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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to 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

REPLY BRIEF OF NUCOR STEEL MARION, INC.

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Nucor Steel Marion, Inc. hereby submits its reply brief in the above-captioned proceeding, which is considering the application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively "FirstEnergy" or "Companies") for approval of an electric security plan.

I. INTRODUCTION AND EXECUTIVE SUMMARY

A review of the initial briefs filed in this case demonstrates that there is broad support for FirstEnergy's proposed ESP III, which in essence is a proposal to extend the current ESP ("ESP II")[1] for an additional two years. Although several parties raise legitimate concerns about the results of the recent 2015/2016 PJM capacity auction for the ATSI zone and the potential impact of those results on FirstEnergy's future standard service offer ("SSO") generation rates, those auctions are now in the past. Moreover,

[1] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order (August 25, 2010) ("ESP II Order") (approving, as modified, ESP II proposal).

there is no way to know at this point what the generation costs will be, since capacity costs are just one component (albeit an important component) of the generation product that suppliers bid to supply in the competitive bid process ("CBP"). Given this uncertainty, and given the generally successful CBP results generated under the current ESP II, it makes sense to leave the ESP II framework in place for an additional two years. This is why Nucor supports ESP III.

In our initial brief, we explained why we think the ESP III Stipulation meets the three criteria for Commission approval of settlement agreements, and in turn why we think the Commission should approve FirstEnergy's proposal. We further observed that the non-signatory parties leveled very few criticisms in their testimony against the current ESP II cost allocation and rate design, which in large part will be extended under ESP III. This trend held true for the most part in the initial briefs, although some of the briefs do touch on certain aspects of the proposed cost allocation and rate design. In this limited reply brief, we will focus on responding to some of the comments and arguments on these issues – specifically, those addressing FirstEnergy's interruptible rates, Riders ELR and OLR.[2]

Following is a summary of Nucor's main points and arguments:

- Riders ELR and OLR are just and reasonable, provide substantial benefits, and should be extended as part of ESP III. Rider ELR can be bid into the future PJM capacity auctions to lower capacity costs for customers. Rider ELR's

[2] In our initial brief, we responded to arguments against one of the few rate design changes proposed in the ESP III Stipulation, the ability for FirstEnergy to spread alternative resource costs under Rider AER over several years. Initial Brief in Support of ESP by Nucor Steel Marion, Inc. at 6-8. We continue to support the proposed modification to Rider AER. Since the initial briefs filed by other parties raise no new arguments on this issue that were not already addressed in our initial brief, we will not address Rider AER here, but refer the Commission back to our discussion of this topic in our initial brief.

economic interruption provisions allow suppliers to make lower generation bids in the competitive bid process, leading to lower generation costs. Rider ELR also provides significant reliability and economic development benefits.

  - EnerNOC's claim that Rider ELR is a "subsidized" rate is unsupported by any evidence in the record. On the contrary, the evidence shows that Rider ELR provides significant benefits that are not even fully reflected in the current ELR credit.

  - AEP Retail's claim that ELR customers are protected against actual interruption is false with respect to emergency interruptions under Rider ELR, and incomplete and potentially misleading with respect to economic interruptions. ELR customers are *required* to curtail their load when an emergency interruption is called. While ELR customers may buy-through economic interruptions, they would have to buy through at a much higher generation price than the SSO generation price.

- EnerNOC's proposal that only customers that signed an extension by May 3, 2012 should be allowed to remain on Rider ELR for the term of ESP III should be firmly rejected. The May 3 deadline was included in the Stipulation so that FirstEnergy could have the ELR customers committed in time to bid the ELR interruptible load into the May 7, 2012 PJM base residual auction ("BRA"), assuming the Commission approved the Stipulation in time. When it became clear that there would not be a decision on ESP III prior to the May BRA, the May 3 deadline became unnecessary, and FirstEnergy informed all parties in this case through their Supplemental Testimony that customers would not be required to commit to ELR by May 3, but would be asked to commit at some later date after the Commission ruled on ESP III. Nucor, and doubtless many other Rider ELR customers, relied on this assurance, and if EnerNOC's recommendation is accepted, these customers and the Rider ELR program would be irreparably harmed. Moreover, EnerNOC's complaints about the effect of Rider ELR in the 2016/17 and 2017/18 BRAs are both illogical and irrelevant.

