP 3 provides at least $21.4 million more in quantifiable benefits compared to an MRO.

Largely adopting the testimony and analysis of Staff witness Robert Fortney, the Commission found that ESP 3 is quantitatively more beneficial than an MRO by $21.4 million.[16] The applicants for rehearing seek to contest three aspects of this analysis. None of their arguments are new. None have any merit. None require rehearing.

a. The Commission correctly determined that the cost of Rider DCR was "a wash" when compared to a rate case.

A key finding in the Commission's quantitative comparison of ESP 3 with an MRO was the comparison of the cost to customers of the recovery of the Companies' distribution infrastructure improvement expenses. The Commission determined that the cost of the DCR compared to a rate case recovery of such costs (that would occur if the Companies' had pursued an MRO) was "a wash." Thus, DCR had no effect on the ESP 3 versus MRO analysis.[17]

NOPEC and OCC/CP contend that the Commission should not have made that determination. NOPEC, for its part, claims that such a finding was "without record support."[18] Yet, both Staff witness Fortney and the Companies' witness William Ridmann testified at length on this issue.[19] Further, the Commission's finding was correct as a matter of pure logic: if the Companies' costs were recoverable under the DCR, there is simply no reason to believe that the same costs would not

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the Companies have not addressed an argument in the applications for rehearing, which merely repeats arguments previously made, the Companies incorporate their prior briefs as part of this Memorandum.

[16] Order, p. 56.

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

[18] NOPEC App., p. 5.

[19] Fortney Direct Testimony, p. 4; Tr. Vol. I, pp. 125-130.

be recoverable in a rate case. This is also the reason why NOPEC and OCC/CP are wrong when they argue that the Commission should not have considered the recovery of these costs as equivalent "in the long run."[20] The Commission's finding is correct that the annual capital related expenses under Rider DCR or a base rate case is the same.

NOPEC and OCC/CP argue that the potential recovery under the DCR dwarfs what the Companies asked for (much less recovered) in the Companies' last distribution rate case.[21] But these arguments, like many quantitative arguments made by these parties, are either wrong or meaningless on a number of fronts. As the Companies demonstrated previously, the DCR recovery amount used by these parties – $405 million – is a cap; it is not a guarantee of what the Companies will actually recover.[22]

Moreover, the comparison of the potential recovery under the DCR to a rate case request or a rate case recovery mixes apples and oranges. There are at least three reasons why. First, the rate case figures are for a single year's recovery; the ESP 3 figure – $405 million – is a not to exceed value to be collected over two years. Second, the scope of costs to be recovered in a rate case far exceeds the limited scope of the DCR, which permits recovery of costs associated only with changes in net plant. Third, amounts that initially were proposed by the Companies in their last distribution rate case were excluded because they were found to be generation related, but were recovered in a different proceeding.[23]

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[20] NOPEC App., p. 6, n. 11; OCC/CP App., p. 40.

[21] NOPEC App., pp. 5-6; OCC/CP App., pp. 40-41.

[22] Companies' Br., p. 33; Companies' Reply, p. 10. Moreover, the $405 million figure improperly inflates the potential recovery over the current ESP. As the Companies' showed previously, the incremental increase in the DCR called for in ESP 3 is $45 million. Companies' Reply, p. 39.

[23] *See* Case No. 08-935-EL-SSO, Opinion and Order, pp. 33, 59-60 (Dec. 19, 2008) (Riders NDU, PUR, DFC); Case No. 09-641-EL-ATA, Finding and Order, pp. 2-3 (Aug. 19, 2009) (Riders RDD and NDD); Case No. 10-388-EL-SSO, Opinion and Order, p. 10 (Aug. 25, 2010) (Rider NDU).

OCC/CP claim that the Commission was wrong to rely on the Commission's December 14, 2011 opinion in AEP Ohio's ESP case,[24] where the Commission held that a similar rider had no effect on the ESP versus MRO analysis. OCC/CP claim that this opinion was later "rescinded."[25] But, as the Companies previously demonstrated,[26] and as OCC witness Wilson Gonzalez admitted:[27] (1) the subsequent decision withdrawing the approval of the ESP then before the Commission said nothing about the distribution infrastructure improvement rider; and (2) the withdrawal of the Commission's approval had nothing to do with either the rider or the rider's effect on the ESP versus MRO test. In any event, on its review of AEP Ohio's more recently proposed ESP, the Commission again approved a DCR-like rider, modeled more closely to resemble Rider DCR, and again found that this rider had no effect on the ESP versus MRO test.[28]

Given the Commission's previous rulings, rehearing should not be granted to modify the correctly held and well supported view that the DCR has no effect on the ESP versus MRO test.

b. ESP 3 provides a quantifiable benefit to PIPP customers.

OCC/CP contend that the six percent discount to PIPP customers provided by ESP 3 shouldn't be considered as a benefit of ESP 3.[29] This argument is literally incredible: how is providing customers a discount not a benefit?

OCC/CP essentially make two arguments, both of which the Commission has already rejected. First, OCC/CP contend that the Commission should not have relied on its approval of the

[24] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order, p. 31 (Dec. 14, 2011) ("Case No. 11-346-EL-SSO").

[25] OCC/CP App., p. 39, n. 109.

[26] Companies' Reply, p. 9, n. 33.

[27] Tr. Vol. III, pp. 131-132.

[28] Case No. 11-346-EL-SSO, Opinion and Order, pp. 46-47 (Aug. 8, 2012).

[29] OCC/CP App., pp. 41-44.

PIPP discount in the Companies' last ESP case, Case No. 10-388-EL-SSO (the "ESP 2 case") because the record here is different. OCC/CP contend that, unlike the record in the ESP 2 case, generation suppliers here have indicated a willingness to participate in a competitive bidding process ("CBP") for PIPP load.[30] As the Companies' briefs have discussed, the record here hardly makes such a showing.[31] The best OCC could get a few suppliers to say is that they "may have" considered participating.[32] But the best proof of suppliers' lack of willingness to participate in a PIPP load auction is whether they actually have shown such interest at all in a tangible (as opposed to a theoretical) way up to now. As the Commission has noted, the Ohio Department of Development ("ODOD") has authority to conduct a CBP for PIPP load.[33] If there had been any demonstrated market for that load, certainly ODOD would have pursued such a strategy or the suppliers would have pursued that strategy with ODOD. The fact that ODOD has not conducted a bid process for PIPP load is independent verification of the lack of any real interest and the unlikely prospect that PIPP customers could receive generation at a discount of six percent under any scenario outside of ESP 3.[34]

Second, OCC/CP say that the PIPP discount somehow favors the Companies' affiliate, FirstEnergy Solutions Corp. ("FES").[35] Like their other arguments on the PIPP discount issue, this is also difficult to understand: how is foregoing the opportunity to sell power at market rates a benefit to the seller? As noted, such a "benefit" has been so obvious and valuable that no other supplier

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[30] *Id.,* p. 42.

[31] Companies' Br., p. 33; Companies' Reply, pp. 12-13.

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

[33] Order, p. 56.

[34] OCC/CP attempt to denigrate that ability of ODOD to hold a CBP for PIPP load. OCC/CP App., p. 43. They cite no evidence to support their view that ODOD could not undertake a CBP or contract with an entity to implement such a process. Indeed, it strains credibility to believe that a department of the State of Ohio could not marshal sufficient resources and expertise to hold a CBP.

[35] OCC/CP App., pp. 43-44.

committed to offer to serve the Companies' PIPP load at a similar (or better) discount and ODOD has not yet seen fit even to investigate the possibility that other suppliers would provide such an offer.

Under ESP 3, PIPP customers will benefit by getting a six percent discount on generation. Other customers will also benefit to the extent that the PIPP discount may reduce Universal Service Rider charges. Because the record shows that these benefits would not occur outside of ESP 3, the Commission properly found that these benefits were benefits of ESP 3. Rehearing on this issue should be denied.

c. ESP 3 provides benefits to low income customers through grants to Fuel Funds.

OCC/CP claim that shareholder grants to Fuel Funds should not be considered a benefit because the Companies receive "indirect" benefits by having the customers who receive assistance pay their bills.[36] OCC/CP have made this argument before.[37] It was wrong then. It is wrong now.

To begin, it's just hard to see how OCC/CP can legitimately say that these programs provide no benefit. Certainly, the "at risk" customers who receive assistance through the Fuel Fund programs benefit. In any event, because the Companies recover bad debts through one of three uncollectible expense riders,[38] the Companies' financial situation is not improved simply because the customer who uses electric service can pay the bill. Ultimately, either the customer who receives the bill or other customers who will pay the uncollectible expense riders will pay the Companies for the service provided. If a customer, through the Fuel Fund or other assistance, can pay his or her own bill, then other customers will not be required to pay a higher amount in the form of an uncollectible expense rider charge. Simply put, all customers – and not the Companies or their shareholders – will benefit from the bill paying assistance provisions of ESP 3.

[36] *Id.*, p. 44.

[37] OCC/CP Br., p. 57; OCC/CP Reply, p. 27.

[38] *See* Rider DUN; Rider NDU; and Rider PUR.

2. ESP 3 provides qualitative benefits over an MRO.

In the Order, the Commission properly detailed the qualitative benefits provided by ESP 3:

> The Commission finds that the additional qualitative benefits of an ESP, which would not be provided for in an MRO, include (1) modification of the bid schedule to provide for a three-year product in order to capture current lower market-based generation prices and blend them with potentially higher prices in order to provide rate stability; (2) continuation of the distribution rate increase "stay-out" for an additional two years to provide rate certainty, predictability, and stability for customers; (3) continuation of multiple rate options and programs to preserve and enhance rate options for various customers provided in ESP 2; and (4) flexibility that offers significant advantages for the Companies, ratepayers, and the public. More specifically, the Commission emphasizes its opinion in its discussion of the three-part test that laddering of products and continuation of the distribution rate increase freeze will smooth generation prices and mitigate the risk of volatility, which is a benefit to customers. Further, the Commission finds that the additional benefits provided via the Stipulation to interruptible customers, schools, municipalities, as well as shareholder funding for assistance to low income customers also make the proposed ESP 3 more favorable qualitatively than an MRO.[39]

The Commission further observed that ESP 3 provided benefits to PIPP customers via the six percent discount being provided by FES. The Commission also noted:

> [T]he proposed ESP 3 supports competition and aggregation by avoiding standby charges, supports reliable service through the continuation of the DCR mechanism, supports business owners' energy efficiency efforts, protects at-risk populations, and supports industry in order to support Ohio's effectiveness in the global economy.[40]

NOPEC and OCC/CP object to the Commission's qualitative benefit analysis. In fact, NOPEC argues that the Commission should not consider qualitative benefits at all.[41] As the Companies have previously shown,[42] this position is not only counter to Commission precedent,[43] it

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[39] Order, p. 56 (citations omitted).

[40] *Id.*

[41] NOPEC App., p. 7.

