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 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

AEP RETAIL ENERGY PARTNERS LLC'S INITIAL POST-HEARING BRIEF

In this proceeding, the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (together, "the FE EDUs") seek this Commission's approval of a partial stipulation implementing what the FE EDUs describe as a two – year "extension" of the ESP this Commission approved in Case No. 10-388-EL-SSO ("ESP-2"). The FE EDUs' application contemplates a mechanistic continuation of the processes this Commission approved in ESP-2. The FE EDUs, however, have done exceptionally little to suggest that the mechanistic continuation of those same rates and processes will benefit its rate-payers or promote the public policies of the State of Ohio if continued for an additional two years.

The Commission should be particularly skeptical of the FE EDUs' claims in this case, as the FE EDUs have presented scant information regarding the current market in their service territories to support their ESP-3 proposal, and have instead pursued a procedural course that appears designed to limit interested parties' opportunities to intervene and critically examine their proposals. The extraordinarily limited time provided for these proceedings – only 52 days between the original filing and the beginning of evidentiary hearings – coupled with the limited time provided for discovery – only 32 days from the date this Commission required FE EDUs to

supplement their original application with the most basic information mandated by Commission rule to the beginning of hearings – is certainly not conducive to a fair and thorough evaluation of the merits of the FE EDUs proposal. In effect, what is presented to the Commission and the ratepayers of the FE EDUs is much like a bad sequel. Even if one liked the original movie, there is no assurance that the sequel will be equally enjoyable. Unlike a movie, however, the FE EDU customers must stay to watch, once they have paid.

I. THE STIPULATION IS NOT A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES

A. Any Appearance of Broad Support for the Stipulation Exists Solely Because The FE EDUs Agreed to Subsidize the Activities of Certain Parties, At The Expense of FirstEnergy's Ratepayers.

Large industrial customers of the FE EDUs support the proposed ESP-3 because benefits secured to them in the ESP-2 case will continue to flow to them. Those benefits appear to consist of an interruptible credit available to them by accepting the terms of service contained in Tariff Rider ELR. These same customers are largely protected against actual interruption of service through an option, offered in ESP-2 and continued in ESP-3, to simply buy through the interruption.[1] The costs of these credits are not borne by the large industrial customers, but instead are imposed on all other customers of FE EDUs through Rider DSE.[2]

Like the large industrial customers, other signatories to the Stipulation in this case also secure the continuation of benefits they obtained in the ESP-3 case. Unlike the large industrial customers whose benefits are undefined and based upon bill credits that will ultimately be determined by the amount of electricity each consumes, virtually all signatory parties other than the large industrials, Staff and, of course, the FE EDUs themselves that signed in support (as

[1] Cross examination Testimony of William R. Ridmann, (hereafter, Ridmann Cross) Transcript ("Tr.") Vol. I pp. 65-68.
[2] Ridmann Cross, Tr. Vol. I p. 69. (See also, for example, Toledo Edison's current tariff, sheet 115).

opposed to non-opposition) of the Stipulation obtain a specifically defined benefit in return for their support. Those benefits are described below, together with the mechanism through which the FE EDUs reallocate the costs of those benefits to non-industrial rate payers, generally:

Association of Independent Colleges and Universities of Ohio (AIUCO)	Stipulation p. 31. Guaranteed compensation for EE Administrator services totaling $83,333 for 2014, 2015, and 2016	Ridmann Cross p. 55-56. FE EDUs' Cost Recovered through Rider DSE
Ohio Manufacturers Association	Stipulation p. 31. Guaranteed compensation for EE Administrator services totaling $250,000 for 2014, 2015, and 2016	Ridmann Cross p. 55-56. FE EDUs' Cost Recovered through Rider DSE
Counsel of Smaller Enterprises	Stipulation p. 31. Guaranteed compensation for EE Administrator services totaling $100,000 for 2014, 2015, and 2016	Ridmann Cross, Vol I, p. 55-56. FE EDUs' Cost Recovered through Rider DSE
Ohio Hospital Association	Stipulation p. 31. Guaranteed compensation for EE Administrator services totaling $100,000 for 2014, 2015, and 2016 --- Stipulation p.34. Cleveland Clinic: Distribution plant, facilities and equipment installed to support expansion project	Ridmann Cross, Vol. I, p. 55-56. FE EDUs' Cost Recovered through Rider DSE --- First $70 Million recovered through Provision (g) of Rider EDR
City of Akron	Stipulation p. 32. Funding to be provided only to Ohio Edison Customers in City of Akron, $200,000 for 2014 and 2015 (for EE)	Ridmann Cross Vol. I, p. 56. FE EDUs' Cost Recovered through Rider DSE
Material Sciences Corporation	Stipulation p. 37 n.11 – Billing demand component of Rider EDR, part (d), adjusted to $6.00/kVa for ESP 2 and continuing through ESP 3; ESP 3 rate is listed as $8.00/kVa ($2 discount)	Ridmann Cross Vol. I, p. 42-44. Toledo Edison recovers the difference from other customers taking service through Rate Schedule GS.
Ohio Partners for Affordable Energy (OPAE)	Stipulation p. 40 $1 Million for its fuel fund program, divided equally between 2015 and 2016. Further, Stipulation p.31 OPAE	Ridmann Cross, Vol. I, p. 57. There is no direct recovery of this funding from rate paying customers. However, to the

