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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 Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	)	Case Nos. 10-388-EL-SSO

POST-HEARING BRIEF IN SUPPORT OF ESP SUBMITTED BY NUCOR STEEL MARION, INC.

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Nucor Steel Marion, Inc. ("Nucor") hereby submits its post-hearing brief in support of the application for approval of an electric security plan ("ESP") by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies"). FirstEnergy's ESP is presented in a stipulation and recommendation ("ESP Stipulation" or "Stipulation") among FirstEnergy and numerous other parties which was filed with the Public Utilities Commission on March 23, 2010.[1]

I. INTRODUCTION AND SUMMARY

The ESP Stipulation comes at the end of a long slog, which began in the summer of 2009 with the announcement of FirstEnergy's move to PJM, continued through the proceeding to consider FirstEnergy's market rate offer ("MRO") proposal in Case No. 09-906-EL-SSO (which was fully litigated through the fall of 2009 and into early 2010), and

[1] Errata filings were submitted by FirstEnergy on March 30, 2010, and April 13, 2010.

culminated in the settlement discussions that produced the Stipulation. Considering also that the ESP proposal embodied in the Stipulation is FirstEnergy's fourth standard service offer ("SSO") proposal since the passage of S.B. 221, it should be readily apparent that many of the issues addressed in the Stipulation have been the subject of serious thought, debate, and compromise among most of the parties to this proceeding for much of the last two years.

Nucor, a large industrial, interruptible customer of Ohio Edison, is a signatory to the Stipulation, and we support the proposed ESP. The ESP will provide significant benefits, including mitigating the uncertainty regarding the rate impacts of FirstEnergy's move to PJM, resolving several outstanding cases (thereby advancing the principle of administrative efficiency), and establishing a competitive bidding process for generation supply that is similar to the process used in FirstEnergy's existing ESP, which most observers regarded as a success. The proposed ESP also continues, and even improves upon, several of the good rate design features of the current ESP.

The Stipulation is the result of serious and extensive bargaining among the parties, and is supported by a broad cross-section of stakeholders.[2] As a result of that bargaining, there was much give and take – consequently, while Nucor (and presumably other parties) would have preferred different provisions in many cases, the end result is a reasonable compromise that we can support. The Stipulation meets all of the criteria the Commission relies upon in considering whether to adopt a stipulation.[3] The

[2] Direct Testimony of William R. Ridmann ("Company Ex. 4") at 8-12; Prefiled Testimony of Tamara S. Turkenton ("Staff Ex. 2") at 2-9.
[3] Company Ex. 4 at 10-13.

evidence on the record also shows that the provisions of the ESP Stipulation are more favorable in the aggregate as compared to the expected results of an MRO.[4] Accordingly, the Stipulation is just and reasonable and should be approved.

Nucor will not address all the elements of the Stipulation in this brief, since those elements are described in detail and supported by the testimony of several witnesses supporting the Stipulation, including Mr. William Ridmann of FirstEnergy, and Ms. Tamara Turkenton of the Staff. In this brief, we will focus once again on the contested issue closest to Nucor's heart – FirstEnergy's proposed interruptible rates – the Economic Load Response Program Rider ("Rider ELR") and the Optional Load Response Program Rider ("Rider OLR"). As the Commission knows, interruptible rates were major issues in all of FirstEnergy's past SSO cases, and they are an issue with respect to the proposed ESP as well. In this case, the evidence demonstrates that Riders ELR and OLR are an integral piece of the overall settlement that will provide benefits to customers on the rates, as well as providing capacity avoidance, energy cost reduction, and economic development benefits that will accrue to all FirstEnergy customers. Nucor's positions on interruptible rates are supported not only by the evidence adduced in this case, but by evidence from Case No. 09-906-EL-SSO ("MRO Case"), where interruptible rates (and specifically the continuation of Rider ELR and OLR) were a contested issue and where Nucor sponsored the comprehensive testimony of Dr. Dennis W. Goins on this issue.[5]

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[4] *Id.* at 21-27.

[5] The Commission took administrative notice of the record in the MRO Case. Case No. 10-388-EL-SSO, April 6, 2010 Entry at 2-3. In this brief, cites to the transcript in the instant ESP proceeding shall be styled "Tr. Vol. __ at __." Cites to Dr. Goins' testimony in the MRO Case will be styled "Goins MRO Testimony at ___," and cites to other testimony in the MRO case will be done in the same way, referencing the specific witness. Cites to the hearing transcripts in the MRO Case will be styled "MRO Case Tr. Vol. __ at __."

Nucor urges the Commission to approve the Stipulation. The following is a summary of Nucor's arguments and positions in this brief:

- FirstEnergy's Interruptible Rates Should Be Extended as Modified by the Stipulation.
    - FirstEnergy's proposed interruptible rates, Riders ELR and OLR, are just and reasonable and provide substantial benefits. These benefits include:
        - Avoided generation capacity cost savings;
        - Avoided energy cost savings;
        - Avoided transmission and distribution cost savings;
        - Savings from avoided reserves and transmission losses;
        - Reliability benefits resulting in the ability of the RTO, a FirstEnergy operating company, or FirstEnergy's transmission affiliate ("ATSI") to call an interruption when an emergency condition exists;
        - Environmental benefits through the avoidance of the need for new peaking generation and additional transmission capacity;
        - Avoidance of enormous negative rate impacts to Rider ELR customers; and
        - Economic development and job retention benefits.
    - The claims by witnesses on behalf of EnerNOC, Inc. ("EnerNOC") and the Demand Response Coalition[6] that the requirements of Riders ELR and OLR are virtually identical to the requirements for participation in PJM's capacity market (the Reliability Pricing Model, or "RPM") are incorrect, particularly with respect to Rider ELR. There are significant differences between a customer's obligations under Riders ELR or OLR, and the customer's obligations if it were to participate in the PJM RPM through a curtailment service provider ("CSP"). These

[6] The Demand Response Coalition is comprised of EnergyConnect, Inc., CPower, Inc., Viridity Energy, Inc., Comverge Inc., Enerwise Global Technologies, Inc., and Energy Curtailment Specialists, Inc., all of whom are CSPs in PJM. *See* Direct Testimony of Bruce Campbell, ("Demand Response Coalition Ex. 1") at 3.

differences make both Riders ELR and OLR distinctly different products from the PJM RPM, and much more valuable to Ohio.

- The combined credit proposed for Rider ELR (the ELR and EDR credits) and the Rider OLR credit are the same as in the current riders and are more than justified. In his testimony in the MRO Case, Dr. Goins presented a comprehensive analysis of the cost savings produced by Rider ELR, starting with the long-term avoided capacity cost based on the 2009 FERC-approved PJM estimate of the cost of installing a combustion turbine. He concluded that an interruptible credit above $13.00 per kW/month would be justified, much higher than the current credits. Dr. Goins' analysis of the Rider ELR credit was not challenged by any of the parties opposing the extension of Riders ELR and OLR in their testimony in this proceeding.

