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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 Approval of a Market Rate Offer to Conduct A Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated With Reconciliation Mechanism, and Tariffs for Generation Service	)	**Case No. 08-936-EL-SSO**

REPLY BRIEF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

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TABLE OF CONTENTS

Page

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I. INTRODUCTION

In their Initial Brief, the Companies[1] established that their proposed market rate offer ("MRO") provides a fair, open, and transparent competitive bid process ("CBP") for the procurement of standard service offer ("SSO") electric generation service. The Initial Brief demonstrated how the proposed CBP satisfies every requirement for approval of an MRO set forth in Amended Substitute Senate Bill 221 ("S.B. 221"). Given that the Application in this matter meets S.B. 221's statutory criteria, the Commission must issue an order approving the CBP no later than October 29, 2008 and allow the Companies to initiate the CBP.

Neither Staff nor any intervenor can seriously dispute that the Companies' proposed MRO meets all statutory requirements for approval.[2] Unable to attack the proposal on the statutory merits, Staff and certain intervenors criticize the Companies' proposal because the

[1] The "Companies" are Applicants Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

[2] Staff and the following intervenors filed initial briefs: the City of Cleveland ("Cleveland"), Constellation Energy Group, Inc. ("Constellation"), Dominion Retail, Inc. ("Dominion"), Industrial Energy Users-Ohio ("IEU"), Kroger Co. ("Kroger"), Nucor Steel Marion, Inc. ("Nucor"), the Ohio Energy Group ("OEG"), Ohio Partners for Affordable Energy ("OPAE"), Office of the Ohio Consumers' Counsel ("OCC"), and Omnisource Corporation ("Omnisource").

MRO proposed by the Companies does not have all the "bells and whistles" that certain parties would like to see – such as time-differentiated rates, interruptible rates or rates that reflect traditional class cost-of-service differences. All of these arguments miss the point. Under R.C. 4928.142, the Commission must only determine whether the Companies' proposed MRO meets the statutory requirements – and it has only 90 days from the date the Companies' Application was filed to do so. Certainly, as the briefs in this case and the testimony of record make clear, there are an infinite number of ways the Companies could have designed their MRO. The Commission need not evaluate all of these infinite possibilities, as the inquiry here is simple: whether the proposed MRO CBP meets specifically defined statutory criteria. Because the record shows that the Companies proposed MRO CBP meets all statutory requirements, the Commission therefore should approve it.

Most of the arguments made by the other parties were anticipated and addressed in the Companies' Initial Brief, and thus will not be repeated in significant detail here. The various arguments from all of the briefs may be distilled into four issues.

First, Staff and Nucor incorrectly contend that the Application cannot be approved because the Companies have not adhered to recently approved Commission rules – rules that were approved after the Companies submitted their filing. Staff and Nucor are wrong. The rules governing competitive bidding and corporate separation are not yet in effect, and the statute explicitly contemplates MRO filings under such circumstances. R.C. 4928.142(A)(1). (Companies Init. Br., pp. 18-19.) Even if Staff and Nucor were correct on this point – and they are not – the remedy would be to order conformance with the rules, not wholesale rejection of the MRO Application. R.C. 4928.142(B).

Second, much has been written in OEG's and OPAE's briefs about the alleged superiority of active portfolio management versus a competitive bidding process. Their arguments miss the mark, for several reasons. Most significantly, S.B. 221 *requires* an MRO Application to set forth terms of a competitive bidding process. Accordingly, that defect alone is a sufficient death knoll for the positions of OEG and OPAE.. Even further, the statute's 90-day time constraint for reviewing an MRO application would not accommodate full consideration of the complex active portfolio management process – as an alternative, or otherwise. The statute does *not* allow for "active portfolio management" by utilities. Rather, S.B. 221 contemplates a competitive bidding process whereby *suppliers* supply wholesale power based upon the outcome of that process, and that the suppliers would manage portfolios and their attendant risks in the manner they deemed appropriate. Moreover, the record does not support OEG's and OPAE's purported reason behind active portfolio management, *i.e.*, the possibility or expectation of lower rates. The record instead shows that active portfolio management likely would, in fact, lead to higher prices. What active portfolio management *would* accomplish is increased regulatory scrutiny over subjective utility decision making, and increased risk for disallowed utility costs, in contravention of R.C. 4928.142. S.B. 221 does not permit this outcome. R.C. 4928.142(A)(1).

Third, several parties criticize the Companies' proposed rate design. These parties overlook how interruptible rates, time-of-use rates and other alternative rate design proposals would affect the reconciliation of retail generation revenues and wholesale energy costs. Under the Companies' proposal, the retail rate design is intended to closely match how wholesale supplies will be procured under the CBP. By aligning retail rate design with the wholesale procurement method, revenues received from retail customers will more closely track the costs paid to wholesale suppliers. Introducing demand charges, interruptible rates and time-of-use rates will cause a mismatch between the amount the Companies must pay for wholesale power and the amount collected from retail customers. While it is true that this mismatch could be recovered and trued up through the Rider CRT reconciliation mechanism, large quarterly swings in Rider CRT may produce large variations in retail generation rates, thereby distorting price signals and causing shopping based upon rate design rather than price, as described by Companies' witness William Ridmann. (Company Ex. 9, p. 5.) Changes to the wholesale product, however, is not a solution to this situation and should not be made because such changes would discourage participation by bidders otherwise willing to participate in the auction, thus jeopardizing the entire process, and in addition may increase the bid prices of such unique wholesale products. Such an approach is inconsistent with R.C. 4928.142(A) where the Commission is required to foster bid participation in the competitive bidding process. Alternative rate design proposals advocated in this proceeding such as demand rates, time-of-use rates and interruptible rates, while theoretically possible, would cause more problems than they would solve because there is no reliable basis to match those types of rates with the structure of the wholesale procurement. But the increased size of the revenue variance arising due to changes in retail rate design could be accommodated through Rider CRT, whereas changes in the wholesale product would undermine the CBP process in contravention of R.C. 4928.142. Therefore, if changes in rate design must occur, it would be better if they occurred at the retail level.

Fourth, the criticisms of the Companies' proposal to implement Rider CRT on a non-bypassable basis are misplaced. With respect to the CBP expense and uncollectibles portion of Rider CRT, the only party that says in their brief that these costs should not be recovered is Staff – and the position taken in Staff's brief is inconsistent with its own witness's testimony at hearing. The remaining parties have no apparent problem with the recovery of these costs, but object to the rider being nonbypassable. These charges should be paid by all customers, including those that shop, because all customers receive a continuing benefit from the option to take advantage of SSO service. Likewise, all customers benefit from the recovery of delta revenues through Rider CRT. Special contracts provide economic development benefits to both shopping and non-shopping customers.

