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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 No. 10-388-EL-SSO

JOINT INITIAL POST-HEARING BRIEF OF THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND THE NORTHWEST OHIO AGGREGATION COALITION

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I. INTRODUCTION

The Northeast Ohio Public Energy Council ("NOPEC") and the Northwest Ohio Aggregation Coalition ("NOAC") (collectively "NOPEC/NOAC"), intervened in this proceeding to protect the interests of large-scale governmental aggregators in northern Ohio, and ensure that aggregation remains a viable option for the approximately 550,000 combined residential and small commercial electric customers currently participating in the NOPEC and NOAC aggregation programs in the service territories of Ohio Edison Company ("Ohio Edison"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("Toledo Edison") (collectively "FirstEnergy" or the "Companies").

NOPEC and NOAC actively participated in the seven (7) days of hearing associated with FirstEnergy's sister market rate offer ("MRO") proceeding (Case No. 09-906-EL-SSO), and continue their efforts herein to ensure that FirstEnergy's electric security plan stipulation filed in the above-captioned docket (the "ESP Stipulation") allows large scale governmental aggregation electric customers to continue receiving the benefits of aggregation. Contrary to the assertions in the ESP Stipulation and associated filings, certain aspects of this stipulation would have a

negative effect on both large-scale governmental aggregations and Ohio ratepayers. Fortunately, the remedy is quite simple—if the Commission adopts the following five essential modifications to the ESP Stipulation, the concerns of NOPEC and NOAC about this global settlement will have been satisfactorily addressed to the benefit of its residential and small commercial aggregation customers:

- Include similar Governmental Aggregation Generation Supplier ("GAGS") language as set forth in the Supplemental ESP Stipulation filed on February 19, 2009 in Case No. 08-935-EL-SSO;
- Add specific requirements imposing an obligation on the Commission and its Staff to engage in meaningful audits of the distribution investments and associated expenditures to be collected through the Delivery Capital Recovery Rider ("Rider DCR");
- Reserve the right for the Commission and/or other signatory parties to review the post-2016 legacy Regional Transmission Expansion Plan ("RTEP") charges allocated to CEI, Toledo Edison, and Ohio Edison that are expected to be recovered from Ohio ratepayers, and which NOPEC and NOAC oppose;
- Include a provision, as advocated by Ohio Environmental Council witness Carrie Cullen Hitt, approving long-term solicitations for renewable energy credits ("RECs") for both solar and non-solar resources, and full cost recovery by FirstEnergy; and
- Ensure that the 5% cap in the Generation Cost Reconciliation Rider ("Rider GCR") is not artificially low so as to make this rider non-byapssable under virtually all circumstances.

For these reasons, and as further explained below, the Public Utilities Commission of Ohio (the "Commission") should either deny the Companies' ESP Stipulation in its current form or, in the alternative, modify the ESP Stipulation by adopting the NOPEC/NOAC proposals set forth in this Joint Brief.

II. STATEMENT OF THE CASE

A. NOPEC and NOAC: Ohio's Large-Scale Governmental Aggregations

NOPEC is a regional council of government established under Chapter 167 of the Ohio Revised Code, and is certified by the Commission as an electric governmental aggregator in the CEI and Ohio Edison service territories of FirstEnergy. NOPEC currently is comprised of 128 communities in the nine northeast Ohio counties of Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull and Portage. NOPEC is providing electric service to more than 400,000 residential and small commercial electric aggregation program customers in those counties (Direct Testimony of Mark Frye in the MRO proceeding ("MRO NOPEC/NOAC Joint Ex. 1"), p. 3, lines 1-5).

NOAC is comprised of the communities of Maumee, Northwood, Oregon, Perrysburg, Sylvania, Toledo, Holland, Lake Township in Wood County and the Board of County Commissioners of Lucas County (on behalf of the unincorporated townships of Lucas County). Each community is certified as an electric governmental aggregator and collectively they are currently serving approximately 150,000 residential and small commercial electric customers on the Toledo Edison system within Lucas and northern Wood Counties (*Id.,* at 3, lines 7-13).