	receives an annual administrative fee from these funds equal to 5% of the funding provided by the Companies for the Community Connections Program per 07-551-EL-AIR and 08-935-EL-SSO	extent funds are used to pay bills that might otherwise go unpaid, the Company obtains indirect recovery, which to be fair, it would apparently see in any event through other riders
Consumer Protection Association Empowerment Counsel of Greater Cleveland Cleveland Housing Network	P 41: Fuel Fund monies ($4MM/year 2015-2016) allocated to Cleveland Electric ($1.39 MM/year, $2.78 MM total) and distributed by same agencies as set forth in Exhibit D to 7/28/09 Letter in 09-641. Under the letter each gets a third (aprox -$463,000/yr and $927,000 total)	Ridmann Cross Vol. I, p. 58-59. There is no direct recovery from rate paying customers. However, to the extent funds are used to pay bills that might otherwise go unpaid, the Company obtains indirect recovery, which to be fair, it would apparently see in any event through other riders

B. The Stipulation Plainly Lacks Support From Residential and Commercial Rate-Payers

As the chart above suggests, FirstEnergy goes too far when it suggests that a broad base of its customers support the Stipulation. In fact, *no customer* receiving service through commercial or residential rate schedules is a signatory to the Stipulation, and even more tellingly, no entity that represents such customers *in the customers' capacity as rate payers* is a signatory to the Stipulation. Instead of actual support by a broad coalition of rate paying customers, the FE EDUs have attempted to create an appearance of such support by agreeing to fund the works of a number of entities that provide energy-related services.

AEP Retail readily concedes that the funding the FE EDUs provide to these energy-related service providers is used to support a number of worthy causes. Even so, the direct concern of these signatory parties involves the availability of funding for their programs, and not the rates paid to the FE EDUs by the consumers in their service territory. Because the availability of funding must be the paramount concern of these entities, any claim that the Stipulation is supported by commercial or residential customers is inherently dubious. Moreover, as the chart

also demonstrates, after agreeing to fund the good works of these various programs, the FE EDUs have been remarkably successful – particularly with commercial customers – in transferring the revenue collected from other ratepayers through Rider DSE to the customers that receive benefits of the funding. This Commission should not confuse support for the Stipulation by programs that benefit consumers with support for the Stipulation from the FE EDU customers, themselves. The two are not necessarily the same thing.

The facts of this case are akin to the Commission's recent rejection of the Ohio Power Company Stipulation in its electric security plan in February of this year. The Commission found that certain provisions of the Stipulation were not in the public interest and did not provide rate stability for customers as negotiated by the parties involved.[3] The Commission specifically found that because the parties to the Stipulation did not demonstrate that the provisions of the settlement benefit ratepayers and the public interest that, under the three-part test for considering stipulations, the Commission must reject the Stipulation.[4] The only thing shown by the record in relation to each of the provisions described in the table above is that *the parties that signed the Stipulation are receiving a benefit reserved to themselves*. As the Ohio Consumers' Counsel, NOPEC, NOAC, Sierra Club, Natural Resource Defense Council, RESA, Direct Energy, IGS, Interstate Gas Supply, and AEP Retail all agree, the provisions of this plan and the filing as a whole do not benefit ratepayers or the public interest and should be rejected by the Commission consistent with this Commission's application of the three-part test in the AEP Ohio ESP proceeding.

[3] AEP Ohio ESP II, Case No. 11-346-EL-SSO et. al, February 23, 2012 Entry on Rehearing at ¶19.
[4] Id.

The FE EDUs have not carried their burden of demonstrating that the Stipulation is a product of serious bargaining among capable, knowledgeable parties. Although AEP Retail has no quarrel with each party promoting its own interests, the process is fully undermined where, as is the case here, the stipulation becomes a mere collection of earmarks for the narrow interests of a limited number of groups.

II. THE STIPULATION VIOLATES IMPORTANT REGULATORY PRINCIPLES AND PRACTICES

A. The Stipulation Fails to Satisfy The Statutory MRO Test.

In Ohio Revised Code §4928.143, the Ohio General Assembly clearly mandated that any Electric Security Plan (ESP) proposed by the FE EDUs must be ***demonstrably*** more favorable than results that are available through the alternative Market Rate Option (MRO) provided for within Ohio Rev. Code §4928.142.

> The burden of proof in the proceeding shall be on the electric distribution utility. . . . [T]he commission by order shall approve or modify and approve an application filed [for an ESP] if it finds that the electric security plan so approved, 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 under [an MRO]**.

Ohio Revised Code §4928.143(C)(1). (Emphasis supplied). The FE EDUs have completely failed to carry the burden of proof that, by statutory mandate, they bear.

1. FE EDUs' Proposed ESP Fails the MRO Test Quantitatively.

The FE EDUs' claims that the Stipulation meets the MRO test quantitatively because its customers will not be compelled to pay some $293.7 Million in RTEP costs that the FE EDUs expect PJM to assess it during the delivery years beginning in 2014/15 and ending in 2021/22.