The remaining arguments are a mish mash of theories on why the MRO should be rejected; for example, because The Brattle Group supposedly is not "independent" and therefore incapable of serving as the CBP manager; because market power in the MISO region allegedly is not being effectively mitigated; and because of claims that the auction product would not be clearly defined without provision of specific load requirement data – all of which are without merit. These arguments were addressed in the Companies' Initial Brief and therefore addressed only briefly in this Reply. None of these arguments rebut the conclusion that the Application complies in every respect with S.B. 221's statutory requirements.

In short, some parties have claimed "deficiencies" in meeting statutory requirements where there are, in fact, none. The Companies' MRO Application meets all the requirements of R.C. 4928.142 (A) and (B), as shown below and in the Initial Brief. When such requirements are met, "the electric distribution utility may initiate its competitive bidding process" (R.C. 4928.142(B)).

II. ARGUMENT

A. The MRO Application Cannot Be Rejected Because Of Alleged Non-Compliance With Rules That Are Not In Effect.

Staff and Nucor argue that the Companies' MRO Application should be rejected for failing to comply with "newly approved" Chapter 4901:1-37 of the Ohio Administrative Code. This is wrong. As the Companies explained in their Initial Brief, the rules contemplated by R.C. 4928.142 (A)(1) only come into play "upon their taking effect." R.C. 4928.142(B). No rules have taken effect. Although the Commission approved amendments to the existing competitive bid rules under R.C. 4928.142(A)[3] on September 17, 2008, they will not take effect prior to the end of the 90-day statutory period in which the Commission must enter an opinion in this case. (Companies Init. Br., pp. 18-19.) The final order approving the rules remains subject to rehearing[4] and appeal, and the rules themselves are subject to Joint Committee on Agency Rule Review ("JCARR") jurisdiction for a minimum of 65 days, during which time the rules are subject to legislative review and invalidation. R.C. 111.15(D).

Notably absent from Staff's and Nucor's briefs is any discussion of the fact that the rules these parties argue the Companies have not complied with are not yet effective – and they have not been reviewed and approved by JCARR. Staff and Nucor cite no basis to delay or reject the Companies' Application based on rules that have no legal effect; and there is none.[5]

Staff's briefing position, claiming a threshold requirement for the Companies to file an updated corporate separation plan, is contrary to the position Staff witness Mr. Buckley took on the witness stand. Mr. Buckley recommended that after the corporate separation rules become effective, EDUs should file their updated plans in a separate TRF docket. (Tr. II pp. 11-12.)

[3] R.C. 4928.142(A)(1) provides that the Commission "shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualification of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section."

[4] Certain of the rules approved by the Commission go beyond the authority conferred by statute, for reasons the Companies will explain in an application for rehearing of the order approving these rules. Because the rules are not yet in effect, the Companies do not believe that this proceeding is the appropriate forum to address these rules. The point remains, however, that the rules are not yet in effect and will not be in effect during the 90-day period in which the Commission must rule on the Companies' application.

[5] On this issue Staff offered witness Raymond Strom's opinion on certain ways in which the utilities may be required to conform their application to the Ohio Administrative Code (Staff Ex. 1, p. 3), but Mr. Strom's testimony cannot serve as a legal opinion interpreting the statute, as Staff seems to suggest. At hearing, Mr. Strom made clear he offered no legal opinion on the rulemaking process, and cross-examination on this issue was appropriately limited. (Tr. II, pp. 26-35.) As Examiner Pirik correctly stated, "the process is what it is and the statute will speak for itself." (*Id.*, p. 28.)

When asked, Mr. Buckley confirmed that he did not believe that the MRO should be rejected based on this recommendation:

> Q: You are not suggesting, are you, that the – the MRO application that's pending in this case should be delayed or any action on it should be delayed until after the corporate separation rules are amended and complied with?
>
> A: No.

(*Id.*)

Mr. Buckley had it right. The Companies' alleged non-compliance with not-yet-effective rules is no basis to reject an MRO Application. In fact, the statute sets forth the appropriate cure for this very situation. R.C. 4928.142(B) states that the Commission may, if necessary, require an EDU to conform its filing to Commission Rules *upon their taking effect*, if an EDU files an MRO application prior to the effective date of Commission rules:

> An electric distribution utility may file its Application with the commission *prior to the effective date of the commission's rules* required under division (A)(2) of this section, and, *as the commission determines necessary*, the utility shall immediately conform its filing to the rules *upon their taking effect.*

R.C. 4928.142(B) (emphasis added). The Commission may determine whether an MRO filing must be modified to conform to newly effective rules, and would order a utility to do so – *if the Commission deems it necessary.*

This applies to Mr. Strom's position as well regarding providing information or discussion related to customer load information, time-differentiated pricing, and participation in retail markets. (Staff Init. Br., p. 6.) While compliance with such rules is not required until the rules are in effect (and then only if compliance is directed by the Commission), the Companies will activate the competitive bidding process website as early as today, October 14, 2008. This website will include all of the requirements of the Commission's rules. Further, the evidentiary record in this proceeding is already replete with discussions by the Companies' witnesses and other witnesses about numerous retail rate design options, including time-differentiated rates and other options, and participation in daily markets through in-depth discussions of active portfolio management proposals. The website will provide information related to load and rate class descriptions, customer load profiles and how to develop and utilize those, load data for two years, applicable tariffs, historical shopping data, and information related to energy efficiency, load reduction, renewable energy and advanced energy. At this point, requiring the Companies to add a discussion would only serve to replicate evidence already in the record.

Additionally, alleged statutory deficiencies in an MRO filing do *not* permit the Commission to reject the application. The utility by statute must be given an opportunity to cure such statutory deficiencies. Conforming the application to the rules after they have gone into effect may be required by the Commission, but by no means does this require the utility to start over again from scratch and re-file the application.

Finally, R.C. 4928.142(A)(2) requires that any rules enacted under the statute "shall be consistent with the requirements of division (A)(1) of this section." Division (A)(1) requires that the MRO be determined through a competitive bidding process that provides for: (a) an open, fair and transparent solicitation; (b) clear product definition; (c) standard bid evaluation criteria; and (d) oversight by an independent third party. As explained in the Companies' Initial Brief, the Companies have satisfied each of these statutory requirements, the absence of Commission rules notwithstanding. Because the Companies have complied with the statute, the Companies will necessarily be in compliance with the applicable rules once those rules become effective. The Commission cannot impose greater requirements on the Companies through the rulemaking process than what is required by statute.

