

**FILE**

**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 ) Case No. 10-388-EL-SSO  
Establish a Standard Service Offer )  
Pursuant to R.C. § 4928.143 in the Form )  
of an Electric Security Plan. )

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**SUPPLEMENTAL POST-HEARING BRIEF  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,  
CITIZEN POWER,  
CITIZENS COALITION,  
AND  
NATURAL RESOURCES DEFENSE COUNCIL**

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**JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL**

Jeffrey L. Small, Counsel of Record  
Gregory J. Poulos  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
614-466-8574 (Telephone)  
614-466-9475 (Facsimile)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[poulos@occ.state.oh.us](mailto:poulos@occ.state.oh.us)

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Theodore Robinson  
Staff Attorney and Counsel of Record  
William M. Ondrey Gruber, Of Counsel  
**Citizen Power**  
2121 Murray Avenue  
Pittsburgh, PA 15217  
(412) 421-7029 (Telephone)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)

Joseph P. Meissner, Counsel of Record  
Matthew D. Vincel  
The Legal Aid Society of Cleveland  
1223 West 6th Street  
Cleveland, OH 44113  
(216) 216-687-1900 (Telephone)  
[jpmessn@lasclev.org](mailto:jpmessn@lasclev.org)  
[mvincel@lasclev.org](mailto:mvincel@lasclev.org)  
**Citizens Coalition**

Henry W. Eckhart  
50 West Broad Street, #2117  
Columbus, OH 43215  
(614) 461-0984 (Telephone)  
(614) 221-7401 (Facsimile)  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)  
**Natural Resources Defense Council**

July 1, 2010

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**I. INTRODUCTION AND STATEMENT OF THE CASE**

On March 23, 2010, Ohio Edison Company, the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("FirstEnergy" or the "Company") filed an application ("ESP Application"<sup>1</sup>) to request approval of their electric security plan ("ESP") proposal. That proposal could determine prices consumers will pay for generation, transmission, and distribution service.

The ESP filing included a Stipulation and Recommendation ("Stipulation"<sup>2</sup>) providing that FirstEnergy "may render th[e] Stipulation and ESP null and void" if it was not approved as filed by May 5, 2010 (just 43 days after filing).<sup>3</sup> An Attorney Examiner

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<sup>1</sup> FirstEnergy ESP Ex. 1 (including schedules).

<sup>2</sup> The Stipulation was designated "Joint ESP Ex. 1."

<sup>3</sup> Stipulation at 2.

Entry was issued on March 24, 2010 that, among other matters, set April 13, 2010 as the date for intervenor testimony (21 days after the filing) and set April 20, 2010 as the hearing date (28 days after the filing).

The hearing convened on April 20, 2010. Briefs were filed on April 30, 2010.<sup>4</sup>

The Commission issued an Entry on Rehearing on May 13, 2010, which stated:

[T]he Commission believes that additional information regarding the impact of the proposed ESP on customer's bills is necessary before we can consider the Joint Stipulation. Therefore, pursuant to Rule 4901-1-34, O.A.C., the Commission directs that the evidential hearing in this proceeding resume on June 17, 2010 . . . . Further, the Commission directs its Staff to present a detailed analysis of the impact of the proposed ESP on customer's {sic} bills. Staff's testimony regarding the analysis should be pre-filed seven days prior to the hearing.

The supplemental hearing was rescheduled, and took place on June 21, 2010. Robert Fortney testified for the PUCO's Staff. FirstEnergy sought to enter a supplemental stipulation ("Supplemental Stipulation"<sup>5</sup>) into the record. Over the objection of the OCC, the Supplemental Stipulation was presented for the record and supported without the requirement of pre-filed testimony. FirstEnergy Witness Ridmann was cross-examined regarding the Supplemental Stipulation by counsel for parties that opposed the partial settlement.

Another case before the PUCO that figures prominently in the record of this case ("ESP Case") is the Company's filing of a market rate offer ("MRO") application on October 20, 2009 (Case 09-906-EL-SSO, "MRO Application" in the "MRO Case").

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<sup>4</sup> See, e.g., Post-Hearing Brief by the Office of the Ohio Consumers' Counsel, Citizen Power, Citizens Coalition, and the Natural Resources Defense Council (April 30, 2010) ("Brief").

<sup>5</sup> The Supplemental Stipulation was designated "Joint ESP Ex. 2."