By including these $293.7 Million in "benefits", the FE EDUs calculate that the total quantitative benefits of the ESP exceed the result likely under an MRO by a total of $200.6 Million.[5]

AEP Retail joins Staff witness Robert Fortney in urging the Commission to reject this analysis. The benefit of the RTEP credit claimed by the FE EDUs was a result of this Commission's decisions in the FE EDUs' ESP-2 case[6] and is not a benefit resulting the from the FE EDUs' ESP-3 proposal or the Stipulation submitted by the FE EDUs in support of its proposed ESP-3. Further, while AEP Retail urges this Commission to direct its staff to conduct a thorough and independent analysis of the FE EDUs' claims regarding the economic benefits of the ESP-3 proposal, even the simple modification Mr. Fortney made to Mr. Ridmann's exhibit is sufficient, all else equal, to show that the ESP is at a minimum some $7.6 Million more expensive than any result that might reasonably be anticipated under an MRO.[7]

2. The FE EDUs' Claims of Qualitative Benefits Are Suspect, and the FE EDUs Have Done Virtually Nothing To Support Their Claims That Qualitative Benefits Exist.

In support of their application, the FE EDUs assert the following qualitative benefits exist:

(i) The "Benefits" Secured by Bidding Demand Response Resources into the May 2012 PJM Base Residual Auction (BRA);
(ii) The "Benefits" of the 6% PIPP Discount;
(iii) The "Benefits" of extending the recovery period for REC credits;
(iv) The "Benefits" of the Distribution freeze and Rider DCR; and
(v) The "Benefits" of Three Year Blending.[8]

Each of these claimed benefits is certainly questionable, as demonstrated by the brief discussions below. More significantly, the FE EDUs provide little to no evidence to support the existence of

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[5] Direct Testimony of William R. Ridmann, Co. Exhibit No. 3, (hereafter, Ridmann), p. 19 and attachment WRR-1.
[6] Direct Testimony of Robert B. Fortney, Staff Exhibit No. 3 (hereafter "Fortney") p. 2. See also Case No. 10-388-EL-SSO, Opinion and Order dated Aug 25, 2010, p. 44.
[7] Fortney, p. 2-3. However, AEP Retail cannot endorse Mr. Fortney's suggestion that the ESP may actually provide a $21 Million benefit to consumers if certain timing considerations are eliminated. The fact is, as Mr. Fortney also testified, the elimination of timing considerations should be recognized to be a "wash", in reality. Cross Examination of Robert B. Fortney, (hereafter," Fortney Cross") Transcript Vol. II, p. 265-266.
[8] Ridmann, pp. 15-16.

the claimed benefit other than the naked assertion of its witness that a benefit should be recognized.

(i) The FE EDUs Were Unable to Secure Any "Benefit" by bidding Demand Response Resources into PJM's 2015-2016 Base Residual Auction

The FE EDUs filed their application on April 13, 2012. In that application, they asserted that they needed this Commission's approval of their ESP-3 proposal by May 2, 2012 in order to bid Peak Demand Response Resources (PDR) and Energy Efficiency (EE) Resources into the May, 2012, PJM BRA. It is hardly surprising that this Commission found that a three week period for evaluation, review and approval of a proposed ESP, as demanded by the FE EDUs, was simply inadequate, and even this highly expedited hearing schedule could not provide approval to the FE EDUs by May 2, 2012.

The FE EDUs' actions once they recognized they would be unable to obtain this Commission's "timely" – as the FE EDUs would have it – approval speak volumes. Without Commission approval, the FE EDUs chose not to bid PDR into the PJM BRA. Thus, those "benefits" were lost because of the FE EDUs' unrealistic expectations concerning Commission action. At the same time, the FE EDUs chose to bid the EE Resources into the May, 2012 BRA even without approval of their ESP-3 proposal. As a result, these "benefits" (whatever they might have been – and the Commission should recognize that even FE EDU's own witness acknowledged that these benefits are entirely speculative)[9] were secured as a result of business decisions made by the FE EDUs for their own purposes, not because of this Commission's approval of the stipulation supporting ESP-3.

[9] Stoddard Cross, Tr. Vol. IV, pp. 23. See also Direct Testimony of James F. Wilson, (hereafter "Wilson"), OCC Exhibit 9, pp. 8-9.

(ii) The Benefits of the 6% PIPP Discount, If Any, Are Unknown And Violate State Policies Described in R.C. §4928.02.

Like so much of the FE EDUs' claims of qualitative benefits, they claim a benefit in relation to the 6% discount in generation costs for PIPP customers that is actually unsupported by any evidence introduced by the FE EDUs. Initially, the Commission should note that the 6% discount is made available to the FE EDUs by the generation provider – in the case of ESP-2 and the proposed ESP-3, by the FE EDUs' generation affiliate, FirstEnergy Solutions (FES). At most, the FE EDUs themselves merely pass the discount through to customers. This position turns the ESP versus MRO test on its head. If the Commission allows this discount to count as a benefit of the ESP then it is the same as saying that any and all shopping by non-PIPP customers related to anything in the plan that encourages shopping, as required by state policies, should be counted as a benefit under the ESP. Just like the PIPP discount operates to reduce the amounts otherwise paid by retail customers who share in the burden of paying the USF, so too are the discounts to the otherwise applicable EDU rate provided by CRES providers to shopping customers. Following this illogical path, all ESP calculations in the future should claim all discounted rates provided to customers from CRES providers as a benefit of the plan regardless of whether they are PIPP customers or not.