B. S.B. 221 Does Not Provide For Active Portfolio Management By Utilities.

As set forth in the Companies' Initial Brief, the CBP allows the Companies to purchase a standard wholesale power supply product through a fair and open competitive bid that is chosen on the basis of one criterion – price. No subjective analysis is required in determining what bids to select, consistent with S.B. 221's mandates. S.B. 221 contemplates a competitive bid process that provides for: (a) open, fair and transparent competitive solicitation; (b) clear product definition; (c) standardized bid evaluation criteria; and (d) design, administration, and compliance oversight by an independent third party. (Companies Init. Br., pp. 35-36.) The "active portfolio management" approach promoted by OEG and OPAE (OEG pp. 2, 9-10; OPAE pp. 4-7) shares none of these traits. (Companies Init. Br., pp. 32-38; Tr. I, p. 29; Tr. IV pp. 150-55.) Active portfolio management entails subjective utility decision-making and bid selection – an inherently closed-door, non-standard, discretionary process that would be subject to utility discretion and thus vulnerable to after-the-fact review. The Ohio General Assembly rejected active portfolio management in favor of a competitive bidding process. Accordingly, the proposal of OPAE and OEG does not meet the statutory requirement under S.B. 221.

Under the Companies' MRO proposal, and consistent with S.B. 221, any portfolio management would be undertaken by the winning wholesale suppliers, not by the Companies. (Companies Init. Br., pp. 36-37.) The open and transparent nature of the CBP is designed to provide suppliers with the information necessary to monitor, assess and price risks associated with formulating their bids. (Companies Init. Br., p. 37, *citing* Company Ex. 3, pp. 11-12.) The Companies do not own or operate generation facilities. The Companies are not in a position to assess generation portfolios and associated risks. Suppliers are in the best position to manage such risks, and do so routinely.

The record in this case demonstrates that suppliers know the generation portfolio management business – distribution companies do not. At hearing, Mr. Warvell testified that the Companies do not have portfolio management expertise. (Tr. I., pp. 97-98.) Conversely, Constellation witness Mr. Fein confirmed that wholesale suppliers utilize portfolio management practices as a matter of course:

> Q. If Constellation was a winning bidder . . . would it be Constellation's intent to use some type of portfolio management to arrange for its supply?
>
> A. . . . I think we are probably no different than other wholesale suppliers that participate in these types of procurements. You would utilize a range of your portfolio to serve any kind of load that you are going to serve, yes.

(Tr. IV, p. 53.) Suppliers are simply in a better position to assess and manage wholesale procurement risks. S.B. 221 recognizes this reality and shifts risks away from utilities by requiring, for example: (1) independent third party control; (2) standardized bid selection; (3) an "open, fair, and transparent" process and so on.

The parties that advocate active portfolio management fail to appreciate that by designing the auction product on a full-requirements, slice-of-system basis, as Dr. Reitzes explained, "what you are doing is you're getting suppliers to compete against each other with respect to their ability to manage the portfolio of products that are required to support standard system offer load so, in essence, you are having a competition to see who can do that at the lowest cost." (Tr. I, p. 29.) As proposed by OPAE and OEG under their version of an active portfolio approach, the Companies would be subject to after-the-fact criticism and second-guessing concerning their portfolio management. OPAE and OEG thus seek to preserve the option of arguing in future proceedings that the Companies' costs to provide generation service should be disallowed – despite a clear statutory mandate that generation costs should be recovered. R.C. 4928.142(C).

S.B. 221 does not provide for alternatives to a competitive bidding process based on alternative proposals and evaluation on whether such proposals would lead to lower rates. (Companies Init. Br., pp. 32-36.) S.B. 221 requires a competitive bidding process – period. Further, the record does not support a conclusion that active portfolio management would result in lower rates than a CBP designed in accordance with S.B. 221. (Companies Init. Br., p. 36, *citing* Tr. IV, p. 146.) In fact, Ms. Alexander's testimony suggests an approach that would only lead to increased costs and inefficiency, and Dr. Reitzes testified to his expectation that the prices resulting from an active portfolio management approach would be higher than those expected from the Companies' proposal. (*Id.*; Tr. I, p. 29).

C. OEG's Allegations Concerning Market Power and Its Attempted Comparison of the MRO to the 2007 Illinois Auction Are Without Merit.

OEG argues that the proposed CBP cannot be open, fair or transparent because FES has and exercises market power. (OEG Init. Br., pp. 5-7.) But OEG's own expert, Mr. Baron, admits that he has not conducted any independent study of FES's market power and has no opinion whether in fact FES has market power or is exercising it. (Tr. IV, pp. 69, 74.) Mr. Baron's supposition is based solely on comments filed by Commission Staff in a FERC docket. (*Id.*, p. 69.) But Staff's comments are not part of the record in this proceeding. More importantly, if Staff continued to hold the views expressed FERC Docket RM07-19-000 or in Case No. 07-796-EL-ATA before this Commission, Staff presumably would have shared those views in this proceeding. Staff did not. Moreover, to the extent Staff does in fact continues to believe that issues of market power need to be addressed, the fact that Staff is participating in FERC Docket RM07-19-000 evidences a recognition by Staff that FERC is the appropriate forum in which to address these issues.

OEG's concerns regarding the reverse auction process utilized in Illinois similarly miss the mark. OEG claims that "Illinois' [sic] experience with a reverse auction is a recent example of how a newly deregulated utility can manipulate the clearing price when its generation-owning affiliate has market power." (OEG Init. Br., p. 6.) This is factually incorrect, misleading, and largely irrelevant. To begin, there is no comparable statute to S.B. 221 in Illinois, as shown in the Companies' Initial Brief (pp. 37-40). Further, many factors, other than the bidding process, contributed to high electric retail rate percentage increases in Illinois on January 1, 2007 – including the end of a *ten-year freeze*, at *reduced rates*. *See* 220 ILCS 5/16-111; 220 ILCS 5/16-102. Certain Illinois residential customers experienced a high percentage increase in retail rates on January 1, 2007 due to a redesign eliminating certain outdated benefits for residential customers, causing dramatically high increases once both the benefit had been removed and electric retail rates were simultaneously unfrozen, on January 1, 2007.[6]

Moreover, the Illinois reverse auction process was not shown to produce unreasonable results, as OEG claims. To the contrary, on consideration of several expert witnesses' testimony regarding the reverse auction process in ICC Dockets #05-0159-62, the Commission determined the process to be reasonable. Final Order (Jan. 24, 2006).

After evaluating the ICC Order in Dockets #05-0160-62, in the context of the evidence, the FERC found the reverse auction would, "if conducted consistent with the process described [in the petition], result in just and reasonable rates." 115 F.E.R.C. P61,286, at 11, ¶ 47, 2006 WL 1496628, Docket No. ER06-831-000 (2006) (approving Ameren generator affiliate participation in the Illinois reverse auction).