- Complaints by EnerNOC and the Demand Response Coalition witnesses that the Rider ELR credit is above PJM capacity "market" prices are invalid and irrelevant to the question of whether Rider ELR is just and reasonable and should be approved. The PJM capacity "market" prices cited by those parties are widely-varying one-year, short-term capacity "market" prices from a single auction – moreover, the record evidence only includes such data for two of the three years covered by Rider ELR. A credit that reflects the long-term avoided cost of capacity, as well as the other cost savings embodied in Rider ELR, ensures that FirstEnergy will be able to attract and retain interruptible load over the term of the ESP, which would not be the case if interruptible customers could elect whether to be interruptible each year based on volatile, short-term capacity market prices. Not only is Rider ELR better for customers on the rate, but it is also a more certain mechanism for FirstEnergy to rely on to meet its peak demand reduction benchmarks.

- The proposal by the Office of Consumer Counsel's ("OCC's") witness Gonzalez to replace Riders ELR and OLR with the interruptible request for proposal ("RFP") process proposed in the MRO Case should be rejected. The shortcomings of the RFP as compared to Riders ELR and OLR are detailed in Dr. Goins' testimony in the MRO Case, and OCC has provided no evidence that the RFP would produce the cost savings it claims.

- EnerNOC witness Schisler's Claims of Due Process Violations and Procedural Deficiencies are Invalid, and Should Not Form the Basis for Rejecting the Extension of Riders ELR and OLR in the Stipulation.

- EnerNOC was, or should have been, on notice that the status of FirstEnergy's interruptible rates following the conclusion of the current ESP would be issues in the MRO Case, and EnerNOC relied on any FirstEnergy statements that Rider ELR and OLR would expire at the conclusion of the current ESP at its own risk.

- Any claims that EnerNOC was misled in the ATSI auction process should be pursed at PJM or the Federal Energy Regulatory Commission ("FERC"), and should have no bearing on the Commission's determination of whether Riders ELR and OLR should be extended as proposed in the Stipulation.

- Riders ELR and OLR Can Properly be Considered Incremental to Interruptible Load on the FirstEnergy System that Existed in 2008.

II. ARGUMENT

A. FirstEnergy's Interruptible Rates Should Be Extended as Modified in the Stipulation.

Under the Stipulation, the parties agreed to modify and extend FirstEnergy's current interruptible rates, Riders ELR and OLR. Several parties opposing the Stipulation in this proceeding – namely, EnerNOC, the Demand Response Coalition, and OCC – recommend that these rates be terminated at the conclusion of the current ESP. The arguments of these parties are not sound and should be rejected.

Certain parties opposing the extension of Riders ELR and OLR apparently do not understand how the riders work. EnerNOC's witness, Mr. Kenneth Schisler, for example, testified that he does not understand how the provision under Rider ELR allowing FirstEnergy to call economic interruptions hedges power supply risk for retail customers.[7] Moreover, the thrust of his testimony focuses on FirstEnergy disclosure

[7] Direct Testimony of Kenneth D. Schisler, ("EnerNOC Ex 1") at 11.

issues, not the merits of Riders ELR and OLR.[8] Similarly, the Demand Response Coalition's witness, Mr. Bruce Campbell, was apparently unaware of several key differences between Rider ELR and the PJM RPM product offered by CSPs.[9] While EnerNOC and the Demand Response Coalition do not fully understand how FirstEnergy's interruptible rates work, and, consequently, do not appear to understand the benefits those rates provide, it is clear that these parties want Riders ELR and OLR gone so that customers who would otherwise be interested in taking service under these rates would have no choice but to go to a CSP.[10] For OCC's part, it is unclear why OCC is opposing extension of Riders ELR and OLR now when they raised no concerns to the extension of these riders when the issue was litigated in the MRO Case.

The evidence in this case and the MRO Case demonstrate that Riders ELR and OLR provide substantial benefits – benefits that effectively went unchallenged even by the parties opposing extension of the riders. The Commission should approve the modification and extension of Riders ELR and OLR as part of this Stipulation in order to ensure the availability of strong, stable, long-term interruptible rates for FirstEnergy's customers.

[8] *Out of 19 pages, Mr. Schisler's testimony contains two paragraphs that arguably address the merits of* Riders ELR and OLR. *Id.*

[9] Tr. Vol. III at 659-663.

[10] Tr. Vol. III at 667 (Mr. Campbell agreed that part of the reason he would like to see the ELR and OLR tariffs terminated is that it would give CSPs a larger customer based to sell to); Tr. Vol. II at 355 (Mr. Schisler testified that he wants Riders ELR and OLR terminated because "EnerNOC wants to serve FirstEnergy customers and wants to provide them with demand-side management service including energy efficiency and demand response."). It would seem that Mr. Schisler's claim that Rider ELR is "anti-competitive" rests on his view that a regulated utility should not be offering an interruptible rate in competition with CSPs, particularly where the rate does not match the short-term RTO auction payment for capacity. EnerNOC Ex. 1 at 11. In apparently advocating that regulated utility interruptible rates should offer programs and credits no different than what is available from CSPs, the CSP witnesses miss the entire point of a regulated interruptible rate.

1. **Riders ELR and OLR provide substantial benefits and are different from the demand response products offered by CSPs.**

   a. **FirstEnergy's interruptible rates provide a broad array of benefits.**

Interruptible load provides a means of avoiding the cost of adding generating capacity.[11] In addition to avoiding generation capacity, interruptible load can provide transmission and distribution cost savings.[12] Interruptible load also avoids reserve capacity that would have been required if the interruptible load were firm, as well as the cost of transmission losses.[13] Interruptible rates provide substantial reliability, environmental, energy savings, and market power mitigation benefits that were described by Dr. Goins in his testimony in the MRO Case:

> [Interruptible load] provides reliability benefits by substituting for such ancillary services as spinning and operating reserves. Interruptible load expands the range of resources available to meet contingencies, lowers customer costs, and can even be used to mitigate wholesale price volatility and curb potential market power problems. Interruptible service is also a form of insurance or safety net, protecting against emergency situations if and when they occur. In addition, interruptible load can create environmental benefits by avoiding the impacts of constructing and operating fossil generation.
>
> As I noted, interruptible load can be used in wholesale markets to reduce prices and price volatility. For example, market-clearing prices fell by \$100-\$200/MWh on a peak day in August 2006 in the Midwest ISO when interruptible load was used in response to a call for demand reductions. Similarly, Ohio Edison's current Rider ELR—in which Nucor participates—calls for economic interruptions when an Economic Buy Through Option Event occurs—that is, when the MISO LMP exceeds 1.5 times the CBP wholesale price. These economic curtailments reduce the need to purchase power at elevated prices, thereby reducing supply costs for the utility and its customers. Interruptible customers typically are allowed to buy through economic interruptions—but only at market-based prices,

[11] Goins MRO Testimony at 12; MRO Case Tr. Vol. I at 116; MRO Case Tr. Vol. IV at 610.
[12] Goins MRO Testimony at 27.
[13] *Id.* at 29.