A case before the Federal Energy Regulatory Commission ("FERC"), which also figures prominently in the record of this ESP Case, was filed by the Company in August 2009. The pending case before FERC involves the proposed switch in the transmission operations of the Company's affiliated American Transmission System, Incorporated ("ATSI") from the footprint of the Midwest Independent System Operator ("MISO") to PJM Interconnection, Inc. ("PJM"). The Company's request before FERC for waiver of legacy regional transmission expansion plan ("RTEP") charges by PJM was denied on December 17, 2009.<sup>6</sup> FERC determined that a transmission owner that switches RTOs "should be prepared to assume the costs attributable to [its] decisions."<sup>7</sup>

## **II. PROCESS: THE JUNE HEARING DID NOT PROCEED ACCORDING TO THE COMMISSION'S DIRECTIVE.**

### **A. The June Hearing Did Not Effectively Assist the Commission's Decision-Making.**

#### **1. The supplemental hearing added to the existing procedural problems.**

The resumption of the hearing on June 21, 2010 brought procedural problems in addition to those that have previously beset this case.<sup>8</sup> The proceeding was reopened by order of the Commission, but only for the purposes stated in the Entry on Rehearing issued on May 13, 2010. Nothing in the Commission's rules permits an attorney

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<sup>6</sup> *American Transmission Systems, Inc.*, FERC Docket Nos. ER09-1589-000, et al., Order Addressing RTO Realignment Request and Complaint (December 17, 2009).

<sup>7</sup> "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 whether such a move is cost-justified. \* \* \* We see no basis to modify the existing RTO rules simply because a particular cost allocation makes a *transmission owner's business decision* more expensive." *American Transmission Systems, Inc.*, FERC Docket Nos. ER09-1589-000, et al., Order Addressing RTO Realignment Request and Complaint at ¶113 (December 17, 2009) (emphasis added).

<sup>8</sup> See, e.g., Brief at 6-17 (April 30, 2010).

examiner to overrule the Commission's instructions regarding the purpose and content of additional proceedings ordered by the PUCO itself.

FirstEnergy sought to enter its Supplemental Stipulation into the record, a matter that was not the subject of the Commission's Entry on Rehearing and also not the subject of a motion to reopen as required by Ohio Adm. Code 4901-1-34. FirstEnergy had ample time to submit such a motion. The Supplemental Stipulation is accompanied by a letter written by FirstEnergy's counsel dated May 12, 2010<sup>9</sup> (the day before the Commission's Entry on Rehearing was issued), yet FirstEnergy failed to file a motion to reopen the proceedings and failed to show "good cause" as required by the Commission's rule.

The OCC also stated an evidentiary objection -- hearsay<sup>10</sup> -- to the testimony and exhibits presented by Staff Witness Fortney on June 21, 2010.<sup>11</sup> Cross-examination of Staff Witness Fortney, as elaborated upon below, revealed that FirstEnergy provided the assumptions, the typical bill values, and an important part of written testimony that was admitted into the record. Presentation of FirstEnergy's material through a PUCO Staff witness was, like the testimony and exhibits associated with FirstEnergy's Supplemental Stipulation, against the stated purpose of reopening the record. However, the presentation of FirstEnergy's bill impact work by a PUCO Staff member also deprived counsel for parties who oppose the partial settlement of the opportunity to examine the source and veracity of the new statements (i.e. a problem with hearsay). The means of presentation also deprives the Commission itself of clarity regarding the nature of the bill

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<sup>9</sup> Joint ESP Ex. 2 (Supplemental Stipulation).

<sup>10</sup> Evid. R. 802 ("Hearsay is not admissible . . .").

<sup>11</sup> Tr. at 26 and 28 ("classic hearsay") (June 21, 2010).



impacts presented. Mr. Fortney was not well acquainted with important elements of the numerical presentation that composed the bulk of his testimony.

**2. The comparison presented by Staff does not substitute for the bill comparison to the MRO presented by the OCC.**

Through this Supplemental Brief, numerous concerns are raised regarding the validity and completeness of the bill analysis prepared by FirstEnergy and attached to the supplemental testimony presented by Staff Witness Fortney. However, the Commission should remember that the additional information purports to compare customer bills under the proposed ESP to current bills. It does not compare customer bills under the proposed ESP to customer bills under an MRO (i.e. absent the ESP). The comparison with the MRO is important to the Commission's examination of whether the proposed ESP "is more favorable in the aggregate as compared to the expected results [under a MRO]."<sup>12</sup>

The bill comparison attached to Staff Witness Fortney's testimony does not present what customer bills might be absent the proposed ESP:

Q. In your testimony you don't present any bill impact scenarios for the ESP not being approved. It's only for under the ESP, correct?