- Issues with respect to the timing of the termination of FirstEnergy's ESPs and the PJM BRAs have made it problematic for FirstEnergy to bid Rider ELR interruptible load into the BRAs. Although the Commission need not resolve this issue in this ESP proceeding, the Commission should find an opportunity prior to the next PJM auction in 2013 to evaluate potential options to ensure that FirstEnergy will have a stable and reliable supply of interruptible load that it can bid into future BRAs.

- OCC's recommendations with respect to Riders ELR and OLR should be rejected. These riders are appropriately addressed in this ESP proceeding, not the energy efficiency/peak demand reduction portfolio proceeding, since they are rates. The costs of these riders are also appropriately allocated to all customer classes, since these rates provide benefits to all customers.

- Contrary to NOPEC and NOAC's claim, Nucor did not "spring" its request that administrative notice be taken of Nucor's testimony in Case No. 09-906-EL-SSO on the parties in this case. All parties were on notice that the signatory parties to the ESP III Stipulation requested incorporation of the full record from the ESP II case, and NOPEC and NOAC had ample opportunity to contest or rebut Nucor's evidence. Moreover, this same administrative notice issue was fully litigated in the ESP II case, with the Commission deciding in favor of administrative notice of the full record in Case No. 09-906-EL-SSO. As in the ESP II case, the Attorney Examiner's decision to take administrative notice of parts of the ESP II record in this case was well within the bounds of Ohio law.

II. ARGUMENT

The interruptible rates proposed in ESP III, Riders ELR and OLR, are just and reasonable and should be approved. These rates have been the topic of much discussion and debate in the proceedings over the past few years considering FirstEnergy's various SSO proposals but, in the end, the Commission approved inclusion of these rates in FirstEnergy's initial ESP, and approved them again in largely the same form in ESP II. In both of those cases, the Commission determined that the rates provide benefits and were reasonable, and since these rates are Commission approved rates, they continue to be presumed just and reasonable.[3]

No party offered any testimony in this case showing that Rider ELR is not a reasonable rate or should not be continued. Even in the briefs, no party (with the possible exception of EnerNOC, whose transparent attempt to cripple Rider ELR is

[3] *See* Office of Consumers' Counsel v. Pub. Util. Comm., 18 Ohio St.3d 264, 265 (1985).

addressed below) argued that ELR should be eliminated or discontinued. In short, there is no evidence in this case supporting a discontinuance or significant change to the current Rider ELR. By contrast, the evidence on the record supporting the extension of Rider ELR is plentiful.[4]

While no party in this case mounted a direct assault against Rider ELR, several parties took swipes at the rate, seemingly (in most cases) as part of a larger effort to sink the ESP III proposal, or to advance specific agendas. As discussed below, none of these attacks are persuasive in undermining the proposal to extend Rider ELR, or the ESP III proposal overall.

A. EnerNOC and AEP Retail Mischaracterize Rider ELR

Both EnerNOC and AEP Retail make inaccurate and unsupported statements about Rider ELR in their briefs. These statements show that EnerNOC and AEP Retail either do not fully understand Rider ELR, or they are purposely mischaracterizing the rate. Out of an abundance of caution, Nucor wishes to address these statements so that the Commission has full and correct information regarding Rider ELR.

1. EnerNOC mislabels Rider ELR as a "subsidized" tariff offering

In its brief, EnerNOC provocatively labels Rider ELR as a "subsidized" rate.[5] The problem is that EnerNOC points to no evidence demonstrating that Rider ELR is a

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[4] *See, e.g.*, Tr. Vol. I at 66 (ELR can be used to meet statutory peak demand reduction requirements); *id.* at 70 (wholesale suppliers take economic and reliability interruptions under ELR into account when structuring their bids); Tr. Vol. III at 99 (economic interruptions under ELR could lead to suppliers making lower generation bids, to the benefit of all SSO customers); *id.* at 100 (emergency interruptions under ELR provide a reliability benefit to all customers). *See also*, Direct Testimony of Dr. Dennis W. Goins on Behalf of Nucor Steel Marion, Inc. in Case No. 09-906-EL-SSO ("Goins MRO Testimony") at 11-32. Administrative notice of Dr. Goins' testimony was taken at the hearing in this proceeding. Tr. Vol. III at 19, 171.

