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 to Provide for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	))))))	Case No. 12-1230-EL-SSO

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

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I. INTRODUCTION

On April 13, 2012, the Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and Toledo Edison Company ("TE") (collectively "FirstEnergy" or "Companies") filed an application for approval of its third electric security plan ("ESP") in the form of a Stipulation and Recommendation (the "ESP 3 Stipulation," and the entire filing hereinafter referred to as the "ESP 3 Proposal"). Neither the Northeast Ohio Public Energy Council ("NOPEC"), the Northwest Ohio Aggregation Coalition ("NOAC"), the Office of the Ohio Consumer's Counsel ("OCC") nor any other representative of the residential consumers in the three FirstEnergy service territories signed the ESP 3 Stipulation.

The focus of FirstEnergy's filing, and the basis for its unjustifiable rush to judgment in this case is the misleading claim that the ESP 3 Proposal is simply an extension of its current ESP in Case No. 10-388-EL-SSO (the "ESP 2 Case").[1] This claim is not factually or legally correct.

[1] Prefiled Direct Testimony of William R. Ridmann ("FirstEnergy Ex. 3"), pp. 9, 11-13; Prefiled Direct Testimony of Robert B. Stoddard ("First Energy Ex. 14"), pp. 2-3.

Although FirstEnergy may desire an outcome that is based on the ESP 2 Case, it cannot change Ohio law. As a separate ESP filing, the ESP 3 Proposal must be judged solely on its own merits. When compared to the stipulation in the ESP 2 Case, the ESP 3 Proposal seeks Public Utilities Commission of Ohio's (the "Commission") approval of a new ESP involving new substantive provisions, and covering a new two-year time period (from June 1, 2014 through May 31, 2016).[2] The ESP 3 Proposal is subject to a separate and independent stand-alone analysis as to whether it satisfies: (i) the statutory ESP vs. MRO test set forth in Ohio Revised Code Section ("R.C.") 4928.143(C)(1); and (ii) the Commission's three-prong test for considering the reasonableness of stipulations.

The rushed procedural schedule in this case was designed by FirstEnergy to railroad the ESP 3 Proposal through the Commission without providing a meaningful opportunity for consumer participation and analysis. Rushing to judgment more than two years before the end of the current ESP period, more than four (4) months before the next proposed energy auction for FirstEnergy's standard service offer ("SSO"), and approximately seven (7) months before the end of the statutory time frame in which the Commission has to consider the ESP 3 Proposal[3] is unnecessary, unreasonable, and compromises the due process rights of Ohio consumers.

In reality, when the ESP 3 Proposal is viewed in light of the limited evidence before the Commission, it fails to satisfy both the ESP vs. MRO test under R.C. 4928.143(C)(1) and the Commission's three-prong test for determining the reasonableness of a stipulation. For these reasons alone, the Commission must deny the ESP 3 Proposal in its current form. In addition, FirstEnergy's misleading pretense regarding the need for the rush to Commission approval, and the failure to adhere to the time period contemplated under R.C. 4928.143 for Commission

[2] See generally the ESP 3 application, ESP 3 Stipulation, and accompanying exhibits ("FirstEnergy Ex. 1").

[3] R.C. 4928.143(C)(1) (establishing a 275 day period for Commission review of ESP filings).

review, creates issues involving the denial of fundamental due process rights for Ohio consumers.

In the alternative, if the Commission prefers an ESP to a MRO for the period of time after the current ESP expires, it should modify the ESP 3 Proposal. NOPEC/NOAC proposed several such recommendations of in this joint brief that would not only provide quantitative (monetary) benefits to residential consumers in the FirstEnergy service territories, but also allow FirstEnergy to satisfy its legal burden of proof in this case.

II. STATEMENT OF THE CASE

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

NOPEC is a regional council of governments established under Chapter 167 of the Ohio Revised Code, and is the largest governmental retail energy aggregator in the State of Ohio. Comprised of 162 communities in the ten (10) northeast Ohio counties of Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull, Portage and Huron, NOPEC provides electric aggregation service to approximately 500,000 retail electric customers located in the service territories of CEI and OE.[4]

The present members of NOAC are: the cities of Toledo, Northwood, Maumee, Oregon, Perrysburg and Sylvania, the unincorporated townships in Lucas County as represented by the Board of Lucas County Commissioners, the villages of Holland and Ottawa Hills, and the townships of Lake and Perrysburg in Wood County. Each community is certified as an electric governmental aggregator and is currently serving approximately 160,000 residential and small commercial electric customers on the Toledo Edison system within Lucas and northern Wood Counties.[5]

[4] Direct Prefiled Testimony of Mark R. Frye ("NOPEC/NOAC Joint Ex. 1"), pp. 2-3.
[5] *Id*.

NOPEC and NOAC (collectively "NOPEC/NOAC") intervened in this proceeding to protect the interests of nearly 700,000 residential and small commercial electric customers served by large-scale NOPEC and NOAC governmental aggregation programs in all three FirstEnergy service territories.