A. That's correct.<sup>13</sup>

The annualized revenue impact, details on residential rates, and a comparison of the impact on residential customer bills under the proposed ESP versus under a MRO was

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<sup>12</sup> R.C. 4928.143(C)(1).

<sup>13</sup> Tr. at 42 (Fortney) (June 21, 2010).

provided in OCC Witness Gonzalez's testimony<sup>14</sup> and his Schedule WG-3. Schedule WG-3 shows *reductions* in bills that would take place in the absence of the ESP. It also demonstrates that a bill analysis is entirely possible without FirstEnergy providing the figures, even though it was accomplished in the tight timeframe originally provided to intervening parties.

### **3. Conclusion**

The proposed ESP should not be approved. Meanwhile, the fully litigated MRO Case lies dormant many months after the ninety-day statutory deadline for a decision in such cases has passed. The proper course under these circumstances is for the Commission to issue and order that modifies and approves a MRO for customers as recommended by Ohio Consumer and Environmental Advocate members in the MRO Case.<sup>15</sup>

#### **B. The Commission's Directive Was Not Followed.**

##### **1. The Staff did not prepare bill impacts for the proposed ESP.**

##### **a. FirstEnergy prepared the bill impacts.**

Mr. Fortney did not present the information that the PUCO Staff was ordered to present at the supplemental hearing. The key assumptions contained in Staff's pre-filed testimony were provided by Mr. Ridmann from FirstEnergy and calculations of typical bills were also provided by the Company. Despite the Commission's directive in its May 13, 2010 Entry on Rehearing, the PUCO Staff relied upon FirstEnergy's assumptions and

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<sup>14</sup> OCC ESP Ex. 2 at 54-56 (Gonzalez).

<sup>15</sup> *In re FirstEnergy's 2009 MRO Case*, Case No. 09-906-EL-SSO, Initial Post-Hearing Brief by OCEA Members (January 8, 2009). This course would also serve the other State policies stated in R.C. 4928.02.

its bill calculations. In Mr. Fortney's words, FirstEnergy's work was used "[b]ecause it's so much more convenient to rely on the company who already has the software . . . ."<sup>16</sup>

Mr. Fortney's key assumptions were taken, largely word-for-word, from the previous testimony of FirstEnergy Witness Ridmann, and FirstEnergy prepared the bill comparison for the Staff.<sup>17</sup> Staff Witness Fortney stated that he did not want to present an evaluation based upon assumptions.<sup>18</sup> However, such assumptions must be made to perform a bill impact analysis and Mr. Fortney left that task to FirstEnergy Witness Ridmann and FirstEnergy. While the PUCO Staff executed the Stipulation and the Supplemental Stipulation, the Commission directed *Staff* (not FirstEnergy) to prepare the bill impact analysis. Staff was willing elsewhere to examine, on its own, the assumptions regarding the instant case.<sup>19</sup> The PUCO and the public should have been provided with Staff's independent evaluation of bill impacts during the term of the proposed ESP.

Considerable confusion surrounds the single-year comparison that Mr. Fortney claims to have prepared. In the pre-filed testimony, Mr. Fortney only states that typical bills were developed using "current rates" and "proposed rates."<sup>20</sup> Staff Witness Fortney testified that by "current," he meant summer rates for 2010 and winter rates for 2011, compared with "proposed" rates composed of summer rates for 2011 and winter rates for

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<sup>16</sup> Tr. at 57 (Fortney) (June 21, 2010).

<sup>17</sup> Compare Staff ESP Ex. 4 at 2-4 (responses to question 5) (Fortney Supplemental) with FirstEnergy ESP Ex. 4 at 15-17 (Ridmann). On cross-examination, Mr. Fortney did not deny that FirstEnergy was the source of his assumptions, his typical bill numbers, and part of this written testimony. Tr. at 33-34 (Fortney) ("My assumptions should be exactly the same as Mr. Ridmann's testimony"), at 24 ("The typical bills were produced by FirstEnergy") and at 29-32 (e.g. "word for word . . . ?" responded to by: "As they should be.") (June 21, 2010).

<sup>18</sup> Tr. at 37 (Fortney) (June 21, 2010).

<sup>19</sup> Staff ESP Ex. 1 at 7 (Choueiki).

<sup>20</sup> See, e.g., Staff ESP Ex. 4 at 2 (Fortney Supplemental).

2012.<sup>21</sup> However, Mr. Fortney's typical bill comparisons reflect the same assumptions about the Stipulation that are contained in FirstEnergy Witness Ridmann's earlier testimony.<sup>22</sup> Review of FirstEnergy's assumptions shows that Mr. Fortney did not perform the comparison that he claimed upon cross-examination.

