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 REPLY BRIEF OF THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND THE NORTHWEST OHIO AGGREGATION COALITION

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I. INTRODUCTION

The Northeast Ohio Public Energy Council ("NOPEC") and the Northwest Ohio Aggregation Coalition ("NOAC") are not opposed to FirstEnergy providing SSO service after May 31, 2014 under an electricity security plan. In fact, NOPEC and NOAC signed and supported the second supplemental stipulation in FirstEnergy's last ESP case.

NOPEC and NOAC could support another FirstEnergy ESP, <u>but not this one</u>. The Companies' proposed ESP 3 is not a satisfactory rate deal for the 700,000 residential and small commercial electric customers NOPEC and NOAC represent in all three of the FirstEnergy EDU service territories. FirstEnergy's ESP 3 Proposal is stacked with benefits, but those benefits inure to FirstEnergy and its affiliates and to signatories to the Stipulation who receive special earmarks. Residential customers do not receive any meaningful benefits under the ESP 3 Proposal as filed. Compounding the lack of benefits to residential customers is the fact that the Companies seek to rush this ESP 3 Proposal through the Commission in record time, without giving intervenors adequate time to fully examine what the proposal contains.

What the ESP 3 Proposal filed in this case contains is less quantitative benefits to NOPEC and NOAC consumers than the expected results from an MRO; a continuation of and increase in the DCR rider which raises consumers' distribution rates by up to $405 million in 2015 and 2016 without the regulatory scrutiny of a distribution rate case at the Commission; an exclusionary Stipulation that lacks residential customer representative signatures; and Stipulation provisions such as the exclusion in SEET for the Companies' income from deferred charges that violate regulatory precedent. Moreover, the Companies' pretenses for the expedited procedural schedule in this case, to develop a new ESP some two years in advance of the current ESP's expiration, create bad precedent for the ability of interested parties to intervene and critically examine FirstEnergy's ESP 3 Proposal. Nor can the Companies prove that their three year "blending" proposal will benefit residential customers.

When the ESP 3 Proposal is analyzed in light of the serious due process concerns raised by the parties, and limited evidence before the Public Utilities Commission of Ohio (the "Commission"), the Companies fail 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.

In light of this failure, the Commission's decision to reject the ESP 3 Proposal should be easy. If the Commission, however, prefers to adopt an ESP for the period of time after the current FirstEnergy ESP expires, it should modify the ESP 3 Proposal based on the recommendations of NOPEC and NOAC, which would not only provide significant benefits to residential (and other) consumers in the FirstEnergy service territories, but allow FirstEnergy to satisfy its legal burden of proof in this case.

II. LEGAL ARGUMENT

Simply put, the ESP 3 Proposal does not satisfy the ESP vs. MRO test in R.C. 4928.143(C)(1), or the Commission's three-prong test for determining the reasonableness of a stipulation. For either of these reasons alone (and certainly both), the ESP 3 Proposal must be rejected by the Commission.

A. FirstEnergy's piecemeal review of the ESP 3 Proposal does nothing to overcome its failure to satisfy the ESP vs. MRO Test in R.C. 4928.143(C)(1).

FirstEnergy has the burden of proof in this proceeding to 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"[1] under a MRO. Knowing that FirstEnergy cannot prove that the ESP 3 proposal is more favorable quantitatively, FirstEnergy's Brief places virtually sole reliance on the Commission's December 14, 2011 Opinion and Order in Case No. 11-346-EL-SSO (the "2011 AEP ESP Case") to support its claim that the "Commission must consider both quantitative and qualitative factors in its analysis."[2] This is quite interesting in light of the contradictory statements expressed by FirstEnergy's generation affiliate, FirstEnergy Solutions Corp. ("FES"), as part of the 2011 AEP ESP Case.

Starkly opposite to FirstEnergy's arguments in this case are those of FirstEnergy's generation affiliate (FES) from the 2011 AEP ESP:

> RESA focuses on the word "aggregate" to suggest that, by its use of that word, the General Assembly was inviting the Commission to disregard any quantitative analysis of the Proposed ESP and to rest its decision instead on qualitative factors in analyzing the ESP vs. MRO test. There are two problems with this. First, for this argument to be correct, the

[1] Ohio Revised Code Section ("R.C.") 4928.143(C)(1).

[2] Initial Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy Brief"), p. 24.

> Commission would have to determine that the alleged qualitative benefits of the ESP somehow outweigh the quantified cost to customers. That, of course, begs the question as to how to do it. If there is no limit on the Commission's discretion, then the statutory test loses any meaning. If the Commission can just "deem" an ESP better because the Commission says so, how can that be meaningfully challenged or reviewed? It cannot, which is why such an interpretation makes no sense. Second, as applied in this case, the Commission must determine that the qualitative benefits of the Proposed ESP are worth more than the $325 million – $800 million cost of the Proposed ESP compared to an MRO sworn to by all credible witnesses. As discussed below, most of the qualitative benefits are not benefits to customers at all or not benefits of the Proposed ESP. Thus, for customers, it cannot be argued that the Proposed ESP is more favorable.[3]

Ironically, FirstEnergy argues in this case to do exactly what its generation affiliate claimed that the Commission and AEP could not do in the 2011 AEP ESP Case; that is, to ask the Commission to disregard the failure of the quantitative ESP vs. MRO analysis, and instead focus on amorphous qualitative benefits flowing to a limited number of customers. This violates Ohio law and common sense. NOPEC and NOAC agree with FES' legal argument in the 2011 AEP ESP Case, that "The Proposed ESP's undisputed price tag puts the Signatory Parties in an untenable position – explaining how a plan that requires customers to pay more for electric service can possibly be seen as more favorable than a market-based outcome."[4] The answer is simple: the Commission should not approve FirstEnergy's ESP 3 Proposal as filed in this case.