B. Procedural History

On April 13, 2012, FirstEnergy filed the ESP 3 Proposal, including a request for expedited Commission review and approval by May 2, 2012.[6] The expedited approval date requested by FirstEnergy proved to be just 19 calendar days after the filing date of the ESP 3 Proposal.[7]

FirstEnergy's support for the ESP 3 Proposal was limited to only: (i) a five-page application (the "ESP 3 Application"); (ii) the ESP 3 Stipulation, which was signed by some (but not all) of the parties to the ESP 2 Case and was not signed by NOPEC, NOAC, OCC nor any other representative of the residential consumers in the three FirstEnergy service territories; (iii) the pre-filed testimony of William R. Ridmann; (iv) redlined tariffs and other exhibits attached to the ESP 3 Application; (v) the supplemental pre-filed testimony of William R. Ridmann, which was filed on April 23, 2012; (vi) a supplemental information filing docketed on May 2, 2012 pursuant to Commission order; and (vii) the rebuttal testimony of Robert B. Stoddard, which was filed on June 7, 2012. No other testimony was filed by FirstEnergy in this case. And, no signatory party to the ESP 3 Stipulation (other than the Commission Staff) filed, or even requested to file, testimony in support of the ESP 3 Proposal.

On April 18, 2012, NOPEC, NOAC and other non-signatory parties to the ESP 3 Stipulation filed a Joint Motion to Bifurcate Issues with the Commission with the goal of putting

[6] See Paragraph 2 of Attorney Examiner Wiley's April 19, 2012 Entry in this case.

[7] Recognizing the inherent unreasonableness of the May 2, 2012 date, FirstEnergy also proposed an absolute approval date of no later than June 20, 2012. *Id.*

the brakes on FirstEnergy's unreasonable attempt to push through a new ESP for the 2015-2016 time-period without allowing NOPEC, NOAC or any other interested parties adequate time to analyze the proposal. Rather than grant this request, the Attorney Examiner issued an Entry on April 19, 2012 establishing a rushed procedural schedule calling for the evidentiary hearing to commence on May 21, 2012 (just a little over one month from the filing date of the ESP 3 Proposal). Although the Commission pushed back the start of the evidentiary hearing to June 4, 2012,[8] the Commission still failed to address the fundamental concerns of NOPEC, NOAC and others regarding the unmanageable timeline.

NOPEC and NOAC were formally granted intervention in this case by Entry of Attorney Examiner Mandy A. Willey dated May 14, 2012. Evidentiary hearings were held in the case from June 4, 2012 through June 6, 2012, with the rebuttal phase taking place on June 8, 2012. NOPEC and NOAC participated in the evidentiary hearing, and jointly presented the testimony of one expert witness, Mark Frye, the President of Palmer Energy.[9] Mr. Frye's testimony focused on the failure of FirstEnergy's ESP 3 Proposal to satisfy the "more favorable in the aggregate" test under R.C. 4928.143(C)(1), the absence of substantial residential customer participation in the ESP 3 Stipulation, and lack of benefits to residential customers.

III. LEGAL ARGUMENT

As set forth below, and when viewed in light of the scant evidence before the Commission, FirstEnergy fails to demonstrate that the ESP 3 Proposal (for the specific two-year time period from June 1, 2014 through May 31, 2016) "is more favorable in the aggregate as compared to the expected results that would otherwise apply" under a MRO.[10] (Emphasis

[8] See Paragraph 10 of Attorney Examiner Wiley's May 2, 2012 Entry in this case.

[9] *See generally* NOPEC/NOAC Joint Ex. 1.

[10] R.C. 4928.143(C)(1).

added). Moreover, the Companies have failed to satisfy the Commission's three-prong test for considering the reasonableness of stipulations. For these reasons, the ESP 3 Proposal must be denied.

A. FirstEnergy's ESP 3 Proposal Fails the ESP vs. MRO Test in R.C. 4928.143(C)(1).

To satisfy its burden of proof in this proceeding,[11] FirstEnergy must demonstrate that the ESP 3 Proposal, "including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply"[12] under a MRO. As discussed in detail below, the ESP 3 Proposal fails to satisfy the requirements set forth in R.C. 4928.143(C)(1) because FirstEnergy: (i) failed to demonstrate that the ESP 3 Proposal is quantitatively more favorable in the aggregate than the expected results of a MRO; (ii) chose not to include signatory parties on the ESP 3 Stipulation representing the interests of the residential customers in all of the FirstEnergy service territories; (iii) proposed an additional $405 million distribution rate increase using Rider DCR (rather than a distribution rate case); (iv) sought to double-count certain "benefits" initially used for purposes of the ESP vs. MRO test in the ESP 2 Case, and involving obligations already incurred by FirstEnergy as part of the stipulation in the ESP 2 case; and (v) sought to evade the requirements under Ohio law regarding the Commission's application of the Significantly Excess Earnings Test ("SEET") under R.C. 4928.143(F).

1. FirstEnergy's ESP 3 Proposal fails the quantitative ESP vs. MRO test in R.C. 4928.143(C)(1).

Simply put, the ESP 3 Proposal fails to satisfy the statutory ESP vs. MRO test in R.C. 4928.143(C)(1). For this reason alone, the ESP 3 Proposal must be denied.

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[11] *Id*. (stating that the "burden of proof in the [ESP] proceeding shall be on the electric distribution utility").

[12] *Id*.