[5] Post-Hearing Brief of EnerNOC, Inc. ("EnerNOC Brief") at 2

subsidized rate. This is because the evidence on the record supports exactly the opposite conclusion.

By making its subsidization claim, EnerNOC presumably is referring to the credit an ELR customer receives under ELR compared to what that customer would get paid if it bid its interruptibility into the PJM capacity market (either on its own behalf, or though a curtailment service provider ("CSP") such as EnerNOC). But PJM capacity is not equivalent to Rider ELR. While Rider ELR certainly can be (and has been) bid into the PJM capacity market, there are several other components to Rider ELR aside from the capacity component that provide additional value to the FirstEnergy system.

Specifically, under Rider ELR, FirstEnergy may call economic interruptions when market prices get high, and the customer has the option of curtailing its load or "buying-through" the interruption at the higher market price (as opposed to the lower SSO generation price).[6] Competitive suppliers bidding into FirstEnergy's generation auctions, knowing that they will not have to serve very large industrial interruptible customers at their bid prices when market prices get high, may submit lower bids than if the economic interruption option under ELR were not available, resulting in lower generation prices for all SSO customers.[7]

Further, under ELR, customers may be interrupted not only by PJM, but also by one of the Companies, or ATSI in the case of an emergency, providing an enhanced

[6] ESP III Stipulation (Company Ex. 1), Attachment B, Rider ELR , Section E.

[7] Tr. Vol. I at 70; Tr. Vol. III at 99.

reliability benefit as compared to PJM capacity.[8] Also, Rider ELR can definitely be used by FirstEnergy to meet its statutory peak demand reduction requirements,[9] while it is unclear whether or under what circumstances interruptible load that is bid into the PJM capacity markets either by the customer or through a CSP could be used for this purpose.

EnerNOC clearly ignores all these benefits when making its unsubstantiated claim that Rider ELR is a "subsidized" rate. Moreover, even when focusing only on the capacity value of Rider ELR, the evidence in the record is contrary to EnerNOC's claim that Rider ELR is a subsidized rate. As Nucor's witness Dr. Goins testified in Case No. 09-906-EL-SSO, in order to ensure a stable, long-term supply of interruptible load, the credit should reflect the long-run avoided cost of capacity, as opposed to the fluctuating short-term market price reflected in the capacity markets.[10] Using this measure, the current Rider ELR credit is undervalued.[11] However, even the short run value of capacity established in the May 2012 PJM base residual auction for the ATSI zone translates into a capacity value far in excess of the current ELR credit.[12] Finally, EnerNOC tried to make a very similar argument in the ESP II case, but its claims were rejected by the Commission.

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[8] Rider ELR, Section D.

[9] Tr. Vol. I at 66.

[10] Goins MRO Testimony at 31.

[11] *Id.* at 26-32.

[12] In the May BRA, capacity cleared at $357/MW/day. AEP Retail Ex. 1. This figure is equivalent to $10.86/kW/month, a figure considerably in excess of the current Rider ELR credit. (($357/MW/Day * 365 days)/12 months) = $10,858/MW/month or $10.86/kW/month.

2. AEP Retail's claim that ELR customers are protected against actual interruption of service is inaccurate

Although AEP Retail does not appear to have any real issue with Rider ELR on its merits, in its overall effort to disparage ESP III, AEP Retail attempts to paint Rider ELR as a give-away to large industrial customers. In this regard, AEP Retail states that ELR 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."[13] This statement is simply false with respect to emergency interruptions under ELR, and incomplete and potentially misleading with respect to economic interruptions.