Review of the assumptions copied from FirstEnergy Witness Ridmann's testimony shows that the "current" rates used for typical bills could not be for summer 2010. The typical bills are based on rates that reflect reconcilable riders at January 2010 levels<sup>23</sup> and a Deferred Fuel Cost Recovery Rider based on an estimated balance at December 2010<sup>24</sup> that does not become effective until January 1, 2011.<sup>25</sup> Similar review of the assumptions shows that the "current" rates used for typical bills could not be for winter 2011 since the typical bills are based on rates that reflect reconcilable riders at January 2010 levels<sup>26</sup> and a Deferred Generation Cost Recovery Rider based on an estimated balance at May, 2011<sup>27</sup> that does not become effective until June 1, 2011.<sup>28</sup>

Adding to the confusion regarding Mr. Fortney's presentation, the DSI Rider that permits increases in distribution rates for FirstEnergy's existing ESP expires on

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<sup>21</sup> Tr. at 36 (Fortney Supplemental) (June 21, 2010).

<sup>22</sup> Tr. at 33-34 (Fortney) (June 21, 2010). Also, compare Staff ESP Ex. 4 at 2-4 (Fortney Supplemental) and FirstEnergy ESP Ex. 4 at 15-17 (Ridmann).

<sup>23</sup> Staff ESP Ex. 4 at 2, item "(d)" (Fortney Supplemental).

<sup>24</sup> Staff ESP Ex. 4 at 3, item "(g)" (Fortney Supplemental).

<sup>25</sup> *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion & Order at 15 (March 25, 2009).

<sup>26</sup> Staff ESP Ex. 4 at 2, item "d" (Fortney Supplemental).

<sup>27</sup> Staff ESP Ex. 4 at 3, item "(g)" (Fortney Supplemental).

<sup>28</sup> *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding & Order at 5 (March 4, 2009).

December 31, 2011,<sup>29</sup> in the middle of the 2011/2012 winter. The treatment of the expiration of the DSI Rider in the PUCO Staff's bill comparison could not be described by Mr. Fortney, who was "not entirely sure when the DSI Rider expires."<sup>30</sup>

The bill analysis presented on June 21, 2010 is based upon FirstEnergy's testimony and its bill comparisons, which Staff Witness Fortney was unable to adequately describe and defend. The additional testimony containing bill impacts does not satisfy the directive stated in the Commission's Entry on Rehearing, and constituted impermissible hearsay. The testimony and associated exhibits should be stricken<sup>31</sup> and not considered by the Commission.

**b. The additional testimony failed to show bill impacts for the entire period covered by the proposed ESP.**

Staff was instructed to provide a bill analysis "for the proposed ESP,"<sup>32</sup> an instruction that was not followed by Staff Witness Fortney. The proposed ESP would commence in June 2011 and end in May 2014, and Mr. Fortney acknowledged that "there are things that increase" as part of the proposed ESP.<sup>33</sup> The tables attached to Mr. Fortney's testimony, limited to the numerical work performed by FirstEnergy, makes a

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<sup>29</sup> Stipulation at 17 ("billed through Rider DSI prior to January 1, 2012").

<sup>30</sup> Tr. at 40 (Fortney) (June 21, 2010).

<sup>31</sup> Ohio Adm. Code 4901-1-15(F) provides that a party adversely affected by a procedural ruling may "raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case." The OCC's motion to strike was denied at hearing (Tr. at 25-28), and this Supplemental Brief is the first opportunity to raise the matter following the supplemental hearing.

<sup>32</sup> Entry on Rehearing at 9, ¶17 (June 13, 2010).

<sup>33</sup> Tr. at 38 (Fortney) (June 21, 2010).

comparison for a single year.<sup>34</sup> The only explanation given for Staff's limited review of bill impacts is that Mr. Fortney "thought the first year was confusing enough"<sup>35</sup> and that preparing the bill impact analysis would require "mak[ing] some assumptions."<sup>36</sup>

Increases in distribution rates during the three-year term of the proposed ESP -- by means of the "DCR" provision in the Stipulation<sup>37</sup>-- has been a controversial part of the proposed settlement but Staff Witness Fortney stated that he was "not all that familiar with the DCR."<sup>38</sup>

Rates are likely to increase during the term of the proposed ESP, due in part to increasing distribution rates resulting from the DCR Rider. FirstEnergy provided the PUCO Staff with a bill analysis that assumed \$124 million in additional distribution revenues for FirstEnergy for the comparison year.<sup>39</sup> This number is not contained in the Stipulation and Supplemental Stipulation. The revenue increases permitted under the partial settlement are greater than \$124 million -- amounts that begin at \$150 million for the twelve month period beginning on January 1, 2011<sup>40</sup> and end with a permissible \$180 million in annualized increases during 2014.<sup>41</sup> The PUCO Staff did not provide any evaluation of these important DCR provisions in the partial settlement that would increase customer bills.