Although the FE EDUs acknowledge that there is no reason why they should not be equally pleased to receive a 6% discount from any supplier serving the PIPP load, they are unwilling to provide any opportunity to the 35 or so CRES providers registered to provide service within their territories to compete for this load.[10] As a result, the "benefit" of this discount has not been tested, although a number of CRES providers have expressed an interest in

[10] Ridmann Cross, Tr. Vol. I, pp. 120-125.

competing for this load.[11] Stated simply, the FE EDUs provide no assurance that another supplier would not meet or beat FES' 6% discount, and even though the economics are entirely irrelevant to the FE EDUs, they are obviously reluctant to see the value of the discount tested.

The Commission should also declare that this provision of the plan violates the state policies embodied within R.C. 4928.02. Specifically, R.C. 4928.02(C), (D), (G), (H), (I) and (L) all include state policies that the FE EDUs' proposal violates:

- As discussed above, the favoritism hardwired into the FE EDUs' plan to allow its affiliate FES to be the exclusive supplier of generation for PIPP customers fails to ensure a diversity of electricity suppliers as outlined in R.C. 4928.02(C).
- The plan fails to encourage market access for cost-effective supply as reflected in R.C. 4928.02(D) because it awards the rights without any opportunity for any other supplier to provide that service in an auction or bid.
- Likewise the continuation of this provision would further a strategy keeping all standard service offer customers in the overall FirstEnergy Corp. affiliated family. This fails to recognize the emergence of competitive electricity markets, as included in R.C. 4928.02(G), and raises concerns with market power and share as outlined in R.C. 4928.02(I) by (1) blocking other providers the opportunity to expand into the FE EDU certified territory by eliminating the potential to serve this defined customer class and (2) by providing one corporate entity even greater market power and creating a deficiency in the balance in the territories.
- The awarding of the right to serve the dedicated PIPP load as an absolute right included in the regulated FE EDUs' ESP plan without any opportunity for non-affiliated providers to

[11] Direct Testimony of Wilson Gonzalez, (hereafter, "Gonzalez"), OCC Exhibit 11, p. 32.

meet or exceed that offering violates R.C. 4928.02(H), which seeks to ensure effective competition by avoiding anticompetitive subsidies between competitive and noncompetitive service. Any argument based on whether providers that were included in settlement negotiations did or did not seek the right to serve the PIPP load, or speculation about whether any of the 35 providers registered to provide CRES services in the FE EDUs territories that were not invited to participate in the negotiations leading to the FE stipulation would or would not have sought to serve the PIPP load, is without merit.[12] A process that formally allowed any and all providers to provide service to that load through an auction or some other competitive measure as preferred by the Commission would be the appropriate path to allow the competitive market to work. This process of a partial settlement with select parties does not fit that competitive model.

- Finally, the guaranteed awarding of market share between the affiliated companies in the absence of a process open to all 35 CRES providers fails to protect at-risk populations as outlined in R.C. 4928.02(L), because of the lack of an opportunity for those populations to see a greater discount or see the development of the competitive market through a diversity of suppliers.

All together, the attempt to ensure the PIPP load stays within the affiliated family of First Energy Corp. as part of the ESP filing is improper and violates the state policies found in R.C. 4928.02 and therefore should be rejected.

[12] The process of awarding the affiliate the exclusive rights to serve the PIPP load also runs afoul of Mr. Ridmann's testimony on a level playing field for competition in the record. Ridmann Cross, Tr. Vol. 1 pp. 136.

(iii) Rather than Provide a Benefit, the Extension of the Period in Which REC Costs Are Recovered Raises The Ultimate Cost to the Consumer.

In their "typical bill analysis"[13] the FE EDUs suggest that prices will fall somewhat as a result of the ESP-3 proposal. This suggestion results *solely* because of the FE EDUs' extension of the period in which the cost of REC credits will be recovered. Any "qualitative benefit" remains unexplained. In reality, the FE EDUs are simply deferring up to 65% of their REC costs for later collection, and imposing 7% interest on the full amount deferred for later collection.[14] Today, when the typical residential or small business consumer receives approximately 0.5% per annum on a two-year Certificate of Deposit, it is unlikely that a typical consumer would agree that this proposed extension and deferral represents a benefit to them.

Although deferring collection of these costs may marginally lower rates at the beginning of the period of deferral, deferring collection of these costs must also raise rates at a later point during the period of collection. In addition, whether rates are maintained at a lower rate or not, the deferral must increase the overall cost to the ratepayers. The proposal is no different than the decision to purchase a car with using a four year loan, or purchase that same car using a seven year loan. The monthly payment may indeed be lower, but the overall cost is certainly higher. Thus, even if the benefit of a marginally lower rate today is deemed a benefit, the deferral of the cost and imposition of additional carrying costs assures that this benefit is at best a "wash", economically and more likely represents an added burden to the ratepayers.