[42] Companies' Reply, p. 17.

is at odds with NOPEC's own witness. NOPEC witness Mark Frye acknowledged that the Commission could consider qualitative benefits[44] and could even approve an ESP where the ESP's generation prices were greater than market-based prices.[45]

Otherwise, NOPEC and OCC/CP essentially argue that the benefits identified by the Commission are too "uncertain" or "ambiguous." Of course, such criticism could be made of any qualitative benefit because such benefits, by definition, are not readily capable of being quantified. (Otherwise, they would be quantifiable benefits.) To succeed here, NOPEC and OCC/CP would have to show that the record fails to support the view taken by the Commission that certain parts of ESP 3 provide benefits over an MRO that can't be quantified. These parties come nowhere close in their respective applications for rehearing to making such a showing. In fact, given this record, they could not do so.

For example, OCC/CP contend that the modification of the bidding schedule of ESP 2 to establish a three-year product to be included as part of the beginning of ESP 3 is unreasonable. They argue that this plan simply replaces lower prices with higher ones.[46] This misconstrues the purpose of ESP 3's planned procurement. As the Commission observed in the Order, while the specific prices that may be garnered by ESP 3's CBPs may be uncertain, the laddering procurement strategy ***will*** smooth the movement of rates, including the effect of any potential increases.[47]

(continued…)

[43] *See, e.g.*, Case No. 10-388-EL-SSO, Order and Opinion, p. 44 (Aug. 25, 2010) (considering both quantitative and qualitative benefits of proposed ESP).

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

[45] *Id.*

[46] OCC/CP App., pp. 50-51.

[47] Order, p. 56.

NOPEC and OCC/CP also argue that the potential prices to be paid under ESP 3 are too uncertain to know whether customers will receive any benefits.[48] Again, this misses the point. As the Companies demonstrated, and as the Commission also pointed out in the Order, it is in times of greatest uncertainty where risk and volatility mitigation strategies are most prudently employed.[49] As all of the witnesses addressing this subject testified, a laddered procurement strategy is a widely accepted and reasonable strategy to mitigate risk and volatility.[50]

OCC/CP state that the Commission was wrong to consider the "stay-out" provision of ESP 3 as a benefit.[51] Specifically, OCC/CP claim that the presence of the DCR effectively negates the distribution base rate freeze that has been and will continue to be in effect. This argument has not only been already rejected in this case,[52] it was rejected in the ESP 2 case as well.[53] It should be rejected again.

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[48] NOPEC App., pp. 7-8; OCC/CP App., p. 12.

[49] Companies' Br., pp. 42-44; Companies' Reply, pp. 19-20; Order, p. 32.

[50] Tr. Vol. II, p. 139 (Wilson); Tr. Vol. III, p. 49 (Frye); Tr. Vol. III, p. 141 (Gonzalez); Tr. Vol. I, p. 172 (Ridmann); Ridmann Supplemental Testimony, p. 5. OCC/CP also contend that the record demonstrates that prices can only be higher through the use of a three-year product because of: (1) the level of uncertainty that exists; (2) the greater uncertainty that bidders attribute to three-year products; and (3) the consequent higher risk premiums that bidders will include in their bid prices. OCC/CP App., p. 12. The record, however, conclusively refutes these conclusions. As the Companies have previously demonstrated (Companies' Br., p. 40; Companies' Reply, pp. 18-19), the Companies' witness Robert Stoddard testified that the levels of uncertainty theorized by OCC witness Wilson simply do not exist. Stoddard Rebuttal Testimony, pp. 3, 14. Mr. Stoddard also testified that suppliers in many states are very familiar with three-year products and do not accord much greater uncertainty with such products relative to shorter ones. *Id.*, pp. 17-18. Indeed, Mr. Stoddard observed that bid prices for longer products could be relatively lower due to economies of scale. Tr. Vol. IV, pp. 132-133.) Mr. Stoddard further testified that bidders have simply not attributed higher risk premiums to longer products. Stoddard Rebuttal Testimony, p. 16. In fact, Mr. Stoddard noted, bidding on longer products may be viewed by bidders as a benefit so as to have an assured market for a certain part of a bidder's supply. *Id*.

Given the relative credentials of Mr. Stoddard versus Mr. Wilson (Companies' Br., pp. 38-39) and the fact that Mr. Wilson has previously incorrectly testified about the likely state of the market in the ATSI zone (noting that there would be an extraordinary level of uncertainty in 2009 going forward), the Commission's determination that Mr. Stoddard's – and not Mr. Wilson's – assessments were correct is ably supported by the record. (For Mr. Wilson's erroneous 2009 claim, see Case No. 09-906-EL-SSO, Wilson Testimony, p. 27. At the hearing, Attorney Examiner Price took administrative notice of Mr. Wilson's testimony in Case No. 09-906-EL-SSO, which was identified as Company Exhibit 9. Tr. Vol. II, p. 166.)

[51] OCC/CP, pp. 46-47.

[52] Order, p. 56.

[53] Case No. 10-388-EL-SSO, Opinion and Order, p. 36 (Aug. 25, 2010).

OCC/CP fail to acknowledge that the scope of cost recovery in a rate case is broader than the narrow recovery authorized through the DCR. While changes in net plant may be equivalent between the DCR and a rate case, the DCR does not permit recovery of any other increased costs of the Companies, which would be permitted in a rate case. Under ESP 3, the Companies are precluded from seeking to recover increases in costs not provided for in any rider. It cannot be disputed that not all of the Companies' costs are recoverable through riders. Further, the costs that can be recovered through the DCR – are only those costs that are determined to be reasonably incurred to support the maintenance and improvement of the Companies' distribution system.[54] Indeed, as OCC witness Gonzalez admitted, the DCR provides a number of benefits over a rate case, including quarterly reconciliation and annual audits in which parties like OCC can participate[55] (and have participated).[56]

As OCC/CP argued regarding the quantitative benefit ESP versus MRO analysis, NOPEC argues that the PIPP discount provisions are not qualitative benefits of ESP 3.[57] As with OCC/CP's argument discussed previously, NOPEC is wrong. The PIPP discount benefits PIPP customers who receive the discount and other customers who would potentially pay higher cost through the Universal Service Rider. There is no evidence that a PIPP load CBP could be held outside of the ESP. The fact that no such process has been tried is proof of that fact.

NOPEC and OCC/CP further take issue with the Commission's determination about the benefits of the Companies' interruptible service program.[58] This also repeats arguments rejected previously in this case[59] and in the ESP 2 matter.[60] As OCC witness Gonzalez testified, this program

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[54] Stip. § B.2; Ridmann Testimony, p. 6.

[55] Tr. Vol. III, pp. 139-141.

[56] *Id.*, pp. 125-126, 139-140.

[57] NOPEC App., pp. 8-9.

[58] *Id.*, p. 8; OCC App., pp. 26-27.

[59] Order, p. 37.

benefits all customers.[61] It permits the Companies to meet their demand reduction targets.[62] It allows the Companies to bid these resources into PJM auctions, potentially putting downward pressure on capacity prices and gaining revenue to offset the costs of implementing demand reduction programs required by SB 221.[63] It further provides reduced rates that may be attractive to industrial and other businesses[64] and thus help Ohio remain competitive globally.

NOPEC also complains that the energy efficiency grant provisions of ESP 3 provide no benefits because the administrator-grantees have no obligation to provide services.[65] The record is otherwise. As Mr. Ridmann testified, those entities receiving energy efficiency grants are under a contractual obligation to provide service.[66] This testimony was undisputed.

The objections to the Commission's determination and description of the numerous qualitative benefits of ESP 3 are without merit. They merely repeat already rejected arguments. They provide no grounds for rehearing.

B. The Commission Properly Found That The Stipulation Satisfied The Commission's Three-Part Test For Approving Stipulations.

1. The Stipulation was the product of serious bargaining among capable, knowledgeable parties because, among other things, it was supported by parties representing diverse interests and was developed as part of a process that excluded no one.

The Stipulation was approved by nineteen Signatory Parties and not objected to by six non-opposing parties. These parties represented customers from every customer class, as well as

(continued…)

[60] Tr. Vol. III, p. 102.

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

[62] Stip. § D.1; Order, p. 11.

[63] Stip. § D.1; Ridmann Supp. Testimony, pp. 3-5

[64] Case No. 09-906-EL-SSO, NUCOR Ex. 1, pp. 12-13.

[65] NOPEC App., pp. 8-9.

[66] Tr. Vol. I, p. 55.

municipalities and numerous generation suppliers.[67] The record shows without rebuttal that all parties participating in the ESP 2 case were given an opportunity to review a draft of the Stipulation and had an opportunity to discuss the Stipulation with the Companies before it was filed.[68] The record further shows that the parties continued to discuss settlement after the Stipulation was filed.[69]

Repeating arguments previously made and rejected in this case,[70] OCC/CP and NOPEC claim that the Stipulation cannot satisfy the first part of the Commission's three-part settlement approval test because the Stipulation is not supported by representatives of "all" or "a majority" of the Companies' residential customers.[71] As the Companies have previously demonstrated[72] and the Commission has previously found,[73] these arguments are legally and factually wrong.

The Commission's settlement approval test has never been an exercise in nose counting. Rather, the first part of the test focuses on ***the process*** and whether it was fair; it does not depend on what parties ultimately support the settlement. In *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*,[74] the Supreme Court expanded on its dicta in *Time Warner AxS v. Pub. Util. Comm.*[75] In *Time Warner*, the court expressed its "grave concern" regarding the "intentional exclusion of an entire customer class" from settlement negotiations.[76] In *Constellation,* the court was faced with a situation where it was undisputed that a party had been excluded from settlement talks.[77] The court

[67] Ridmann Testimony, p. 10; Order, p. 26.

[68] Order, p. 27; Stip., p. 4; Ridmann Testimony, pp. 9-10, 13-14.

[69] Companies' Br., p. 46.

[70] OCC/CP Br., p. 13; OCC/CP Reply, p. 32; NOPEC Br., p. 13; NOPEC Reply, pp. 19-20; Order, p. 26.

[71] OCC/CP App., p. 7; NOPEC App., pp. 10-11.

[72] Companies Br., p. 47; Companies Reply, pp. 29-30.

[73] Order, p. 26.

[74] 104 Ohio St. 3d 530, 535-536 (Ohio 2004).

[75] 75 Ohio St. 3d 229, 233, n. 2 (Ohio 1996).

[76] *Id.*

[77] 104 Ohio St. 3d at 535.

affirmed the Commission's approval of the Stipulation, rejecting an argument that the exclusion of a party ran afoul of the *Time Warner* court's concern. The court quoted the Commission:

> Since representatives on behalf of DP&L residential, commercial, and industrial customers all participated in the settlement process and signed the Stipulation, no entire customer class was excluded. The factual predicate upon which the *Time Warner* admonition was premised is simply not presented in this case.[78]

The same could be said here. Not only was no customer class excluded from participation, but no party was excluded as well.