[6] The Illinois Commerce Commission ("ICC") recognized these billing impact problems and redesigned the rates accordingly to mitigate extreme billing impacts. (See ICC Docket #07-0166, Final Order (Oct. 11, 2007); ICC Docket #07-0165, Final Order (Oct. 11, 2007).

While Illinois P.A. 95-0481 did provide for rate relief to consumers (*see* 220 ILCS 5/16-111.5A) this relief was not a mandatory "refund" or a "credit." Rather, the General Assembly permitted the utilities to *voluntarily* provide rate relief (*See* 220 ILCS 5/16-111.5A), as part of the terms of a negotiated settlement with the Illinois Attorney General that resolved several pending cases, including the FERC case cited by OEG.[7]

D. Provisions of a Policy Statute Do Not Prevail Over Specific Statutory Mandates

OPAE acknowledges but does not analyze the statutory requirements listed in R.C. 4928.142(A), and instead suggests that the MRO must demonstrate compliance with Ohio policies stated in R.C. 4928.02(A) to (N).[8] (OPAE Init. Br., p. 4.) This claim essentially amounts to an argument that R.C. 4928.02(A) to (N), which articulate the state's general goals and policies, should override the specific dictates of R.C. 4928.142(A) and (B). OPAE claims that R.C. 4928.02(A) to (N) require the Companies to: (1) analyze other alternatives (2); include information on how the Companies will meet renewable portfolio requirements; and (3) and show that CBP will protect retail customers from market deficiencies (p. 6). OPAE Init. Br., pp. 5-7.)

Contrary to the claims of OPAE (and others), R.C. 4928.02(A) to (N) place no such burden on the Companies. Unlike R.C. 4928.142, R.C. 4928.02 does not impose any obligations or duties on the Companies to affirmatively show anything. Rather, that section reflects the policy goals and objectives of the state, as carried out by the Commission. *See* R.C. 4928.02 ("It

[7] *People of the State of Illinois ex rel. Illinois State Attorney General Lisa Madigan v. Exelon Generation Co., LLC et al.*, Docket No. EL07-47-000.

[8] Nucor and IEU argue similarly. Nucor argues that the Companies should be required to amend their proposal to address the objectives of S.B. 221. (Nucor Init. Br. pp. 4, 6-8.) IEU argues that Companies have not provided information on how they intend to meet S.B. 221's renewable portfolio requirements, specifically regarding customer-sited capabilities – which they argue is necessary to make a meaningful comparison with the ESP proposal. (IEU Init. Br., pp. 20-23.)

is the policy of this state to do the following throughout this state . . . . In carrying out this policy, the *commission* shall consider rules as they apply . . . ." (emphasis added). Thus, R.C. 4928.02 only comes into play when the Commission must weigh the policy considerations in its discretionary judgment. Here, R.C. 4928.141 expressly directs that "electric distribution utility shall provide consumers . . . a standard service offer of all competitive retail electric services . . .[and] the electric distribution utility shall apply to the public utilities commission . . . in accordance with section 4928.142 or 4928.143 of the Revised Code." *Id.* Thus, once the Commission finds that the requirements of R.C. 4928.142 have been met, any further analysis under R.C. 4928.02 is redundant.[9]

OPAE argues that the Application does not comply with certain policies of the state as reflected in R.C. 4928.02 because, among other reasons, the Companies/Brattle "failed to evaluate any other options than a full-requirements bidding process" and "looked at no other alternatives than a declining clock auction . . . ." (OPAE Init. Br., p. 5.) OPAE is wrong. Dr. Rietzes confirmed that Brattle "also considered other alternatives, primarily a sealed bid procurement similar to what they have in Maryland." (Tr. I, p. 21.) Brattle ultimately rejected the sealed bid procurement method because it lacks certain advantages inherent in the descending clock format, such as the ability of bid participants reach to their competitors in real time. (*Id.*, p. 22.)

Moreover, neither OPAE nor OEG offers any recommendation on how the Commission would require the Companies to explore options other than the proposed CBP and meet S.B. 221's mandated 90-day timeframe. (Companies Init. Br., p. 38.) S.B. 221 unequivocally states

[9] Similarly, proposals seeking to improperly impose requirements beyond those of the 4928.142 should be rejected. Kroger and IEU argued that MRO should not be implemented without consideration of ESP proposal. (Kroger Init. Br., pp. 4-5; IEU Init. Br., pp. 22-23.) While ESP approval under 4928.143 does require comparison with any expected MRO results, 4928.142 does not require comparison with expected 4928.143 results. This recommendation thus does not conform to S.B. 221's mandates.

that the Commission must reach a determination on whether the Companies' MRO Application meets the statutory criteria of R.C. 4928.142(A)(1) and 4928.142(B) no later than ninety days from an *MRO Application filing date.* *R.C. 4928.142(B).* Ms. Alexander admitted that attempting to implement an active portfolio management approach would require many additional time-consuming steps but offered no explanation how this lengthy process would fit into S.B. 221's timeline – and it clearly does not. (Companies Init. Br., p. 38; Tr. IV, pp. 149-51.)

E. The Application Appropriately Includes A Reconciliation Mechanism To Recover Costs Associated With The CBP Process And Generation Procurement.

Under R.C. 4928.142(C), "[a]ll costs incurred by the electric distribution utility as a result of or related to the competitive bidding process *or to procuring generation service* to provide the standard service offer . . . and the cost of all other products and services procured as a result of the competitive bidding process, *shall* be timely recovered through the standard service offer price, and, for that purpose, the commission *shall* approve a reconciliation mechanism, other recovery mechanisms, or a combination of such mechanisms for the utility." (Emphasis added.) The Companies have demonstrated that the statute permits recovery of costs associated with the competitive bidding process, uncollectible expense and delta revenues, all on a non-bypassable basis.