The FE EDUs nonetheless claim a "benefit" accrues by virtue of this deferral. At the same time, they have failed to introduce evidence showing the ultimate costs associated with recovery of that deferral, thereby permitting the Commission to determine whether the "low" car payment

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[13] Supplemental Testimony of William R. Ridmann, Co. Exhibit No. 4, (hereafter, "Supplement"), attachment 3.
[14] Ridmann Cross, Tr. Vol. I, pp. 250-257.

is worth the greater overall expense to ratepayers. As a result, they failed to comply with Ohio Rev. Code § 4928.143(C), which expressly mandates that deferrals and the carrying costs of all deferrals be recognized when a proposed ESP is evaluated.[15]

(iv) The Distribution "Stay Out" Period and Rider DCR

Similarly, the claimed benefit from "frozen" distribution rates appears to be an illusory benefit to rate payers as well. Although base distribution rates may indeed be frozen in a technical sense, the FE EDUs actually improve their position by gaining the certainty of specific, guaranteed increases in distribution rates through Rider DCR, as it will recover its net investment plus a previously approved rate of return on up to a net $15 million per year in increased distribution-related investments during the term of ESP-3.

The offered $15 million "cap" on the amount to be recovered through Rider DCR may provide a benefit, or it may not, depending upon the amounts the FE EDUs invest in distribution over the ESP-3 period. Again, however, the FE EDUs have introduced no evidence concerning their anticipated distribution investments or accumulated depreciation within its base rates, and thus its claimed benefit cannot actually be evaluated.[16] Once again, therefore, it has failed to adequately support its application.

(v) The "Benefit" of The FE EDUs' Three Year Blending Proposal

The very core of the FE EDUs' proposal, of course, is its request for authority to seek bids for three year products in its October, 2012 and January, 2013 CBP auctions. The FE EDUs claim that the requested extension, and approval of its request to seek three year products in the

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[15] . . . any electric security plan . . . .including its pricing and all other terms and conditions, **including any deferrals and any future recovery of deferrals**"[must be] more favorable in the aggregate as compared to the expected results that would otherwise apply under [an MRO]."

[16] AEP Retail acknowledges that a mechanism exists whereby Staff is able to audit the FE EDUs compliance with Rider DCR after the fact. This audit, however, appears to be designed to test compliance with Rider DCR, not with determining whether investments recovered through Rider DCR necessarily provide commensurate benefits to rate paying customers.

CBP auctions, will permit it to "blend" the results obtained from this three year product into its existing SSO offering, thereby "smoothing" rate fluctuations and providing some measure of price stability to its customers.

Rate stability can indeed be a benefit. However, rate stability comes at a cost, and in the absence of the necessary, meaningful information that only the FE EDUs can provide, it is simply impossible to assess the true costs of securing that stability. In order to avoid repetition in its arguments, AEP Retail will discuss the manner in which the FE EDUs *could* provide this Commission with an analytic tool permitting it to measure the cost of its blending proposal below, where it discusses its assignment of error with respect to the exclusion of its proposed Exhibit 6.

B. The Stipulation Violates The Regulatory Principals of Transparency And Public Participation

As it considers the Stipulation, the Commission should not ignore the manner in which the Stipulation was negotiated and presented to this Commission. As designed, this Commission's rules facilitate public participation in proceedings before this Commission. Those rules contemplate the filing of a proposal, public notice of that proposal, an opportunity for interested parties to review the proposal, to seek intervention if their interests are affected by a proposal, and to meaningfully participate in these proceedings through discovery, settlement negotiations, and if need be, evidentiary hearings.

In this case, however, the FE EDUs successfully circumvented these processes. Instead of filing an application containing its proposal, it acted first to garner selective and limited support for that proposal by negotiating a stipulation with those entities with which it had previously reached terms and assuring those entities that the terms those entities had previously found sufficient would be continued if their support was continued. It then filed its application after it reached a stipulation with what it erroneously deemed a sufficient nucleus of the entities most

likely to oppose its plan. It succeeded in limiting the entire period for discovery to one month. Even then, public notice of its plan was not published until May 25, 2012,[17] less than 10 days prior to the start of the scheduled evidentiary hearing – a period, incidentally, that also included an intervening national holiday. These actions are hardly consistent with the promotion of public participation.

C. The FE EDUs Failed to Provide Meaningful projections of Bill Impacts, Avoiding The Intent of The Commission's Own Rules.

The FE EDUs' offered analysis of the impacts to typical bills is a mockery of this Commission's rules. Rule 4901:1-35-03 provides, in relevant part, as follows:

> (C) An SSO application that contains a proposal for an ESP shall comply with the requirements set forth below.
>
> . . .
>
> (3) **Projected** rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.

(Emphasis supplied.) The FE EDUs' projection of the rate impacts was, and even after these hearings remains, woefully inadequate.

The FE EDUs initially attempted to evade the requirement of this rule altogether by seeking a waiver of the rule.[18] When this Commission denied its request for waiver of this (and several other) filing requirements,[19] the FE EDUs responded by submitting a sample bills analysis that completely eschews any responsibility to provide meaningful information regarding the impacts of its proposal on rates throughout the proposed ESP period. Ignoring the best information available to it at the time, the FE EDUs instead provided a projection that incorporates only the increased costs to rate payers that results from the increased level of

[17] Co. Exhibit 5.
[18] Motion and memorandum in support for Waiver of Rules and Request for Expedited Treatment, filed April 13, 2012.
[19] Entry, April 25, 2012.