Even if the appropriate test was whether all customer classes supported the Stipulation, the record shows that the Stipulation would pass that test. Notwithstanding attempts by OCC/CP and NOPEC to denigrate the interests of parties like Ohio Partners for Affordable Energy ("OPAE"), the Empowerment Center of Cleveland, the Consumers Protection Association, the Cleveland Housing Network or the City of Akron, each of these parties indisputably represents residential customers. Indeed, OCC/CP and NOPEC fail to present a single shred of evidence to show that the interests of the customers represented by these parties differ in any way from the interests of any other residents with regard to the issues presented by ESP 3 or the Stipulation. This is particularly telling given OCC's own prior practice of labeling OPAE, the Empowerment Center of Cleveland, and the Cleveland Housing Network as "consumer advocates."[79]

OCC/CP's argument that the interests or participation of the other residential customer representatives has traditionally been "limited"[80] is simply wrong. For example, OPAE has

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[78] *Id*., at 536.

[79] Tr.Vol. III, p.113.

[80] OCC/CP App., p. 8.

participated in many cases and has advocated positions on issues other than weatherization or assistance to low income customers.[81]

Similarly, contrary to OCC/CP's claim, the fact that these other residential customer representatives didn't undertake discovery or present witnesses[82] does not somehow make their representation of residential customers any less meaningful or relevant. Indeed, given that these parties were Signatory Parties (and thus were satisfied with the terms of the Stipulation), it is not notable that they did not do any discovery or sponsor witnesses.

As OCC/CP have previously argued,[83] NOPEC claims that the settlement process was defective because there were no group meetings.[84] As the Companies have discussed previously in this case,[85] the fact that there were no large meetings of the parties is irrelevant. NOPEC witness Frye admitted that NOPEC had an opportunity to review and comment on the draft Stipulation.[86] Importantly, NOPEC fails to state what might have been gained by such a meeting. Indeed, as the Commission stated in the Order, in light of the fact that many parties are represented by out of state counsel, requiring a group meeting as a litmus test for settlement is unnecessarily onerous.[87] It consequently also would act as an unwarranted hurdle towards achieving settlement.

[81] *See e.g., In the Matter of the Application of East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for Its Gas Distribution Service*, Case No. 07-0829, Opinion and Order, p. 15 (Oct. 15, 2008) (OPAE arguing against a modified fixed variable rate design).

[82] OCC/CP App., p. 8.

[83] *Id.*, p. 11; OCC/CP Reply, p. 29.

[84] NOPEC App., p. 11. Thus, NOPEC's claim that it did not have an opportunity to assess the draft Stipulation is contrary to the evidence and flat out wrong. *Id.* NOPEC itself engaged in three rounds of discovery as well as receiving the responses to six rounds of discovery from OCC, seven rounds of discovery from AEP Retail, and numerous rounds of discovery from other parties. NOPEC also retained a witness and presented prefiled testimony at the hearing.

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

[86] Tr. Vol. III, p. 26.

[87] Order, p. 26.

The process that produced the Stipulation here was fair and inclusive. Representatives from all customer classes, in addition to many varied stakeholders, participated and agreed to the Stipulation which, in turn, will benefit the Companies and their customers while promoting competition on the wholesale and retail levels. The apparent dissatisfaction of OCC/CP and NOPEC with the Stipulation isn't proof that the process that produced it was defective. Rehearing based on their objections to the settlement process should be denied.

2. ESP 3 benefits ratepayers and the public.

As noted, the Commission appropriately detailed the benefits provided by ESP 3 relative to an MRO.[88] These benefits are thus benefits that support approving the Stipulation and determining that the Stipulation satisfies the second part of the Commission's three-part test.

The parties seeking rehearing present seven arguments to the effect that ESP 3 does not benefit customers. All have been previously made and properly rejected by the Commission. These arguments therefore provide no basis for rehearing.

a. Providing a three-year product as part of a laddered strategy of SSO procurement benefits customers.

As noted, ESP 3's laddered procurement strategy employs a recognized risk mitigation strategy that will reduce rate volatility and enhance stability in the cost of electricity experienced by the Companies' customers.[89] As also noted, OCC/CP and NOPEC believe otherwise. Indeed, NOPEC goes so far as to say that ESP 3's replacement of a one-year product as part of the procurement for the last year of ESP 2 with a three-product for the first year of ESP 3 is "without any justification."[90] The record proves this hyperbole false. Even if energy and capacity prices increase and thus make generation prices in the short term higher than they otherwise would be, such increases

[88] Order, pp. 55-56.

[89] Stoddard Rebuttal Testimony, pp. 14, 17-18.

[90] NOPEC App., p. 12.

are a modest price to pay for lower prices in the future and smaller increases, resulting in more stable prices, from year to year. For example, as the Companies have previously discussed, using illustrative figures that hold energy prices constant but include known increases in capacity prices, while customers would experience six percent higher rates in planning year 2013-2014 with ESP 3 (than without it), customers would experience rate increases that are one percent and 17 percent less, respectively, in the next two planning years.[91]

OCC/CP's concerns regarding the level of uncertainty are, as noted above, simply not a reason to believe that ESP's procurement plan disadvantages customers. As the record demonstrates, not only are the concerns about uncertainty overblown,[92] but even if such uncertainty was present, it would support ESP 3. Risk mitigation measures are most prudently called for when risks are higher.[93] ESP 3 does exactly that.

The Companies' prior ESPs have been successful in keeping generation rates among the lowest in the state, while encouraging competition at the wholesale and retail level. Given ESP 3's continuation of the successful mechanisms already in place, the Commission's rejection of the claim that a continuation of that same strategy will not be similarly successful is reasonable and well supported.

b. The DCR benefits customers and, through its reasonable balancing of the interests of all parties, fosters reliable service.

ESP 3 merely continues the DCR. This mechanism, and its predecessor Rider DSI, have proven effective to allow the Companies to recover costs incurred in maintaining and improving the

[91] Companies' Br., p. 11. More specifically, under this example, for ESP 3, a customer would see no increase for 2013-2014, a four percent increase for 2014-2015 and an eight percent increase in 2015-2016. Without ESP 3, the same customer would experience a decrease of six percent in the first year, but experience increases of five percent (*i.e.,* an 11 percent swing) and 25 percent, respectively, in the next two years.

[92] Stoddard Rebuttal Testimony, pp. 4, 13-14.

[93] *Id.*, p. 4; Tr. Vol. IV, pp. 147-148.

Companies' distribution system.[94] Through these investments and costs, the Companies have been able to meet all of their reliability standards.[95] Given this history, it was reasonable for the Commission to approve ESP 3's DCR provisions.

OCC/CP, raising arguments made and rejected previously,[96] believe otherwise. As noted, they argue that the DCR is not a benefit because it would allow $405 million in additional cost recovery.[97] As also noted, this is an inappropriate comparison for a number of reasons.[98] Further, as even OCC witness Gonzalez admitted, the DCR provides certain benefits to customers.[99] Indeed, Revised Code Section 4928.143(B)(2)(h) specifically contemplates that provisions like DCR may be approved as part of an ESP.

OCC/CP also argue that the Commission ignored the criteria set forth in Section 4928.143(B)(2)(h).[100] Specifically, repeating arguments previously made and rejected in this case,[101] they contend that the Companies must show what the expectations of customers are for reliability

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[94] Tr. Vol. I., pp. 180-181.

[95] Baker Testimony, pp. 5-6. In fact, for Ohio Edison and Toledo Edison meeting those standards means that their customers have experienced levels of reliability that are among the best in the state. For example, The Toledo Edison Company's SAIFI performance beats the standard by 36% and Ohio Edison Company beats the standard by 23% as compared to Ohio Power Company (20%), Columbus Southern Power Company (24%), Dayton Power and Light Company (24%) and Duke Energy Ohio Company (0%). *See In the Matter of the Annual Report of the Ohio Edison Company Pursuant to Rule 10 of the Electric Service and Safety Standards, Ohio Administrative Code: 1-10-10*, Case No. 12-0451-EL-CSS, p. 2 (Mar. 29, 2012); *In the Matter of the Annual Report of Toledo Edison Company Pursuant to Rule 10 of the Electric Service and Safety Standards, Ohio Administrative Code: 1-10-10*, Case No. 12-0451-EL-CSS, p. 2 (Mar. 29, 2012).; *In the Matter of the Annual Report of the Ohio Power Company Pursuant to Rule 10 of the Electric Service and Safety Standards, Ohio Administrative Code: 1-10-10*, Case No. 11-1914-EL-CSS, p. 2 (Mar. 30, 2012); *In the Matter of the Annual Report of the Columbus Southern Power Company Pursuant to Rule 10 of the Electric Service and Safety Standards, Ohio Administrative Code: 1-10-10*, Case No. 11-1914-EL-CSS, p. 2 (Mar. 30, 2012); *In the Matter of the Annual Report of the Dayton Power and Light Company Pursuant to Rule 10 of the Electric Service and Safety Standards, Ohio Administrative Code: 1-10-10*, Case No. 12-883-EL-CSS, p. 2 (Mar. 20, 2012); *In the Matter of the Annual Report of the Duke energy Ohio Company Pursuant to Rule 10 of the Electric Service and Safety Standards, Ohio Administrative Code: 1-10-10*, Case No. 12-0451-EL-CSS, p. 2 (Mar. 23, 2012).

[96] OCC/CP Br., p. 30; Order, pp. 56-57.

[97] OCC/CP App., pp. 17-18.

[98] Companies' Reply, p. 39.

[99] Tr. Vol. III, p. 141.

[100] OCC/CP App., p. 15.

[101] OCC/CP Br., p. 26; OCC/CP Reply, p. 21; Order, p. 34.

during the expected term of the ESP.[102] In addition, they say that any audit of DCR expenses must include a review of the relationship between distribution investment spending and the Companies' reliability performance.[103] The statute says no such thing.

Section 4928.143(B)(2)(h) provides:

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

The statute thus puts no burden on the Companies. Rather, the statute tasks the Commission to undertake its own review. The Commission's review does not include anything about future expectations of customers. The statute says, "the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that the customers' and the electric distribution utility's expectations ***are*** aligned" (emphasis added). The use of the present tense reflects a review of ***existing*** expectations, not what expectations ***will be***.

The statute also makes no mention of any after-the-fact audit, much less what the audit must cover. The statute merely provides that, if the Commission is going to approve a rider like DCR, then

[102] OCC/CP App., p. 16.

[103] *Id.*

the Commission must review the utility's reliability performance and make sure that it is "aligned" with customers' expectations. The Staff, through the investigation discussed by Staff witness Peter Baker,[104] did exactly what the statute required. The statute requires nothing more.

NOPEC similarly argues that the record does not show that the Companies have devoted sufficient resources concerning reliability.[105] NOPEC focuses its objections, however, on its dissatisfaction with the Companies' performance in the 2015/2016 BRA.[106] NOPEC is wrong on a number of fronts.

To begin, as the record shows, the Companies have performed better than their reliability targets which are in alignment with what customers want.[107] Given that fact, it can hardly be argued that the Companies are not doing what they should be doing to provide reliable distribution service.