First, under Rider ELR, a customer must curtail its load when an emergency interruption is called – the customer absolutely *may not* buy through an emergency interruption.[14] Likewise, if there are no emergency interruptions in a given year, ELR customers are required to curtail at least once every year for a PJM test.[15] In short, there are mandatory actual physical interruptions each year under Rider ELR. If an ELR customer does not curtail in response to an emergency interruption or the PJM test, FirstEnergy may simply cut the customer off.[16] It should be obvious that these mandatory interruptions would be disruptive for industrial customers.

Second, while it is true that an ELR customer has the option to buy-through when an economic interruption is called, AEP Retail does not tell the whole story. As

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[13] AEP Retail Energy Partners LLC's Initial Post-Hearing Brief at 2.

[14] Rider ELR, Section D.

[15] *Id.*

[16] *Id.*

discussed above, but as AEP Retail fails to mention, a customer that elects to buy-through an economic interruption has to purchase generation at a much higher rate than the SSO generation price – at least 1.5 times the SSO price under the terms of Rider ELR.[17] Therefore, buying through an economic interruption is not without potential detrimental economic consequences to an ELR customer. In fact, a customer who simply buys through every economic interruption would end up diminishing the economic benefit the customer gets from participating on Rider ELR.

Like EnerNOC, AEP Retail's attempt to paint Rider ELR as a subsidized gift to industrial customers collapses upon close inspection. By agreeing to participate on Rider ELR, customers take on serious responsibilities, and assume significant risks and costs in return for the credits they receive.

B. EnerNOC's Proposal That Only Customers That Renewed Their Commitment by May 3, 2012 May Stay on Rider ELR Must be Rejected

Out of nowhere, EnerNOC argues in its initial brief that customers that did not sign an ELR extension by May 3, 2012 should not be allowed to continue on Rider ELR for the term of the proposed ESP III. It is difficult to imagine that anyone would take this recommendation seriously, much less adopt this recommendation. It would be grossly unfair to the long-standing interruptible customers that relied on FirstEnergy's assurances that extensions, in fact, did not have to be signed by May 3 once it became clear that the Commission would not rule on the ESP III Application in time for FirstEnergy to bid Rider ELR interruptible load into the May capacity auction. Nevertheless, in an excess of caution, and since the consequences of the Commission

[17] *Id.*, Section E.

adopting EnerNOC's recommendation would be devastating to Nucor and many other Rider ELR customers, as well as negatively impacting the FirstEnergy system, we feel compelled to at least briefly rebut EnerNOC's arguments here.

1. Adopting EnerNOC's recommendation would punish Rider ELR customers, while rewarding EnerNOC for sandbagging

The ESP III Stipulation provided that customers wishing to continue on Rider ELR would need to sign an extension by no later than May 3, 2012.[18] However, it is obvious from the Stipulation that the reason for this May 3 deadline was so FirstEnergy would know it had the Rider ELR load committed in time to bid the load into the May 2012 PJM capacity auction, which took place on May 7, 2012, and that the extension commitment would not be required until after the Commission had ruled on ESP III.[19]

Once it became clear that the Commission would not rule on ESP III in time for FirstEnergy to bid Rider ELR into the May capacity auction, FirstEnergy made clear that it did not need Rider ELR customers to commit to the extension by the May 3 deadline. In his Supplemental Testimony, Mr. Ridmann explained that "[g]iven the procedural schedule set by the Commission in this case the notification by May 3, 2012 is no longer needed. The Companies will inform the relevant customers of the new required date for executing the addendums following the issuance of an Order in this case approving an extension of Rider ELR."[20]

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[18] ESP III Stipulation at 28-29.

[19] *Id.* at 28; 43.

[20] Supplemental Testimony of William Ridmann (Company Ex. 4) at 6.

This was an entirely reasonable thing to do. It would have been unreasonable to expect all Rider ELR customers to sign an extension by May 3, when such customers had no idea what the Commission's ultimate decision would be on the proposal to extend ELR. After all, testimony by non-signatory parties (the first real opportunity to know whether any parties would oppose or suggest major modifications to Rider ELR) was not even due until May 21, 2012.