> transferring the risk of high prices from all consumers to the interruptible customer. By reducing demand during high-cost periods, economic curtailments mitigate conditions that produce price spikes.[14]

Interruptible rates help states promote economic development and retention of manufacturing jobs by providing interruptible customers (who are primarily large industrial customers) with a discounted electricity rate.[15] As the Ohio Energy Group's ("OEG") witness, Mr. Stephen J. Baron, testified in the MRO Case, interruptible rates such as the current Rider ELR provide rate mitigation and avoid rate shock for interruptible customers, and are critical today given the poor state of the economy in Ohio, and the manufacturing sector in particular.[16]

Interruptible load under Rider ELR will also lower short-run capacity costs borne by retail customers by virtue of its being bid into the PJM RPM auctions. As FirstEnergy witness, Mr. Brian A. Farley, explained in the MRO Case, FirstEnergy plans to bid interruptible load into the RPM as a "price taker," thereby displacing the highest cost capacity resources that would otherwise be needed, and essentially guaranteeing lower capacity costs.[17] Even Mr. Campbell, while arguing for the termination of Rider ELR, acknowledges that bidding Rider ELR load into the PJM capacity auctions in this manner will result in lower prices that will benefit "all customers in certainly the western part of PJM, potentially PJM as a whole."[18] In addition to lowering capacity costs overall, any payment received by FirstEnergy for the interruptible load bid into the RPM will be

[14] Goins MRO Testimony at 12-13 (citation omitted).
[15] *Id.*
[16] Baron MRO Testimony at 11-12, 14-15.
[17] Farley MRO Rebuttal Testimony at 5-6.
[18] Tr. Vol. III at 673.

passed back through to retail customers as an offset to generation costs.[19] Finally, FirstEnergy's interruptible rates will play a critical role in helping FirstEnergy achieve its peak demand reduction benchmarks under Section 4928.66(A)(1)(b) of the Revised Code.[20] By using Rider ELR and OLR load to meet the PDR benchmarks, FirstEnergy will avoid additional costs to obtain peak demand reduction.

The benefits from FirstEnergy's interruptible rates come at a cost to interruptible customers – since interruptible service is a non-firm service, interruptible customers receive a lower quality of electric service when compared to firm customers,[21] and must accept the costs and inconveniences associated with having to interrupt their operations. At the hearing, in response to a question by EnerNOC, FirstEnergy witness Ridmann testified that he is uncertain whether there have been interruptions of customers since the current Rider ELR went into effect in 2009.[22] But whether customers have been interrupted in the past year is entirely beside the point. No one knows when a system emergency might occur in the future that might trigger the deployment of emergency interruptible load. Interruptible service provides a "form of insurance or safety net, protecting against emergency situations if and when they occur."[23] Of course, as with any insurance, the value of insurance is not whether a claim

[19] *See* Tr. Vol. I at 153 (Mr. Ridmann testified that to the extent there are revenues coming from PJM associated with Rider ELR, those revenues would be credited back to customers.)
[20] Stipulation at 21 (providing that the demand response capabilities of customers taking service under Riders ELR and OLR shall count toward the Companies' compliance with the peak demand reduction benchmarks set forth in Section 4928.66 of the Revised Code as applied by the Commission's applicable rules and regulations and shall be considered incremental to the interruptible load on the Companies' system that existed in 2008).
[21] MRO Case Tr. Vol. III at 346-47.
[22] Tr. Vol. I at 148-49. Mr. Ridmann testified that customers currently on Rider ELR have been interrupted in the past. *Id.* at 148.
[23] *Goins MRO Testimony* at 13.

is actually made against the insurance – most folks would prefer to avoid using their home or life insurance – the value is the protection provided in an emergency. By taking service under an interruptible rate, interruptible customers accept the risk of service disruptions in order to help safeguard the reliability of the system. Moreover, with the new revisions to Rider ELR, interruptible customers will face all of the same interruptions faced by customers under the PJM capacity program, plus any interruptions called by the utility or the transmission operator at any time for an emergency curtailment event and, in any event, at least one interruption annually.[24]

b. The claims by EnerNOC and the Demand Response Coalition witnesses that the requirements of Riders ELR and OLR are virtually identical to the demand response requirements for participation in PJM's capacity market (the Reliability Pricing Model, or "RPM") are incorrect.

Echoing Dr. Goins, the Demand Response Coalition's witness Mr. Campbell testified that demand response helps avoid the need for generation capacity and transmission infrastructure, provides reliability benefits, and helps reduce the price of wholesale energy and mitigate price spikes.[25] He further indicated that he supported the goals of the interruptible riders.[26] The Demand Response Coalition and EnerNOC, however, have very different ideas from Nucor and other supporters of Riders ELR and OLR about how demand response should be procured. Nucor believes that customers should be given as many options as possible to commit and get paid for their demand response capabilities, including long-term regulated interruptible rate offerings such as

[24] Stipulation, Attachment B., proposed Rider ELR, section D., Emergency Curtailment Event.
[25] Demand Response Coalition Ex. 1 at 3-4.
[26] *Id.* at 6.

Riders ELR and OLR, and participation in the wholesale capacity and energy markets, with or without using a CSP as an intermediary. From their positions in this proceeding, the Demand Response Coalition and EnerNOC disagree – these parties would limit a customer's options by eliminating the regulated interruptible rate option.[27]

A key argument these parties make in support of their position to eliminate Riders ELR and OLR is that the demand response requirements of these rates are "virtually identical" to the requirements of the PJM RPM.[28] After all, these parties wonder, if the programs achieve the same benefits, how can the interruptible credit under Rider ELR (which is higher than the "market" capacity prices for the 2011-12 and 2012-13 delivery years that resulted from the ATSI integration auction) be justified?

The evidence in this proceeding clearly demonstrates that Riders ELR and OLR are not the same as the PJM RPM – in fact, the interruptible rates are very different products from the CSP offerings. For example, Rider ELR allows FirstEnergy to call Economic Buy-Through Option Events when the PJM market prices exceed 1.5 times the wholesale price resulting from FirstEnergy's competitive bid process for generation service.[29] Under this feature, the customer either must curtail its load, or take

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[27] *See* EnerNOC Ex. 1 at 19 (recommending that Riders ELR and OLR be allowed to "expire on their own terms" at the conclusion of the current ESP); Demand Response Coalition Ex. 1 at 14 (supporting Mr. Schisler's recommendation to eliminate any extension of Riders ELR and OLR). It should be noted that Mr. Campbell's testimony supporting Mr. Schisler consisted of three sentences and did not offer any supporting reasons.

[28] Demand Response Coalition Ex. 1 at 9; *see also, id.* at 6 (stating that "CSPs provide services substantially equivalent to those proposed in Riders OLR and ELR"); *id.* at 10 ("[t]he PJM programs and the OLR and ELR provisions are essentially the same"). For EnerNOC's part, even though Mr. Schisler acknowledges that Rider ELR and PJM RPM are different products (Tr. Vol. II at 338-39), apparently he does not believe that different products justify a different value or a different level of compensation, lamenting as he does that FirstEnergy "is paying a *substantially higher than market price for what it's getting from the interruptible customers.*" *Id.* at 357.