1. FirstEnergy's ESP 3 Proposal fails a quantitative ESP vs. MRO analysis under R.C. 4928.143(C)(1).

FirstEnergy's Brief argues unpersuasively that the ESP 3 Proposal "represents a quantitative benefit over an MRO."[5] For purposes of its quantitative ESP vs. MRO analysis, FirstEnergy focused on four provisions in the ESP—"(1) estimated Rider DCR revenues from June 1, 2014 through May 31, 2016; (2) estimated PIPP generation revenues for the period of the

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[3] Reply Brief of FirstEnergy Solutions, Case No. 11-346-EL-SSO (November 18, 2011), p. 15.

[4] *Id.*, p. 13.

[5] FirstEnergy Brief, p. 24.

ESP 3, reflecting the 6% discount provided by the Companies; (3) economic development funds and fuel fund commitments that the Companies' shareholders, not customers, will contribute; and (4) estimated RTEP costs that will not be recovered from customers;"[6] as well as two provisions in the MRO—"(1) estimated revenue from base distribution rate increases based on the proposed Rider DCR revenue caps; and (2) generation revenue from PIPP customers excluding the 6% discount."[7] A careful and accurate analysis of these quantitative provisions alone demonstrates that the ESP 3 Proposal fails to satisfy the ESP vs. MRO test set forth in R.C. 4928.143(C)(1).

i. Any benefits of the RTEP obligation from the ESP 2 Case were obtained in the ESP 2 Case, and provide absolutely no benefit to this ESP 3 case.

FirstEnergy's continued reliance on "RTEP benefits" under the ESP 3 Proposal is totally wrong. As part of FirstEnergy's existing stipulation from the ESP 2 Case, FirstEnergy agreed not to recover "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."[8] It is undisputed that FirstEnergy is obligated to perform this RTEP obligation regardless of whether this ESP 3 Proposal is accepted, modified or rejected by the Commission.[9]

As OCC concisely explained in its brief, "[i]nasmuch as the Companies' obligation under the ESP 2 Stipulation is not contingent upon approval of the ESP 3 proposal, it is disingenuous for the Companies to treat this [forebearance of RTEP costs] as a benefit of the ESP 3

[6] *Id*.

[7] *Id.*, pp. 24-25.

[8] Second Supplemental Stipulation, Case No. 10-388-EL-SSO (June 22, 2010), ¶ 6

[9] Direct Testimony of Mark Frye ("Joint NOPEC/NOAC Ex. 1"), p. 6; Tr. Vol. I, pp. 127-128 (FirstEnergy witness Ridmann explained 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").

Stipulation."[10] Importantly, the Commission Staff (a signatory party to the ESP 3 Stipulation) also concluded that the RTEP should be removed from the analysis because "[t]his benefit was provided in the previous ESP and brings no new value to this case."[11]

ii. Removing the already used $360 million benefit associated with FirstEnergy's RTEP commitment in the ESP 2 Case results in the ESP 3 Proposal failing a quantitative ESP vs. MRO analysis by at least $7 million.

A correct quantitative analysis of the ESP 3 Proposal requires that the pre-existing $360 million benefit attributed to the second supplemental stipulation in the ESP 2 Case be removed from the ESP 3 calculation. Doing so results in the ESP 3 Proposal failing a quantitative ESP vs. MRO analysis by more than $7 million.[12] This fact was confirmed by FirstEnergy witness Ridmann,[13] and Commission Staff witness Fortney.[14] Contrary to the arguments in FirstEnergy's Brief, this negative financial impact on Ohio ratepayers cannot and should not be outweighed by any alleged qualitative benefits of the ESP 3 Proposal.[15]

In its Brief, FirstEnergy also introduces a brand new argument claiming that the "Companies should be able to consider a benefit of approximately $39 million in nominal RTEP savings that were not included as a benefit in the Companies' analysis of quantitative benefits of

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[10] Joint Initial Brief by the Office of the Ohio Consumers' Counsel and Citizen Power ("OCC Brief"), p. 50. See also AEP Retail Energy Partners LLC's Initial Post-Hearing Brief ("AEP Retail Brief"), p. 7 (explaining that the "benefit for the RTEP credit claimed by the FE EDUs was a result of the Commission's decisions in the FE EDUs' ESP-2 case and is not a benefit resulting from the FE EDUs' ESP-3 Proposal").

[11] Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio ("Staff Brief"), p. 8.

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

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

[14] Prefiled Testimony of Robert B. Fortney ("Staff Ex. 1"), pp. 2-3.

[15] FirstEnergy Brief, p. 29.

the current ESP as compared to an MRO."[16] This argument is not only wrong, but it is misleading and without any merit legally.