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<sup>34</sup> As noted above, considerable confusion surrounds the single-year comparison that Mr. Fortney claims to have presented.

<sup>35</sup> Tr. at 37 (Fortney) (June 21, 2010).

<sup>36</sup> Id. at 37.

<sup>37</sup> Stipulation at 14.

<sup>38</sup> Tr. at 39 (Fortney) (June 21, 2010).

<sup>39</sup> Id.

<sup>40</sup> Stipulation at 14.

<sup>41</sup> The increase permitted by the Stipulation is \$75 million over five months. Id.

The bill analysis presented on June 21, 2010 is incomplete. The additional material does not satisfy the directive stated in the Commission's Entry on Rehearing. The additional testimony presented by Mr. Fortney along with its exhibit, entered into evidence at the June 21, 2010 supplemental hearing, was the result of FirstEnergy's work and should be stricken from the record.<sup>42</sup> The Commission should disregard the testimony in its decision-making.

**2. Testimony not permitted by the Commission's Entry was heard at the supplemental hearing to favor FirstEnergy's partial settlement.**

The manner in which the supplemental hearing was conducted was inappropriate for the purpose of providing additional information on possible customer bill impacts -- the stated purpose of the supplemental hearing. The Entry on Rehearing dated May 13, 2010 permitted only a presentation by Staff regarding a bill impact analysis. FirstEnergy sought, and the Attorney Examiner approved (over the objection of the OCC), additional evidence to be presented by only FirstEnergy in the form of the Supplemental Stipulation. After pressing opponents of the partial settlement to present their case on an aggressive timeline, FirstEnergy was permitted to further develop its case in June 2010. This was not the Commission's stated purpose for the supplemental hearing, and was not the subject of any motion by FirstEnergy to reopen the proceedings. The Supplemental Stipulation and the accompanying testimony by FirstEnergy Witness Ridmann should be stricken from the record.<sup>43</sup>

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<sup>42</sup> Again, see Ohio Adm. Code 4901-1-15(F).

<sup>43</sup> Id.

In the Commission's quasi-judicial role and through its representatives presiding over the hearings, the PUCO should avoid any appearance that its role is to argue for a particular result -- in this instance the approval of the partial settlement. FirstEnergy's additional testimony and its exhibit, entered into evidence at the June 21, 2010 supplemental hearing, should not be included in the record of this case and should be disregarded in the Commission's decision-making.

### **III. ADDITIONAL EVALUATION OF THE FLAWED SETTLEMENT**

#### **A. Criteria for the Evaluation of Stipulations**

The Post-Hearing Brief by the undersigned parties evaluated the Stipulation according to the following criteria:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Is the settlement a product of negotiations among parties occupying asymmetric bargaining positions that affected the settlement result?
3. Does the settlement, as a package, benefit ratepayers and the public interest?
4. Does the settlement package violate any important regulatory principle or practice?

This Supplemental Post-Hearing Brief updates the earlier evaluation in light of the contents of the Supplemental Stipulation.



**B. The Supplemental Stipulation Adds to the Concerns Over the Partial Settlement.**

**1. The settlement is not the product of serious bargaining among capable, knowledgeable parties.**

The Brief of the undersigned parties stated that the totality of the circumstances surrounding the negotiation of the Stipulation suggests a rushed process undertaken in less than one month before the ESP Application was filed on March 23, 2010.<sup>44</sup> The supplemental testimony of Staff Witness Fortney revealed that Staff believes the Stipulation contains an additional flaw, and that revelation should give the Commission additional pause in its evaluation of the settlement proposal.

Staff Witness Fortney's supplemental testimony reveals that Staff is additionally critical of the settlement product regarding the treatment of lighting tariffs under circumstances where the competitive bidding price CBP is relatively low.<sup>45</sup> Rather than depend upon the results of the negotiation process, and the parties that were permitted to engage in those negotiations, Mr. Fortney found fault with the settlement results and recommended that increases that might occur under some (low) CBP prices for lighting tariffs be mitigated further.<sup>46</sup>

The Supplemental Stipulation provided payments to the Council of Small Enterprises ("COSE") and the City of Akron ("Akron"), but FirstEnergy proposes that *customers* pay for the Company's agreement to provide money to these additional two

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<sup>44</sup> Brief at 49.