B. Procedural History

On October 20, 2009, Ohio Edison, CEI and Toledo Edison collectively filed an Application for approval of a market rate offer ("MRO") in Case No. 09-906-EL-SSO. Both NOPEC and NOAC were granted intervention by Entry of Attorney Examiner Gregory A. Price issued December 11, 2009. Evidentiary hearings were held in the case from December 15, 2009 through December 23, 2009. Both NOPEC and NOAC participated in the evidentiary hearing, and jointly presented the testimony of one expert witness, Mr. Mark Frye, President of Palmer

Energy (*See generally* MRO NOPEC/NOAC Joint Ex. 1). Mr. Frye's testimony focused on the barriers to large-scale Governmental Aggregation posed by two non-bypassable riders (Rider PDR and Rider GCR) in the Companies' proposed MRO.

Following an expedited briefing schedule, settlement discussions occurred regarding the possibility of reaching a stipulation as part of an electric security plan, rather than the filed MRO. On March 23, 2010, and after compartmentalized negotiations with parties in the MRO proceeding, FirstEnergy filed an application for approval of the ESP Stipulation as signed by a number of the parties to the MRO proceeding (Case No. 09-906-EL-SSO). Neither NOPEC nor NOAC were signatory parties to the ESP Stipulation. By Entry of Attorney Examiner Price issued on March 24, 2010, both NOPEC and NOAC were deemed parties to the above-captioned proceeding based upon their intervention in the prior MRO case.

III. LEGAL ARGUMENT

The ESP Stipulation fails to satisfy the requirements set forth in Ohio Revised Code Section ("R.C.") 4928.143. In particular, the ESP Stipulation as filed is **not** "more favorable in the aggregate" when "compared to the expected results that would otherwise apply under [an MRO]." In particular, the ESP Stipulation: 1) fails to include any signatory party representing the interests of the residential customers in FirstEnergy's service territories; 2) eliminates the GAGS language set forth in the Supplemental ESP Stipulation in Case No. 08-935-EL-SSO that protects both government aggregators and CRES providers (such as FirstEnergy Solutions); 3) gives the Companies unfettered discretion over the distribution investments and associated expenditures to be collected through Rider DCR; 4) ignores the potentially devastating impact of legacy RTEP and MTEP charges to be collected from Ohio ratepayers starting in 2016; 5) provides an impractical method by which the Companies seek to acquire RECs to satisfy the

renewable energy benchmarks established in Senate Bill 221 ("SB 221"); and 6) proposes to make Rider GCR bypassable despite the fact that, for all practical purposes, it will remain non-bypassable for shopping customers.

For these reasons, the Commission must correct the glaring deficiencies in FirstEnergy's ESP proposal in order to protect Ohio consumers and the Ohio economy. Therefore, NOPEC/NOAC submit its joint brief opposing the ESP Stipulation unless the recommendations proposed herein are adopted.

A. The GAGS language set forth in the Supplemental ESP Stipulation in Case No. 08-935-EL-SSO should be adopted in the above-captioned proceeding.

On March 25, 2009, the Commission approved a stipulated ESP in Case No. 08-935-EL-SSO, which remains in effect through May 31, 2011. As recognized in the Commission's March 25, 2009 Order, one important component of that Stipulation involved language protecting both government aggregators and CRES providers in the event of a generation phase-in. The Commission summarized this portion of the stipulation on page 16 of its March 25, 2009 Order as follows:

> If the Commission orders a phase-in of the Companies' generation prices and a government aggregation group elects to phase-in generation costs: each aggregation customer served by a governmental aggregation generation supplier (GAGS) shall receive a phase-in credit equal to the phase-in credit approved by the Commission for the Company's(ies') SSO customers; for every kWh of energy a GAGS delivers to a governmental aggregation customer, the GAGS will be granted, subject to certain provisions of the stipulation, the right to receive from the Company(ies) a receivable amount equal to the phase-in credit received by the aggregation customer, plus carrying charges; any uncollectible GAGS receivables shall be included in the calculation of the Generation Service Uncollectible Rider; and the Generation Service Uncollectible Rider shall remain in full force to allow the Companies throughout the phase-in period and recovery period to charge and collect the uncollectible amounts associated with the GAGS receivables.