distribution-related investment that FirstEnergy proposes to recover through Rider DCR; and a manufactured decrease in costs resulting from the FE EDUs' proposal that they recover the costs of Renewable Energy Credits (RECs) over a greater period of time – a manipulation that, with carrying costs, ultimately imposes greater costs on customers but slightly more than off-sets the increase in Rider DCR.[20] Of course, none of these limitations in its assumptions were disclosed in the supplemental filing[21] containing the analysis of typical bill impacts that this Commission Ordered them to file pursuant to Rule 4901:1-35-03.[22] By thus limiting the information upon which its projections are based, however, the FE EDUs were able to produce a document that creates the misleading impression that FirstEnergy's ESP-3 proposal will result in lower rates, overall, during the period in which ESP-3 is in effect.[23]

The FE EDUs know better. They deliberately chose not to "project" any change in the costs of capacity during the proposed ESP-3 period, even though the costs of capacity within the ATSI zone during the 2015-16 delivery year have been determined by PJM's Base Residual Auction to equal a fully loaded, loss adjusted $349.43 per MW/Day.[24] They also chose not to project any change in the future cost of energy, even though their own expert witness acknowledged that analytic tools exist that permit rational estimates of energy costs during this same period.[25] As a result, the FE EDUs' projections *project* nothing of import, instead incorporating information the FE EDUs understood to be outdated at the time of their filing.

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[20]Ridmann Cross, Tr. Vol. I, pp. 108-111 regarding FirstEnergy's Supplemental Information Filing, Exhibit 3.
[21] Supplement, Exhibit 3,
[22] Entry dated April 25, 2012, ¶11, in which the Commission expressly determined: "...the information on projected rate impacts required by Rule 4901:1-35-03(C)(3) . . . [is] necessary for our consideration of the application and stipulation. Additionally, **some of these filing requirements may involve information that differs from the information utilized in ESP 2.**" (Emphasis supplied.)
[23]Ridmann Cross, Tr. Vol. I, pp. 107-108.
[24] Stoddard Cross, Tr. Vol. IV, pp. 69-75. AEP Retail Exhibit No. 3.
[25] Stoddard Cross, Tr. Vol. IV, pp. 59-61.

(In fact, a later printout of the entirety of the matters for which notice was granted revealed that the request encompassed a stack of papers approximately 8" deep – an amount roughly equal to the entirety of the four days testimony taken in the ESP-3 case.) Over objection,[29] the Company succeeded in obtaining "administrative notice" of this vast quantity of information at the conclusion of day three of the hearing in this matter.

The Ohio Supreme Court has addressed the factors that should be considered to determine whether administrative notice is appropriate:

> "[T]he factors we deem significant include whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed. Moreover, prejudice must be shown before we will reverse an order of the commission."

Canton Storage & Transfer Co. v. Pub. Util. Comm., 1995-Ohio-282, 72 Ohio St. 3d 1, 8 (quoting *Allen v. Pub. Util. Comm.*, 40 Ohio St. 3d 184, 185 (1988).) Thus, "the commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence, and they are not prejudiced by its introduction." *Id.* (Emphasis supplied.)

The *Canton Storage* decision is consistent with the Ohio Rules of Evidence.

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources shoe accuracy cannot reasonably be questioned.

Ohio Evid. R. 201(B).

The attorney examiners' ruling violates every principle of Rule 201(B) and *Canton Storage.* Initially, the FE EDUs certainly did not trouble themselves to confine their request to facts – let alone those generally known or capable of ready determination. As a result, the

[29] Tr. Vol. III, pp. 13-17.

documents – the vast majority of which appear to be disputed testimony of various witenesses – are not the proper subject of administrative notice in the first instance.

Further, the FE EDUs demanded and received "notice" of the entire pre-filed direct testimony of no fewer than five different witnesses in its ESP-2 case (three of whom were not identified and did not testify in the ESP-3 case), together with later supplemental testimony from some of those witnesses, plus a small number of pages (out of more than 900) of transcript testimony. The FE EDUs obtained "notice" in addition of the entirety of its application from its 2009 MRO case, which consisted of two volumes that contain some 600 pages of testimony, schedules, and exhibits applicable to the 2009 MRO application.

Administrative notice was not only improper because the materials "noticed" do not consist of facts, therefore, but, in addition the non-signatory parties were plainly prejudiced from this tactic. AEP Retail, for example, did not participate in either the ESP-2 case or the 2009 MRO case and has no familiarity with those cases, the contents of the dockets, or the issues in those cases. Prior to the morning of the third day of hearing, the parties received reference to merely "the evidentiary record" in the ESP-2 case,[30] and absolutely no notice that the FE EDUs also intended to rely upon the record from its MRO case. The parties, including AEP Retail, therefore had no opportunity to evaluate any portion of the "noticed" material prior to the morning of the third day of hearing, because that material had not been identified in any way more specific than the FE EDUs' reference to the entire "evidentiary record" from its ESP-2 case. In fact, in advance

[30] That suggestion consisted of the following statement, appended at p. 9 to the FE EDUs' application in this case: "The Companies further request that the Commission take administrative notice of the evidentiary record established in the Companies' current ESP, Case No. 10-388-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding." The Attorney Examiners recognized that this request was simply to vague and overbroad, and over-ruled that request – stated as an oral motion – on the first day of hearing. The subsequent, overbroad, "identification" of "specific" items does not resolve the prejudice to the parties.

of briefs from the FE EDUs, AEP Retail can do no more than hazard a guess why any content from these documents might be deemed significant even now.

E. The Attorney Examiners Erred in Excluding from the Record AEP Retail's Exhibit Illustrating How Migration Risks Increase Bid Prices.