1. CBP expenses and uncollectible expense are appropriately recovered through Rider CRT.

In its brief, Staff argues that the Companies failed to support recovery of CBP process expense not recovered through the tranche fee paid by suppliers or recovery of generation uncollectibles. (Staff Init. Br., p. 7.) Staff witness Robert Fortney testified otherwise. When asked whether he had any objection to the idea of a rider that would ensure that generation costs and revenues are matched such as through the CRT mechanism, he responded, "No, I am not – I am not recommending that there should be costs that are not recovered." (Tr. II, p. 38.) Mr. Fortney merely took issue with the fact that Rider CRT, as proposed, is non-bypassable. He recommended that delta revenues be removed from the rider so that those costs could be appropriately "socialized" on a non-bypassable basis. (*Id.*, pp. 39-40.) The clear implication of his testimony is that CBP expenses and uncollectibles *should* be recovered, but on a bypassable basis. Staff has thus offered no support for the conclusion stated in its Brief that CBP expenses and uncollectibles should not be included in Rider CRT.[10]

No other parties contest the general notion that the Companies should recover CBP costs or uncollectibles through Rider CRT, but several contest recovery of these costs on a non-bypassable basis. (Dominion Retail Init. Br., pp. 5-10; Constellation Init. Br., pp. 7-8; OEG Br., pp. 14-15; Nucor Br., p. 27; OPAE Br., p. 9.) The common denominator in all of the arguments against recovery on a non-bypassable basis is that the charges are generation-related. Of course they are – this proceeding involves a procurement mechanism for generation service. R.C. 4928.142(C) provides that "All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process *or to procuring generation service to provide the standard service offer* . . ., *shall* be timely recovered through the standard service offer price, and, for that purpose, the commission *shall* approve a reconciliation mechanism . . . ." (Emphasis added.) The fact that the costs proposed for recovery through Rider CRT are generation-related is precisely why they are recoverable under the statute.

In order to be assured of recovery as provided in the statute, Rider CRT costs must be unavoidable. If significant numbers of customers migrate from the Companies' SSO service,

[10] Similarly, OPAE also argues that customers should not pay any costs of the auction (OPAE Init. Br., pp. 9-10), despite the existence of a statute that says otherwise. While OPAE contends that auction participants or suppliers should pay the full auction costs, OPAE ignores the obvious fact that these costs would be reflected in supplier bids. Customer will have to pay the auction expenses in one form or another.

CBP expenses will be borne solely by the remaining customers. And although parties such as Dominion Retail argue that making Rider CRT non-bypassable would violate R.C. 4928.02, Dominion Retail does not identify what "anticompetitive subsidy" prohibited by the statute would occur by requiring shopping and non-shopping customers to pay Rider CRT. Both shopping and non-shopping customers enjoy the benefits of the Companies serving as a "backstop" for SSO generation service. It is therefore fair and reasonable for both shopping and non-shopping customers to pay costs directly related to the procurement of generation service.

What's more, allowing customers to avoid Rider CRT would create a subsidy rather than eliminate one. All of the costs associated with the procurement and provision of generation service would be borne by the Companies' existing SSO customers, despite the fact that shopping customers also receive a benefit by being able to return to the Companies for SSO service. Making Rider CRT non-bypassable is consistent with the principle that customers who receive a benefit (in this case, the ability to migrate to and from SSO service) should pay for it.

OEG's argument that POLR charges (such as those reflected in Rider CRT) should be collected in distribution rates is easily disposed of for one simply reason: it violates Ohio law. The Supreme Court of Ohio has recently said so. In *Elyria Foundry* Co. *v. Public Util. Comm'n*, 2007-Ohio-4164 ¶ 50, 114 Ohio St. 3d 305, the Court held that generation costs could be recovered in generation rates, and not in distribution rates. ("R.C. 4928.02(G) prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa.") Nothing in S.B. 221 abrogates the Supreme Court's decision. In fact, R.C. 4928.02(H) expressly prohibits "the recovery of any generation-related costs through distribution or transmission rates."[11]

[11] The statutory language quoted above was added to former R.C. 4928.02(G). S.B. 221 renumbered this section as R.C. 4928.02(H). The fact that the General Assembly expressly adopted the holding of *Elyria Foundry*

Dominion Retail's claim – that R.C. 4928.142(C)(3) requires all costs of the CBP to be recovered exclusively through SSO generation service rates, thereby precluding recovery from shopping customers (who do not pay SSO rates) – is incorrect. The statute provides that all costs incurred as a result of the CBP or procurement of generation "shall be timely recovered through the standard service offer price . . . ." R.C. 4928.142(C)(3). That statute does not say that costs will be recovered through generation service rates. Part of the standard service offer price is the cost incurred by the Companies to procure generation. "All costs" incurred by a utility that are related to the CBP process or generation procurement "shall be timely recovered." The only way to assure that such costs are recovered by the utility is through a nonbypassable charge.

Dominion Retail further argues that the state policy of protecting at-risk populations is not served by socializing uncollectible expense because the Commission's credit rules protect the Companies from customers who are bad credit risks. This argument fails to acknowledge two important factors. First, the credit rules give the utilities very little discretion in determining whether a customer is creditworthy. If a customer meets the requirements of the Ohio Administrative Code, *e.g.*, O.A.C. Section 4901:1-10-14, the Companies are required to accept the customer.[12] Second, the Commission's credit rules are routinely superseded during the winter months by winter reconnection orders – orders that have been issued annually for the past 24 years. The winter reconnect period for the 2008/2009 heating season runs for the 7 month period of October 20, 2008 through April 15, 2009. (*See* Case No. 08-951-GE-UNC, Order of

(continued...)

negates comments made at the hearing by OEG's counsel to the effect that S.B. 221 intended to modify the Supreme Court's decision. (*See* Tr. I, pp. 197-98)

[12] Once a person becomes a customer, service to the customer may be terminated only for one of the reasons specified in O.A.C. Section 4901:1-18-05. Before terminating service for non-payment, the utility must offer a payment plan pursuant to O.A.C. Section 4901:1-18-04. Competitive suppliers are not subject to these requirements.

Sept. 10, 2008.) The Companies therefore are not nearly as protected from credit risks as Dominion Retail tries to suggest. Moreover, it is appropriate to recover generation uncollectibles on a non-bypassable basis. To the extent that the Commission has determined that it is appropriate public policy to permit service to customers in a way that raises the likelihood that the Companies will incur uncollectibles expense, then the cost of those policy-driven uncollectible expenses should be borne by all customers.

2. Delta revenues are appropriately recoverable through Rider CRT.

Staff and OEG support the recovery of delta revenues on a non-bypassable basis, but argue that the Companies should apply for recovery in a separate docket. (Staff Init. Br., pp. 7-8; OEG Init. Br., p. 15.) Kroger argues that delta revenues should not be recovered from anyone. (Kroger Init. Br., p. 8.) Cleveland mistakenly argues that the right to recover delta revenues is not in S.B. 221, but ultimately concludes, like Staff, that this issue should be addressed in a separate docket. (Cleveland Init. Br., pp. 5-6.)

As Mr. Norris explained, the Companies propose to recover delta revenues through Rider CRT because the load that will be served under those contracts will be procured in the CBP. (Tr. 1, p. 200.) It is therefore appropriate to consider the recovery of delta revenues in this proceeding rather than in a separate proceeding, as certain other parties propose.