The purpose of the GAGS language is twofold: 1) to encourage and promote large-scale governmental aggregation as the unambiguous mandate in R.C. 4928.20(K) states;[1] and 2) to protect both CRES suppliers (e.g. FirstEnergy Solutions) and the governmental aggregation customers they supply in the event generation prices from the auctions come in so high that the Commission deems it necessary to order a phase-in. In essence, the GAGS language allows governmental aggregation suppliers to remain on the same competitive footing as SSO suppliers (e.g. CEI, Ohio Edison and Toledo Edison), and furthers the General Assembly's important policy directives regarding the promotion of governmental aggregation.

The addition of the GAGS language to the Stipulation is simple, unprejudicial, and can be accomplished at no cost to any of the parties in this case. For this reason, NOPEC and NOAC recommend that the Commission adopt GAGS language similar to that set forth in the Supplemental Stipulation in Case No. 08-935-EL-SSO.

B. The Commission must impose clear and concise requirements for a meaningful regulatory review of the distribution capital expense items to be collected through Rider DCR.

Appearing for the first time in the ESP Stipulation is Rider DCR, which has the potential to drastically change the landscape of distribution-related improvements in the FirstEnergy service territories. Rider DCR is designed to "provide the Companies with the opportunity to recover property taxes, Commercial Activity Tax and associated income taxes and earn a return on and of plant in service associated with distribution, subtransmission, and general and intangible plant . . . which was not included in the rate base determined in the Opinion and Order of January 21, 2009 in Case No. 07-551-EL-AIR" (ESP Stipulation at 13, ¶ B.2). In simple

[1] Unlike Divisions (I) and (J) of R.C. 4928.20, Division (K) is statutorily constructed to focus on the large-scale governmental aggregation itself as opposed to its customers.

terms, the Rider will recover the costs associated with all distribution-related improvements since FirstEnergy's last distribution rate case. The only limitations on recovery of these costs are revenue caps of $150 million for 2012, $165 million for 2013, and $75 million for the first five months of 2014 in which the ESP Stipulation would be in effect (ESP Stipulation at 14, ¶ B.2)—a grand total of $390 million over a period of less than three years. This "limited" amount is nearly three times the amount the Commission allowed FirstEnergy to collect as part of its last fully contested distribution rate case less than one year ago (See Case No. 07-551-EL-AIR, Opinion & Order dated January 21, 2009 at 48.)

It is one thing to allow FirstEnergy to recover $390 million in distribution improvement expenditures through a rider (entirely outside the scope of a formal, statutory rate case proceeding), and quite another to eliminate FirstEnergy's burden to prove that such expenditures are reasonable. As drafted, the ESP Stipulation requires that FirstEnergy make quarterly filings regarding Rider DCR, but states that FirstEnergy only has "the burden of proof to demonstrate the accuracy of the quarterly filings" (ESP Stipulation at 15, ¶ D.2). This lesser burden of proof appears to be more administrative than substantive, and essentially abandons the statutory scheme set forth in R.C. Chapter 4909. Attempting to address this issue, the Stipulation gives the "Staff and Signatory Parties" the "discretion" to "conduct an annual audit" following the quarterly filings in January 2013, January 2014, and July 2014 (ESP Stipulation at 16, ¶ D.2). It is unclear, however, exactly what type of meaningful regulatory review the audit will include.