Joint NOPEC/NOAC witness Frye confirmed in his direct prefiled testimony, and testimony at the evidentiary hearing, that the ESP 3 Proposal fails the "quantitative" ESP vs. MRO test, and for that reason should be rejected by the Commission.[13] More specifically, Mr. Frye testified that an appropriate quantitative analysis of the ESP 3 Proposal, which removes certain already accounted for Legacy RTEP Costs from the ESP 2 Case, leads to the conclusion that "the net present value of ESP III compared to an MRO. . . becomes $7 million less favorable than the MRO."[14] Elaborating on this conclusion, Mr. Frye explained:

> As part of its existing Electric Security Plan ("ESP"), the Companies agreed not to seek recovery of "Legacy RTEP Costs for the longer of: (1) the five year period from June 1, 2011 through May 31, 2016 or (2) when a total of $360 million of Legacy RTEP Costs has been paid for by the Companies…" [Second Supplemental Stipulation, Case No. 10-388-EL-SSO, paragraph 6]. Since the Companies have already agreed to pay for up to $360 million in RTEP expenses under the existing ESP, this obligation of the Companies will remain whether or not the ESP III proposal is approved. In fact, the Companies stated in their discovery response to NOPEC Set 1 – INT-11. . . that the Companies are "not proposing that the terms of the Second Supplemental Stipulation [from the existing ESP II in Case No. 10-388-EL-SSO] would change if the Commission rejected the Companies' proposed ESP III Stipulation." For that reason, and since those RTEP costs have yet to be paid in full, they cannot be included as a benefit towards the MRO vs. ESP test evaluation in this ESP III Application.[15]

FirstEnergy is obligated to perform this RTEP obligation regardless of whether or not this ESP 3 proposal is accepted or rejected by the Commission.[16] This is an undisputed fact that FirstEnergy witness Ridmann confirmed at the evidentiary hearing.[17] FirstEnergy witness Ridmann also acknowledged that removal of the RTEP obligation would lead the ESP 3

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[13] Joint NOPEC/NOAC Ex. 1, pp. 4-5; Tr. Vol. III, p. 54, lines 2-11.

[14] Joint NOPEC/NOAC Ex. 1, p. 6.

[15] *Id*., p. 5.

[16] *Id*..

[17] Tr. Vol. I, pp. 127-128 (explaining that that FirstEnergy will be living up to the obligations set forth in the stipulation from the ESP 2 Case, "which included the provisions of absorbing up to $360 million of RTEP").

Proposal to fail the quantitative ESP vs. MRO test by $7 million.[18] Staff witness Fortney further confirmed this calculation, explaining:

> If you simply remove line (12), RTEP Estimate, from the analysis and only consider the proposed 2-year extension (thus negating any reference to an RTEP credit and the need for a net present value analysis) one can determine that the two year 'cost' of the ESP is $557.4 million. . . [t]he two year 'cost' of an MRO is $549.8 million. In this simply analysis, the cost of the ESP 3 exceeds the 'cost' of an MRO by $7.6 million."[19]

Making the calculation of alleged benefits even less credible is that FirstEnergy improperly included an assumed Commission-approved distribution rate increase of $376 million on the MRO side of the calculation. In essence, this $376 million increased was designed to "offset" the comparable amount under the ESP 3 Proposal designed to be collected through Rider DCR, or approximately $405 million.[20] As Joint NOPEC/NOAC witness Frye explained, the inclusion of an assumed Commission order granting a distribution rate increase on the order of $376 million is unreasonable:

> [FirstEnergy witness] Mr. Ridmann includes a distribution rate increase in PJM planning years 2014 and 2015 under the MRO section of his calculation [WRR-1, line 14]. While the Companies could certainly request a distribution rate increase in those planning years there is no evidence or guarantee that the Commission would award such an increase. Even if the Commission were to approve an increase in the Companies' distribution rates at that time, there is no indication that the Commission would award an increase of $376 million over two years. Consequently, including a prediction of the amount, if any, of a distribution rate increase the Companies would obtain in a potential future Commission proceeding regarding a formal distribution rate increase application filed with the PUCO is speculative, and should be removed from the calculation.[21]

Under a MRO, it is safe to assume that a distribution rate case would provide FirstEnergy with a distribution rate increase of something more than zero dollars for distribution investments

[18] Tr. Vol. I, p. 129, lines 10-19.

[19] Staff Ex. 1, pp. 2-3.

[20] FirstEnergy Exhibit 3, Attachment WRR-1 (Line 14).

[21] Joint NOPEC/NOAC Ex. 1, p. 5. The amounts for each of the three companies were $108,598,923 for CEI, $70,539,796 for TE, and $160,762,886 for OE.

since the time of their last rate case. But, the use of the $376 million number is wildly unrealistic and purely speculative.

To put FirstEnergy's $376 million assumption in perspective, it is important to examine FirstEnergy's most recent distribution rate case—Case No. 07-551-EL-AIR (the "2007 Rate Case"). In the 2007 Rate Case, FirstEnergy proposed distribution revenue increases totaling $339,901,605 for all three companies.[22] Importantly, the proposed $339,901,605 increase in the 2007 Rate Case covered more than a decade of distribution-related investments by FirstEnergy, many of which predated Senate Bill 3. Specifically, the 2007 Rate Case included a date certain of May 31, 2007, and was to be the first distribution rate case for OE since 1989;[23] and the first for CEI and TE since 1995.[24] As a result, the 2007 Rate Case included approximately 18 years of distribution-related investments for OE, and approximately 12 years of distribution-related investments for both CEI and TE.

After the 2007 Rate Case was litigated, the Commission only awarded FirstEnergy a total distribution rate increase of $137,611,225 for all three companies ($29,172,051 for CEI; $38,520,912 for TE; and $69,918,262 for OE).[25] This was about 40% of the total $339,901,605 rate increase initially requested by FirstEnergy.

Yet, as part of the MRO analysis in this case, FirstEnergy posits a distribution rate increase award of $376 million—an amount nearly $40 million more than FirstEnergy even asked for in the 2007 Rate Case, and more than two and one-half (2 ½) times the amount

[22] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and/or Tariff Approvals*, Case No. 07-551-EL-AIR, et al., January 21, 2009 Opinion and Order ("2007 Rate Case Order"), p. 5.