NOPEC's suggestion that the Companies' participation in the BRA be part of the review required under Section 4928.143(B)(2)(h) – a suggestion also made by Sierra Club[108]– is also unsupported and wrong. Section 4928.143(B)(2)(h) deals with the potential approval of distribution system improvement costs. Thus, the reliability concerns addressed by that portion of Section 4928.143 deal with concerns about the reliability of the utility's distribution system. The reliability concerns addressed in the statute deal with standards like SAIFI and CAIDI which, in turn, deal with the frequency and duration of outages on the distribution system. The BRA, which deals with the adequacy and pricing of generation capacity, has nothing to do with distribution reliability. Indeed, neither NOPEC nor Sierra Club attempt to argue otherwise.

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[104] *See* Baker Testimony, pp. 2-3.

[105] NOPEC App., p. 26.

[106] *Id.*

[107] Baker Testimony, p. 5.

[108] Sierra Club App., pp. 3-5.

The DCR provides a proper balance between the interests of the Companies and their customers. The objections to the DCR on rehearing should be rejected.

c. Spreading out the recovery of renewable energy costs benefits customers.

One of the few modifications to ESP 2 that ESP 3 presented is to lengthen the time period during which the Companies will recover their renewable energy costs under Rider AER.[109] The Commission appropriately determined that this extension was "an appropriate method to mitigate rate impacts on customers related to the costs for the Companies' compliance with statutory renewable energy requirements."[110] The Commission further determined that the mitigation and smoothing effects of this extension provided a benefit that outweighed the potential carrying costs produced by the extension.[111] Raising arguments made and rejected in this case before,[112] some parties object.

OCC/CP argue that the decrease in rates caused by the extension of the AER recovery counters the increase in rates supposedly caused by going to a three-year product procurement in the first year of ESP 3.[113] OCC/CP suggest that by rejecting ESP 3, the Commission could have accomplished the same smoothing results. There is no evidence (and certainly not the evidence cited by OCC/CP in their application for rehearing[114]) to support this view. It also ignores the many other benefits provided by ESP 3 beyond the smoothing effect of the laddered procurement and the lower levels of AER charges.

After citing no evidence that supports their view that doing nothing achieves the same rate "smoothing" resulting from ESP 3, OCC/CP complain that there is no evidence to support the

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[109] Stip. §A.4.

[110] Order, p. 35.

[111] *Id.*

[112] OCC/CP App., p. 20; RESA/Direct App., pp. 3-4.

[113] *Id.*

[114] *Id.*

Commission's determination that the benefits of the extension of the renewable cost recovery outweighed the carrying costs. OCC/CP ignore the unrebutted evidence that AER charges will be lower as part of the ESP 3's modification to ESP 2.[115]

RESA/Direct, for their part, contend that the extension is unfair to them. They offer three reasons why. First, they say that the extension artificially lowers generation rates.[116] They repeat, almost verbatim, the arguments put forward in their post-hearing briefs.[117] As the Companies demonstrated previously,[118] RESA/Direct have it exactly backwards: it is the current AER charge that is artificially high due to the distortion caused by the historic three year baseline.

Second, RESA/Direct similarly complain that the extension of the recovery of renewable costs distorts price signals.[119] They say that the deferral at issue here creates a potential mismatch between those customers who will pay for the costs and those customers from whom the cost was incurred.[120] In fact, the need for the deferral is created by the mismatch RESA/Direct seem so worried about because nonshopping customers are required to pay for renewable costs for customers that are currently shopping but were not shopping during the baseline period. Further, that argument could apply to any deferral or to any recovery of costs over a period of time. It is not a basis to reject the extension that ESP 3 contemplates.

Third, RESA/Direct state that the extension is unfair because Competitive Retail Electric Service ("CRES") providers cannot similarly defer similar costs.[121] Remarkably, RESA/Direct cite

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[115] Stip., pp. 2-3; Ridmann Testimony, p. 15.

[116] RESA/Direct App., pp. 3-4.

[117] *Compare* RESA/Direct App., pp. 3-4 *with* RESA/Direct Br., p. 10.

[118] Companies' Reply, p. 26.

[119] RESA/Direct App., pp. 5-6.

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

[121] *Id.*, p. 4. OCC/CP also make this claim. OCC/CP App., p. 25.

no evidence for this proposition. Indeed, their own witness testified to the contrary.[122] Further, Revised Code Section 4928.144 specifically contemplates that increases in generation pricing may be phased-in by the Commission, thereby creating the very type of mismatch complained of by RESA/Direct. The law thus recognizes that such mismatches may occur for generation related charges arising out of electric security plan proceedings.

OCC/CP contend that the Companies' renewable energy purchasing practices have been imprudent and thus the Commission should order that the AER charge should be reduced accordingly.[123] As with many of their arguments, there is nothing in the record to support this position. Indeed, OCC/CP candidly admit that the Commission should refer to a report filed in another case[124] and take administrative notice of that report.[125] As the Companies demonstrate in their memorandum contra OCC's motion to take administrative notice, admitting the auditor reports from Case No. 11-5201-EL-RDR in this case would be patently unfair and inappropriate. The Companies had no notice of the possibility that this report would be part of this record. The Companies have had no opportunity as yet to respond to the report in this case – or in any other proceeding.[126] In fact, the Commission has already established a separate proceeding to review these issues. There is no need to do so here.

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[122] Tr. Vol. III, p. 83. Neither does OCC/CP. OCC/CP App., p. 25.

[123] OCC/CP App., pp. 23-24.

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

[125] *Id.* Ironically, after complaining that the Commission improperly took administrative notice of parts of the record from the Companies' prior ESP cases because those materials contained opinions (OCC/CP App., pp. 60-61), OCC/CP apparently see no problem in having the Commission take administrative notice of one of the auditor's report in Case No. 11-5201-EL-RDR, which is chock full of opinions.

[126] The Commission has set a hearing in Case No. 11-5201-EL-RDR for November 27, 2012. Case No. 11-5201-EL-RDR, Attorney Examiner Entry (Aug. 15, 2012).

The extension of the recovery of the Companies' renewable energy costs will benefit customers. The objections raised to the Commission's approval of this extension should be rejected and rehearing on this issue should be denied.

d. ESP 3's energy efficiency and demand reduction programs are reasonable.

As it has in other cases,[127] the Commission appropriately found that the Companies' interruptible service programs and related energy efficiency and demand reduction activities that are part of the Companies' ESP are reasonable.[128] OCC/CP repeat their now-often stated complaint that residential customers should not have to pay for the credit provided to interruptible service customers.[129] As the Companies have previously shown,[130] this position is completely unsupported and is contradicted in the record. Specifically, OCC witness Gonzalez admitted that all customers, including residential customers, benefit from the interruptible service program.[131] Given that admission, OCC/CP are hard pressed to explain why residential customers should not contribute to the cost of the program. The Commission thus properly rejected OCC/CP's argument.[132]

OCC/CP and Sierra Club advocate that the Commission should have reviewed the Companies' activities regarding the 2015/2016 BRA.[133] This repeats these parties' previous arguments.[134] The Commission properly rejected them.[135] As the Commission determined, these

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[127] *See, e.g.*, Case No. 10-388-EL-SSO, Opinion and Order, pp. 45-46 (Aug. 25, 2010).

[128] Order, p. 38.

[129] OCC/CP App., p. 26.

[130] Companies' Reply, p. 43.

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

[132] Order, p. 37.

[133] OCC/CP App., p. 28; Sierra Club, App., pp. 3-4. Sierra Club's legal argument, based on an unfounded reading of Revised Code Section 4928.143(B)(2)((h) is discussed *supra,* at n. 109.

[134] OCC/CP Reply, p. 35; Sierra Club Reply, p. 4.

[135] Order, p. 38.

issues are not part of this case. Indeed, they are part of at least three different Commission cases.[136] Further, as the Commission found, the principal criticism made of the Companies' performance – that the amount of energy efficiency resources bid into the BRA by the Companies was too low – was unwarranted.[137] As the record shows, the Companies were appropriately concerned about the fact that the Companies did not own additional energy efficiency resources and could face penalties if the energy efficiency resources offered and cleared by the Companies could not be delivered.[138]

The criticism of the Commission's determinations are without merit. Sierra Club complains that in this case the Commission could have reviewed the BRA because the Companies' potential participation in the BRA was a reason for the expedited process here.[139] This is a non sequitur. The Companies certainly attempted to move the review process along potentially to be able to participate in the BRA that was ultimately held commencing on May 7, 2012.[140] Because the Companies' then-current ESP (*i.e.*, ESP 2), which included the Companies' interruptible service rider, was not effective for the planning year covered by the then-upcoming BRA, the Companies attempted to get ESP 3 approved before the BRA so that the Companies' rights to demand response produced through the ELR could be established for the period to be covered by the BRA. The Companies, having the right to such demand response, could then potentially bid those resources into the BRA.[141] Once the review process in this case extended beyond the date of the BRA, the need to get immediate approval

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[136] *See In re Commission's Review of [the Companies'] May 2012 PJM Reliability Pricing Model Auction*, Case No. 12-814-EL-UNC; *In re [Companies] 2012 Long Term Forecast Report*, Case No. 12-504-EL-FOR (April 16, 2012); *In re Application of [the Companies] For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, et seq. (July 31, 2012).

[137] *Id.*

[138] Tr. Vol. I, pp. 287-289.

[139] Sierra Club App., p. 4.

[140] Stip., § D.1; Ridmann Testimony, p. 14.

[141] Tr. Vol. I, pp. 287-289.

of the interruptible service program was effectively moot.[142] Given that the demand response was mooted, there was absolutely no relevance to the Companies' activities in the BRA vis-à-vis this proceeding, especially when these and other PJM related activities were already the subject of a separate docket opened by the Commission.[143]

Sierra Club also contends that it is improper to force the issue of the Companies' participation to be potentially litigated in another case.[144] As a preliminary matter, the Companies' PJM BRA bidding strategies are part of the Companies' 2012-2015 Energy Efficiency and Peak Demand Reduction Program Portfolio Plans recently filed with the Commission.[145] The Companies have the burden of demonstrating that *all* components of these plans are reasonable – including any such bidding strategies.

Assuming for argument's sake that the bidding strategy should have been part if this proceeding, there is no error. As noted, the Commission determined that the Companies' concerns about the ownership of resources that might be bid into the BRA was reasonable.[146] Sierra Club's response to these concerns was the testimony of their expert, who indicated that he was making no specific recommendations in this proceeding and could not with certainty quantify the impact the Companies' bidding strategy might have had.[147] Therefore, the only substantive evidence before the Commission was that presented by the Companies. The Commission further observed, "no party has

[142] As the Companies have previously explained, however, there was still a need to move the process along. Specifically, given the appropriate timeline necessary to establish an SSO load auction, if the Companies were going to change the products for the then-scheduled October 2012 auction, the Companies needed a decision on the Stipulation by mid-July. Companies' Reply, p. 65.

[143] *In re Commission's Review of [the Companies'] May 2012 PJM Reliability Pricing Model Auction*, Case No. 12-814-EL-UNC.

[144] Sierra Club App., p. 5. This, of course, overlooks whether the Commission would have jurisdiction to review these activities.

[145] *In re Application of [the Companies] For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, et seq. (July 31, 2012).

[146] Order, p. 38.