As explained in the Companies' Initial Brief, two categories of delta revenues are at issue: (1) delta revenues arising from existing CEI customers; and (2) delta revenues that will arise from any special contracts entered after December 31, 2008. With regard to the second category, R.C. 4905.31(E) expressly provides that special contracts and reasonable arrangements are subject to Commission approval, and provides for delta revenue recovery.

The delta revenues arising from existing CEI special contracts are a different animal. These contracts exist today. They were approved by the Commission. The Companies are required to procure wholesale generation service to provide retail service to customers under these contracts. Beginning in 2009, if the MRO is implemented, generation service will be procured through the CBP. To the extent rates determined through the CBP do not yield revenues sufficient to make the Companies whole for generation costs, the delta revenues arising from CEI special contracts are *directly* "related to the competitive bidding process" *and* "to procuring generation service." R.C. 4928.142(C)(3). The statute further provides that such costs "shall be timely recovered" and that the Commission "shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility." *Id.* The Companies' proposal to recovery delta revenues from existing contracts through Rider CRT is expressly authorized – in fact, mandated – by S.B. 221.

F. Certain Intervenors' Rate Design Arguments Present No Challenge To The Companies' Proposed MRO.

S.B. 221 does not contemplate any of the rate-design-related modifications and ostensible requirements raised by certain intervenors. S.B. 221 requires approval of an MRO proposal if it meets the statutory criteria set forth in R.C. 4928.142(A)(1) and 4928.142(B). Thus, intervenors arguing rate design issues have offered no basis on which the Commission could reject the MRO application. R.C. 4928.142 mandates no particular rate design. (Companies Init. Br., p. 29.)

As the Companies explained at hearing, the goal of the MRO rate design is to align retail rates with the way the Companies acquire wholesale generation. (Tr. 1, p. 146.) Retail rates will be a function of the pricing structure from the CBP, not differences in peak demands, cost of service or load factors. (*See* Tr. I, p. 157.) Rates will vary only according to voltage and seasonality. (Companies Init. Br., p. 28.)

The rate design recommendations of various intervenors, discussed further below, fail to recognize that a standard service offer is what is mandated by R.C. 4928.142 and proposed here.

No customer is precluded from shopping for their energy needs with a third-party supplier, if their view is that a better rate may be obtained elsewhere on the competitive market.

1. Demand charges are inappropriate for the MRO rate design.

OCC argues that demand charges for larger customers be incorporated into the rate design of the CBP. This should be rejected because the theoretical assumptions underlying the argument are undercut by the unrebutted evidence.

OCC assumes, without support, that the "elimination of non-optional demand charges from all generation tariffs will encourage an inefficient demand for, and use of, generation resources." (OCC Init. Br., p. 5.) OCC also suggests, without evidence or explanation, that if demand charges are not included in rate design, suppliers will submit higher bids. (*Id.*) The testimony provided by Companies' witness William Ridmann, however, negates these theoretical assertions. As explained in the Companies' Initial Brief, Mr. Ridmann reviewed load data for Jersey Central Power & Light (a regulated affiliate of the Companies) and concluded that customer load profiles were essentially unchanged before and after demand charges were eliminated for that utility in 2003. (Company Ex. 9, p. 6.) Therefore, actual prior experience shows that there is not necessarily a correlation between demand charges and load profiles, and therefore no basis for suppliers to include a risk premium due to the elimination of demand charges. Constellation witness Fein confirmed this observation, explaining that it is not necessary to have demand charges in order for customers to participate in demand response programs or otherwise receive the benefits of such programs. (Tr. IV., pp. 13-14.)

Further, OCC's view, if adopted, would result in imbalances in the MRO's rate design. As Mr. Ridmann explained, the introduction of demand charges would give low-load factor customers an incentive to shop. (Company Ex. 9, p. 5.) Since these customers typically pay an above-average SSOGC, their shopping would increase revenue variance, with the increase being passed on to other customers. (*Id.*) Shopping occurring due primarily to flawed retail rate design, as opposed to price-based shopping, would result in unrecovered utility costs and lead to higher reconciliation costs for customers, an outcome at odds with S.B. 221's policy intent of promoting least-cost, competitive market prices for power and energy. (*Id.*) The Commission should reject OCC's attempt to introduce counter-productive demand charges into the MRO rate design.

2. The MRO need not provide for interruptible or time differentiated rates.

Some parties, most notably Nucor, argue that because the rate design proposed in the Companies 2007 CBP (Case No. 07-796-EL-ATA) included interruptible and time-differentiated rates and rate variations based on load factor, there is no reason the Companies cannot offer the same rate design in their MRO. There are three flaws with this argument.

First, adopting any of the alternative rate designs would require the Companies to change the standard, full-requirements product that will be bid in the auction. Nucor and other parties concede this point, arguing that the full requirements product offered by the Company should be broken into different products for different types of load. (Nucor Init. Br., p. 15; Tr. I, pp. 29-30.) Doing this would undermine the auction process in contravention of R.C. 4928.142(A). As Dr. Reitzes and Mr. Fein testified, the Companies have proposed a standard wholesale product that bidders understand and will formulate bids to provide.(Company Ex. 3, p. 17; Tr. IV, pp. 52-53.) Unlike in 2007, one key requirement for the successful completion on any CBP under S.B. 221 is that there be at least four bidders for each product on auction. R.C. 4928.142(C)(2). Further, the Commission is statutorily charged with fostering bidder participation in the competitive bid process. R.C. 4928.142(A). Consequently, an MRO must be designed to ensure that there are a sufficient number of interested parties bidding on each product. Any product design that serves to reduce the number of bidders for a product or discourage bidder participation is counter-productive and contrary to statute. A nuanced and differentiated set of products, with various rate options, is likely to be significantly less attractive to wholesale suppliers than is a single, simple and easily understood product. As the Illinois Commerce Commission noted in a rate case involving a substantially similar product offering, this sort of standard full-requirements product "contributes to the goal of maximizing participation," and "expands the base of potential customers." ICC Docket 05-0160 (cons.), Order dated Jan. 24, 2006, at 107. By "minimizing customer confusion," such products actually "encourage efficient retail markets." *Id.* Moving away from the Companies' proposed standard product may well lead to higher bid prices and would run counter to the clear statutory goal of ensuring minimum required levels of competition. R.C. 4928.142(A)(2).