Finally, the attorney examiners erred when they excluded AEP Retail exhibit 6. AEP Retail offered Exhibit 6 solely to illustrate how the proposed three year blended auction rates necessarily increases migration risks, and how migration risk necessarily induces a CBP bidder to raise the price of its bid. To illustrate the proposition, the exhibit adopted the companies' own projections of wholesale generation rates under its current ESP and under its proposed ESP-3 "blend".[31] To illustrate how the proposed blending must increase costs, AEP Retail assumed a hypothetical migration of 1/3 total load between a CRES and the SSO in response to the price changes that the companies themselves predict as a result of blending.[32]

It is true that the FE EDUs rebuttal witness, Robert Stoddard, took issue with the amount of migration posited by AEP Retail. He was nonetheless able to testify at length regarding the exhibit on cross examination. During that testimony, he first confirmed that he agreed that migration would likely occur in response to differences in price, and that the direction of migration between a CRES and an MRO provider in response to the price differences was accurately depicted within AEP Retail's proposed exhibit 6.[33] The following exchange then followed:

> Q: . . .[S]imply to illustrate the effect that migration risks have, you would agree with me that this chart does illustrate that there is a cost to migration.

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[31] These figures – which AEP Retail certainly believes are wildly inaccurate – were provided by the company in response to AEP Retail's Interrogatory No. 11.7 – an exhibit previously admitted into evidence as AEP Retail's Exhibit No. 2.

[32] AEP Retail attaches its proposed Exhibit 6 hereto in order that the Commission may evaluate this argument, fully.

[33] Stoddard Cross, Tr. Vol. IV, pp. 77-91.

A. Accepting your hypotheticals, you know, as a general matter, I would agree that there are – if the SSO load increases in periods when there is a delta between the SSO price and market price whether the SSO price is lower than market, and if there is a decrease in SSO load when the reverse is true, then the total cost to serve will be higher, but in a way that can be anticipated and modeled by SSO market participants in the bidding process.

Q: And that market participant, anticipating that the cost of service will be higher, is going to bid a higher price to provide that service. Would that be a rational response to the higher cost?

A. Yes. He will bid a higher price, but that's because he is providing greater value to the customers. To clarify that last question – I'm sorry – he's providing more power in the year when power is most expensive, so it's hardly surprising on a blended basis that he is charging a higher price.[34]

In excluding AEP Retail Exhibit 6, the attorney examiner erroneously relied upon the fact that the witness would not initially accept the hypothetical amount of migration occurring in response to the price changes. The point of Exhibit 6, however, was not to demonstrate that a particular amount of migration would occur in response to any particular change in price. Exhibit 6 is instead probative of the manner in which risk migration can be quantified,[35] and how that quantification results in a higher price as a result of blending itself. As the witness himself confirmed, the exhibit accurately illustrated both the principal and the mathematic formula in which the amount of migrating load is nothing but a simple hypothetical. In fact, *any* amount of migration could just as easily be assumed to be the response to blended prices, and the corresponding overall increase in the total price that a supplier would bid in response to that assumption calculated accurately. Similarly, the Commission will find itself able to modify AEP Retail's own "acceptance" – for purposes of the exhibit alone – of the FE EDUs' projections regarding generation rates by instead using any price projection this Commission might find appropriate. Exhibit 6 therefore provided a relevant, clear and non-misleading example why and

[34] Stoddard Cross, Tr. Vol. IV, pp. 87-88.
[35] Indeed, Mr. Stoddard himself endorsed AEP Retail's point when he asserted that migration "can be anticipated and modeled by SSO market participants in the bidding process."

how the proposed blending period must result in higher priced bids, ultimately, in the CBP auction. The exclusion of exhibit 6 was an error. Equally to the point, the failure of the FE EDUs to provide this Commission and the EDUs' own ratepayers with a similar tool is inexcusable.

III. THE STIPULATION, AS A PACKAGE, DOES NOT BENEFIT RATEPAYERS AND THE PUBLIC INTEREST

As discussed above, the stipulation does not benefit ratepayers and the public interest because:

- The stipulation results in an ESP that is not "more favorable in the aggregate" as compared to the results that can be expected under an MRO.
- The stipulation will result in higher rates because of the structure of the auction, and the record evidence necessary to quantify the magnitude of the increase is lacking.
- The stipulation resulted from negotiations conducted within a "black box" among selected parties, before the public had any awareness that the FE EDUs intended to pursue a continuation of ESP-2.
- The FE EDUs' proposal will require that the Commission perform a complete re-evaluation of the entirety of ESP-2/3 next year, wasting this Commission's time and resources and is, therefore, contrary to principles of judicial economy

Regarding the last point above, the FE EDUs repeatedly assert that their ESP-3 proposal is merely an extension of the ESP-2 approved by this Commission, suggesting that the ESP-3 proposal does not require the same level of scrutiny as did their ESP-2. The insistence that ESP-3 is merely an extension of ESP-2 is a remarkable concession, in actuality. The Ohio General Assembly understood that markets fluctuate constantly, and therefore insisted that any approved ESP be regularly re-evaluated. That mandate is embodied within Ohio Rev. Code § 4928.143:

> E) If an electric security plan . . . has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. . . .