[29] Proposed Ohio Edison Company Rider ELR, Sheet 101, page 5.

generation supply at the higher wholesale market price instead of the generation rate under Rider GEN for the term of the Economic Buy-Through Event.[30] This feature obviously increases rate volatility for customers on the rider, but it also provides benefits to FirstEnergy's customers since bidders into the generation auctions will know this economic interruptible load is on the system, such bidders will know they will not have to serve this load when Economic Buy-Through Events are called, and will take this into account in structuring their bids.[31] The PJM RPM has no such Economic Buy-Through Event component.[32]

Rider ELR requires a commitment that the customer will stay on the rider for three years commencing at the start of the next ESP in June 2011.[33] Not only does this requirement lock the customer into FirstEnergy's interruptible rates for three years beginning at the end of the current ESP, it also locks the customer into taking generation supply from FirstEnergy for those three years, since taking generation service under the FirstEnergy SSO is a prerequisite to participation on Rider ELR.[34] By contrast, a customer selling its interruptible load into the PJM RPM through a CSP has a minimum one-year term, has the flexibility to choose to participate in one year and not the next, and is in no way restricted from shopping for generation supply by virtue of its choice of demand

[30] *Id.* at page 1-2.
[31] Tr. Vol. I at 146.
[32] Tr. Vol. II at 338; Tr. Vol. III at 662.
[33] Proposed Ohio Edison Company Rider ELR, Sheet 101, page 5 (specifying that the term of the rider is June 1, 2011 – May 31, 2014, and requiring 36 months notice to terminate).
[34] *Id.* at page 1.

response program.[35] The much longer term of Rider ELR allows FirstEnergy to rely on ELR load at the same price for three years to supply all of the benefits discussed earlier.

Rider ELR also has an economic development component. The CSP demand response programs advocated by the Demand Response Coalition and EnerNOC have no such component.[36] The following chart summarizes several of the features that make Rider ELR a significantly different and more valuable product to FirstEnergy than CSPs participating in the PJM RPM:[37]

<u>Rider ELR</u>[38]	<u>PJM Capacity Bid (CSP)</u>
3 year term beginning in 2011[39]	1 year minimum[40]
Fixed interruptible credit for term	Annual payments to customers vary from year to year (unless CSP chooses to offer fixed payment)[41]
3 year commitment beginning in 2011	Voluntary participation each year[42]
Mandatory performance when emergency interruption called with substantial penalty for non-performance	Penalty for non-performance, if any, determined by CSP
Meets Peak Demand Reduction statutory benchmarks	Uncertain whether it meets Peak Demand Reduction statutory benchmarks[43]
Interruptions can be called by Company and transmission operator (as well as PJM) for system emergencies	Interruptions only called by PJM

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[35] Tr. Vol. III at 648-49, 662-63.
[36] *Id.* at 661.
[37] Many of the differences in this chart also are differences between Rider OLR and the CSP offerings. Unlike Rider ELR, however, Rider OLR does not provide for economic interruptions, nor is there a rate impact mitigation rationale for Rider OLR.
[38] Note that the terms and conditions for Rider ELR are set forth in the rider – see Attachment B to the Stipulation.
[39] *Id.* Can be terminated by the customer only after 36 months notice.
[40] Tr. Vol. III at 649.
[41] *Id.* at 652.
[42] *Id.* at 649.
[43] Tr. Vol. III at 656.

Interruptible 8760 hours per year as necessary for system emergencies called by Company and transmission operator, plus PJM interruptions	Interruptible only under conditions and during limited peak hours (plus limited number and duration) set by PJM – 8 hours per day on weekdays – less than 25% of each week[44]
Only available to customers that take SSO service; also limited to certain customers who took interruptible service as of February 1, 2008	Open to any FirstEnergy customer, whether it is taking SSO service or shopping for generation supply, except for ELR/OLR customers[45]
Serves economic development and rate impact objectives in Ohio	No economic development considerations[46]
Terms and conditions the same for every customer and publicly available	Private contractual negotiations with CSP[47]
Service offering overseen and regulated by PUCO	No regulatory oversight[48]
Allows FirstEnergy to call Economic Buy Through Option Events	No provision for Economic Buy Through Option Events[49]
Allows FirstEnergy to bid in at no cost and reduce capacity charges	CSP decides what price to bid

To summarize – Riders ELR and OLR are not the same as CSP PJM RPM offerings. They are different products, with different attendant benefits, risks, purposes, and values. The argument that "it's all the same," therefore, is an invalid rationale for eliminating Riders ELR and OLR and bulldozing the customers interested in taking service under those rate offerings into the waiting arms of the CSPs.

[44] *See* PJM Tariff, Attachment DD-1, Procedures for Demand Resources, ILR and Energy Efficiency at section A, subsections 2 and 7. The PJM Tariff was administratively noticed in the MRO Case. The tariff indicates that participants must agree to be potentially interruptible a specified 8 hour period each weekday, with potentially up to 10 interruptions for emergencies for up to 6 hours per interruption each year. 40 weekday hours divided by 168 weekly hours = 23.8%.

[45] Tr. Vol. III at 662-63.

[46] *Id.* at 661.

[47] *Id.* at 653.

[48] *Id.*

[49] *Id.* at 662.

2. The credits for Riders ELR and OLR should be approved.

The total combined credit for current Rider ELR customers consists of two credits separately set forth in Riders ELR and EDR. This level of credit was approved by the Commission in the last ESP proceeding, so these rates are presumed just and reasonable.[50] The total credit would continue at the same level under the Rider ELR proposed in the new ESP.[51] Similarly, the Rider OLR credit is proposed to remain the same (there is no EDR credit for OLR). The interruptible credits for Riders ELR and OLR have become an issue in this case, with accusations that the credits are somehow anticompetitive because the credits are above, at least in some cases, PJM RPM prices that came out of the ATSI integration auctions. As discussed below, the combined Rider ELR credit is a reasonable credit for a long-term, stable interruptible rate.

a. The Current and Proposed Rider ELR and Rider OLR credits are more than justified.

In his testimony in the ESP proposal, Dr. Goins presented an analysis of an appropriate credit for an interruptible rate such as Rider ELR, using the long-term avoided cost of generation capacity as a starting point. Dr. Goins' analysis, which was not addressed by any of the parties opposing the extension of Rider ELR in their testimony in this proceeding, concluded that a credit of $13.00 per kW/month for Rider

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[50] *See* Office of Consumers' Counsel v. Pub. Util. Comm., 18 Ohio St. 3d 264, 265 (1985) (rates approved by the Commission are presumed reasonable).

[51] Currently, the credit under Rider ELR is $1.95 per kW, and the credit under Rider EDR for Rider ELR customers is $8.05 per kW. Under the proposed Stipulation, the credits for Rider ELR customers would be split evenly between Rider ELR and EDR (*i.e.*, the credits under both riders would be $5.00 per kW) – the combined credit would be the same.