As Mr. Norris and Mr. Ridmann explained, leaving the standard product unchanged and incorporating Nucor's proposed rate design would lead to large swings in Rider CRT. (Companies Init. Br., pp. 28-32; *citing* Company Ex. 9, p. 5, Company Ex. 2, p. 4.) Introducing demand charges, interruptible rates and time-of-use rates will cause a mismatch between generation costs and revenues. While it is true that this mismatch would be recovered and trued up through the Rider CRT reconciliation mechanism, large quarterly swings in Rider CRT would result in large variations that would need to be added to base generation rates. This would distort price signals and promote the very type of "rate design shopping" discussed by Mr. Ridmann. Nucor's proposals are thus feasible in theory but not in practice.

Second, as indicated above, S.B. 221 does not require the Companies to design MRO rates based on cost of service, time of use, load factor, demand or any other factor. Indeed, if there were such a statutory requirement other parties would have cited it; and they have not. As

Nucor acknowledges, the Companies' proposal "would result in retail rates that are close to uniform across all consumer classes." (Nucor Init. Br., p. 9.)

While Nucor argues that the proposed modification would result in lower average costs for high load-factor classes, Nucor provided no support for this assertion. (Companies Init. Br., p. 32; Tr. III, pp. 40-41.) Other intervenor witnesses asserted the precise opposite – that it is *more* costly to procure generation service for high load-factor customers, such as industrial customers. (OPAE Ex. 1, p. 23). This lack of consensus signals why it is better to have a *standard* service offer based on a standard, full-requirements product. A standard product and rate design provides for less confusion in the marketplace, better understanding of the product being offered (and therefore, greater competition among bidders), and lastly, ensures that by bidding load on a full requirements, slice-of-system basis, a supplier's risk is appropriately spread among all customers included in that supplier's slice of the system. (*See* Tr. I, pp. 27-28.)

Third, Nucor and other parties gloss over the fact that competitive retail suppliers will be able to provide the rate design options that these parties advocate. Both Nucor's Dr. Goins and Kroger's Mr. Higgins admitted that the market will provide rate options such as interruptible rates and TOU rates, if these are not offered by the Companies. (Companies Init. Br., pp. 31, 32; Tr. III, p. 37; Company Ex. 8, pp. 14-16.) Their concession is confirmed by Constellation witness Fein, who stated that Constellation offers those options currently, and anticipates offering them in Ohio. (Tr. IV, pp. 46-47.) The Companies' proposed rate design does not limit customers' ability to shop; if anything, it promotes shopping by customers with "non-standard" loads.

Notably, neither Dr. Goins nor any other intervenor witness offered specific dynamic or hourly pricing proposals that the Commission might evaluate as an alternative to the Companies' proposed MRO. As a result, there is no record evidence to support a rate design other than the one proposed by the Companies.

Nucor also suggests that without interruptible rates, the Companies will not be able to meet mandatory demand response requirements. (Nucor Init. Br., pp. 21-22.) R.C. 4928.66(A)(1)(b) requires utilities to implement "peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018." Nucor cites no record support for its claim that without interruptible rates, the Companies will not be able to meet these requirements. (Nucor Init. Br., p. 22.) Moreover, if the Commission determines that the Companies have not met demand reduction requirements, there are mechanisms in place for the Commission to address this issue in future proceedings. *See* R.C. 4928.66(B) and (C). Nucor's claim that the Companies are required to implement economic development initiatives similar to the ESP are similarly flawed in that there is no such requirement under R.C. 4928.142.

III. VARIOUS OTHER ISSUES HAVE NO BEARING ON WHETHER THE MRO SHOULD BE APPROVED.

There are several other issues raised by Staff and intervenors, addressed briefly below, which similarly carry no weight in assessing the Companies MRO Application in accordance with S.B. 221.

A. No Party Has Demonstrated That The MRO Fails To Satisfy Statutory Requirements.

1. The product is clearly defined.

No party can reasonably argue that the MRO's proposed slice-of-system tranche is not a clearly defined product, although IEU and OPAE attempted to do so. (IEU Init. Br., p. 12; OPAE Init. Br., p. 11). As shown in the Companies' Initial Brief (pp. 12-14), the record shows that the product is easily understood from the bidder's perspective. (Company Ex. 3, p. 18; Tr. I,

p. 25: Tr. III, p. 59; Tr. IV, pp. 52-53.) The possibility that MISO rules or markets may change in the future, as IEU notes, has no bearing on whether the MRO's CBP product is clearly defined. Similarly, load forecasting information (which will be provided on a website (Company Ex. 3, p. 5),[13] will allow bidders to plan their bidding positions, but will not "define" the product in any statutory sense, despite IEU's claims. (IEU Init. Br., p. 16.) Load forecasting information will change over time, and cannot be captured in a static MRO application. The Companies have appropriately defined the type of load forecasting information that will be provided to bidders in the application and exhibits for the slice-of-system product. A witness for Constellation, a potential bidder in the auction, verified that the MRO's product definition gives Constellation an understanding of what it would be required to supply, even without specific load forecasting information. (Companies Init. Br., p. 13; Tr. IV, pp. 52-53.) The record shows that the CBP product is clearly defined, and that the Companies' application meets the requirements of R.C. 4928.142(A)(1)(b).

2. The application satisfies the requirements of independent third-party design, oversight and administration.

Certain intervenors' claim that the requirements of R.C. 4928.142(A)(1)(d) have not been met, or that the MRO proposal does not allow for appropriate Commission oversight. (*See* Initial Briefs of IEU (pp. 18-20), OCC (pp. 6-8), OEG (pp. 13-14), and Kroger (pp. 5-6).) But these arguments are baseless. As set forth in the Companies' Initial Brief (pp. 15-17), there is no credible evidence that would undermine Brattle's independence. Moreover, the MRO provides for auction management to take place under the Commission's supervision. (*See e.g.*, Companies Init. Br., pp. 7, 17.)

[13] As mentioned, supra, the Companies' competitive bidding process website will be up and running as early as October 14, 2008.

3. MISO's Market Monitoring function has been shown.

Briefs of Staff, IEU and OPAE argue that the Companies' MRO application is deficient due to various perceived shortcomings in the wholesale market. Generally, these arguments are wrong because the Commission has no authority to mitigate wholesale market power. (Companies Init. Br., pp. 21-22.)

S.B. 221 recognizes this fact. R.C. 4928.142(B) requires a showing of membership in an RTO with the ability to mitigate market power (not, as OPAE suggests, a showing of MISO's efficacy in monitoring the wholesale market (OPAE Init. Br., pp. 3-4)). This authority vested in an RTO comes from FERC. (Companies Init. Br., pp. 11-12.) The Ohio General Assembly understands the FERC regimen for approving and regulating RTOs and FERC-authorized market power mitigation functions. *State v. Thompson*, 102 Ohio St. 3d 287, 289-90 (2004) (stating presumption that the General Assembly is aware of prior law). The General Assembly understood the options before it and determined that the market monitoring authority granted to a FERC-approved RTO was sufficient.