This Commission approved ESP-2 in 2010. ESP-2 was to exist for no more than three years. As a result, the year four 're-evaluation' requirement, like the statutory obligation to perform an 'advance' SEET test, were not issues at the time ESP-2 was approved.

Now, however, the FE EDUs seek a two year extension of an ESP approved for a term of three years. As a result, the FE EDUs propose to maintain the same ESP structure for a five year period. Revised Code section 4928.143(E), mandates this Commission conduct a re-evaluation in year four of any ESP that exceeds three years. Thus, if approved, the FE EDUs' proposal will necessitate re-examination of its ESP in year 4, in any event. Further, the proposal permits the FE EDUs to avoid the "upfront" SEET test, a result the General Assembly plainly did not intend. As a result, the proposal contributes to a waste of the resources of this Commission and of the parties to this proceeding, and represents a threat to the statutory structure designed by the General Assembly. For these reasons alone, the "extension" proposal should not be approved, and the FE EDUs should be compelled to propose a plan that it supports through full compliance with the statute and this Commission's SSO rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing were served upon the following parties to this proceeding this June 22, 2012, via electronic mail if available or by depositing the same in the United States Mail, postage prepaid, addressed as follows:

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This lack of transparency is something the Commission raised as a concern when rejecting the AEP Ohio ESP Stipulation on February 23, 2012. The Commission rejected the Stipulation in part because it did not have adequate information in the record detailing the bill impacts. Specifically the Commission stated, "[h]owever, the evidence in the record ***inadvertently*** failed to present a full and accurate portrayal of the actual bill impacts to be felt by customers, particularly with respect to low load factor customers who have low usage but high demand."[26]

In that case the stipulation was rejected as violating the three-part test. In this case, the misinformation is deliberate. The FE EDUs insist they have no obligation to base these projections upon readily available information regarding capacity costs and forward energy prices. The Commission should treat the two ESP proceedings consistently and reject this stipulation based on the FE EDUs' failure to accurately portray the billing impact of their proposal before the impacts appear on customer bills, and it is too late to make the corrections.

D. The Attorney Examiners Erred in Ruling Upon the FE EDUs request that they Take Administrative Notice of Disputed Testimony From the FE EDU's ESP-2 Proceeding.

At the outset of the hearing, the FE EDUs made an oral motion asked the hearing examiners to take administrative notice of the entirety of the record from its ESP-2 case. The hearing examiners properly denied this motion, but invited the FE EDUs to renew their motion, after first identifying specific items regarding which they wished notice be taken.[27]

With absolutely no explanation why any identified item should be the subject of administrative notice, the Company later produced a list and renewed its motion that administrative notice be taken of the items on the list.[28] The list was obviously overly inclusive.

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[26] AEP Ohio ESP II, Case No. 11-346-EL-SSO et. al, February 23, 2012 Entry on Rehearing at ¶19. (Emphasis supplied.)
[27] Tr. Vol. I, pp. 26-29.
[28] Tr. Vol. III, pp. 10-12,

Line		13/14	14/15	15/16	Total
1	**Revenues Assuming No Migration**				
2	Ridmann SSO Price (multi-year products) ($/MWh) *	53.45	55.81	60.10	
3	Market Price ($/MWh) *	50.16	52.90	66.32	
4	Static SSO Load (GWh)	3,000	3,000	3,000	9,000
5=2x4	Revenues ($MM)	$ 160.4	$ 167.4	$ 180.3	$ 508.1
6=3x4	Cost of Market Purchases ($MM)	$ 150.5	$ 158.7	$ 199.0	$ 508.1
7					
8					
9	**Revenues Assuming Migration**	13/14	14/15	15/16	Total
10	Ridmann SSO Price (multi-year products) ($/MWh) *	53.45	55.81	60.10	
11	Market Price ($/MWh) *	50.16	52.90	66.32	
12	SSO Load with Migration (GWh)	2,000	2,000	5,000	9,000
13=10x12	Revenues at Riddman Prices ($MM)	$ 106.9	$ 111.6	$ 300.5	$ 519.0
14=11x12	Cost of Market Purchases ($MM)	$ 100.3	$ 105.8	$ 331.6	$ 537.7
15=14-13	Loss Due to Migration ($MM)				$ 18.70
16					
17	SSO Priced to Address Migration Risk ($/MWh)	55.37	57.82	62.26	
18=17x12	Revenues at Migration Adjusted Prices ($MM)	$ 110.7	$ 115.6	$ 311.3	$ 537.7
19=11x12	Cost of Market Purchases ($MM)	$ 100.3	$ 105.8	$ 331.6	$ 537.7
20=19-18	Loss Due to Migration w/ Adjusted Prices ($MM)				$ 0.0

* Source: OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA AEP RETAIL ENERGY PARTNERS LLC'S MOTION TO EXTEND THE PROCEDURAL SCHEDULE, Exhibit D, AEPR Set 1-INT-11.7 Attachment 1

NOTE: NOT ADMITTED INTO EVIDENCE
TR VOL #IV, pp 152-154

AEP RETAIL
Exhibit 6

This foregoing document was electronically filed with the Public Utilities

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6/22/2012 4:56:28 PM

in

Case No(s). 12-1230-EL-SSO

Summary: Brief electronically filed by Mr. Michael D. Dortch on behalf of AEP Retail Energy Partners, LLC