[147] Tr. Vol. I, pp. 357-358.

claimed that it brought these concerns to FirstEnergy's attention in its energy efficiency collaborative or raised this issue before the Commission in the Companies' most recent program portfolio proceeding."[148] Sierra Club's response is that it should not have been required to have anticipated such issues.[149] In sum, Sierra Club wants to be able to play "Monday Morning Quarterback" and have the Commission disregard the Companies' analyses of the circumstances that they faced before the fact. That is neither fair nor responsible. And it is certainly not grounds to grant rehearing.

Sierra Club is reduced to attempting to impugn the Companies' position about the propriety of their actions relative to the BRA, *i.e.*, describing the Companies as merely being concerned with "profits."[150] Notably, Sierra Club cites no particular statement made by the Companies and instead cites a bulky 27 pages of transcript.[151] Yet a review of those 27 pages reveals only a few statements by Companies' witness Ridmann to the effect that because the Companies made no profit on whatever it bid into the BRA, the Companies were unwilling to incur penalties associated with a failure to deliver resource that were bid into and cleared the auction.[152] Since the Companies would not be able to recover the penalties from customers, the Companies were unwilling to take the risk of incurring them unless the Commission was willing to hold the Companies' harmless.[153] As the Commission has determined, the Companies' concerns and actions were not unreasonable.[154] The objections to the ESP 3's energy efficiency and peak demand reduction provisions are without merit and rehearing on these issues should be denied.

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[148] Order, p. 38.

[149] Sierra Club App., pp. 6-7.

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

[151] *Id.*, p. 7, n. 13.

[152] Tr. Vol. I, pp. 321-322, 330-331.

[153] *Id.,* pp. 321-322.

[154] Order, p. 38.

e. Recovery of lost distribution revenue was reasonable.

As noted, the Companies agreed to freeze distribution base rates.[155] The Companies are also required to meet demand reduction and energy efficiency requirements.[156] These requirements undoubtedly benefit customers while causing the Companies to lose revenue. Allowing the Companies to recover lost distribution related revenue simply keeps the Companies whole for the period of ESP 3 during the period that base distribution rates are frozen. Noting that the lost distribution provision in the Stipulation "[was] the result of a reasonable compromise," the Commission properly found that it should be adopted.[157]

OCC/CP object, mainly because they view the recovery of lost distribution revenues to be unlimited.[158] As the Commission stated in the Order, OCC/CP's position that the recovery of lost revenue distribution revenue is unlimited is wrong.[159] ESP 3's lost distribution provision is coterminous with ESP 3. Upon the expiration of ESP 3, the Commission will have to revisit this issue.[160]

OCC/CP are also wrong when they contend that the Companies' figures in the record regarding the potential recovery of lost distribution revenue are understated.[161] Improperly referring to materials that are not part of this record,[162] OCC/CP argue that the lost distribution revenue likely

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[155] Stip. § B.1.

[156] *Id.*, § D.1.

[157] Order, p. 39.

[158] OCC/CP App., p. 30. OCC could hardly object that lost distribution revenues shouldn't be recovered at all. OCC witness Gonzalez admitted that, on behalf of OCC, he had previously testified in several cases supporting the recovery of lost distribution revenue on the grounds that such recovery provided appropriate incentives to utilities to implement conservation programs which benefitted customers. Tr. Vol. III, p. 121.

[159] Order, p. 39.

[160] *Id.*, pp. 39-40.

[161] OCC/CP App., pp. 29-30.

[162] The Companies' memorandum contra OCC's motion to take administrative notice demonstrates why admitting these materials would be improper.

to be recovered under ESP 2 and ESP 3 will be over $91 million.[163] Even if you assume that the use of the documents is proper, much like the OCC's prior calculations of the amount of lost distribution revenues likely to be recovered,[164] OCC's new calculations are riddled with obvious errors. For starters, the $91 million figure allegedly covers 42 months (from January 2013 through June 2016), while ESP 3 covers only 34 months (from June 2014 through May 2016). Thus, OCC/CP's $91 million number vastly overstates the alleged effect of ESP 3. Moreover, the OCC/CP use improper and overstated values for distribution rates used to calculate lost distribution revenue. They include rider values in their calculations that simply have not ever and should never be included when lost distribution revenue is calculated – only base distribution rates are used. Further, OCC/CP use *ex ante* values in their calculations. But the actual lost distribution revenues will be calculated on an *ex post* basis after M&V evaluation. Due to this adjustment, the actual lost distribution revenue will most certainly differ from the OCC/CP estimates.

OCC/CP's arguments on rehearing regarding the LDR provisions of ESP 3 merely repeat arguments that the Commission has already rejected. The same result should apply here. To the extent OCC/CP attempt to offer new arguments, they should be rejected either because they improperly rely on information not in this record or because they are simply wrong.

f. There is no need for a purchase of receivables program.

The Commission found that the IGS and RESA/Direct did not present sufficient grounds to modify ESP 3 to include a purchase of receivables ("POR") program.[165] The Commission stated:

> Although the marketers have demonstrated that the purchase of receivables by the utility is their preferred business model, there is no record in this proceeding demonstrating that the absence of the

[163] OCC/CP App., p. 30.

[164] Tr. Vol. III, pp. 123-124 (OCC's witness Gonzalez admitted that he incorrectly calculated the amount of lost distribution revenues that were likely to be recovered).

[165] Order, p. 42.

> purchase of receivables has inhibited competition. There is no record in this proceeding that the Companies are under any legal obligation to purchase receivables. There is no record that circumstances have changed since the adoption of the stipulation [in *WPS Energy, Inc., et al. v. FirstEnergy Corp.*, Case No. 02-1944-EL-CSS], to justify abrogating the stipulation.[166]

IGS and RESA/Direct take issue with the Commission's analysis in three ways.[167] First, they argue that the Commission was wrong to determine that there had been no showing that the absence of a POR program inhibited competition. They assert that this is not the proper issue.[168] But this is exactly the first question that the Commission needed to address. It cannot be disputed that a POR program would increase costs, at least for nonshopping customers.[169] Uncollectible expenses for CRES providers are generally higher than the Companies' uncollectible expenses.[170] Since a POR program would require the Companies to absorb these costs – and to recover them from all customers including nonshopping customers – a POR program represents a potential increase in rates. Thus, the question that is properly before the Commission is this: is having a POR program worth the cost? Given that promoting competition is the main reason put forward by IGS and Direct/RESA, the Commission properly addressed whether there was a need to promote competition within the Companies' service territories in this manner.

Contrary to the assertions made by IGS and RESA/Direct, the record overwhelmingly supports the view that competition with the Companies' territories is flourishing. Indeed, it is

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[166] *Id*., p. 41.

[167] Relatedly, RESA/Direct also complain that the Commission failed to address their suggestion that the Commission consider supplier consolidated billing. (RESA/Direct App., pp. 16-17.) RESA/Direct provide no reason or rationale why the Commission was wrong. As demonstrated by the Companies previously (Companies' Reply, pp. 53-54), because this proposal was hopelessly vague and because supplier consolidated billing has been adopted in only one state – Texas, which has a vastly different regulatory model than Ohio (Tr. Vol. III, pp. 77-78, 85-86) – the Commission properly declined to take up RESA/Direct's suggestion.

[168] IGS App., p. 6; RESA/Direct App., pp. 9-10.

[169] Tr. Vol. III, pp. 68-70, 90.

[170] Tr. Vol. II, p. 189.

undisputed that shopping levels in the Companies' territories are the highest in the state.[171] The Commission's determination that a POR program was not worth the cost was reasonable and well supported in light of the high level of competition taking place in the Companies' territories.

IGS and RESA/Direct claim that the Commission should ignore the percentage of customers shopping in the Companies' territory as evidence of competition. As they have argued previously,[172] they contend that the number of suppliers making offers on the Commission's "Apples to Apples" webpage is the true barometer of competition.[173] Yet, as the Companies have previously shown,[174] the number of suppliers on the "Apples to Apples" webpage is unreliable. As was admitted by the marketers' witness, the webpage presents the status of offers in a territory for a single snapshot in time and all suppliers do not participate in the webpage.[175]

IGS and RESA/Direct, as they have done previously,[176] also attempt to minimize the percentage of shopping customers within the Companies territories by pointing out the relatively large number of residential customer who are taking retail generation service through governmental aggregation.[177] This is either beside the point or a fact that does not support the marketers. These parties do not argue that the contracts obtained through governmental aggregation were not competitive. Nor could they. Further, simply because a customer is on a governmental aggregation contract does not mean that the customer is irretrievably insulated from being ripe for a competitive bid from either supplier. In any event, the fact that there is a large amount of governmental

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[171] Tr. Vol. II, p. 19; Tr. Vol. III, pp. 29-30.

[172] RESA/Direct Reply., pp. 2-3; IGS Reply, pp. 6-7.

[173] IGS App., pp. 6-7; RESA/Direct App., pp. 10-11.

[174] Companies' Reply, p. 49.

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

[176] RESA/Direct Reply, p. 2; IGS Reply, p. 4.

[177] IGS App., p. 7; RESA/Direct App., p. 10.

aggregation activity is something that the Commission should encourage, consistent with the Ohio state policy.[178]

IGS also argues that the Commission's statements about the absence of harm to competition are illogical. IGS asserts that, in light of the Commission's acknowledgement that a POR program was the marketers' "preferred business model," the absence of such a program, as a matter of logic IGS says, should mean that there would be less competition.[179] It is IGS' argument – not the Commission's Order – that is illogical. Simply because the Commission rejected the marketers' preferred business model does not mean that marketers will decline to participate. In fact, as the level of shopping in the Companies' territories shows, that is demonstrably not the case.

Second, IGS and RESA/Direct contend that the Commission erred by noting that the Companies had no legal obligation to purchase the marketers' receivables.[180] But whether there is a legal obligation is properly another key issue in the Commission's analysis. Certainly, the presence of a legal obligation helps define the Commission's jurisdiction to compel the Companies to purchase receivables. Further, the absence of a legal obligation is the distinguishing factor between the Companies and the utilities with POR programs in Ohio cited by the marketers. All of those programs were adopted by stipulation.

Notably, the marketers fall far short in attempting to describe what authority the Commission might have to order the Companies' to adopt a POR program. Revised Code Section 4928.143 says nothing about supplier receivables. The best that RESA/Direct can do is cite Revised Code Section 4928.02(B).[181] That statute states a policy to "[e]nsure the availability of unbundled and comparable

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[178] R.C. § 4928.20(K).

[179] IGS App., p. 5.

[180] *Id.*, p. 8; RESA/Direct App., p. 16.

[181] RESA/Direct App., p. 10.

retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." But the Commission acted consistently with that policy (and with the policy stated in Section 4928.02(C)[182]) by analyzing whether the absence of a POR program had harmed competition. Moreover, by not adopting a POR program, the Commission's actions were consistent with the policy stated in Section 4928.02(H) which calls for the avoidance of anticompetitive subsidies.