FirstEnergy nowhere explains where the alleged "$39 million in nominal RTEP savings" comes from. Instead, FirstEnergy simply argues that it should be added back into the quantitative ESP vs. MRO test because the result would render the ESP 3 Proposal more favorable in the aggregate than a MRO.[17] Such a conclusory argument must be rejected as ludicrous.

NOPEC and NOAC can only assume, based upon FirstEnergy's citation to Attachment WRR-1 to Mr. Ridmann's prefiled testimony in the ESP 2 Case, that the $39 million amount equals the difference between the amount of the RTEP obligation from the initial stipulation in the ESP 2 Case ($321.3 million), and the increased RTEP obligation from the second supplemental stipulation in the ESP 2 Case ($360 million).[18] FirstEnergy's argument is ridiculous.

Attachment WRR-1 to Mr. Ridmann's prefiled testimony in the ESP 2 Case only provided support for the initial stipulation in the ESP 2 Case, <u>not</u> the subsequently filed supplemental stipulation and/or second supplemental stipulation. As a result, Mr. Ridmann's analysis (which FirstEnergy relies upon) only pertains to FirstEnergy's agreement as <u>part of the initial stipulation in the ESP 2 Case</u> "to not seek recovery through retail rates for the costs billed by PJM during the period June 1, 2011 through May 31, 2016 for RTEP projects which are approved by the PJM Board prior to June 1, 2011."[19] The "benefit" placed on this obligation for

[16] *Id.*, p. 28.

[17] *Id*.

[18] *Id.*, p. 28 (footnote 137).

[19] Stipulation and Recommendation, Case No. 10-388-EL-SSO (March 23, 2010), p. 18, ¶ C.2.

purposes of the ESP vs. MRO test was $321.3 million. But, the second supplemental stipulation negotiated by the parties (including NOPEC and NOAC), increased the value from a $321.3 million obligation to a $360 million obligation.[20] The entire $360 million (not the lesser amount attributed to the language in the initial stipulation from the ESP 2 Case) represents the quantitative benefit relied upon by the Commission in approving the entire ESP 2 stipulation (including the second supplemental stipulation).[21] FirstEnergy's claim that the full $360 million was not accounted for in the ESP 2 Case is simply FirstEnergy grasping at straws to somehow jiggle the numbers to make the ESP vs. MRO quantitative calculation positive. It is not – the quantitative calculation is negative.

Moreover, FirstEnergy's argument also should be rejected procedurally because it is based entirely on information (Attachment WRR-1 to Mr. Ridmann's prefiled testimony in the ESP 2 Case) improperly admitted into evidence in this case through the Attorney Examiner's ruling on administrative notice.[22]

iii. The amount of FirstEnergy's assumed proposed increase in distribution rates resulting from a rate case for purposes of the ESP vs. MRO comparison should be significantly less than $376 million.

FirstEnergy's Brief fails to even mention the $376 million assumption included on the MRO side of Mr. Ridmann's ESP vs. MRO analysis. More specifically, Mr. Ridmann's assumption estimated that FirstEnergy would receive a Commission-approved $376 million increase in a future distribution rate case for the two year ESP 3 time period. Instead of stating

[20] Second Supplemental Stipulation and Recommendation, Case No. 10-388-EL-SSO (July 22, 2010), p. 5.

[21] Opinion and Order, Case No. 10-388-EL-SSO (August 25, 2010), pp. 27, 32, 36, 42, and 44 (noting "a minimum of $360 million in RTEP charges" as a benefit under the ESP vs. MRO test).

[22] FirstEnergy Brief, p. 28 (footnote 137). See Joint Initial Post-Hearing Brief of the Northeast Ohio Public Energy Council and Northwest Ohio Aggregation Coalition ("NOPEC/NOAC Brief"), pp. 19-24 (explaining the reasons why the administrative notice ruling violates Ohio law, Commission precedent and Ohio law).

any basis for this unreasonable assumption, FirstEnergy argued two much less significant issues: (1) whether Rider DCR is appropriate for inclusion on the ESP side of the analysis under R.C. 4928.143(C)(1); and (2) whether the amount included on the ESP side of the equation for Rider DCR should be adjusted to account for regulatory lag.[23] Neither of these issues, however, addresses the fact that the Companies' assumption that it would be awarded a $376 million distribution rate increase is outlandish, speculative and wholly unsupported for purposes of the MRO calculation.

As NOPEC and NOAC emphasized in their Joint Brief, FirstEnergy is assuming a Commission-approved distribution rate increase on the order of $376 million is entirely unreasonable because: (1) "[w]hile 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;"[24] (2) "[e]ven 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;"[25] and (3) the $376 million assumption is nearly $40 million more than FirstEnergy even asked for in its most recent rate case—Case No. 07-551-EL-AIR (the "2007 Rate Case")—and more than two and one-half (2 ½) times the amount approved by the Commission in the 2007 Rate Case.[26] A more accurate MRO calculation (with a significantly reduced amount for a distribution rate increase) would result in an even greater failure of FirstEnergy to meet its burden of proof.

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[23] FirstEnergy Brief, pp. 29-33.

[24] 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.

[25] *Id.*

[26] See NOPEC/NOAC Brief, pp. 9-10.