Given this background, there are several reasons why EnerNOC's recommendation should be rejected. First, Nucor, and doubtless other current Rider ELR customers, did not sign the extension by May 3, in reliance on FirstEnergy's assurances that a new deadline after the issuance of an order in the ESP III proceeding would be established. Adopting EnerNOC's recommendation would unfairly punish these interruptible customers for making the entirely rational decision to wait until after an order is issued in this proceeding to sign an extension committing to Rider ELR for an additional two years.

Second, after the procedural schedule was established in this case and it became clear that FirstEnergy would not be able to bid the ELR load into the May capacity auction as originally intended, the May 3 deadline became an immaterial term of the Stipulation. The Stipulation, in fact, recognizes that, despite the request of the signatory parties, the Commission might not rule on the Stipulation by the requested May 2 date.[21] Implicit in the Stipulation, therefore, is the recognition that the deadlines tied to the bidding of interruptible load into the May capacity auction would become

[21] ESP III Stipulation at 6, 43.

immaterial and unnecessary if the Commission did not rule by the initial requested May 2 date.

Third, all parties were on notice of the change to the May 3 deadline once Mr. Ridmann's supplemental testimony was filed. No signatory party – *including EnerNOC who signed the Stipulation as a non-opposing party* – objected to Mr. Ridmann's testimony or withdrew from the Stipulation. EnerNOC had adequate time between the filing of Mr. Ridmann's supplemental testimony (filed on April 23, 2012) and the original May 3 deadline to raise any objections or concerns that it had with the elimination of the May 3 deadline. EnerNOC was also free to withdraw from the Stipulation, and put on its own evidence demonstrating why only customers who signed an extension by May 3 should be allowed to continue on Rider ELR, or opposing any aspect of Rider ELR or the proposed ESP III proposal, for that matter. By staying silent then, EnerNOC should be estopped or considered to have waived any claim regarding the elimination of the May 3 deadline now.

2. EnerNOC's claim that the Rider ELR extension will result in less interruptible load to bid into the 2016/17 and 2017/18 BRAs is irrelevant and nonsensical

In support of its eleventh-hour effort to effectively eliminate Rider ELR, EnerNOC states that permitting customers to continue on Rider ELR will have a negative impact on prices in the ATSI zone.[22] According to EnerNOC, this negative impact would result

[22] EnerNOC Brief at 8.

from reducing the amount of customers with interruptible load that may participate in future PJM BRAs on their own or through a CSP such as EnerNOC.[23]

EnerNOC cites no evidence to support this claim, because there is none. The claim is pure speculation on EnerNOC's part – and illogical speculation at that. The ESP III plan as proposed would run through May 2016, and under the terms of the proposed ELR, customers would be committed to that rider through May 2016. This ESP, in other words, has nothing to do with the 2016/17 and 2017/18 BRAs. Even assuming all of the current ELR customers elect to remain on ELR for the term of ESP III, there is nothing preventing EnerNOC or any other CSP from approaching these customers at any point about bidding their interruptible load into the 2016/17 and 2017/18 capacity auctions.

Moreover, even if the extension of Rider ELR through May 2016 has a detrimental impact on future PJM BRAs, as EnerNOC claims, this would be the case whether or not ELR customers signed an extension by May 3, 2012 or by some later date. Therefore, EnerNOC's argument does not support allowing some customers (those who signed an extension by May 3) to continue on Rider ELR, while kicking other customers (those who did not sign the extension by May 3) to the curb.

3. EnerNOC has not demonstrated any harm from the elimination of the May 3 deadline; in fact, on the contrary, it is the FirstEnergy system that would be harmed if it loses a substantial portion of its ELR load due to the EnerNOC argument

Obviously, EnerNOC's goal in raising these new arguments in its brief is to cause at least some current Rider ELR customers to become ineligible for the ELR extension so that EnerNOC may come in and try to serve those customers. But EnerNOC

[23] *Id.*

demonstrates no actual harm to EnerNOC that would result from the elimination of the May 3 deadline that it would not have also experienced if the deadline were not eliminated. In fact, EnerNOC ignores a significant benefit it has received from the elimination of this deadline. If the original deadline stood, many or most current ELR customers probably would have signed the extension, thereby taking these customers "off the market" for CSPs. Since the May 3 deadline has been eliminated and customers have not yet been given a new deadline to commit to Rider ELR, all of these customers remain up for grabs for CSPs today. EnerNOC, therefore, is free to try to sign these customers up for the time period beyond the end of the current ESP II, which terminates as of May 31, 2014.