[23] See generally Commission Case No. 89-1001-EL-AIR (date certain of June 30, 1989).

[24] See generally Commission Case Nos. 95-299-EL-AIR and 95-300-EL-AIR (date certain of March 31, 1995).

[25] 2007 Rate Case Order, pp. 22-23.

approved by the Commission in the 2007 Rate Case. Moreover, the 2007 Rate Case spanned a very long period of time (18 years for OE, and 12 years for CEI and TE), while a distribution rate case in 2015 would cover at most eight years, and a distribution rate case in 2016 would only at most nine years. Further, the amount requested by FirstEnergy in a future distribution rate case necessarily would be reduced downward to reflect the substantial distribution capital improvement revenues collected by FirstEnergy pursuant to the distribution riders in place since 2009 (currently Rider DCR).

Based on these facts, it is clear that FirstEnergy would recover nowhere near the $376 million included in its MRO analysis, and likely significantly less than the $137,611,225 increase approved by the Commission in the 2007 Rate Case. A more accurate MRO calculation (with a significantly reduced amount for a distribution rate increase) would result in an even greater failure of the Companies to meet the quantitative ESP vs. MRO test. In fact, it would show that the proposed ESP 3 would be less favorable than MRO by not just $7 million, but actually several hundred million dollars. Thus, a more realistic analysis of the ESP 3 Proposal currently before the Commission costs consumers hundreds of millions of dollars more than a MRO.

2. Alleged qualitative benefits associated with the ESP 3 Proposal cannot overcome the failure of FirstEnergy to satisfy the quantitative ESP vs. MRO test.

There is little, if any, dispute that the ESP 3 Proposal fails a quantitative analysis of the MRO vs. ESP test. As a result, FirstEnergy is left arguing that some debatable and amorphous qualitative (non-monetary) benefits outweigh the negative results of the quantitative analysis. In essence, FirstEnergy claims that the negative financial impact to customers is irrelevant because of the "other" benefits in the ESP 3 Proposal. In no way should these "other" benefits overcome

the substantial failure of FirstEnergy to demonstrate that they have satisfied a quantitative ESP vs. MRO analysis.

3. FirstEnergy can only satisfy the ESP vs. MRO test if the recommendations proposed by NOPEC and NOAC are adopted by the Commission.

As set forth above, FirstEnergy's ESP 3 Proposal fails to satisfy the statutory legal test governing this proceeding. If an ESP is the desired result, the solution is to increase the benefits provided to consumers so that the statutory test can be satisfied. To do so, the Commission should adopt the following recommendations offered by NOPEC/NOAC that would allow the ESP 3 Proposal to satisfy the quantitative ESP vs. MRO test: (i) "eliminate the continuation of the DCR Rider after May 31, 2014 and require the Companies to file for a distribution rate increase if they believe it is warranted";[26] (ii eliminate FirstEnergy's proposal to exclude income it receives from deferred charges from the SEET calculation applicable to FirstEnergy under Ohio law; (iii) require FirstEnergy to bid all of its eligible demand response and energy efficiency resources into all future PJM capacity auctions; and (iv) continue to hold the proposed energy auctions in October 2012 and January 2013, but modify the auction products to cover two different terms—the first auction product would cover the final year of the current ESP (e.g. June 1, 2013 through May 31, 2014), while the second auction product would cover the two-year time period of the ESP 3 Proposal (June 1, 2014 through May 31, 2016)—and provide the Commission with sufficient information to determine the need for continued "smoothing" of customer rates.[27]

[26] Joint NOPEC/NOAC Ex. 1, p. 14.

[27] In the context of the auction products, this proposal stays true to the deal reached in the ESP 2 Case (for a one-year auction product), and allows the Commission, at the "completion of the January 2013 auctions," to "have a one year price for the 34 tranches of SSO from June 2013 through May 2014 and it would also have a two year price for 34 tranches of SSO from June 2014 through May 2016. If the Commission decides smoothing out pricing is in the consumers' best interest then it could do so knowing the true impact on consumers." *Id*., pp. 14-15.

B. The Limited Evidence Presented by FirstEnergy Fails to Establish that the ESP 3 Proposal is Just and Reasonable.

Assuming *arguendo* that FirstEnergy's ESP 3 Proposal case could satisfy the ESP vs. MRO test (as to which NOPEC/NOAC strongly disagree and do not concede), there also must be a demonstration that the ESP 3 Stipulation is just and reasonable. Yet again, FirstEnergy cannot satisfy its legal burden of proof.

The Ohio Supreme Court has stated that a "stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing."[28] As a result, the Commission "may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the commission."[29]

In determining the reasonableness of a stipulation, the Commission must consider whether the settlement: (i) was the product of serious bargaining among capable, knowledgeable parties: (ii) benefits ratepayers and the public interest; and (iii) violates any important regulatory principles or practices.[30] In this case, the Companies fail to satisfy the three-pronged test for reasonableness.

1. The ESP 3 Proposal is not the product of serious bargaining.

The hurried approach to FirstEnergy's ESP 3 Proposal has resulted in a forced march to push through an unlawful, unreasonable and unjust ESP resulting from limited and compartmentalized negotiations with certain signatory parties to the stipulation in the ESP 2 Case. Such an approach must be rejected by the Commission.