For example, assuming that FirstEnergy were to receive a future Commission-approved increase in distribution rates equal to that from the 2007 Rate Case ($137,611,225, or approximately $238 million less than the $376 million assumption in this case), the proposed ESP 3 would be less favorable than a comparable MRO by not only just $7 million, *but by several hundred million dollars*. Thus, a more realistic analysis of this ESP 3 Proposal currently before the Commission shows that it costs consumers at least hundreds of millions of dollars more than a MRO.

iv. When compared to the amounts recovered by FirstEnergy through Rider DCR, the estimated results of a distribution rate case would not result in a "wash" for Ohio ratepayers.

As a backup argument, FirstEnergy claims that the amounts recovered through Rider DCR and the estimated results of a Commission-approved distribution rate case would be a "wash" over time,[27] so neither item is useful in the ESP vs. MRO analysis. In essence, FirstEnergy borrows the testimony of Commission Staff witness Fortney.[28] This argument is without merit and does not comport with Ohio law.

First, it is important to put this argument and Mr. Fortney's testimony in perspective. Mr. Fortney did not testify that Rider DCR and a distribution rate increase over the proposed two-year time period of the ESP 3 Proposal would result in a wash. Instead, he explained that "in general they would be a wash *over time*." (Emphasis added). As OCC correctly noted in its brief, the "ESP vs. MRO test is not an 'over the long run' analysis.'"[29] The ESP 3 Proposal is for a period of two years. That two year period (not some unidentified period of time in the future) is the only time frame to be analyzed for purposes of the statutory ESP vs. MRO analysis.

[27] FirstEnergy Brief, p. 29.

[28] *Id*.

[29] OCC Brief, p. 54.

Within this two year time frame, it is apparent that Rider DCR is not a "wash" when compared to the results of an expected distribution rate case. Further, the statutory ESP vs. MRO analysis nowhere provides for quantitative provisions to be removed from the calculation simply because they might constitute a "wash" at some point in the future. In reality, Rider DCR provides FirstEnergy with up to a $405 million distribution revenue windfall in 2015 and 2016 highlighting FirstEnergy's failure to satisfy the quantitative ESP vs. MRO analysis.

Second, and ignored by FirstEnergy, is the fact that a "distribution rate case would afford all parties and the PUCO an extensive period to review any rate increase request. . . the consideration of expert testimony, and the presentation of arguments by all affected persons to assure that the resulting distribution rates approved by the Commission are just and reasonable."[30] Mr. Fortney also explained that distribution rate cases are "what the Commission staff, especially the utility department of the Commission staff, does best."[31] Dumping distribution-related investments into Rider DCR defeats the traditional distribution rate case protections established under Ohio law that provide regulatory oversight over the propriety of FirstEnergy's distribution-related investments. These protections involve a formal investigation conducted by Staff resulting in a written Staff report, establishment of a date certain, and allowing the Commission to determine an appropriate rate of return on the permitted distribution investments.

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[30] *Id.*, p. 52.

[31] Tr. Vol. II, p. 265.

2. The alleged qualitative benefits associated with the ESP 3 Proposal are overstated, and cannot overcome FirstEnergy's failure to satisfy the quantitative ESP vs. MRO analysis.

There is little, if any, dispute that the ESP 3 Proposal fails a quantitative analysis of the MRO vs. ESP test.[32] As a result, FirstEnergy is left arguing that a series of amorphous qualitative (non-monetary) benefits overcome the substantial failure of the Companies to demonstrate that they have satisfied a quantitative ESP vs. MRO analysis. Such an argument must be rejected.

i. Any qualitative benefits of the ESP 3 Proposal are outweighed by the uncertainty in the energy market.

At the hearing, FirstEnergy elicited testimony from OCC witness Wilson confirming that "the one thing about the energy market that's certain is uncertainty."[33] FirstEnergy then argues in its Brief that a three-year auction product is the solution to this uncertainty.[34] But, a number of parties, including OCC and NOPEC/NOAC, counter with the argument that a shorter, one-year auction product provided a better hedge against the uncertainty in the energy market.[35] Adding to the difference of opinion, Commission Staff witness Fortney acknowledged that the middle ground (a two-year auction product) could offer the same benefits of rate stability and reduced uncertainty.[36]

Amidst such uncertainty, there is no right answer. The Commission Staff got it right: "Much ink will be spilled concerning the question of whether the use of single year products or multi-year laddering would result in overall lower prices. The debate is pointless. There is no

[32] See generally OCC Brief, AEP Retail Brief, NOPEC/NOAC Brief.

[33] FirstEnergy Brief, p. 37.

[34] *Id.* pp. 36-45.

[35] See OCC Brief, p. 17 (referencing OCC witness Wilson's testimony and explained that "[s]witching to a three-year auction product at this time creates risks that will result in expected risk premiums for market participants and which in turn raise costs that are paid by FirstEnergy's customers").

[36] Tr. Vol. II, p. 263.

objective answer."[37] As Mr. Fortney added: "It's always easy to be a Monday morning quarterback, and in three years. . . [s]omebody might be saying it, 'We screwed up.'"[38]

There is no demonstrable benefit associated with such uncertainty. For this reason, the move to a three-year auction product cannot be proven to be a benefit. It is just as likely to prove disadvantageous to consumers as advantageous.

ii. The minimal benefits of a distribution rate freeze are outweighed by the significant costs associated with Rider DCR.