IGS contends that the Commission's July 19, 2000 order in Case No. 00-813-EL-EDI provides a legal obligation to have a POR program.[183] That order provides no such thing. Rather, the order contemplated that electric distribution utilities would work with suppliers on consolidated billing issues and potentially an agreed-to POR program. Indeed, in its Entry on Rehearing, the Commission expressly recognized that "the decision to purchase receivables will ultimately rest with each EDU and supplier."[184] IGS ignores that fact that the Commission subsequently approved a stipulation in the *WPS Energy* matter, which represented an agreement of the type contemplated in Case No. 00-813-EL-EDI.

Third, IGS and RESA/Direct argue that the Commission was incorrect in stating that circumstances had not changed since the adoption of the partial payment posting priorities ("PPPP") in *WPS Energy*.[185] For IGS, this is a puzzling argument given the stark admission made by its witness in response to the Attorney Examiner:

> 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?

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[182] That statute provides: "Ensure the diversity of electricity supplies and suppliers, by giving customers effective choices over the selection of those supplies and suppliers. . . ."

[183] IGS App., pp. 10-11.

[184] Case No. 00-813-EL-EDI, Entry on Rehearing (Aug. 31, 2000), p. 8.

[185] IGS App., p. 9; RESA/Direct App., p. 13.

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.[186]

IGS weakly argues that this testimony somehow doesn't mean what it says because IGS' counsel was not given the opportunity to follow up.[187] This argument overlooks that counsel never bothered to ask for the opportunity to follow up (or even proffer any evidence as to what a further examination would have shown). It also ignores that IGS witness Parisi was certainly not constrained by the bench in any way that precluded him from giving as fulsome an answer as he saw fit.[188]

RESA/Direct, for their part, contend that the alleged problems with the PPPP cited by their witness Ringenbach constitute changed circumstances from the time of the *WPS Energy*

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[186] Tr. Vol. II, pp. 213-214 (emphasis added).

[187] IGS App., p. 12.

[188] Even ignoring the clear adverse admission of IGS' witness, the "changed circumstance" identified by IGS hardly merits establishing a POR Program. In sum, IGS points to the establishment of bad debt trackers for the Companies. (IGS App., pp. 13-14). But this really isn't much of a change. No one would dispute that the Companies would have had the ability to recover bad debt expense before the *WPS Energy* case. The only thing a bad debt tracker does is allow the Companies to recover that expense more quickly, without the additional cost imposed through regulatory lag. Yet, the fact that the Companies can recover bad debt cost more efficiently does not support the establishment of a POR Program.

stipulation.[189] But the fact that RESA/Direct believe there may be issues with the effective implementation of the PPPP does not mean that a POR program is necessary. The more direct response to any issues with the implementation of the PPPP is to do what the Commission did – establish a workshop to discuss and work collaboratively towards answering the questions raised by Ms. Ringenbach.[190] Because the Commission has acted to deal directly with the questions that the Commission perceives exist relating to marketer arrears, there is nothing further that the Commission needs to do in this case.[191]

g. There is no need for additional enhancements to the Companies' EDI system as suggested by RESA/Direct witness Bennett.[192]

Despite the Companies' agreement to enhance their EDI system in several ways (as demonstrated in Company Exhibit 7), RESA/Direct again request that the Commission order the Companies to further enhance their EDI system. This argument has already been rejected by the Commission.

RESA/Direct reiterate the same arguments they made in their Brief, *i.e.*, that the Companies should provide a different web-based system than the Companies already provide to CRES suppliers. As they have done previously, RESA/Direct claim that the "original intent" of Attachment C to the Stipulation in the ESP 2 case was for the Companies to create a different a type of system. As the

[189] RESA/Direct App., p. 10.

[190] IGS suggests that the purpose of the workshop was, among other things, "to consider rule changes, rule waivers, and modifications to FirstEnergy's tariffs and practices to promote competition via a POR program." IGS App., pp. 3-4. The Order says no such thing. The purpose of the workshop established by the Order was to address the issues raised by Ms. Ringenbach, *i.e.*, "specifically for the purpose of reviewing FirstEnergy's implementation of the partial payment priority, including, but not limited to, the implementation of the stipulation with respect to customers on deferred payment plans." Order, p. 42.

[191] IGS advocates that the Commission should hold this case open until the resolution of the workshop. IGS App., pp. 18-19. There is no reason to do so. In fact, IGS provides no reason. Anything that is developed in the workshop can be handled through another proceeding, if necessary.

[192] RESA also requests that, on rehearing, the Commission should specifically state that the EDI enhancements covered in Company Exhibit 7 are requirements under the Opinion and Order. The Companies do not object to this request so long as it conforms to what the Companies confirmed they would do in Company Exhibit 7.

Companies showed previously,[193] RESA/Direct have provided no evidence regarding the "original intent" of RESA or any other party in settling the ESP 2 case. Therefore, the Commission should not, on rehearing, modify Attachment C to the Stipulation in this case.

RESA/Direct argue that the Companies should be able to provide account numbers on eligibility lists without violating the confidentiality provisions of Rule 4901:1-10-24(E)(1), Ohio Administrative Code, because a CRES provider will be given that number anyway from the customers.[194] To be sure, once customer contact is made, a customer may supply the customer number to the CRES provider. However, the eligibility list that would be used by CRES providers to solicit customers could not identify or provide customer numbers without violating the rule. Put simply, absent Commission order, the Companies cannot provide account numbers on eligibility lists.

The only arguably "new" issue RESA/Direct raise is to contend that the Commission failed to consider the policy of the state in rejecting Mr. Bennett's recommendations. However, RESA/Direct do not present any evidence to demonstrate that the Companies' EDI system, and their method (and other utilities' methods) of supporting CRES providers impedes CRES providers from entering Ohio's market or raises costs for CRES providers. There is a uniform system of providing information in Ohio, a system to which all CRES providers in this state have access. As Mr. Bennett testified, his employer is competing in the Companies' service territories.[195] Consequently, the Commission should deny rehearing on this issue.

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[193] Companies' Reply, pp. 55-56.

[194] RESA/Direct App., p. 8.

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

3. ESP 3 does not violate any important regulatory principle or practice.

a. The parties were accorded due process.

NOPEC, ELPC, and OCC/CP rehash the procedural arguments that they raised previously: (1) the procedural schedule in this case was inadequate; (2) the procedural schedule hindered intervention; and (3) the Attorney Examiners improperly granted administrative notice. In the Order, the Commission considered and properly rejected these arguments.[196]

(i) The procedural schedule in this case did not deny the parties the opportunity for thorough and adequate participation.

OCC/CP again argue that they were denied due process because of the expedited schedule in this proceeding.[197] NOPEC similarly complains about a "rush to judgment."[198]OCC/CP and NOPEC assert that the time period between the Companies' filing of the Application and the hearing was too short. Specifically, OCC/CP cite to Revised Code Section 4928.143.[199] That statute sets 275 days as the ***maximum*** period for which the Commission can consider an ESP. Despite OCC/CP and NOPEC's complaints, the procedural schedule in this case was not unusually brief. As the Companies' previously showed, the Commission has set cases for hearing in shorter time frames.[200]

Citing Revised Code Section 4905.082, OCC/CP further argue that the procedural schedule prohibited them from meaningful participation in this case, including their right to take ample

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[196] Order, pp. 16-23.

[197] OCC/CP App., p. 54.

[198] NOPEC App., p. 14. NOPEC also argues that the procedural schedule violated a "statutory requirement" that that each ESP is independently adjudicated. *Id*. NOPEC asserts that the Commission failed to subject ESP 3 to an analysis that was independent of ESP 2. *Id*. But NOPEC fails to show how the Commission's analysis violated any statutory requirement. To the extent that NOPEC is complaining that the Commission took administrative notice of materials from the record in the ESP 2 case, that argument also fails for the reasons set forth below.

[199] OCC/CP App., p. 54.

[200] Companies' Reply, pp. 62-63.

discovery.[201] But OCC/CP fail to identify any discovery that they were denied. Nor does OCC/CP dispute (as the Commission recognized in the Order) that they had the opportunity to—and did—conduct discovery and file motions to compel discovery before the hearing in this case.[202] In fact, they served six rounds of discovery and presented prefiled testimony of three witnesses including one outside consultant. Other than empty claims, OCC/CP fail to demonstrate any prejudice from the procedural schedule. As a result, the Commission properly found that OCC/CP were not denied the opportunity to participate in this case.[203]

(ii) No party was denied intervention.

OCC/CP also argue, as they have previously,[204] that the procedural schedule improperly affected the intervention of parties in this case.[205] OCC/CP again complain that the Attorney Examiner's procedural entry that provided interested persons seven days to intervene deterred those parties from participating in the proceeding.[206] They also repeat their complaint that the Attorney Examiner's order waiving the Companies' obligations to provide newspaper publication notice also harmed the ability of other parties to intervene.[207]

Putting aside that OCC/CP lack standing to make this argument,[208] to the extent that the OCC/CP bases their argument on the Commission's waiver of the newspaper publication, this argument is untimely. In the Order, the Commission properly recognized that any argument regarding waivers of the filing requirements should have been filed within 30 days of the

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[201] OCC/CP App., p. 54.

[202] Order, p. 22.

[203] *Id.*

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

[205] OCC/CP App., p. 56.

[206] *Id.*, pp. 56-57.

[207] *Id.*, p. 57.

[208] They were granted intervention in this case because of their involvement in the ESP 2 case. Case No. 12-1230-EL-SSO, Entry, p. 3 (Apr. 19, 2012).

Commission's April 25, 2012 entry and therefore should be disregarded.[209] OCC/CP present no explanation as to why their complaint about the alleged inadequacy of notices has not been waived.

In any event, OCC/CP importantly fail to identify any party that was unsuccessful in its efforts to intervene. Indeed, OCC/CP admit that 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.[210] In fact, in OCC/CP's application for rehearing, they provide a list of additional parties that participated in the ESP 3 proceeding in addition to all those that participated in the ESP 2 case.[211] OCC/CP's complaints regarding the procedural schedule's impact on intervention are thus unsupported. The Commission correctly found that no party was denied intervention in this case.[212]

(iii) The Commission properly affirmed the ruling of the Attorney Examiner granting administrative notice.

Regardless of the number of ways that OCC/CP, NOPEC and ELPC phrase (and repeat and rephrase) their arguments, their arguments boil down to two issues: 1) whether the parties had notice and the opportunity to explain and rebut the evidence that was administratively noticed; and 2) whether the parties demonstrated any prejudice.[213] These are the factors that should be considered to determine whether administrative notice is appropriate.[214] The Commission properly found that the intervening parties had notice and opportunity to rebut the evidence that was administratively noticed

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[209] Order, p. 17.

[210] OCC/CP App., p. 57, n.162.

[211] *Id.*, p. 58.

[212] Order, p. 47.

[213] ELPC also argues that the Companies' application and testimony are incomplete under the Commission's rules. ELPC App., pp. 4-6. This argument overlooks that the Companies' evidence was not limited to the application (including the Stipulation) and Mr. Ridmann's prefiled testimony. The Companies also submitted evidence through their motion to take administrative notice of certain materials from prior cases. Thus, ELPC's "sufficiency" argument depends on ELPC being correct about the propriety of the administrative notice taken by the Attorney Examiners and affirmed by the Commission. As demonstrated previously (Case No. 10-388-EL-SSO, Entry on Rehearing, pp. 6-7 (May 13, 2010)) and below, ELPC is wrong about administrative notice and thus ELPC's "sufficiency" argument fails.