For these reasons, the Commission should clarify that: 1) FirstEnergy must demonstrate that any and all of its distribution expenditures under Rider DCR are reasonable; 2) the annual audits will not be limited to a review of the arithmetic in FirstEnergy's quarterly filings, but will also include site visits "in the field looking as to whether investments were put into the

distribution system," as recommended by Commission Staff witness Turkenton (Tr. Vol. I at 226); 3) any person, not just the Staff or a Signatory Party, can request an annual audit; and 4) annual audits will begin in January 2012, rather than January 2013.

C. The ESP Stipulation glosses over the potentially devastating impact of collecting legacy RTEP and MTEP charges from Ohio ratepayers from 2016 onward.

Throughout the litigation surrounding FirstEnergy's MRO Application and this ESP Stipulation, the elephant in the room remained FirstEnergy's business decision to switch regional transmission organizations ("RTO"). Rather than focus on the extraordinary costs associated with this move, or the significant impact it would have on Ohio ratepayers, the ESP Stipulation's signatory parties struck a deal that "only" requires Ohio ratepayers to pay for a portion of FirstEnergy's business decision.[2] In fact, Section C.2 of the ESP Stipulation allows FirstEnergy to recover from Ohio ratepayers the costs associated with: 1) "[a]ll MTEP charges that are charged to the Companies" for transmission projects approved by MISO prior to June 1, 2011; and 2) RTEP charges charged to the Companies for transmission projects approved by PJM prior to June 1, 2011 (a time period for which ATSI was not even a member of PJM) starting on June 1, 2016. In reality, this "deal" is little more than FirstEnergy using its negotiating power to get Ohio ratepayers to contribute millions of dollars to its unilateral business decision to switch RTOs. This fact alone warrants the Commission's denial of the ESP Stipulation.

1. As non-signatory parties, NOPEC and NOAC adamantly contend that Ohio customers should not be responsible for the costs of FirstEnergy's business decision to switch RTOs.

[2] For example, Staff witness Choueiki concluded that a "commitment to not seek recovery of more than 50% of the legacy RTEP charges from Ohio retail customers with a probability of one is, in Staff's opinion, a much better outcome than simply hoping for FERC to ultimately order FirstEnergy to absorb 100% of the legacy RTEP charges" (Testimony of Hisham Choueiki, PhD., P.E. ("Staff Ex. 1") at 8).

Several weeks prior to the filing of its MRO Application, FirstEnergy's transmission affiliate (ATSI) requested permission from the Federal Energy Regulatory Commission ("FERC") to withdraw from its current regional transmission organization (MISO) to become a member of PJM. As part of its request to the FERC, ATSI sought a waiver of PJM's annual allocation of RTEP costs, as such costs were planned and approved prior to ATSI's integration into PJM. In conjunction with ATSI's waiver request, FirstEnergy Services Company filed a complaint against PJM requesting that the FERC, in the alternative to ATSI's wavier request, find that PJM's RTEP allocation methodology was unjust, unreasonable and unduly discriminatory when applied to ATSI's integration into PJM. FERC denied both the complaint and wavier request, noting:

> Transmission owners that seek to change RTOs should be prepared to assume the costs attributable to their decisions. ATSI is permitted to balance the benefits it associates with its decision to join PJM under its existing tariff against the costs it anticipates it will incur in exiting the Midwest ISO and joining PJM to determine wether such a move is cost-justified.

(*FirstEnergy Service Company v. PJM Interconnection, L.L.C.* (Dec. 17, 2009 Order), 129 FERC ¶61,249 at ¶113) (hereinafter "FERC 2009 Order"). NOPEC and NOAC strongly agree with the FERC's decision. As non-signatory parties, NOPEC and NOAC will adamantly oppose the attempted recovery of such RTEP charges from FirstEnergy's Ohio customers. For this reason, NOPEC and NOAC encourage the Commission to modify the ESP Stipulation to reserve itself the right to challenge FirstEnergy's recovery of these legacy transmission charges in Ohio.