FirstEnergy's Brief claims that the proposed distribution rate freeze through May 31, 2016 "serves to help stabilize the distribution portion of customer rates for another two years."[39] But, the distribution rate freeze is low-hanging fruit for FirstEnergy when examined in the context of Rider DCR. As AEP Retail points out in its brief, "[a]lthough 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."[40] OCC agreed, explaining "Customers will see an increase in collections through Rider DCR between ESP 2 and ESP 3 of $45 million. It is disingenuous for FirstEnergy to state the ESP 3 provides for a distribution rate freeze when the Stipulation provides for such a significant collection from customers for distribution-related investments."[41]

Moreover, FirstEnergy's Brief mischaracterizes the testimony of NOPEC/NOAC witness Mark Frye at the evidentiary hearing.[42] Although Mr. Frye acknowledged the existence of

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[37] Staff Brief at 5. It is important to note that the varying proposals do not pit a single year auction product versus a laddering approach. The issue is whether a one-year auction product or a three-year auction product within a laddering approach is more appropriate.

[38] Tr. Vol. II, p. 264.

[39] FirstEnergy Brief, p. 12.

[40] AEP Retail Brief, p. 13.

[41] OCC Brief, p. 64.

[42] See FirstEnergy Brief, p. 13.

certain positive aspects of Rider DCR at it exists in the stipulation from the ESP 2 Case, Mr. Frye's ultimate recommendation in this case called for the complete removal of Rider DCR from the ESP 3 Proposal. In fact, Mr. Frye concluded that "the Commission should 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."[43] FirstEnergy, however, chose selectively to ignore the substance of Mr. Frye's recommendation—that the Rider DCR should be removed from the ESP 3 Proposal and the Companies should be required to file for a formal distribution rate increase with the Commission if they believe it is warranted.

iii. The benefit of the PIPP discount is a wash.

The alleged benefits claimed by FirstEnergy for the PIPP discount are a wash. Although PIPP customers would receive a benefit of discounted generation supply at 6% off the price to compare, the intended beneficiary of this deal is FirstEnergy's generation affiliate, FES.[44] This "attempt to ensure the PIPP load stays within the affiliated family of FirstEnergy Corp. as part of the ESP filing is improper and violates the state policies found in R.C. 4928.02."[45] This PIPP load also could be bid out to the wide variety of competitive electric suppliers who are parties in this case, many of which would likely bid on it if offered the opportunity to do so.

iv. There are no benefits associated with either of FirstEnergy's justifications for pushing through an unnecessary ESP on an expedited time frame.

FirstEnergy's effort to push through an unnecessary ESP on an expedited time frame is based on a two-part charade that began with the April 13, 2012 filing of its ESP 3 Proposal and continues in FirstEnergy's post-hearing brief.

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

[44] See AEP Retail Brief, p. 8.

[45] AEP Retail Brief, p. 11. See also Initial Brief of the Retail Energy Supply Association, Direct Energy Services, LLC and Direct Energy Business, LLC, pp. 23-24.

When the ESP 3 Proposal was filed, it included a request for expedited Commission review and approval by May 2, 2012,[46] just 19 calendar days after the filing date. FirstEnergy initially claimed that the request for expedited approval was necessary to allow FirstEnergy 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").[47] Yet, this "justification" for expedited approval proved to be the first charade in this proceeding. It was not even mentioned in FirstEnergy's brief and has now disappeared as a reason for the rush to judgment.

FirstEnergy knew as of February 29, 2012 (and certainly earlier) that potential retirements in the ATSI zone could produce a significant increase in PJM capacity prices for the ATSI zone, and was ordered by the Commission to explore any additional resources it could bid into the PJM BRA.[48] In fact, the Sierra Club's brief emphasized that "FirstEnergy was aware of the PJM base residual auctions well before even applying to join PJM from MISO—a move that became final on June 1, 2011, nearly one full year before the 2015/2016 BRA."[49] The Sierra Club further explained that "FirstEnergy clearly knew the benefits of bidding into the 2015/2106 BRA and leveraged those benefits against the Commission's concerns of high capacity prices. . . as enticement for expediting a decision on their highly contested ESP."[50]

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

[47] See FirstEnergy Ex. 1 (ESP 3 application), pp. 2-3. See also AEP Retail Brief at 8. Recognizing the inherent flaws in FirstEnergy's request, the Attorney Examiner issued an Entry on April 19, 2012 establishing a procedural schedule calling for the evidentiary hearing to commence on May 21, 2012 (well after FirstEnergy's proposed date for expedited approval).

[48] Post-Hearing Brief of Enernoc, Inc., p. 4.

[49] Initial Brief of the Sierra Club ("Sierra Club Brief"), p. 7. The Sierra Club added that "FirstEnergy has participated in previous auctions and has personnel that monitor the auctions. The 2015/2016 BRA did not sneak up on FirstEnergy out of the blue."

[50] Sierra Club Brief, p. 9.

In reality, FirstEnergy sat on its hands until it "became apparent that the Signatory Parties were interested in the Companies' ability to offer energy efficiency resources into the 2015/2016 PJM BRA."[51] Although the "Companies eleventh hour efforts proved to be too little, too late," it is "bizarre that in a case that was supposedly filed in haste for maximizing benefits to customers related to that auction [the PJM BRA], the FirstEnergy utilities did not avail themselves (and their customers) of this fundamental opportunity for the very benefits that are the supposed benefits of the case"[52]—namely, the historically low generation prices.[53]

v. The ESP 3 Proposal violates the deal struck by the parties in the ESP 2 Case relating to a one-year bid product.