ELR would be justified. Based on this evidence, it is clear that the credit for Rider ELR that is currently in effect and as provided for in the Stipulation is more than justified.[52]

Since avoided generation capacity costs is a primary benefit of interruptible load, the starting point of Dr. Goins' analysis is the long-term avoided cost of peaking generation capacity.[53] In PJM's RPM construct, PJM uses an administratively-set cost of new entry, or "CONE" value to represent the minimum capacity payment required to attract new capacity to enter the market.[54] CONE is defined in the PJM tariff as the nominal levelized cost of a combustion turbine generation station.[55] The CONE is an appropriate estimate of avoided generation cost since: (a) it is an independent estimate developed by PJM, which has no reason to bias the estimate; (b) it is subject to challenge by interested and expert parties in the FERC approval process; (c) it is FERC-approved; and (d) it is developed for the region of the country where FirstEnergy is located. PJM's most recent CONE estimate was approved by FERC in 2009. For 2012-2013, PJM's CONE has been set at $112,868 per MW/year, or $9.41 per kW/month.[56]

The Rider ELR credit should also reflect the other benefits besides avoided generation capacity cost that are provided by Rider ELR interruptible load. For example, Dr. Goins testified that a reasonable rule-of-thumb for an adjustment to reflect the avoided reserve capacity and avoided transmission losses associated with interruptible

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[52] Dr. Goins also testified in the MRO Case that, if anything, the Rider OLR credit was too low. Goins MRO Testimony at 25. As a result, it is difficult to see why leaving the credit at current levels could be considered excessive.
[53] Goins MRO Testimony at 26.
[54] *Id.* at 26-27.
[55] PJM Tariff, Attachment DD at sections 2.16 and 2.58.
[56] *Id.* at section 5.10(a)(iv).

load would be to increase the avoided peaking capacity cost by 15 to 20 percent.[57] This would increase the $9.41 per kW avoided capacity cost value to $11.29 per kW/month.[58]

Since Rider ELR allows for FirstEnergy to call Economic Buy Through Option Events, the credit under this rider should also reflect avoided energy costs.[59] In its 2007 CBP proposal, FirstEnergy indicated that the value of the economic interruption credit should reflect market energy prices (LMPs), with the credit netting to zero if the customer bought through all economic interruptions. Using these assumptions, FirstEnergy indicated that the economic interruption credit should range from $1.60-$2.60 per kW.[60] Based on FirstEnergy's analysis, a conservative estimate of avoided energy costs associated with Rider ELR economic interruptions would be $2.00 per kW-month.[61] When this level of credit is added to the $11.29 per kW/month adjusted credit noted above, the result is a credit of $13.29 per kW/month, far higher than the proposed Riders ELR/EDR combined and Rider OLR credits.

It is worth noting that Dr. Goins' analysis does not even include an estimate of avoided bulk transmission and distribution costs, or any additional amount specifically for economic development. Both of these benefits should be considered too. Dr. Goins' analysis from the MRO Case demonstrates that the current and proposed *combined* credit for Rider ELR is most certainly a reasonable compromise in the Stipulation.

[57] Goins MRO Testimony at 29.
[58] *Id.* at 28.
[59] *Id.* at 29.
[60] *Id.*; Ex. DWG-3 (citing Case No. 07-976-EL-ETA, Reply Comments of FirstEnergy at 50).
[61] *Id.* at 29.

b. Complaints by the opposing parties about the level of the Rider ELR credit have no merit.

Despite the fact that the Stipulation merely proposes to extend the current combined credit for Rider ELR interruptible customers that the Commission has already determined to be just and reasonable, the credit has drawn the fire of EnerNOC's witness, Mr. Schisler, who complained that the credit is too high compared to market prices.[62] OCC witness Mr. Gonzalez makes a similar claim, arguing that acquiring interruptible load through a competitive bid would attain peak demand reductions at a lower cost than through Riders ELR and OLR.[63]

The argument that the Rider ELR credit is somehow uncompetitive because it is currently higher than PJM RPM capacity prices, or that Rider ELR customers are being subsidized by other customers, is without merit and unsupported by the evidence. As discussed above, Rider ELR interruptible service is a very different product from the PJM RPM. The credit for Rider ELR is justified based on an analysis of the value of the various components of the rate – including long-term avoided generation and transmission capacity, economic interruptions, and avoided losses and reserves. Only Dr. Goins performed just such an analysis. In contrast to Rider ELR, the PJM RPM is a much narrower product – it is simply a form of short-term generation capacity acquired through PJM. Also, as Mr. Ridmann testified at the hearing, comparing the RPM price with the credits available to customers under Rider ELR is conceptually not an appropriate comparison, since Rider ELR interruptible load is used not only to meet PJM

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[62] *See* EnerNOC Ex. 1 at 11.

[63] Direct Testimony of Wilson Gonzalez ("OCC Ex. 2") at 45.

requirements, but is also used to meet the state peak demand reduction requirements under S.B. 221 (which permits FirstEnergy to avoid additional costs for peak demand reduction).[64]

Moreover, even if comparing the Rider ELR credit with PJM RPM prices for the same years were a valid comparison, such a comparison is not possible in this case since Rider ELR will be in effect from June 2011 through May 2014, and we only have PJM capacity "market" prices for FirstEnergy for the first two delivery years from a single auction.[65] Given the volatility of the prices coming out of the PJM capacity auctions (discussed further below), it is anyone's guess what the market price of capacity truly is for the first two years of the ESP, much less in the third year of the ESP.[66]

In short, Rider ELR imposes greater obligations on customers on the rate and provides more benefits to Ohio than would be the case if the customer participated in the PJM RPM, and these additional obligations justify a higher payment. Comparing the Rider ELR credit with the prices produced in the PJM RPM is an invalid comparison. Even if a market price were an appropriate approach to setting an interruptible discount, no party in this proceeding has provided evidence of a "market value" of the full Rider ELR product.

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[64] Tr. Vol. I at 167.

[65] Tr. Vol. II at 340-41. Even when PJM capacity prices from the initial auction are known for a particular planning year, the prices can change due to the fact that PJM also conducts incremental auctions. Tr. Vol. III at 640-41.

[66] One of the many problems with using the raw so-called "market" figures is the failure to adjust any of these prices upward for avoided losses and reserves.

c. **Valuing interruptible load only at the short-run market price of capacity would jeopardize the supply of interruptible load on FirstEnergy's system.**

The focus by EnerNOC and the Demand Response Coalition on using the short-run RPM "market" price of capacity from a single PJM auction as the proper measure of the value of interruptible load reveals a fundamental flaw with these parties' proposal to scrap FirstEnergy's interruptible rates. By insisting that short-term RPM capacity "market" prices are the correct value of interruptible load, these parties jeopardize the existence of a stable supply of interruptible load on FirstEnergy's system.

Dr. Goins addressed the problem with basing an interruptible credit on short-run prices in his testimony in the MRO Case. The first problem is that short-run market prices might be too low to attract customer participation. This appears to be the case with Rider OLR, which has a $1.95 per kW credit, which Mr. Campbell testified approximated the short-run "market" value of capacity for the first two years of the ESP based on the RPM auction.[67] Today, not a single customer is on Rider OLR,[68] and FirstEnergy's witness in the MRO Case, Mr. John Paganie, testified that he believes the reason is that the $1.95 credit is too low to attract customer participation on the rider.[69] Indeed, this demonstrates the invalidity of Mr. Campbell's concern that "customers will flock to the OLR Rider because of its high compensation relative to market prices in RPM" when capacity market prices are below the OLR credit.[70]

[67] Demand Response Coalition Ex. 1 at 10.
[68] Tr. Vol. I at 140.
[69] MRO Case Tr. Vol. 1 at 109.
[70] Demand Response Coalition Ex. 1 at 11.