2. The ESP Stipulation allows FirstEnergy to double recover transmission charges from Ohio ratepayers starting on June 1, 2016.

Starting June 1, 2016, Ohio ratepayers will be double paying for RTO-approved transmission projects: once for MISO-approved projects, and a second time for PJM-approved

transmission projects. Even FirstEnergy recognized this double payment problem, arguing to the FERC that "without the relief it requests, ATSI would be required to pay twice in conjunction with its planned realignment, i.e., to pay under both PJM's and the Midwest ISO's allocations for projects planned and approved in separate by each over the same period.". (FERC 2009 Order at ¶ 98). In essence, FirstEnergy contended that ATSI should not have to pay twice for transmission system upgrades as a result of its switch from MISO to PJM. Both NOPEC and NOAC agree with this argument and strongly recommend that FirstEnergy be required to assume the entire cost of its business decision to transfer RTOs.

A true understanding of the proposed double recovery requires a detailed analysis of Section C.2 of the ESP Stipulation to determine exactly what transmission charges are recoverable from Ohio ratepayers, and when those charges can be recovered.

First, Section C.2 expressly states that "[a]ll MTEP charges that are charged to the Companies, either directly or indirectly, shall be recovered from customers" through Rider NMB. The referenced MTEP charges represent only the portion of the total MTEP charges that MISO allocates to the ATSI footprint that are then charged to CEI, Ohio Edison, Toledo Edison. Shockingly, no party provided any estimate of the expected MTEP charges (or length in years of the recovery of those MTEP charges from Ohio ratepayers). Yet, Staff witness Choueiki testified that the annual allocation of MTEP charges to CEI, Ohio Edison, and Toledo Edison will be in the neighborhood of $6-8 million per year (Tr. Vol. I at 215). Because such charges can be recovered for the life of the approved transmission projects, this annual $6-8 million allocation would amount to total charges of approximately $60-80 million for the 10-year period starting June 1, 2011 and ending on May 31, 2021.

Second, and perhaps more importantly, the record in both the MRO proceeding and this case reflect the fact that ATSI is expected to be allocated approximately $557 million in RTEP charges for transmission projects approved by PJM prior to May 31, 2011—the date of ATSI's integration into PJM (Staff Ex. 1 at 6).[3] Of the $557 million, the Commission Staff estimated that approximately $473 million would be allocated to CEI, Toledo Edison, and Ohio Edison—and consequently Ohio ratepayers (Staff Ex. 1 at 6).[4] Notably, Section C.2 of the ESP Stipulation allows FirstEnergy to recover RTEP costs charged to CEI, Toledo Edison and Ohio Edison starting on June 1, 2016, but prohibits "recovery through retail rates for the costs billed by PJM during the period June 1, 2011 through May 31, 2016." FirstEnergy witness Ridmann estimated the amount of RTEP charges during this five year period to be approximately $320 million (WRR Attachment 1 to the Direct Testimony of William R. Ridmann)—leaving Ohio ratepayers to be held responsible for more than $153 million of RTEP charges in the five year period from June 1, 2016 through May 31, 2021 (and unknown millions of dollars in the years thereafter).

Based on the two analyses above, it is clear that starting on June 1, 2016, Ohio ratepayers will be responsible for paying both MTEP and RTEP charges for the life of the respective RTO-approved transmission projects. More specifically, for the five-year period from June 1, 2016 through May 31, 2021, Ohio ratepayers will be double paying MTEP and RTEP charges in an amount likely to exceed $200 million—an amount that can only be expected to increase in the years thereafter. Such double recovery is entirely unreasonable, especially in light of the fact

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[3] This estimate is based solely on the estimated dollar amounts provided by FirstEnergy and attached to Staff Ex. 1 as HMC Attachment 1.