FirstEnergy then moved on to charade number two. FirstEnergy's focus in its Brief is now a second alleged justification for expedited Commission approval by "mid-July"[54]—to "allow the Companies to modify the competitive bidding process ('CBP') to allow for a three-year bid product in the October 2012 auction."[55] Lost in this request is the fact that FirstEnergy unilaterally seeks to change the bid product from a one-year to a three-year product despite the one-year bid product being a negotiated (and Commission-approved) term from the stipulation in the ESP 2 Case.[56] In essence, FirstEnergy seeks to unilaterally modify an existing Commission-approved stipulation without the written approval of <u>all</u> of the signatory parties thereto (including NOPEC and NOAC). Such disregard for a Commission-approved stipulation must be rejected.

FirstEnergy, NOPEC, NOAC and others signed the stipulation from the ESP 2 Case, and must be bound by the terms of this bargained for deal. FirstEnergy's unilateral attempt to redraw

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[51] Supplemental Testimony of William R. Ridmann ("FirstEnergy Ex. 4"), p. 2.

[52] OCC Brief, p. 41.

[53] FirstEnergy Brief, p. 2.

[54] *Id.*, p. 3.

[55] *Id*.

[56] Initial Stipulation. Case No. 10-388-EL-SSO (March 23, 2010), Attachment A.

the terms of the stipulation from the ESP 2 Case violates a fundamental legal principle—that a deal is a deal unless all the parties agree to change it.[57] From a policy perspective, it is equally important from the Commission to honor and enforce the terms of a stipulation it previously approved.[58]

vi. Even if the Commission does not enforce the deal from the stipulation in the ESP 2 Case, the change in length of the big product did not warrant an expedited proceeding in this case.

Sophisticated bidders (including FirstEnergy's generation affiliate) do not need to know whether they will be bidding on a one-year auction product or three-year auction product in mid-July 2012. If nothing changes, the product at issue for the October 23, 2012 auction[59] will remain a one-year product. To the extent the Commission approves something different, participating bidders (most of which are involved in this case) will assuredly receive notice and have the opportunity to plan for a three-year auction product. Even if this does not happen, potential bidders already are on notice that the bid product might change, and they can plan pricing schemes for both one-year and three-year products.

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 in NOPEC/NOAC's joint initial post-hearing brief, and for the reasons above, FirstEnergy's ESP 3 Proposal fails to satisfy the statutory legal test governing this

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[57] See e.g., *City Of Whitehall ex rel. Fennessy v. Bambi Motel*, 131 Ohio App.3d 734, 742 (10th Dist., 1998) (holding that "A party who has agreed to a stipulation cannot unilaterally retract or withdraw from it").

[58] It should also be noted that the Ohio Supreme Court recently reaffirmed that "[w]here the parties following negotiation make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides." *Martin Marietta Magnesia Specialties, L.L.C. v. PUCO*, 129 Ohio St. 3d 485, 490 (2011), citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, paragraph one of the syllabus. In this case, the contract equivalent (a stipulation) must be enforced according to its clear and unambiguous terms, not unilaterally changed by FirstEnergy.

[59] FirstEnergy Brief, p. 3.

proceeding. If an ESP is the desired result, however, the only solution is to increase the benefits provided to consumers so that the statutory ESP vs. MRO test can be satisfied. To do so, the Commission should adopt at least the following recommendations offered by NOPEC/NOAC:

(a) Eliminate the continuation of the DCR Rider after May 31, 2014, and require any distribution-related investments to be accounted for in a separately filed distribution rate case;

(b) Eliminate FirstEnergy's proposal to exclude income it receives from deferred charges from the SEET calculation applicable to FirstEnergy under Ohio law;

(c) Require FirstEnergy to bid all of its eligible demand response and energy efficiency resources into all future PJM capacity auctions; and

(d) Continue to hold the proposed energy auctions in October 2012 and January 2013 in accordance with the terms of the stipulation from the ESP 2 Case (the use of a one-year auction product covering the final year of the current ESP from June 1, 2013 through May 31, 2014), while modifying the ESP 3 Proposal to provide for a second auction product covering the two-year time period of the ESP 3 Proposal (June 1, 2014 through May 31, 2016).

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

Assuming *arguendo* that FirstEnergy's ESP 3 Proposal 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. The ESP 3 Stipulation, however, does not satisfy this reasonableness test.

1. Contrary to the arguments in FirstEnergy's Brief, the ESP 3 Stipulation was not the product of serious bargaining.[60]

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 compartmentalized negotiations with certain signatory parties to the stipulation in the ESP 2 Case that began, at

[60] *Id.*, pp. 46-49.

most, one month before the ESP 3 Proposal's filing.[61] As the OCC noted in its brief, the Commission (in particular Commissioner Roberto) previously recognized the "asymmetrical bargaining positions of the parties" in the ESP context."[62] As Commissioner Roberto explained in a concurring/dissenting opinion from the ESP 2 Case:

> I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.[63]

Importantly, Commissioner Roberto noted that "[i]n light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when a agreement arises within the context of other regulatory frameworks." These words ring especially true in this proceeding, and can lead to but one conclusion: FirstEnergy's ESP 3 Stipulation, and its rush to judgment, must be rejected.

i. There cannot be serious bargaining without representation from all customer classes.