<sup>45</sup> Staff ESP Ex. 4 at 5 (Fortney Supplemental).

<sup>46</sup> Id.

signatories using riders to collect the money from customers.<sup>47</sup> “Serious bargaining” did not occur with respect to adding these two parties. Serious bargaining did not occur under circumstances where FirstEnergy failed to make any financial concession. In the Supplemental Stipulation, the Company proposes to satisfy the narrow interests of COSE and Akron without committing any additional shareholder dollars.<sup>48</sup> While such an arrangement can be agreed upon by FirstEnergy and additional parties that hold narrow interests, serious bargaining did not take place.

Staff’s additional criticism of the settlement results and the lack of any concession on the part of FirstEnergy while two parties were added to the partial settlement add to the concerns raised in the Brief filed by the undersigned parties regarding the first criterion for the evaluation of settlements.

**2. The weight given to parties’ adoption of the Stipulation should be discounted due to the asymmetric bargaining positions in the negotiations.**

The dynamic of the asymmetric positions of the signatories to the Stipulation and the Supplemental Stipulation is not changed by the addition of two signatories to the later document. The statutory framework that framed the asymmetric negotiating process is described in the Brief filed by the undersigned parties. As OCC Witness Gonzalez stated:

Th[e] asymmetry in negotiating positions lessens the weight of every non-FirstEnergy party’s execution of the resulting Stipulation as an expression of the parties’ fundamental support for

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<sup>47</sup> Supplemental Stipulation at 2 (“with such [COSI] amounts recovered through Rider DSE”) and at 3 (“with such [Akron] amounts recovered through Rider DSE”).

<sup>48</sup> Tr. at 83 and 87 (Ridmann) (June 21, 2010).

the package. The Stipulation is favorable for FirstEnergy, but not for the public.<sup>49</sup>

The Commission must carefully review every term and condition in the Stipulation and Supplemental Stipulation and be willing to change the proposal in keeping with sound regulatory policy.

Customer parties who executed the Supplemental Stipulation may not agree with the specific additions to the Stipulation -- accomplished when FirstEnergy negotiated with COSE and Akron promising *customer payments* (including payments by stipulating parties) rather than using Company funds. The acquiescence of parties to the Supplemental Stipulation may be nothing more than the inability of such parties to conclude that there could be any other result in light of the flawed bargaining process. These are the exact circumstances under which commissioners have stated that the partial settlement should undergo close Commission scrutiny according to its parts.<sup>50</sup>

The Supplemental Stipulation is more flawed than the Stipulation, and should be rejected by the Commission. In the alternative, in the event the Commission decides to approve an ESP to serve customers, the flaws revealed by the undersigned parties in their Brief and in this Supplemental Brief should be corrected.

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<sup>49</sup> OCC ESP Ex. 2 at 11 (Gonzalez).

<sup>50</sup> In FirstEnergy's initial ESP case, Commissioner Roberto stated that "... because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest - or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1-2 (March 25, 2009). Commissioners Centolella and Lemmie stated similar concerns. *Id.*, Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring at 2 (March 25, 2009) ("need to be taken into account when considering the weight to be given to this stipulation" and "[t]he Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of issues.").

**3. The settlement, as a package, does not benefit ratepayers and the public.**

The Supplemental Stipulation merely provides for \$200,000 in payments to the Council of Smaller Enterprises (“COSE”) and \$300,000 to Akron,<sup>51</sup> and proposes that customers (not FirstEnergy) pay for these additional arrangements “through Rider DSE.”<sup>52</sup> These payments -- which do not involve any sacrifice on the part of FirstEnergy as the result of the “negotiations” -- serve the Company’s narrow interest in removing opposition to its proposed ESP. FirstEnergy Witness Ridmann was unable to describe the particular activities expected of COSE and Akron in return for the payments.<sup>53</sup> No documentation of such activities need be submitted by the additional signatories to either FirstEnergy or the PUCO to satisfy the terms of the Supplemental Stipulation.<sup>54</sup> No observer can be impressed by Mr. Ridmann’s statement that “we’re going to want to take a look at basically what they’ve done as part of [Akron’s] . . . efforts.”<sup>55</sup>

The Commission should judge benefits from the perspective of the ratepayers and the public as a whole. For example, Counsel for the Citizens Coalition inquired of Mr. Ridmann regarding the Companies’ support for funding to assist low-income customers, retain their service and avoid disconnection. The existing program is broad-based (e.g. geographically) and funded by FirstEnergy under the current ESP.<sup>56</sup> Such a broad-based

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<sup>51</sup> Supplemental Stipulation at 2-3.