[28] *Office of Consumers' Counsel v. PUCO* (1992), 64 Ohio St.3d 123, 125-126 (citing *Duff v. PUCO* (1978), 56 Ohio St.2d 367, 379).

[29] *Id*. at 125.

[30] *Office of Consumers' Counsel v. PUCO* (2005), 111 Ohio St.3d 300, 319.

First, and foremost, the ESP 3 Stipulation does not include broad residential customer representation. As NOPEC/NOAC witness Frye explained, "the absence of substantial residential customer representation such as NOPEC and NOAC and the Office of the Ohio Consumers Counsel in the Stipulation filed in this case is troublesome."[31] In reality, the ESP 3 Stipulation lacks any true representation of residential customers in the three FirstEnergy service territories whatsoever. Although several low income groups providing services to low-income residential customers did sign the ESP 3 Stipulation, these groups are geographically limited (e.g., the Empowerment Center of Greater Cleveland and Cleveland Housing Network), and primarily focused on programs rather than utility rates (e.g., Ohio Partners for Affordable Energy's weatherization program). The City of Akron did not participate in the evidentiary hearing in this case, and, contrary to FirstEnergy's claims, is not a genuine representative of residential customers under the ESP 3 Stipulation. Instead, the City of Akron's interests lie with the city's largest employer, FirstEnergy, and its sphere of representation is geographically limited to the OE service territory. Without NOPEC, NOAC, and/or OCC as signatory parties to the ESP 3 Stipulation, an entire customer class representing nearly two million residential customers served by FirstEnergy has been consciously omitted from the bargaining process.

Second, FirstEnergy filed the ESP 3 Proposal on April 13, 2012, or more than two years before the expiration of its current ESP. Making matters worse for consumers, FirstEnergy requested expedited approval by the Commission based on what later proved to be an unfounded claim that approval was necessary to bid a very small amount of energy efficiency and certain demand response resources into PJM's May 7, 2012 Base Residual Auction for the 2015/2016 Planning Year (the "PJM BRA").[32] Although NOPEC/NOAC recognize and support the

[31] Joint NOPEC/NOAC Ex. 1, p. 4

[32] See FirstEnergy Ex. 1 (ESP 3 application), pp. 2-3.

potential benefit of FirstEnergy bidding eligible demand response and energy efficiency resources into PJM's Base Residual Auctions, such a request could have, and should have, been filed well before April 13, 2012 (less than one month prior to the PJM BRA). Using this unfounded basis for forcing through an unreasonable ESP raises further credibility issues.[33]

Third, the ESP 3 Proposal (and proposed approval dates) provided NOPEC/NOAC with precious little time to assess the impact of the capacity prices resulting from the PJM BRA. Not coincidentally, the ESP 3 Proposal was filed without mention of the PJM BRA being held on May 7, 2012 and the extremely high capacity prices expected from that auction. As explained in NOPEC/NOAC witness Frye's testimony, the extremely high capacity prices from the PJM BRA proved to be true:

> In the final year of the current ESP (PJM planning year June 2013 through May 2014), the RPM BRA results for PJM were $27.73 per MW-day. For the first year of the Companies proposed ESP III (PJM planning year June 2014 through May 2015), the RPM BRA results for were $125.99 per MW-day. The RPM capacity costs for FirstEnergy in the final year of the ESP III were announced by PJM on Friday, May 18, 2012 and were $357 per MW-day in ATSI.[34]

The shockingly high capacity figure for FirstEnergy's service territories of $357 per MW-day (or perhaps slightly lower based upon certain adjustments)[35] is approximately double (and some cases even greater than) the price of capacity for other PJM zones serving the load of other

[33] Related to the rush to judgment in this case, FirstEnergy deliberately chose to file the ESP 3 Proposal in the middle of an unusually busy time at the Commission when its existing ESP 2 had two (2) more years to run. Counsel for the parties in this case were actively involved in several AEP proceedings (e.g. the AEP ESP case and AEP capacity charge case), the DP&L ESP case, and numerous others. Consequently, the evidentiary hearing in this case and the evidentiary hearing in the lengthy AEP ESP case unnecessarily overlapped. It should not fall on NOPEC/NOAC, OCC and other interested parties to be substantively denied due process by FirstEnergy's unfounded timeline to process an unreasonable, and unlawful filing.

[34] Joint NOPEC/NOAC Ex. 1, p. 9.

[35] Tr. Vol. II, p. 22 (FirstEnergy witness Ridmann acknowledges that the adjusted capacity price is closer to $329/MW-day).

electric distribution utilities in Ohio.[36] Yet, this issue, and the potential dramatic impact on customer bills, was not considered by FirstEnergy until the absolute last minute.

Finally, unlike its prior SSO proceedings—including Case No. 08-935-EL-SSO (FirstEnergy's first SSO case following the enactment of Senate Bill 221), the MRO Case, and/or the ESP 2 Case—FirstEnergy chose not to conduct comprehensive settlement meetings with all interested parties. Instead, FirstEnergy held individualized and compartmentalized negotiations with certain parties from the ESP 2 Case. Although NOPEC and NOAC were approached by FirstEnergy in the week or two immediately prior to the filing of the ESP 3 Proposal, neither NOPEC nor NOAC had an appropriate amount of time to review the proposal, conduct discovery, provide comments and requests for substantive changes to the proposal, or otherwise seriously bargain with FirstEnergy. Instead, NOPEC and NOAC were presented with what amounted to "take it or leave it" offers that were rejected. Simply put, there cannot be serious bargaining when one side intentionally ignores the representatives of the nearly two million residential customers (NOPEC, NOAC and OCC) and they are not provided with the opportunity to bargain.