[214] Order, p. 19 citing *Canton Storage & Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, 8.

and that no party demonstrated any prejudice. The Commission's decision thus was neither unreasonable nor unlawful.

OCC/CP, NOPEC and ELPC argue that there are "problems" with the Commission's decision that they had the opportunity to explain and rebut the evidence that the Commission administratively noticed.[215] None of their "problems," however, has merit.

OCC/CP contend that the Commission unreasonably concluded that all parties in this case had knowledge of the prior proceedings.[216] OCC/CP's argument is curious. OCC/CP do not deny that ***they*** participated in the prior proceedings. In fact, OCC/CP not only participated, but raised the same complaints about the Attorney Examiners' ruling taking administrative notice in the ESP 2 case.[217]

OCC/CP's argument sidesteps the Commission's finding that "the parties had ample opportunity to explain and rebut the evidence for which FirstEnergy sought administrative notice."[218] OCC/CP's suggestion that the Commission held that all parties must participate in the prior proceedings for the Attorney Examiners to grant administrative notice misreads the Order. The Commission did not hold that the decision to grant administrative notice rests on whether all parties participated in the prior proceedings. The Commission merely pointed out that parties who participated in those prior proceedings "presumably have knowledge of, and an adequate opportunity to explain and rebut, the evidence."[219] OCC/CP and NOPEC would thus fall in this category.

OCC/CP, NOPEC and ELPC also complain that the timing of when the Attorney Examiners granted administrative notice prevented them from seeking discovery and thus rebutting the evidence. Their complaints are without substance. Each of these parties has acknowledged that, on April 13,

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[215] *See e.g.*, OCC/CP App., p. 58.

[216] *Id*.

[217] Case No. 10-388-EL-SSO, Entry on Rehearing, pp. 6-7 (May 13, 2010).

[218] Order, p. 20.

[219] Order, p. 19 citing *Allen v. Publ. Util. Comm.* (1988), 40 Ohio St. 3d 184, 185-86.

2012, the Companies provided notice in their Application of their plan to seek administrative notice of the record in the ESP 2 case.[220] As the Commission observed, each of these parties had the opportunity to seek discovery to determine the specific documents on which the Companies sought administrative notice similar to the Attorney Examiner's request. They did not. The timing of the Attorney Examiners' ruling did not affect the parties' ability to seek discovery.

Nor did the timing of the ruling affect the parties' ability to explain or rebut the administratively noticed evidence. Although OCC/CP, NOPEC and ELPC complain that the ruling was made on the third-day of the hearing, they had notice on April 13, 2012 (more than seven weeks before the hearing) that the Companies were seeking administrative notice. In addition, the record reflects that these parties had additional notice at the very beginning of the hearing, before the Companies' witness William Ridmann took the stand, that the Attorney Examiners would grant administrative notice.[221] OCC/CP, NOPEC and ELPC thus had the opportunity to explain and rebut the evidence at the hearing. They also had the opportunity to cross-examine the Companies' witness William Ridmann regarding this evidence.

The complaints of OCC/CP, NOPEC and ELPC regarding the timing of the ruling taking administrative notice are belied by their own inaction. After the Attorney Examiners took administrative notice of the evidence, these parties did not request an opportunity to explain or rebut the facts. Nor did any of them counter-designate any part of the record in the ESP 2 case or Case No. 09-906-EL-SSO or even ask for the opportunity to do so. And none of these parties asked for additional time to present evidence. Instead, they simply objected to the Attorney Examiners' order.

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[220] OCC/CP App., p. 59; NOPEC App., p. 16; ELPC App., p. 7.

[221] Tr. Vol. I, p. 29 (Attorney Examiner Price indicated that if the Companies provided a list of specific documents, then "I'm sure that administrative notice will be liberally taken.").

OCC/CP and NOPEC also argue that they were prejudiced because the Attorney Examiners took administrative notice of testimony of three witnesses who did not testify in this proceeding.[222] They complain that these witnesses were not subject to cross-examination and thus they were denied due process.[223] These arguments are misdirected. The determinative issues are whether OCC/CP and NOPEC had an opportunity to explain or rebut this evidence and whether they were prejudiced;[224] not whether the testimony contained within the administratively noticed evidence is subject to cross-examination. Further, each of these parties participated in the previous cases and thus had an opportunity to cross-examine the witnesses in those cases.[225] OCC/CP and NOPEC thus fail to show how administrative notice of this testimony caused any prejudice to them.

OCC/CP and NOPEC also argue that the Commission erred by taking administrative notice of opinions.[226] They cite no case that supports this limitation. To the contrary, the Supreme Court of Ohio has repeatedly upheld that the Commission has authority to take administrative notice of records of prior and contemporaneous Commission hearings and investigations.[227] The Commission thus properly found that its authority to take administrative notice is not limited to "facts."

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[222] OCC/CP App., p. 59; NOPEC App., p. 22. OCC/CP also argue that two of these witnesses are on the Commission's Staff and therefore exempt from discovery. OCC/CP App., p. 59. To the extent that OCC/CP contend that they were unable to take discovery from these witnesses, OCC/CP miss the point. As discussed above, OCC/CP had ample opportunity to seek discovery from the Companies regarding the specific information that it intended to seek administrative notice and to present evidence to rebut any of the administratively noticed material, including the testimony of the two witnesses from the Commission's Staff.

[223] OCC/CP App., p. 59; NOPEC App., p. 22.

[224] *See Allen*, 40 Ohio St. 3d at 185-86.

[225] Order, p. 4; Case No. 10-388-EL-SSO, Opinion and Order, p. 5 (Aug. 25, 2010).

[226] OCC/CP App., pp. 60-61; NOPEC App., pp. 22-23.

[227] *Allen*, 40 Ohio St. 3d 184, 185-186 (permitting administrative notice of records from another Commission case); *County Comm'rs Assoc. v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 243, 277 (same); *Canton v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 76, 80 (permitting administrative notice of utility's application from a prior proceeding).

OCC/CP and NOPEC further argue that Rule 201(B) of the Ohio Rules of Evidence limits the Commission to taking administrative notice of facts not subject to reasonable dispute.[228] However, the Commission correctly found that it is not strictly bound by the Ohio Rules of Evidence.[229] The Attorney Examiners did not find that any facts from the ESP 2 case or 09-906-EL-SSO were conclusive. Instead, the Attorney Examiners admitted these facts into evidence for the Commission's consideration. OCC/CP, NOPEC and ELPC could have offered evidence to dispute this evidence. The Commission's decision thus was not unlawful or unreasonable. Therefore, the Commission properly affirmed the Attorney Examiners' order granting administrative notice in this case.

b. The Commission appropriately determined that certain deferrals should be excluded from the significantly excessive earnings test "(SEET").

Consistent with the practice under the Companies' current and prior ESPs, the ESP 3 Stipulation provided that the carrying costs accrued on deferrals would be excluded from the calculations for SEET purposes.[230] The Commission approved this provision of ESP 3 as it had twice done previously.[231]

Certain parties object. A principal argument advanced, again as it was in their earlier briefs, is that excluding any component of deferrals from SEET is inconsistent with the Commission's treatment of deferrals in the AEP Ohio SEET orders.[232] As they have done before, these parties

[228] OCC/CP App., pp. 60-61; NOPEC App., pp. 22-23.

[229] Order, p. 19.

[230] Companies' Br., p. 53; Case No. 08-935-EL-SSO, Second Opinion and Order, p. 12 (Mar. 25, 2009); *see generally* Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010).

[231] Order, p. 48. In the Companies' earlier ESPs (as well as here), the negotiated Stipulations subsequently approved by the Commission underlying those ESPs expressly provided for the exclusion of deferred carrying charges for SEET purposes); *See generally*, Case No. 10-388-EL-SSO, Opinion and Order, p. 5 (Aug. 25, 2010); Case No. 08-935-EL-SSO, Second Opinion and Order, p. 12 (Mar. 25, 2009).

[232] *Compare* NOPEC/NOAC Br., pp. 17-19; OCC/CP Br., pp. 65-66 (citing *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 Admin. Code*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011)) *with* OCC/CP App., p. 36; NOPEC App., p. 13.

overlook that the ESP before the Commission here is the result of a stipulation. For this reason, the AEP Ohio orders are irrelevant. Indeed, the Commission has recognized the fact that a stipulation requires different considerations than a litigated matter, and thus the rules that apply to the former do not necessarily apply to the latter. As the Commission recognized in its generic SEET proceeding:

> [T]he Commission further finds that where an electric utility's ESP or MRO has been resolved by stipulation, which includes a method for the treatment of write-offs and deferrals in calculating the SEET, the Commission is not modifying the stipulation with this proceeding, to the extent that the issue is adequately addressed in the stipulation and the order approving the stipulation. Accordingly, the approved standard service offer stipulations of Duke and FirstEnergy shall stand as approved by the Commission to the extent the treatment of deferrals and write-offs in the SEET calculation were addressed.[233]

The reason for the different treatment given to certain items for SEET purposes arising from a stipulation as opposed to a litigated matter was aptly summarized by the Commission in the generic SEET proceeding:

> The Commission recognizes that the issues surrounding the treatment of deferrals are extremely complex. . . . Because many factors need to be considered in order to weigh the appropriateness of the treatment of any given deferral, the Commission finds that the treatment of deferrals, for purposes of the SEET, should be determined on a case-by-case basis.[234]

This rationale fully applies here. The Companies have agreed to certain deferrals. Deferrals generally, as the Commission has recognized, can redound to the benefit of the Companies' customers.[235] The Companies should not have to suffer the risk of potential SEET-related refunds as a result of having agreed to a customer benefit and foregoing what would otherwise be current

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[233] *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities* ("generic SEET proceeding"), Case No. 09-786-EL-UNC, Finding and Order, p. 16 (June 30, 2010).

[234] *Id.*

[235] *Id.*

recovery of a cost. The reasonable compromise by the parties was properly endorsed by the Commission. Rehearing on this issue should be denied.

Relatedly, NOPEC suggests that the "extension" of ESP 2 for an additional two years requires the Companies to satisfy the separate SEET provisions under Revised Code Section 4928.143(E).[236] This is merely a restatement of another party's previously rejected argument.[237] As the Companies' previously discussed,[238] "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."[239] No additional SEET considerations are necessary.

c. The Commission appropriately approved the Companies' corporate separation plan.

ESP 3 included a provision that sought simply to maintain the preexisting Commission approval to the Companies' corporate separation plan, which occurred as part of the ESP 2 Order.[240] Because there have been no changes to the corporate separation plan, this provision (like many in ESP 3) was merely a carryover from the Stipulation that produced the current ESP. As part of its approval of ESP 3, the Commission did nothing to modify its previous approval of the Companies' corporate separation plan, therefore the plan remains approved based upon the Commission's action in ESP 2. No new separate approval was requested or required. And the Commission's rules related to corporate separation plans do not require any further review of the approved plan. The OCC/CP and NOPEC position that the Commission should not have again approved the already approved plan is simply absurd.