<sup>52</sup> *Id.*

<sup>53</sup> Tr. at 80 and 85 (Ridmann) (June 21, 2010).

<sup>54</sup> *Id.* at 82 and 86-87.

<sup>55</sup> *Id.* at 87.

<sup>56</sup> *Id.* at 92-94 (Ridmann) (June 21, 2010). The existing program, inadequate in its funding under existing economic circumstances, provided \$6 million during 2009-2011. *In re FirstEnergy’s 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion and Order at 14, ¶(28) (March 25, 2009).

program -- which is cut back by seventy-five percent in the Stipulation compared to funding during the existing ESP<sup>57</sup> -- would provide a real benefit to ratepayers and the public. These funds are used to assist customers in obtaining a vital service, and they reduce uncollectible expenses and PIPP surcharges associated with nonpayment of utility bills. Instead of providing tangible customer benefits, FirstEnergy devoted its efforts to proposing that customers pay the costs of enticing two parties to join in the partial settlement.

Any benefits to ratepayers and to the public from the settlement package have not been enhanced by the provisions contained in the Supplemental Stipulation.

**4. The settlement violates important regulatory principles and practices.**

The Supplemental Stipulation devotes a few additional lines to provide payments to entice COSE and Akron to join the partial settlement. The payments are not made to support broad-based programs. State policy is to ensure “nondiscriminatory . . . retail electric service.”<sup>58</sup> The terms added to the partial settlement discriminate based upon opposition to the previously proposed Stipulation. The added terms violate State policy.

The Commission’s practice should be concerned with not only the interests of signatories to the partial settlement but also with the interests of non-signatories and the public at large.<sup>59</sup> In this instance, the Commission should discourage the addition of additional signatories to the partial settlement -- accomplished in the absence of any sacrifice by FirstEnergy -- without any accompanying benefit to the public. If the Supplemental Stipulation and accompanying testimony is not stricken from the record,

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<sup>57</sup> Id. at 93-94.

<sup>58</sup> R.C. 4928.02(A).

<sup>59</sup> See, e.g., Brief at 41-41.

the provisions added to the partial settlement by the Supplemental Stipulation should be rejected as against Commission practice.

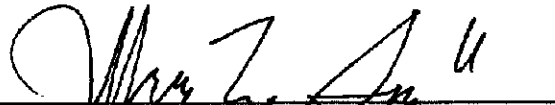
#### IV. CONCLUSION

The proposed electric security plan was hastily negotiated, and FirstEnergy wielded tremendous and unequal bargaining power in the negotiating process as the result of the interplay of statutory provisions related to SSO plans. The Stipulation that frames the ESP Application also violates numerous regulatory principles and practices.

The path to a SSO plan for service to customers beginning June 1, 2011 should go through the Company's pending MRO Case. The Commission decision in the MRO Case is long overdue, and should be issued to provide for generation service to customers for the 2011 to 2014 period.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record  
Gregory J. Poulos  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
614-466-8574 (Telephone)  
614-466-9475 (Facsimile)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[poulos@occ.state.oh.us](mailto:poulos@occ.state.oh.us)

*W. M. Ondrey Gruber*

Theodore Robinson  
Staff Attorney and Counsel of Record  
William M. Ondrey Gruber, Of Counsel

**Citizen Power**

2121 Murray Avenue  
Pittsburgh, PA 15217  
(412) 421-7029 (Telephone)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)

*J. Meissner*

Joseph P. Meissner, Counsel of Record  
Matthew D. Vincel

The Legal Aid Society of Cleveland

1223 West 6th Street

Cleveland, OH 44113

(216) 216-687-1900 (Telephone)

[jmeissn@lasclev.org](mailto:jmeissn@lasclev.org)

[mvincel@lasclev.org](mailto:mvincel@lasclev.org)

**Citizens Coalition**

*Henry W. Eckhart*

Henry W. Eckhart

50 West Broad Street, #2117

Columbus, OH 43215

(614) 461-0984 (Telephone)

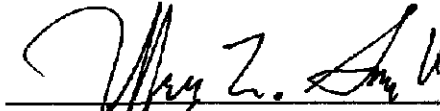
(614) 221-7401 (Facsimile)

[henryeckhart@aol.com](mailto:henryeckhart@aol.com)

**Natural Resources Defense Council**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Supplemental Post-Hearing Brief* was served on the persons stated below, electronically (as instructed by the Attorney Examiners), this 1<sup>st</sup> day of July, 2010.