Establishing a credit too low to attract customer participation is just one problem with basing an interruptible payment on short-run costs. Other problems include the potential for wildly-fluctuating payments from year to year, and payments well in excess of the long-run avoided cost of capacity at times of shortages. As Dr. Goins explained:

> Short-run market prices fluctuate to reflect current market conditions for existing generating capacity, while long-run avoided costs reflect the cost of adding new capacity to meet demand growth. Long-run—not short-run—capacity costs more accurately reflect avoided cost savings attributable to interruptible service. Short-run prices do not give a clear signal regarding the cost of capacity to serve future peak demands. In addition, basing an interruptible credit or price on short-run market prices is similar to relying solely on spot market purchases to meet future energy needs—both approaches increase consumer risks via unstable and unpredictable prices. Moreover, interruptible rates that reflect short-term price fluctuations may impede the development of robust and effective retail interruptible programs.
>
> Firm customers may also be negatively affected by an RFP-based interruptible program during shortage periods where short-run marginal pricing can drive the value of interruptible load far above long-run avoided costs. For example, relying on spot markets is wonderful as long as excess supply exists and prices are low. However, when generation supply becomes scarce, short-run market prices can far exceed the cost of new capacity that cannot be added immediately. A more traditional interruptible program similar to Rider ELR should reflect the long-run avoided cost of adding capacity—not a short-term value that reflects capacity shortages.[71]

Evidence on short-run "market" prices in this case bears out the concerns raised by Dr. Goins in the MRO Case. On several occasions in this case, the capacity prices that came out of the PJM FRR auction for the ATSI zone for the 2011-12 and 2012-13 delivery years were discussed. According to Mr. Campbell, the capacity price for the 2011-12 delivery year is approximately $3.31 per kW/month, and the price for the 2012-13 delivery year

[71] Goins MRO Testimony at 31.

is approximately 50 cents per kW/month.[72] The fact that the capacity price for the 2011-12 delivery year is more than *six times* the price of capacity for the 2012-13 delivery year demonstrates the volatility of short-run market prices. Indeed, both Mr. Campbell and Mr. Schisler conceded that capacity prices coming out of the PJM RPM process can be volatile.[73]

While acknowledging the volatility of short-run capacity prices, the parties that advocate elimination of Riders ELR and OLR appear oblivious to the impact on customers of being subjected to a dramatically fluctuating interruptible credit. Mr. Campbell, for example, could not "give an unqualified agreement" to the proposition that interruptible customers need reasonable rate certainty to make prudent operating decisions.[74] In fact, Mr. Campbell testified that he did not even know what types of customers typically are on Riders ELR and OLR,[75] and that he was unaware that Rider ELR had an economic development component.[76] For his part, Mr. Schisler testified that he did not agree that industrial customers who wish to take service under Rider ELR would be harmed by the elimination of the rider, even after claiming that the ELR credit is an "incredibly better deal than the market would offer."[77]

By contrast, Dr. Goins (who unlike the CSP witnesses, actually works for customers) testified that rate certainty is an extremely important consideration for the

[72] Demand Response Coalition Ex. 1 at 10-11.
[73] Tr. Vol. II at 389; Tr. Vol. III at 651-52.
[74] Tr. Vol. III at 652.
[75] *Id.* at 648.
[76] *Id.* at 661.
[77] Tr. Vol. II at 454, 445.

large commercial and industrial customers that are typically on interruptible rates.[78] According to Dr. Goins, "[i]nterruptible customers need reasonable rate certainty to make prudent operating and investment decisions."[79] Addressing the difficulty from a customer's perspective with an interruptible credit that varies from year to year, Dr. Goins further explained that the "lack of certainty regarding program participation imposes huge planning and operating risks on potential interruptible customers. This uncertainty will significantly diminish – if not eliminate – the manufacturing retention and economic development benefits associated with traditional interruptible rates similar to Rider ELR."[80] Also, as OEG witness Baron testified in the MRO Case, unlike interruptible credits that can vary erratically from year to year, a stable, long term interruptible rate would encourage interruptible customers to remain SSO customers, thereby reducing "volumetric risk" (the risk that current SSO customers might switch to an alternate supplier during the supply contract period) incurred by generation suppliers bidding into the CBP.[81]

In summary, continuing the current combined credit is more than justified for Rider ELR. Short-run market capacity under RPM is a different – and much more limited – product than Rider ELR interruptible load. While Nucor has no problem with CSPs such as EnerNOC and the members of the Demand Response Coalition providing an interruptible service to retail customers based on the short-run RPM prices, the efforts

[78] Goins MRO Testimony at 21.
[79] *Id.*
[80] *Id.*
[81] Baron MRO Testimony at 15.

of these parties to deny customers long-term fixed rate interruptible options under Riders ELR and OLR have no valid basis and should be soundly rejected.

d. Eliminating Rider ELR would have tremendous negative rate impacts on Rider ELR customers, negative effects on economic development and be contrary to state policy.

The evidence shows that continuation of Rider ELR, in particular, is necessary to support economic development and avoid substantial negative rate impacts on current Rider ELR customers. For example, Dr. Goins estimated that elimination of Rider ELR-related credits could result in rate increases approaching 50 percent to these customers.[82] Opponents to Rider ELR offered no comparable rate impact analysis. Moreover, continuation of Rider ELR is consistent with state electric utility policy.

As noted above, interruptible rates help the state to promote economic development and manufacturing jobs retention, since many Ohio industries are competing with industry out-of-state that also have the benefit of utility interruptible rates.[83] This is particularly important to Ohio, given the importance of industry to the state, which has been hard hit by the recession. Indeed, one of the state policies enunciated in state electric utility law is to: "[f]acilitate the state's effectiveness in the global economy."[84] Unlike PJM programs or CSP programs, regulated interruptible rates can be designed and regulated by the Commission to meet specific state economic development and demand response needs with the input of participating customers.

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[82] Goins MRO Testimony at 10.

[83] As Dr. Goins explained, interruptible rate options are a common service offered by most electric utilities. Goins MRO Testimony at 12.

[84] Senate Bill 221, section 4928.02(N).