2. The ESP 3 Proposal does not, as a package, benefit ratepayers and the public interest.

At its core, FirstEnergy's ESP 3 Proposal asks the Commission to agree to the entirety of the ESP 3 Stipulation because it is similar to the stipulation approved in the ESP 2 Case, but with a few new provisions. Those new provisions, however, include alterations to the proposed competitive bidding schedule; modifications to the recovery period of renewable energy credits; increases of approximately $405 million in the amount of distribution improvement costs proposed to be recovered through Rider DCR from June 1, 2014 through 2016; elimination of

[36] Tr. Vol. II, pp. 22-23.

meaningful Commission review over, and application of, the SEET; and continuation of full recovery treatment for "lost distribution" revenues from energy efficiency efforts, which no other Ohio electric distribution utility enjoys. Rather than benefit ratepayers, these proposals negatively impact the residential and small commercial customers in FirstEnergy's service territories, including the approximately 700,000 electric customers in NOPEC's and NOAC's governmental aggregations.

Most importantly, the ESP 3 Proposal fails the ESP vs. MRO test in R.C. 4928.143(C)(1). The application of this statutory test, which guides the analysis of all ESP proposals, to the facts of the ESP 3 Proposal confirms that it is at least $7 million less favorable in the aggregate than a MRO, and more likely several hundred million dollars less favorable.[37] There is little doubt that the ESP 3 Proposal does not benefit ratepayers.

[37] *See generally* pages 6 – 10 of this Joint Brief.

3. The ESP 3 Proposal violates important regulatory principles and practices.

a. The ESP 3 Proposal's request that the previously approved one year auction product in the stipulation from the ESP 2 Case be changed to a three year product allows FirstEnergy to unilaterally change the terms of a Commission-approved stipulation.

As signatory parties to the stipulation in the ESP 2 Case, both NOPEC and NOAC actively participated in, and negotiated the terms of, a stipulation ultimately approved by the Commission. One component of the stipulation in the ESP 2 Case was the inclusion of a one-year product in the competitive bid processes/auctions currently scheduled for October 2012 and January 2013. Rather than seek a Commission modification of this provision, or approval from all (not just some) of the signatory parties to the stipulation in the ESP 2 Case, FirstEnergy unilaterally sought to change the bid product from a one-year product to a three-year product. This is not the deal struck by the signatory parties to the stipulation in the ESP 2 Case, including NOPEC and NOAC. It is entirely inappropriate for FirstEnergy to seek to unilaterally modify an existing Commission-approved stipulation without the written approval of all of the signatory parties thereto (including NOPEC and NOAC). Otherwise, public utilities in the State of Ohio will have little, if any, incentive to comply with the obligations of a Commission-approved stipulation.

b. The SEET provisions in the Stipulation violate the Commission's regulatory precedent and common sense.

One of the significant consumer protection provisions embedded in Senate Bill 221 requires the Commission, on an annual basis, to compare the earnings of Ohio's investor-owned electric utilities with ESPs (e.g., FirstEnergy) to the earnings of other publicly-traded companies

with similar risks.[38] If the Commission determines that a utility's ESP rates resulted in "significantly excessive" earnings, then the utility must refund such excess earnings to the utility's customers.[39] Through this test, known as the SEET, the General Assembly acknowledged that Ohio consumers cannot, and should not, be required to fund significantly excessive earnings of Ohio's utilities.

In this case, however, FirstEnergy seeks to dilute and evade the SEET analysis by excluding certain items from the SEET calculation. In fact, Paragraph (B)(3) of the ESP 3 Stipulation states that certain adjustments will be made to the SEET calculation to "exclude the impact. . . (ii) of deferred carrying charges. . . due to implementing this ESP 3 or the ESP in Case No. 10-388-EL-SSO." (Emphasis added). Such an exclusion not only differs from the information available on FirstEnergy's own financial statements,[40] but runs directly contrary to the Commission's holding that deferrals should not be excluded from an electric utility's earnings for the purposes of the SEET analysis.[41] In that case (the AEP SEET case), the Commission explained:

> Unlike OSS or extraordinary or non-recurring items, deferrals should not be excluded from the electric utility's ROE as requested by AEP-Ohio. Consistent with generally accepted accounting principles, deferred expenses and the associated regulatory liability are reflected on the electric utility's books when the expense is incurred. Subsequently, with the receipt of deferred revenues, there is an equal amortization of the deferred expenses on the electric utility's books, such that there is no effect on earnings in future years. Accordingly, we are not persuaded by the arguments of AEP-Ohio to adjust CSP's 2009 earnings to account for certain significant deferred revenue..[42]

[38] R.C. 4928.143(F).

[39] See *Id.*

[40] Direct Prefiled Testimony of Daniel J. Duann ("OCC Ex. 10"), p. 8.

[41] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC (*Opinion and Order* dated January 11, 2011) at 31.

[42] *Id.*

If the Commission approves this provision of the ESP 3 Proposal without modification, then the earnings of FirstEnergy in 2015 and 2016 for purposes of the SEET analysis will be much lower than FirstEnergy's earnings as reported on their financial statements. Such an adjustment defeats the intended express purpose of the SEET—to ensure that "significantly excessive earnings resulting from an ESP will be returned to customers who paid what ultimately were determined to be excessive rates."[43]

c. FirstEnergy's attempt to introduce backdoor "evidence" from two prior cases to support the ESP 3 Stipulation is improper and in violation of Ohio law, and general principles of due process and fairness.