Jeffrey L. Small  
OCC Counsel of Record

## SERVICE LIST

[burkj@firstenergycorp.com](mailto:burkj@firstenergycorp.com)  
[korkosza@firstenergycorp.com](mailto:korkosza@firstenergycorp.com)  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)  
[elmiller@firstenergycorp.com](mailto:elmiller@firstenergycorp.com)  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[lmcalister@mwncmh.com](mailto:lmcalister@mwncmh.com)  
[jclark@mwncmh.com](mailto:jclark@mwncmh.com)  
[david.fein@constellation.com](mailto:david.fein@constellation.com)  
[Cynthia.brady@constellation.com](mailto:Cynthia.brady@constellation.com)  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)  
[RTriozi@city.cleveland.oh.us](mailto:RTriozi@city.cleveland.oh.us)  
[SBeeler@city.cleveland.oh.us](mailto:SBeeler@city.cleveland.oh.us)  
[Cmooney2@columbus.rr.com](mailto:Cmooney2@columbus.rr.com)  
[drinebolt@aol.com](mailto:drinebolt@aol.com)  
[Thomas.mcnamee@puc.state.oh.us](mailto:Thomas.mcnamee@puc.state.oh.us)  
[smhoward@vorys.com](mailto:smhoward@vorys.com)  
[mhpetricoff@vssp.com](mailto:mhpetricoff@vssp.com)  
[mwarnock@bricker.com](mailto:mwarnock@bricker.com)  
[wis29@yahoo.com](mailto:wis29@yahoo.com)  
[cmiller@szd.com](mailto:cmiller@szd.com)  
[aporter@szd.com](mailto:aporter@szd.com)  
[gdunn@szd.com](mailto:gdunn@szd.com)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)  
[mheintz@elpc.org](mailto:mheintz@elpc.org)  
[dsullivan@nrdc.org](mailto:dsullivan@nrdc.org)  
[swolfe@viridityenergy.com](mailto:swolfe@viridityenergy.com)  
[Ccunningham@Akronohio.Gov](mailto:Ccunningham@Akronohio.Gov)  
[cfaruki@ficlaw.com](mailto:cfaruki@ficlaw.com)

[ricks@ohanet.org](mailto:ricks@ohanet.org)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)  
[gkrassen@bricker.com](mailto:gkrassen@bricker.com)  
[mwarnock@bricker.com](mailto:mwarnock@bricker.com)  
[mkl@bbrslaw.com](mailto:mkl@bbrslaw.com)  
[gas@bbrslaw.com](mailto:gas@bbrslaw.com)  
[jbentine@cswlaw.com](mailto:jbentine@cswlaw.com)  
[mwhite@cswlaw.com](mailto:mwhite@cswlaw.com)  
[myurick@cswlaw.com](mailto:myurick@cswlaw.com)  
[dmancino@mwe.com](mailto:dmancino@mwe.com)  
[glawrence@mwe.com](mailto:glawrence@mwe.com)  
[lkeiffer@co.lucas.oh.us](mailto:lkeiffer@co.lucas.oh.us)  
[nmoser@theOEC.org](mailto:nmoser@theOEC.org)  
[will@theOEC.org](mailto:will@theOEC.org)  
[trent@theOEC.org](mailto:trent@theOEC.org)  
[Williams.toddm@gmail.com](mailto:Williams.toddm@gmail.com)  
[Amy.Spiller@duke-energy.com](mailto:Amy.Spiller@duke-energy.com)  
[mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  
[mparke@firstenergycorp.com](mailto:mparke@firstenergycorp.com)  
[beitingm@firstenergycorp.com](mailto:beitingm@firstenergycorp.com)  
[Dane.Stinson@BaileyCavalieri.com](mailto:Dane.Stinson@BaileyCavalieri.com)  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)  
[jpmessn@lasclev.org](mailto:jpmessn@lasclev.org)  
[mvincl@lasclev.org](mailto:mvincl@lasclev.org)  
[eric.weldele@tuckerellis.com](mailto:eric.weldele@tuckerellis.com)  
[afreifeld@viridityenergy.com](mailto:afreifeld@viridityenergy.com)  
[charles.dyas@btlaw.com](mailto:charles.dyas@btlaw.com)  
[david.paragas@btlaw.com](mailto:david.paragas@btlaw.com)  
[Gregory.Price@puc.state.oh.us](mailto:Gregory.Price@puc.state.oh.us)