NOPEC and NOAC have no problem with each party representing its own specific interests, and receiving certain benefits. But, as AEP Retail points out, the settlement process is "fully undermined where, as in the case here, the stipulation becomes a mere collection of earmarks for the narrow interests of a limited number of groups."[64] And, it is especially troublesome when "no customer receiving service through commercial or residential rate

[61] *Id.*, p. 46.

[62] OCC Brief, p. 9.

[63] *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. 10-388-EL-SSO, (Second Finding and Order, Opinion of Commissioner Cheryl Roberto Concurring in Part and Dissenting in Part dated March 25, 2009), pp. 1-2.

[64] AEP Retail Brief, p. 6.

schedules is a signatory to the [ESP 3] Stipulation, and even more tellingly, no entity that represents such customers in the customers' capacity as rate payers is a signatory to the Stipulation."[65]

"Without a signatory party that represents all residential customers, by far the largest number of the Companies' customers, the Stipulation fails to represent the interests of most of FirstEnergy's customers."[66] FirstEnergy's Brief misguidedly argues that the "City of Akron's support of the Stipulation qualified as support by a residential customer representative."[67] Nowhere, however, does FirstEnergy explain how the City of Akron represents residential customers. The only provision applicable to the City of Akron in the ESP 3 Stipulation involves the receipt of approximately $100,000 per year from FirstEnergy to implement certain energy efficiency projects.[68] The limited nature of the City of Akron's participation is confirmed in the Supplemental Brief filed by the City of Akron in the ESP 2 Case, which stated:

> the Stipulation strengthens the benefits contained in the Joint Stipulation because it brings 'two more parties on to promote energy efficiency to our customers and the contact base with which they have contacts with. The Supplemental Stipulation will also help FirstEnergy, through Akron, reach a clientele or group of residents that are harder for FirstEnergy to reach. Further, the Supplemental Stipulation will support Akron's 'genuine interest' in promoting energy efficiency in Akron.[69]

The City of Akron's interests are limited to energy efficiency project funding, not the electric rates of its residents. Assuming *arguendo* that the City of Akron could also represent residential customers in its city, it could only do so within the limited geography of its city limits within the Ohio Edison service territory. The City of Akron cannot be a genuine representative of the

[65] *Id.*, p. 4.

[66] OCC Brief, p. 13.

[67] FirstEnergy Brief, p. 48.

[68] See FirstEnergy Ex. 1 (ESP 3 Stipulation), p. 32, ¶ E.7.

[69] Supplemental Brief of the City of Akron, Case No. 10-388-EL-SSO, p. 3.

Companies nearly 2 million residential customers when the City's interests are both geographically and programmatically limited and, more importantly, intertwined with the City's largest employer, FirstEnergy.

For similar reasons, the brief filed on behalf of the Commission Staff is incorrect in arguing that the public at large is represented by the Ohio Partners for Affordable Energy, the Cleveland Housing Network, the Consumer Protection Association or the Empowerment Center of Greater Cleveland.[70] 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 focus 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."[71]

In reality, the ESP 3 Stipulation lacks any true representation of residential customers in the three FirstEnergy service territories whatsoever. 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.

ii. Settlement efforts in prior FirstEnergy SSO proceedings demonstrate the lack of serious bargaining in this case.

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

[70] Staff Brief, p. 4.

[71] AEP Retail Brief, p. 4.

Case—FirstEnergy chose not to conduct comprehensive settlement meetings with all interested parties in this case. Instead, FirstEnergy held individualized and compartmentalized negotiations with certain parties from the ESP 2 Case.

The parties to the ESP 2 Case and this proceeding, however, are not the same. In fact, 16 new parties filed for, and were granted intervention in, this proceeding. Those 16 parties (including AEP Retail, the Sierra Club, IGS Energy) were not parties to the ESP 2 Case, and were not invited to the bargaining table in this case. In fact, these 16 interested parties were "excluded from the negotiations"[72] because FirstEnergy only invited parties from the ESP 2 Case to the settlement table.

Further, the Commission's Opinion and Order from the ESP 2 Case described a markedly different bargaining process: "the negotiations held for the Combined Stipulation lasted months, beginning on December 1, 2009 and ending with the filing of the original stipulation on March 23, 2010. During this time, there were several settlement meetings, which were noticed to all parties."[73] In this case, the limited and compartmentalized negotiations lasted for, at most, a few weeks and involved no notice or group settlement meetings. In fact, as OCC explained in its brief, "[u]nlike other proceedings, the parties to the case did not meet together as a group even once before the filing of the Stipulation," thus providing "no opportunity for participants to hear the views of other parties and raise objections."[74]

FirstEnergy first telephoned NOPEC and NOAC about ten days prior to its filing the ESP 3 application and e-mailed to them ESP 3 with a redlined version of ESP 2. It was immediately apparent that the Company "double counted" the RTEP benefit to consumers in ESP 2. The

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[72] OCC Brief, p. 12.

[73] Case No. 10-388-EL-SSO (Opinion and Order dated August 25, 2010), pp. 21-22.

[74] OCC Brief, p. 11.