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[236] NOPEC App., p. 13.

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

[238] Companies' Reply, p. 46.

[239] *Id.*

[240] Stip. § H.1.

Not deterred from making arguments for the sake of argument and elevating form over substance, OCC/CP and NOPEC contend that the Commission should not have approved again the Companies' corporate separation plan and should have conducted a more "in depth" review.[241] It is undisputed that the plan approved in this case was the same plan that the Commission already approved in the ESP 2 case.[242] NOPEC claims, however, that the Commission's prior approval was merely a "rubber stamp."[243] This is a curious argument coming from NOPEC which was a Signatory Party to the Stipulation in the ESP 2 case.[244] As such, NOPEC must have believed that the corporate separation plan submitted as part of that Stipulation was reasonable and complied with Ohio law. What's more, NOPEC's view improperly impugns the integrity of the Commission's review. The Commission must be assumed to have undertaken its responsibilities as it has been authorized to do, including the responsibility to assure that the Stipulation complied with Ohio law. Indeed, the third part of the Commission's three part settlement review test – that the Stipulation does not violate any regulatory principle or practice – addresses this very issue.

OCC/CP contend that the approval of the corporate separation plan in the ESP 2 case did not comply with the requirements of Revised Code Section 4928.17; specifically, the Commission failed to determine under Section 4928.17(C) that the plan complied with the requirements of Section 4928.17(A).[245] OCC/CP argue that the Commission failed to make a similar finding here.[246]

OCC/CP are wrong. There are three reasons why. First, as noted, OCC/CP assume that the Commission's prior review in the ESP 2 case did not include a consideration of the requirements of

[241] OCC/CP App., p. 53; NOPEC App., p. 24.

[242] *Id.*

[243] NOPEC App., p. 24.

[244] Case No. 10-388-EL-SSO, Second Supplemental Stipulation, p. 11 (July 22, 2010).

[245] OCC/CP App., p. 53.

[246] *Id.*

Section 4928.17. Applying the three-part settlement review process, the Commission found that the Stipulation there – including the corporate separation plan – did not violate any regulatory principle or practice.[247] This necessarily included any issues under Section 4928.17.

Second, OCC/CP fail to say exactly what in the Companies' corporate separation plan fails to comply with Ohio law. This omission is telling.

Third, by the time that the plan was presented in the ESP 2 case, the plan had already been reviewed specifically under Section 4928.17. In Case No. 99-1212-EL-ETP, the Companies filed an interim corporate separation plan. In its July 19, 2000 Order in that case, the Commission reviewed that plan under the requirements of Section 4928.17:

> We find that FirstEnergy has constructed its interim plan in a manner that achieves, to the extent reasonably practical, the structural separation contemplated by Section 4928.17(A)(1), Revised Code, and the corresponding Commission rules. The company has shown that the provision of special services by the utility unit will allow customers an expeditious return from service interruptions and an additional consumer option. FirstEnergy has provided a sufficient timeline for its transition to full structural separation. Therefore, the company has met its burden of showing "good cause" for this Commission to approve the interim functional separation plan. However, the Commission reserves the right to invoke its authority to preserve fair competition, for both interim and permanent arrangements.[248]

Subsequently, in 2009, the Commission promulgated new regulations relating to corporate separation plans, including the requirement that plans be resubmitted for review.[249] The Companies resubmitted their plan in Case No. 09-462-EL-UNC. That proceeding was folded into the ESP 2 case by virtue of the ESP 2 Stipulation's request for approval of the corporate separation plan. As noted by Staff witness Turkenton in the ESP 2 case, the plan submitted for review in 2009 was essentially

[247] Case No. 10-388-EL-SSO, Opinion and Order, pp. 41-42 (Aug. 25, 2010).

[248] Case No. 99-1212-EL-ETP, Opinion and Order, p. 26 (July 19, 2000).

[249] *See* Case No. 08-777-EL-ORD, Finding and Order, pp. 6-7 (Sept. 17, 2008).

the same plan that was provided on July 19, 2000.[250] Thus, the specific findings that OCC/CP seek have already been provided.

[250] *See* Case No. 10-388-EL-SSO, Tran. Vol. I, pp. 233-234 (May 4, 2010).

III. CONCLUSION

For the foregoing reasons, the Commission should deny all of the applications for rehearing on the Order.

Respectfully submitted,

/s/ David A. Kutik

James W. Burk, Counsel of Record
Arthur E. Korkosz
Kathy J. Kolich
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5861
(330) 384-3875 (fax)
burkj@firstenergycorp.com
korkosza@firstenergycorp.com
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 (fax)
dakutik@jonesday.com

Attorneys for Applicants, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra Applications for Rehearing was sent to the following by e-mail this 27th day of August, 2012:

"Amy.Spiller@Duke-Energy.com" <Amy.Spiller@Duke-Energy.com>, "cynthia.brady@constellation.com" <cynthia.brady@constellation.com>, "dakutik@JonesDay.com" <dakutik@JonesDay.com>, "dane.stinson@baileycavalieri.com" <dane.stinson@baileycavalieri.com>, "david.fein@constellation.com" <david.fein@constellation.com>, "DBoehm@bkllawfirm.com" <DBoehm@bkllawfirm.com>, "drinebolt@ohiopartners.org" <drinebolt@ohiopartners.org>, "dryan@mwncmh.com" <dryan@mwncmh.com>, "ehess@mwncmh.com" <ehess@mwncmh.com>, "Garrett.Stone@bbrslaw.com" <Garrett.Stone@bbrslaw.com>, "gregory.dunn@icemiller.com" <gregory.dunn@icemiller.com>, "GKrassen@Bricker.com" <GKrassen@Bricker.com>, "jbowser@mwncmh.com" <jbowser@mwncmh.com>, "Lang, Jim" <JLang@Calfee.com>, "korkosza@firstenergycorp.com" <korkosza@firstenergycorp.com>, "mhpetricoff@vorys.com" <mhpetricoff@vorys.com>, "Mike.Lavanga@bbrslaw.com" <Mike.Lavanga@bbrslaw.com>, "MKurtz@bkllawfirm.com" <MKurtz@bkllawfirm.com>, "mparke@firstenergycorp.com" <mparke@firstenergycorp.com>, "murraykm@mwncmh.com" <murraykm@mwncmh.com>, "MWarnock@Bricker.com" <MWarnock@Bricker.com>, "Ray.Strom@puc.state.oh.us" <Ray.Strom@puc.state.oh.us>, "ricks@ohanet.org" <ricks@ohanet.org>, "TOBrien@Bricker.com" <TOBrien@Bricker.com>, "trent@theOEC.org" <trent@theOEC.org>, "VLeach-Payne@mwncmh.com" <VLeach-Payne@mwncmh.com>, "burkj@firstenergycorp.com" <burkj@firstenergycorp.com>, "jpmeissn@lasclev.org" <jpmeissn@lasclev.org>, "robert.fortney@puc.state.oh.us" <robert.fortney@puc.state.oh.us>, "McBride, Laura" <LMcBride@Calfee.com>, "doris.mccarter@puc.state.oh.us" <doris.mccarter@puc.state.oh.us>, "Ccunningham@Akronohio.Gov" <Ccunningham@Akronohio.Gov>, "rkelter@elpc.org" <rkelter@elpc.org>, "joliker@mwncmh.com" <joliker@mwncmh.com>, "dsullivan@nrdc.org" <dsullivan@nrdc.org>, "callwein@wamenergylaw.com" <callwein@wamenergylaw.com>, "lmcalister@bricker.com" <lmcalister@bricker.com>, "matt@matthewcoxlaw.com" <matt@matthewcoxlaw.com>, "greg.lawrence@cwt.com" <greg.lawrence@cwt.com>, "cathy@theoec.org" <cathy@theoec.org>, "Tammy.Turkenton@puc.state.oh.us" <Tammy.Turkenton@puc.state.oh.us>, "teresa.ringenbach@directenergy.com" <teresa.ringenbach@directenergy.com>, "ray.strom@puc.state.oh.us" <ray.strom@puc.state.oh.us>, "robinson@citizenpower.com" <robinson@citizenpower.com>, "ricks@ohanet.org" <ricks@ohanet.org>, "myurick@taftlaw.com" <myurick@taftlaw.com>, "nolan@theOEC.org" <nolan@theOEC.org>, "sam@mwncmh.com" <sam@mwncmh.com>, "smhoward@vorys.com" <smhoward@vorys.com>, "steven.huhman@morganstanley.com" <steven.huhman@morganstanley.com>, "Thomas.McNamee@puc.state.oh.us" <Thomas.McNamee@puc.state.oh.us>, "jmclark@vectren.com" <jmclark@vectren.com>, "gpoulos@enernoc.com" <gpoulos@enernoc.com>, "cmooney2@columbus.rr.com" <cmooney2@columbus.rr.com>, "RHorvath@city.cleveland.oh.us" <RHorvath@city.cleveland.oh.us>, "christopher.miller@icemiller.com" <christopher.miller@icemiller.com>, "asim.haque@icemiller.com" <asim.haque@icemiller.com>, “vparisi@igsenergy.com” <vparisi@igsenergy.com>, “sauer@occ.state.oh.us” <sauer@occ.state.oh.us>, “etter@occ.state.oh.us” <etter@occ.state.oh.us>, “yost@occ.state.oh.us” <yost@occ.state.oh.us>, “leslie.kovacik@toledo.oh.gov” <leslie.kovacik@toledo.oh.gov>, “trhayslaw@gmail.com” <trhayslaw@gmail.com>, “Judi.sobecki@dplinc.com” <Judi.sobecki@dplinc.com>, “Randall.Griffin@dplinc.com” <Randall.Griffin@dplinc.com>, “Jkyler@bkllawfirm.com” <Jkyler@bkllawfirm.com>, “tsiwo@bricker.com” <tswio@bricker.com>, “jeanne.kingery@duke-energy.com” <jeanne.kingery@duke-energy.com>, “dorothy.corbett@duke-energy.com” <dorothy.corbett@duke-energy.com>, “jejadwin@aep.com” <jejadwin@aep.com>, “mdortch@kravitzllc.com” <mdortch@kravitzllc.com>, “mjsatterwhite@aep.com” <mjsatterwhite@aep.com>, “stnourse@aep.com” <stnourse@aep.com>, “sandy.grace@exeloncorp.com” <sandy.grace@exeloncorp.com>, “stephen.bennett@exeloncorp.com” <stephen.bennett@exeloncorp.com>, “lkalepsclark@vorys.com” <lkalepsclark@vorys.com>, “wttpmlc@aol.com” <wttpmlc@aol.com>, “BarthRoyer@aol.com” <BarthRoyer@aol.com>, “robb.kapla@sierraclub.org” <robb.kapla@sierraclub.org>, jvickers@elpc.org jvickers@elpc.org, dstahl@eimerstahl.com

/s/ David A. Kutik
An Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

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