In the case of Rider ELR, its design reflects specific state needs by applying specifically to customers who were served under interruptible rates historically and protecting them to some degree from negative rate impacts, while establishing rates that can be relied on to produce statutorily-required peak demand reduction and hedging against high market prices. PJM and/or CSP programs are not designed with this or other state policy objectives in mind. Similarly, state policy requires the Commission to "ensure the availability to consumers of reasonably priced electric service"[85] and the statutory structure contemplates competing regulated (SSO) and non-regulated supply options for all customers in Ohio. While competitive suppliers might prefer that there be no SSO supply option, that is not what Ohio law requires. A similar conclusion can be reached as to interruptible options – while CSPs might prefer that there be no regulated interruptible options, that is not what Ohio law requires either. As the Commission stated in FirstEnergy's first SSO proceeding under S.B. 221 (the 2008 MRO proceeding – Case No. 08-936-EL-SSO) in rejecting *FirstEnergy's position that* interruptible rates were not required for an SSO (MRO):

> The Commission notes that the policy of the state, as codified in Section 4928.02, Revised Code, requires the Commission to ensure the availability of unbundled and comparable retail electric service that provides customers with the supplier, term, price, conditions, and quality options they elect to meet their respective needs.... Likewise, the record demonstrates that interruptible rates can be used to reduce generation and transmission capacity needs (Nucor Ex. 1 at 11). Moreover, the Commission notes that FirstEnergy has not demonstrated that time-of-day rates or interruptible rates are impractical or cannot be implemented as part of a competitive bidding process (Tr. I at 159; Tr. V at 21). In fact, the record in this proceeding demonstrates that FirstEnergy included both time-of-day rates and interruptible rates in its prior request, in Case

[85] *Id.* section 4928.02(A).

> No. 07-796-EL-ATA, for a competitive bidding process (Nucor Ex. 1 at 5, 10). Therefore, because the Commission finds that FirstEnergy has not demonstrated that its proposed rate design advances the state policies enumerated in Section 4928.02, Revised Code, the proposed rate design should not be adopted and approved by the Commission.[86]

Indeed, after the Commission issued this decision, the SSO ultimately approved (FirstEnergy's last ESP) included Riders ELR and OLR with the same credit levels (on a combined basis) as proposed in this case.

3. OCC Witness Gonzalez's recommendation to replace Riders ELR and OLR with the interruptible RFP proposed in the MRO Case should be rejected.

OCC witness Mr. Gonzalez recommends that Riders ELR and OLR be replaced with an interruptible RFP.[87] However, he ignores the problems with an RFP as a substitute for Riders ELR and OLR that were fully explored in the MRO Case. Specifically, Dr. Goins discussed the RFP proposal in detail and the problems with replacing the riders with this approach.[88] Mr. Gonzalez did not address, much less rebut, the concerns identified by Dr. Goins.

Interestingly, neither Mr. Gonzalez nor OCC took any position on this issue when Nucor and other parties in the MRO Case vigorously argued for extension of Riders ELR and OLR and rejection of the RFP as proposed. By contrast, in this case, Mr. Gonzalez asserts, with no basis or supporting evidence, that procuring interruptible load through a competitive bid would enable FirstEnergy to attain peak load reductions at a lower cost than through Riders ELR and OLR.[89] OCC performed no study or analysis to support

[86] Case No. 08-936-EL-SSO, Opinion and Order, at 24 (November 25, 2008).
[87] OCC Ex. 2 at 45.
[88] Goins MRO Testimony at 18-26 and 31-34.
[89] *Id.*

this assertion.[90] Common sense dictates that it is impossible to know whether such an RFP would produce a lower or higher cost than Riders ELR and OLR, since no one can know what prices will be bid. It would depend on how the RFP is configured, what other options are available, and what level of payment would be required by participating customers. In fact, in the MRO Case, FirstEnergy estimated that the cost of the interruptible RFP would be the same as Rider ELR.[91] Also in the MRO Case, there was testimony from a FirstEnergy witness that the payments to winning bidders under the proposed RFP could be higher than those under Rider ELR.[92] More importantly, while an RFP may acquire some level of demand response, *it fails to meet the need for a just and* reasonable, cost-based, non-discriminatory interruptible rate. Finally, an interruptible RFP would entail many of the shortcomings discussed above, including the problems associated with fluctuating interruptible credits based on volatile, short-run market prices.[93] OCC's proposal should be rejected.

B. EnerNOC's Claims of Due Process Violations and Procedural Deficiencies are Invalid, and Should Not Form the Basis for Rejecting the Extension of Riders ELR and OLR.

EnerNOC witness Mr. Schisler claims that EnerNOC was misled by FirstEnergy into believing that Riders ELR and OLR would expire by their own terms at the conclusion of the current ESP, and that EnerNOC relied on FirstEnergy's representations to its detriment. To remedy these supposed violations on the part of FirstEnergy, EnerNOC demands that Riders ELR and OLR be allowed to expire by their own terms at

[90] Tr. Vol. III at 786.
[91] Goins MRO Testimony at 11.
[92] MRO Case Tr. Vol. 1 at 104.
[93] Goins MRO Testimony at 31.

the end of the current ESP, rather than be extended as proposed in the Stipulation – a strange remedy given that it would punish the interruptible customers that wish to take service under the interruptible rates, not FirstEnergy. Although EnerNOC clearly has an axe to grind with FirstEnergy, it is the interruptible customers whose heads are being put on the chopping block.

EnerNOC's claims and arguments in this case do not hold up under scrutiny. The evidence in this case shows that EnerNOC had, or should have had, notice that issues concerning FirstEnergy's interruptible rates would be addressed in the MRO Case. To the extent EnerNOC decided not to participate in that case to protect its interests, EnerNOC assumed the risk that the interruptible rate issues would turn out in a way EnerNOC did not expect. Further, even if EnerNOC has a claim that it was misled by FirstEnergy in the ATSI auction process, the place to pursue that claim is at PJM or FERC, not the Commission and not in this rate case.

1. EnerNOC was, or should have been, on notice that the status of FirstEnergy's interruptible rates following the conclusion of the current ESP would be issues in the MRO Case.

The essence of EnerNOC's complaint in this case is that it thought Riders ELR and OLR were going to expire at the end of the current ESP, and this somehow affected how participants in the ATSI integration auctions evaluated the market and formulated their bids.[94] According to EnerNOC, the termination of Riders ELR and OLR was a done deal – that is, until FirstEnergy secretly agreed to extend the riders in the settlement process in

[94] EnerNOC Ex. 1 at 8.

this case. Having "no notice" that extension of the riders could be an issue in the settlement process, EnerNOC did not participate in the settlement process.

EnerNOC's claims are undercut by extensive evidence on the record in this case. Despite the fact that Riders ELR and OLR "expire by their own terms" in May of 2011, coinciding with the end of the current ESP, it should have been obvious to anyone paying attention that the status of the interruptible rates would be a major issue in the MRO Case, as it has been in every other FirstEnergy SSO case. FirstEnergy discussed the termination of the riders in its application, and proposed an interruptible RFP as a replacement mechanism to acquire peak demand reduction.[95] Even if EnerNOC could not tell from FirstEnergy's MRO application that the status of the riders would be an issue, it was clear that this would be the case when Dr. Goins on behalf of Nucor and Mr. Baron on behalf of OEG filed testimony advocating for the extension of Riders ELR and OLR. Had EnerNOC recognized (as it should have) that its interests could be affected in the MRO Case, EnerNOC could have become a participant in that case, and would also have had the opportunity to participate in the settlement discussions that produced the Stipulation. Indeed, anyone even monitoring the record in the MRO Case would have been on notice that Staff proposed an ESP as an alternative to FirstEnergy's proposed MRO, and initiated the discussions on this idea that eventually led to the Stipulation in this case.[96]

[95] Case No. 09-906-EL-SSO, Application at 24-25; *see also* Paganie Testimony at 6-7, Fanelli Testimony at 9-10, 13.
[96] Tr. Vol. II at 288-91.