Staff briefing on this issue ignores FERC's market monitoring jurisdiction and misreads the limited and precise nature of S.B. 221's requirements. (Staff Init. Br., pp. 8-14.) Staff argues that the Companies' MRO application should not be approved because its description of the market monitor function of the RTO is vague. Specifically, Staff claims that the Companies' MRO application falls short because it does not specify whether MISO has sole mitigation authority, whether that function is delegated to the MMU, or whether both options apply. (*Id.*, pp. 9-10.) Staff states that FERC's pending cases, RM07-19 and AD07-7, may decide such issues, and that until FERC decides these issues, Staff cannot recommend approval of MRO application. (*Id.*, pp. 10-11.) Staff claims that R.C. 4928.142 contemplates that MMU will perform market monitoring functions, not MISO, who may be reluctant to police its own members. (*Id.*, pp. 11-12, 14.)

Notwithstanding Staff's concerns, it is FERC – not the General Assembly or the Commission – that has the plenary authority to regulate market power and to delegate such power to RTOs. Undoubtedly, the Ohio General Assembly was aware of such authority when it enacted S.B. 221. Even IEU – which complains of FERC's inability to regulate market power *well* – recognizes there is no deficiency that the Commission or the Companies could remedy, because any such deficiency would stem from alleged "problems at the regional and federal levels." (IEU Init. Br., p. 11.)

Nothing in the Staff's concerns expressed during the FERC's recent rulemaking on whether the power to mitigate market power resides in the RTO or the MMU matter. In either case, MISO will satisfy the requirements of S.S. 221; namely, it is an RTO that "has a market monitoring function and the ability to take action to identify and mitigate market power or the electric distribution utility's market conduct." R.C. 4928.142(b)(2).

The Companies have demonstrated each statutory requirement regarding this issue. R.C. 4928.142(B) requires three things. First, an MRO application must demonstrate that the EDU belongs to a FERC-approved RTO. The Companies have done so. Second, the RTO – here, MISO – must have a market-monitor function and the ability to take actions to identify and mitigate market power or market conduct. It does. And third, the Companies must demonstrate an available public source of information identifying "pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis." The Companies have shown this. Thus, R.C. 4928.142(B)'s requirements have been met.

4. Published pricing information is available.

The Companies have demonstrated the availability of pricing information through published sources and thus met the R.C. 4928.142(B)(3) requirement. IEU claims the Companies should be required to provide Intercontinental Exchange ("ICE") Data (showing pricing for contracts for delivery) to support their application. (IEU Init. Br., pp. 16-18; *see also* OPAE Init. Br., p. 4.) The plain language of the statute does not require this arbitrary exercise. The statute requires only a showing that such information is available. Notably, *no* party claims that such information is *not* available – only that certain data have not been provided (which, again, is not required by R.C. 4928.142(B)(3).

As shown in the Companies Initial Brief (pp. 23-24), there is no question that Companies have met the R.C. 4928.142(B)(3) requirement. (*See also* Company Ex. 1, pp. 4-5; Tr. I, pp. 68-69; Constellation Ex. 1, pp. 11-12.)

B. SSO Master Supply Agreement Issues

OEG, OCC, and IEU take issue with the Companies' contingency plan to purchase SSO supply through the MISO day-ahead market, and argue to impose more rigid procurement requirements on the Companies in the event of supplier default. (OEG Init. Br., pp. 3-4; OCC Init. Br., pp. 11-13; IEU Init. Br., p. 23.) These arguments fail to consider that it is impossible to know in advance the exact circumstances under which a supplier would default and contingency purchases would be made, when such circumstances will occur, and what the state of the market would be at that time. The proposed MRO and SSO Master Supply Agreement recognize these uncertainties, and sets forth an appropriately flexible means for contingency power procurement. Allowing for this flexibility will enable the Companies to make informed and prudent decisions at the time any such circumstance would arise. (*See* Tr. I, pp. 128-29; 130-31.)

Constellation argues that the Companies should make three changes to the Master SSO Supply Agreement ("MSA") to "promote increased competition" in the CBP. (Constellation Init. Br., p. 8.) First, Constellation contends that the Notational Quality Language should be modified to allow flexibility in the assignment of contracts. The Companies disagree with the need for this change.

Constellation's second proposed change is to include a provision to require the Companies to make weekly payments to suppliers in the event the Companies' debt falls below investment grade. This is impractical and commercially unreasonable. The Companies do not bill retail customers on a weekly basis; paying wholesale suppliers on a weekly basis would therefore produce a significant working capital requirement that are not part of the present rate structure, but eventually would be passed along to customers. The Commission is in a sufficient position to take actions to assure payment by the Companies to wholesale suppliers to maintain retail service.

Constellation's third recommendation is that the MSA specify the Companies' alleged responsibility for firm transmission service obligations; or, alternatively, to allow winning SSO suppliers to pass through increases and decreases in firm transmission costs to the Companies' retail customers. This recommendation would require the Companies to structurally change the wholesale product to be offered in the CBP, and would cause significant problems in billing and administration.

OCC argues that the Commission should require the Companies to "provide all bidders the same information that its affiliate supplier, FirstEnergy Solutions, has gained through its supply of generation service to the service territory," to avoid creating an "unfair advantage." (OCC Init. Br., p. 10-11.) It is unclear exactly what OCC has in mind. To the extent OCC means to suggest that the Companies should make load information that may be used in forecasting load available to all suppliers, the Companies agree, and have confirmed that they will do so. (Tr. I, pp. 87-88.) However, a request for the Companies to obtain confidential information from their affiliate and provide it to competitors would be inappropriate on several levels, if this is OCC's intent. Most importantly, such request would ignore the fact that the Companies are functionally separate from FES, in accordance with their Commission-approved Corporate Separation Plan.

C. S.B. 221 Does Not Provide For Comparison Of An MRO To An ESP.

Kroger argued that MRO should not be implemented without careful consideration of ESP proposal. (Kroger Init. Br., pp. 4-5) – Other parties also hint at considering ESP in tandem with MRO. As the Commission has already determined in rejecting consolidation of the ESP and MRO cases, these are separate cases under different statutes and must be tried and determined as such. (Entry of Sept. 15, 2008, p. 3.)

IV. CONCLUSION

The Companies have shown that the proposed MRO and competitive bidding process meet the requirements of R.C. 4928.142(A)(1) and (B). Accordingly, the application should be approved in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company was electronically delivered to the following persons, this 14th day of October, 2008:

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