[4] The $473 million represents the costs associated with transmission projects approved prior to FirstEnergy's transition to PJM, and while FirstEnergy remained a member of MISO.

that the double recovery results solely from FirstEnergy's unilateral business decision to switch RTOs.

D. The Commission should provide for the availability of long-term REC contracts, along with full cost recovery mechanisms for the Companies.

NOPEC/NOAC strongly believe in the policy goals embedded in the General Assembly's decision to adopt renewable energy portfolio standard ("RPS") in SB 221. In order to promote renewable energy development in Ohio and compliance with the annual RPS benchmarks in SB 221, NOPEC/NOAC fully support the recommendations of Ohio Environmental Council witness Hitt that the Commission require FirstEnergy to procure RECs through long-term, 10-15 year contracts (*See generally* Direct Testimony of Carrie Cullen Hitt, "OEC Ex. 1"), while allowing FirstEnergy to "recover costs associated with long-term contracts coterminous with the contracts themselves" (OEC Ex. 1 at 7). In this manner, renewable energy developers receive a long-term revenue stream attractive to financial investors (OEC Ex. 1 at 3-4), while the utility is guaranteed recovery of the costs associated with such long-term contracts. This remedy would not only jump start the renewable energy market in Ohio, but reduce the likelihood of future force majeure filings from Ohio utilities, including FirstEnergy (OEC Ex. 1 at 4, footnote 3).

E. Rider GCR fails to encourage or promote large-scale governmental aggregation, and should be made bypassable for shopping customers with no strings attached.

As part of the MRO proceeding from which the ESP Stipulation evolved, FirstEnergy proposed a non-bypassable Rider GCR to recover costs associated solely with the Companies SSO service (See MRO Co. Ex. 7, p. 23, lines 19-21). In particular, Rider GCR ensures that the Companies remain revenue neutral in the procurement of SSO generation supply. For the

reasons set forth in the Joint Briefs filed by NOPEC and NOAC in the MRO proceeding,[5] Rider GCR should be entirely bypassable for shopping customers. In simple terms, this charge relates solely to the Companies' SSO generation supply, and provides absolutely no benefit for shopping customers. "Customers electing to remain with the SSO should pay SSO related charges. Customers shopping should not" (MRO NOPEC/NOAC Jt. Ex. 1, p. 9, lines 24-26).[6]

In order to allegedly resolve this issue, the ESP Stipulation proposes to make Rider GCR bypassable, but only until: 1) the balance of Rider GCR reaches 5% of the Companies' generation expense; or 2) the winning auction bidder defaults. Notably, FirstEnergy's sole witness, Bill Ridmann, testified that the initial balance of Rider GCR could reach 5% of the Companies' generation expenses by the time the ESP Stipulation takes effect on June 1, 2011[7]—thereby rendering Rider GCR non-bypassable for all practical purposes. Such a result was clearly not intended by the ESP Stipulation, and runs directly contrary to the policy goals set forth in R.C. 4928.20 that require the promotion of governmental aggregation. For this reason, the Commission should revisit Rider GCR and make it entirely bypassable for shopping customers.

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[5] NOPEC/NOAC's joint initial post-hearing brief in the MRO case was filed on January 8, 2010 and the joint reply brief was filed on January 15, 2010.

[6] See also MRO Constellation Ex. 1, p. 28, lines 12-13 (explaining "customers that are not taking SSO service from FirstEnergy should not have to pay FirstEnergy for any reconciliations associated with SSO service").

[7] Tr. Vol. I at 175.

IV. CONCLUSION

For the reasons set forth above, NOPEC and NOAC respectfully request that the Commission either deny the Companies' ESP Stipulation in its current form or, in the alternative, modify the Companies' proposal as recommended herein.

Respectfully submitted,

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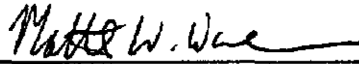
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties of record, by electronic mail, this 30th day of April, 2010.



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