Rather than present sufficient evidence in support of its ESP 3 Proposal, FirstEnergy tried to introduce backdoor "evidence" from two prior cases to bolster its case in this entirely separate ESP 3 proceeding. Instead of offering evidence in addition to Mr. Ridmann's testimony, FirstEnergy simply added a brief statement at the end of the ESP 3 application asking that the "Commission take administrative notice of the evidentiary record established in the current ESP, Case No. 10-388-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding."[44]

It was only after FirstEnergy's request to incorporate the entire record from both the MRO Case and ESP 2 Case was denied by the Attorney Examiner,[45] that FirstEnergy provided a "List of Documents for Administrative Notice" nearly two days later (on June 6, 2012, the third day of the evidentiary hearing and the final day of FirstEnergy's direct case). The "List of Documents for Administrative Notice" included: (i) seven (7) specific pages out of a total of

[43] *Id.* at 6.

[44] FirstEnergy Ex. 3 (the ESP 3 application), p. 5. Notably, the ESP 2 Case dealt with establishing the form of SSO for an entirely different three-year time period, and involved different parties from those in this case.

[45] Tr. Vol. I at 29.

approximately 941 total pages from four separate volumes of transcript testimony from the evidentiary hearing in the ESP 2 Case; and (ii) the prefiled testimony of three witnesses who did not testify or otherwise participate in the ESP 3 case (Hisham Choueiki, Tamara Turkenton, and John D'Angelo).[46]

Further violating NOPEC and NOAC's due process rights, FirstEnergy also, for the first time, requested that administrative notice be taken of FirstEnergy's application for a MRO in the MRO Case.[47] Despite numerous objections from the non-signatory parties to the ESP 3 Stipulation, including those of NOPEC, NOAC and OCC,[48] the Attorney Examiner took administrative notice of all of the documents identified in FirstEnergy's "List of Documents for Administrative Notice." This ruling took place on the very same day FirstEnergy provided NOPEC/NOAC with the "List of Documents for Administrative Notice,"[49] and requested that administrative notice be taken.

Compounding matters, counsel for Nucor Steel Marion ("Nucor") also asked the Attorney Examiners to take administrative notice of the direct prefiled testimony of Nucor witness Dennis Goins from the MRO Case.[50] Over the objections of NOPEC, NOAC, OCC and other parties, the Attorney Examiner took administrative notice of Mr. Goins' testimony as well.[51] As a signatory part to the ESP 3 Stipulation, Nucor had every opportunity to participate in this case and present testimony. Nucor, however, chose not to present testimony. Instead, without notice to FirstEnergy, the Commission, NOPEC, NOAC, or any other interested parties,

[46] See Tr. Vol. III at 10-12.

[47] The MRO Case dealt with different statutory requirements, and a different form of SSO that was never actually ruled upon by the Commission.

[48] Other non-signatory parties which objected to the Companies' request for administrative notice at the hearing included AEP Retail, the Environmental Law and Policy Center, Sierra Club, and the Retail Energy Supply Association.

[49] Tr. Vol. III at 170-173.

[50] *Id.* at 19.

[51] *Id.* at 171.

Nucor sprung the request for administrative notice on the parties on the third day of the evidentiary hearing in this case, thereby denying all of the parties the opportunity to review such testimony and cross-examine the unavailable witness. Further, the testimony of the unavailable Mr. Goins involved a separate case (the MRO Case), and a different form of SSO.

The effect of FirstEnergy's tactic–and the Attorney Examiner's rulings–is to prevent the non-signatory parties in this case from having an adequate opportunity to review and rebut such "evidence." In essence, the Attorney Examiner's rulings allow FirstEnergy (with the assistance of Nucor) to try (albeit unsuccessfully) to satisfy its burden of proof with information from other proceedings, despite the parties not having knowledge of this ruling until the end of the evidentiary hearing, and without allowing the parties the opportunity to conduct orderly discovery and cross-examination of the witnesses and testimony from the other cases. The Constitution (in particular, the due process and confrontation clauses), Ohio law and the Commission's rules provide for a more orderly and fair process.

In issuing the ruling on administrative notice, the Attorney Examiner relied upon a May 10, 2010 Entry on Rehearing from the ESP 2 Case, as well as the Ohio Supreme Court's decision in *Canton Storage and Transfer Co. v. PUCO*.[52] Together, those cases established that certain factors should be reviewed in determining whether administrative notice is proper, including: "whether the complaining party had prior knowledge of, and had an opportunity to explain and rebut, the facts administratively noticed."[53] Although NOPEC and NOAC acknowledge that there is precedent for taking administrative notice in Commission proceedings, such precedent is inapplicable to the facts here because NOPEC and NOAC did not have prior

[52] (1995), 72 Ohio St.3d 1 (citing *Allen v. PUCO* (1988), 40 Ohio St.3d 184). See Tr Vol. III at 13-14.

[53] *Canton Storage and Transfer* at 8.

knowledge of the facts administratively noticed, and were not (and still have not) been provided with the opportunity to explain and rebut those facts.

NOPEC and NOAC did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012,[54] and the Attorney Examiner did not take administrative notice of the documents until the end of the hearing that same day.[55] FirstEnergy did ask to incorporate the record through a brief statement at the end of the ESP 3 application,[56] but such a far-reaching request was not ruled upon by the Commission before the hearing. Notably, Attorney Examiner Price rejected the incorporation of the entire record in the ESP 2 Case on the first day of the hearing; instead, asking FirstEnergy to submit a specific list of documents.[57] Thus, it was only at the close of the third day of the evidentiary hearing—and after the direct cases had concluded—that the Attorney Examiner finally ruled on the request (and allowed Nucor to do so for the first time and without any prior notice to the parties), and provided NOPEC and NOAC with knowledge of the facts administratively noticed.