EnerNOC tries to excuse its failure to participate in the MRO Case by asserting that, regardless of whether the status of the riders became a contested issue, it could still rely on FirstEnergy's representations that the riders would expire because FirstEnergy had the ability to "veto" any modifications to the proposed MRO mandated by the Commission.[97] But this is a misreading of the law. Section 4928.142(B)(3) of the Revised Code provides that if the Commission makes a negative finding as to one or more of the requirements necessary to institute a competitive bidding process under an MRO, the Commission "shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application." This provision in no way confers on a utility a veto over the Commission. The Commission still must approve any MRO plan in its entirety. Therefore, it should have been clear to EnerNOC that even if FirstEnergy planned to allow Riders ELR and OLR to expire and to replace the riders with an interruptible RFP, the Commission could have ordered FirstEnergy to extend the riders.[98]

EnerNOC's claims that FirstEnergy failed to "notify the market" about the possible extension of Riders ELR and OLR also hold no water. In addition to the public record in the MRO Case, there was other information in the public domain making clear that the status of the interruptible rates was at issue. For example, in December of 2009, FirstEnergy filed its energy efficiency and peak demand reduction portfolio plan,

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[97] *Id.* at 293.

[98] Given that the MRO Case is still pending, even if the Commission were to grant EnerNOC's requested relief in this ESP case, the Commission could still order continuation of Riders ELR and OLR as a result of the MRO Case.

in which it proposed to count interruptible load toward meeting its peak demand reduction benchmarks. In the application in that case, FirstEnergy represented that the status of Riders ELR and OLR was the subject of litigation, the outcome of which was unclear.[99] EnerNOC was a party to that case.[100] EnerNOC also complains that FirstEnergy did not update the "frequently asked questions" on the ATSI integration auction website to state that FirstEnergy might extend Riders ELR and OLR.[101] But the auction rules make clear that ATSI does not guarantee the accuracy or completeness of the information on the auction website.[102] EnerNOC was not "entitled" to rely on the accuracy of this information.[103]

2. Even if EnerNOC has a claim against FirstEnergy, this case is not the right forum to address it, and the remedy EnerNOC proposes is completely unrelated to the alleged offence.

Even assuming FirstEnergy intentionally "misrepresented" the status of Riders ELR and OLR in an attempt to manipulate the market, FirstEnergy's actions took place in the context of the ATSI integration auction, which is under the jurisdiction of FERC.[104] When asked whether EnerNOC had pursued its claims before FERC, Mr. Schilser said that he spoke to some people at PJM, but that EnerNOC has made no formal complaint about FirstEnergy's behavior either to the PJM market monitor or to FERC.[105]

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[99] Tr. Vol. II at 321-23.
[100] *Id.* at 312-13.
[101] EnerNOC Ex. 1 at 13.
[102] Tr. Vol. II at 435-37; Company Ex. 6.
[103] Tr. Vol. II at 428 (confirming Mr. Schisler's belief that EnerNOC was entitled to rely on information that FirstEnergy put into the market).
[104] Tr. Vol. II at 460-61.
[105] *Id.* at 329-30 (confirming that EnerNOC has not spoken to anyone at FERC about its claims that FirstEnergy made material representations in the capacity market); *id.* at 460-61 (confirming that discussions between EnerNOC and PJM's employee in charge of demand response operations about EnerNOC's concerns with the ATSI auction did not result in a complaint).

EnerNOC is in the wrong forum to complain about FirstEnergy's behavior in the ATSI integration auction. EnerNOC should take its complaint up with FERC or PJM if EnerNOC believes that its complaint is valid. More importantly, EnerNOC's complaint about FirstEnergy's behavior has no bearing on the question of whether the interruptible rates proposed in the Stipulation are just and reasonable. The Commission should not allow EnerNOC's complaint against FirstEnergy to burden the regulatory process in Ohio, or to hinder the Commission's efforts to determine whether the Stipulation is in the best interest of Ohio's retail ratepayers.

C. Riders ELR and OLR Can Properly be Considered Incremental to Interruptible Load on the FirstEnergy System that Existed in 2008.

It is critical that Riders ELR and OLR count to meet FirstEnergy's statutory peak demand reduction benchmarks and be considered incremental to interruptible load that was on the system in 2008. Not only is this an express condition for the availability of the rate schedules, but it will ensure that the full peak demand reduction potential of the riders is captured and will avoid the costs of acquiring additional peak demand reduction capability that would otherwise be necessary.

Surprisingly, given his concerns about the cost of peak demand reduction, OCC witness Mr. Gonzalez questions the provision in the proposed Riders ELR and OLR stating that the interruptible load under these riders will be considered incremental to interruptible load on the system in 2008.[106] He observes that in the Commission's March 10, 2010 Finding and Order in Case Nos. 09-535-EL-EEC et al., the Commission stated that it lacked sufficient information regarding incremental peak demand reductions that

[106] OCC Ex. 2 at 18-19.

the Companies' 2009 programs were designed to achieve, compared to reductions that the programs in place the preceding year had been designed to achieve.[107] From this statement, he concludes that the Commission has "already determined that ELR and OLR loads are considered 'incremental' only in a comparison with interruptible loads previously in place," and that only peak demand reductions over the existing 400 MW in 2008 should be counted as incremental.[108]

To begin with, Mr. Gonzalez points to no statutory provision or Commission rule requiring the adoption of OCC's interpretation. In the order he cites, moreover, the Commission did not make a determination on whether the existing Riders ELR and OLR should count toward meeting the benchmarks, but simply stated that it did not have enough information to make the determination. In the case of the new Riders ELR and OLR proposed in the Stipulation, as explained by Staff witness Turkenton at the hearing, Riders ELR and OLR are not historic projects.[109] Rather, the extended and modified Riders ELR and OLR will be new programs as of June 1, 2011. No current Rider ELR customers will be required to sign up for the new Rider ELR, and any customers that sign up for Rider OLR will clearly be incremental since there are no customers currently taking service under that rider. In short, it is appropriate to view the extended Riders ELR and OLR as new programs, and the customers that participate in those programs as new interruptible load. Treating the interruptible load under the riders as incremental

[107] *Id.* at 18.
[108] *Id.* at 18-19.
[109] Tr. Vol. 1 at 230.

to the peak demand reduction that existed on the system in 2008, therefore, is a reasonable interpretation of the statutory requirements for peak demand reduction.

III. CONCLUSION

Nucor respectfully requests that the Commission approve FirstEnergy's ESP Stipulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Post-Hearing Brief In Support of ESP Submitted by Nucor Steel Marion, Inc.*, was served upon the persons listed below via electronic transmission this 30th day of April, 2010.

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