Stipulation as filed, still states that NOPEC and NOAC specifically agree to the RTEP as a benefit of ESP 3. This alone shows that there was no bargaining in good faith by the Company. The terms were set in hardened concrete.

NOPEC and NOAC in good faith signed on to ESP 2's second stipulation for a ladder auction arrangement. Their signatures were necessary for the stipulation in ESP 2 to meet the three prong test. The representatives of the two million Ohio families and small businesses ratepayers were e-mailed a document redlining out the remaining two one-year auctions required by ESP 2. They received a document demanding three year auctions that would include 2016 – a year where it is uncontested that ATSI capacity prices skyrocketed at great financial benefit to FirstEnergy Corp. FirstEnergy's position on negotiations: "Take it or leave it."

Neither NOPEC nor NOAC had an appropriate amount of time to review the proposal, conduct discovery, provide comments and requests for substantive changes, or otherwise seriously bargain with FirstEnergy. 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).

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. For the reasons stated in NOPEC/NOAC's joint initial post-hearing brief, the proposals in the ESP 3 Stipulation 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), and violates the state policies enumerated in R.C. 4928.02. The application of the statutory ESP vs. MRO test to 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. There is little doubt that the ESP 3 Proposal does not benefit residential ratepayers, especially considering the policies embedded in R.C. 4928.02, especially the requirement to ensure the availability of "reasonably priced retail electric service."[75]

3. The ESP 3 Proposal violates important regulatory principles and practices. does not, as a package, benefit ratepayers and the public interest.

i. FirstEnergy's "rush to judgment" in this case violates the statutory requirement that each ESP be adjudicated independently.

OCC accurately noted in its brief that the "General Assembly's ESP framework is for plans to be established for time periods."[76] 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 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).[77] 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. FirstEnergy's attempt to do otherwise runs contrary to Ohio law.

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[75] R.C. 4928.02(A).

[76] OCC Brief, p. 7.

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

ii. The SEET provisions in the Stipulation violate the Commission's regulatory precedent.

FirstEnergy's Brief contends that the provision in the ESP 3 Stipulation allowing for the exclusion of deferred carrying charges from the SEET calculation is permissible.[78] This is incorrect.

First, FirstEnergy makes the nonsensical argument that the exclusion is justified because the "identical exclusion has been in both of the previous ESP Stipulations agreed to for these Companies and has twice been accepted by the Commission in its approval of those Stipulations."[79] Two wrongs do not make a right. This type of exclusion from the SEET calculation runs directly contrary to the Commission's holding in Case No. 10-1261-EL-UNC (the "AEP SEET Case") that deferrals should not be excluded from an electric utility's earnings for the purposes of the SEET analysis.[80]

Rather than acknowledge this Commission precedent, FirstEnergy tries to distinguish the Commission's holding in the AEP SEET Case because (at least in this instance) it does not benefit FirstEnergy. Instead, FirstEnergy focuses on a generic SEET proceeding where the Commission stated that the "treatment of deferrals, for purposes of the SEET should be determined on a case-by-case basis."[81] But, FirstEnergy fails to import any reason why deferrals in this case should be treated any differently than they were in the AEP SEET Case. Adding to the lack of credibility in FirstEnergy's argument is the acknowledgment that the impact of

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[78] FirstEnergy Brief, p. 53.

[79] *Id*.

[80] *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), p. 31.

[81] See FirstEnergy Brief, p. 55, citing to *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC (Entry dated June 30, 2010), p. 16.

excluding the deferred carrying charges from the "SEET calculations is minimal."[82] If the impact on FirstEnergy is minimal, what is the harm in giving the benefit of the doubt to consumers, especially when doing so comports with past Commission precedent?

iii. 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.

As fully briefed by NOPEC/NOAC, OCC and AEP Retail, the Attorney Examiners unreasonably and unlawfully took administrative notice of piecemeal portions of the record from two entirely separate proceedings to allow FirstEnergy (with the assistance of Nucor) to try (albeit unsuccessfully) to satisfy its burden of proof.[83] In essence, the "ultimate act of trampling on the non-signatory parties due process rights occurred on the third day of the evidentiary hearing and the final day of the direct case, when to assist the Companies in meeting their burden of proof, the Attorney Examiners took administrative notice of large volumes of the record" from the MRO Case and ESP 2 Case.[84] Such a ruling must be rejected.

III. CONCLUSION

FirstEnergy has failed to prove that the ESP 3 Proposal satisfies either the statutory ESP vs. MRO test or the three-prong test for determining the reasonableness of a stipulation. For the reasons set forth above, and in our initial post-hearing brief, 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 jointly request that the Commission modify the ESP 3 Proposal as follows:

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[82] FirstEnergy Brief, p. 55.

[83] See NOPEC/NOAC Brief, pp 19-24; OCC Brief, pp. 77-87; AEP Retail Brief, pp. 17-20.

[84] OCC Brief, p. 72.

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

4. Continue to hold the proposed energy auctions in October 2012 and January 2013 in accordance with the terms of the stipulation from the ESP 2 Case (the use of a one-year auction product covering the final year of the current ESP from June 1, 2013 through May 31, 2014), while modifying the ESP 3 Proposal to provide for a second auction product covering the two-year time period of the ESP 3 Proposal (June 1, 2014 through May 31, 2016).

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 29th day of June 2012.

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