Since NOPEC and NOAC did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012, they had no opportunity to explain and/or rebut such facts. The reason is simple: until the Attorney Examiner took administrative notice on June 6, 2012, there were not any facts administratively noticed, and therefore no opportunity to explain or rebut them existed. And, there has been no opportunity granted to the parties after June 6, 2012 to explain or rebut the facts administratively noticed.

While FirstEnergy and Nucor will argue that NOPEC and NOAC had prior knowledge of the facts administratively noticed through their participation in the MRO Case and/or ESP 2

[54] Tr. Vol. III at 10-12.

[55] *Id.* at 170-173.

[56] Application at 5.

[57] Tr. Vol. I at 29 (explaining "I am uncomfortable incorporating wholesale the entire record from 10-388").

Case, this is incorrect. The participation of NOPEC and NOAC in those two cases is irrelevant to the ESP 3 Case—a stand-alone filing to be adjudicated on its own merits through the record before the Commission. The record in this case only includes the testimony of FirstEnergy witnesses Ridmann and Stoddard in support of the ESP 3 Proposal.

Finally, the Attorney Examiner erred by taking administrative notice of more than undisputed adjudicative facts, thereby completely ignoring the fundamental requirement of judicial or administrative notice—namely, that the notice relates to an adjudicative fact "not subject to reasonable dispute in that it is either (i) generally known within the territorial jurisdiction of the trial court or (ii) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ohio Evid. R. 201(B). Expanding on this rule, the Staff Notes to Ohio Evid. R. 201(B) explains:

> Rule 201(B)(1) applies to adjudicative facts generally known within the territorial jurisdiction. This category relates to the type of fact that any person would reasonably know or ought to know without prompting within the jurisdiction of the court and includes an infinite variety of data from location of towns within a county to the fact that lawyers as a group enjoy a good reputation in the community. A second class of facts subject to judicial notice is provided by Rule 201(B)(2). These are facts capable of accurate and ready determination. . . . The type of fact contemplated by 201(B)(2) includes scientific, historical and statistical data which can be verified and is beyond reasonable dispute.

The alleged "facts" for which administrative notice was granted by the Attorney Examiner in this proceeding are (and were) reasonably disputed in both the MRO Case and ESP 2 Case. Introduction of the administratively noticed documents also were subject to strong objections from numerous interested parties at the evidentiary hearing in this case.

Further, the information in a complex multi-billion dollar utility proceeding before the Commission assuredly is not the "type of fact that any person would reasonably know or ought to know," and therefore falls outside the scope of Ohio Evid. R. 201(B)(1).

Finally, the information included in the administratively noticed documents is neither "capable of accurate and ready determination," nor "scientific, historical and statistical data which can be verified and is beyond reasonable dispute," as required by Ohio Evid. R. 201(B)(1). Instead, the vast majority of the documents include opinions and testimony disputed and debated in the MRO Case, the ESP 2 Case and this proceeding.[58]

For these reasons, the "facts" subject to administrative notice are entirely outside the scope of the type of facts appropriate for administrative notice. Indeed, the scope of what was noticed goes far beyond the mere undisputed facts that can be considered for administrative notice.

IV. CONCLUSION

FirstEnergy has failed to prove that the ESP 3 Proposal satisfies the statutory ESP vs. MRO test and that the ESP 3 Stipulation satisfies the three-prong test for reasonableness. Therefore, the ESP 3 Proposal must be denied. The ESP 3 Proposal would have a negative effect on large-scale governmental aggregations and Ohio consumers. For the reasons set forth above, NOPEC and NOAC respectfully request that the Commission reject the ESP 3 Proposal as filed.

In the alternative, if the Commission determines that an ESP is preferable to a MRO, NOPEC and NOAC request that the Commission modify the ESP 3 Proposal as follows:

1. Eliminate the continuation of Rider DCR after May 31, 2014 and require the Companies to file for a distribution rate increase if they believe it is warranted;

2. Eliminate FirstEnergy's proposal to exclude income it receives from deferred charges from its SEET calculation;

3. Require FirstEnergy to bid all eligible demand response and energy efficiency resources into all future PJM capacity auctions; and

[58] The Attorney Examiner stated: "All the documents that are listed we've taken administrative notice, whether it's facts or opinion. I think we – the rationale that I explained applies equally to facts as – to opinion as it would to facts." Tr. Vol. III at 172.

4. Continue to hold the proposed energy auctions in October 2012 and January 2013, but modify the auction products to cover two different terms—the first product would cover the final year of the current ESP (June 1, 2013 to May 31, 2014), while the second auction product would cover the two-year time period of the ESP 3 Proposal (June 1, 2014 to May 31, 2016) in order to provide the Commission with sufficient information to determine the need for "smoothing" of customer rates.

Respectfully submitted,

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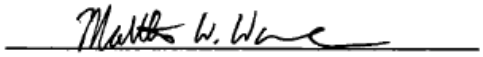
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties of record, by electronic mail, this 22nd day of June 2012.



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Summary: Text Joint Initial Post Hearing Brief electronically filed by Teresa Orahood on behalf of Northeast Ohio Public Energy Council and Northwest Ohio Aggregation Coalition