While no harm to EnerNOC has been substantiated from elimination of the deadline, the harm to ELR customers and the FirstEnergy system from EnerNOC's proposal is obvious. The FirstEnergy system could lose a substantial portion of its ELR load, and all of the benefits brought by that load, if customers are precluded from committing to an ELR extension if ESP III is approved. As discussed above, interruptible load under ELR brings substantial benefits to the system and should be encouraged, not discouraged as advocated by EnerNOC.

4. In approving the ESP III Stipulation, the Commission should make it clear that current ELR customers did not have to sign a contract addendum by May 3, 2012 in order to qualify for the ELR extension

Nucor is a signatory to the ESP III Stipulation and requests that the Commission approve the Stipulation. In light of EnerNOC's arguments, however, we request that in approving the Stipulation, the Commission explicitly state that the May 3, 2012 deadline

for the execution of a contract addendum is an immaterial term in light of the procedural schedule in this case, and the fact that FirstEnergy could not bid Rider ELR load into the May 2012 PJM BRA as originally intended. We further request that, assuming the Rider ELR extension is approved, the Commission clarify in its order that eligible customers are free to sign a contract addendum and remain on Rider ELR during ESP III when FirstEnergy provides such an addendum at a later date.[24]

C. Issues Related to the Bidding of Interruptible Load into Future PJM BRAs Should be Addressed in a Separate Proceeding

Given FirstEnergy's original plan to bid Rider ELR load into the May 2012 BRA, FirstEnergy's decision not to bid interruptible load into the auction based on the procedural schedule that was established in this case, and the subsequent high capacity prices for the ATSI zone that resulted from the BRA, it is no surprise that some parties discussed issues related to the use of energy efficiency and interruptible load in the capacity auctions in their briefs.[25]

Nucor supports Rider ELR interruptible load being bid into the PJM capacity auctions, whether they are the BRAs or supplemental auctions. Bidding interruptible load into the capacity auctions has a dual benefit. First, it potentially lowers capacity prices since interruptible load would be bid in at a very low price, thereby displacing

[24] While arguing that the deadline extension for participation on Rider ELR is "not supported by the clear language of the Stipulation" (EnerNOC Brief at 8), EnerNOC cites no statute or case law requiring that a stipulation be approved as filed. In fact, the law is clear that a stipulation is a non-binding recommendation to the Commission, and that the Commission may make modifications as it sees fit. *See* Duff v. Pub. Util. Comm., 56 Ohio St.2d 367 (1978). The Commission routinely makes modifications to stipulations in SSO cases – ESP II is a case in point. *See* ESP II Order.

[25] *See, e.g.*, Initial Brief by the Sierra Club; EnerNOC Brief at 4-9.

other higher-priced capacity resources.[26] Lower capacity prices could translate into lower generation prices.[27] Second, revenues FirstEnergy receives from the auction for interruptible load are passed back through to customers to reduce the Rider DSE1 charge.[28]

Unfortunately, interruptible load was not bid into the 2015/2016 BRA, and, as noted above, subsequent BRAs (including the 2016/17 auction to be held next year) are beyond the scope of this proceeding. Nevertheless, we believe that the issue of how FirstEnergy's interruptible load (ELR load) may be used in future BRAs is an important issue that the Commission should address prior to the next auction.

At the hearing, Examiner Price observed that there is currently a "planning horizon problem" with bidding Rider ELR interruptible load into the BRA, since ELR has been slated to expire at the end of each three-year ESP, and each BRA is for a delivery year three years ahead.[29] Examiner Price suggested that a possible solution would be to extend the ELR termination date beyond the term of the ESP, so that FirstEnergy could continue to bid ELR into the BRAs without having to worry about the "ownership" concerns associated with the simultaneous termination of ELR and each ESP.[30]

Nucor agrees that ways of delinking Rider ELR from FirstEnergy's future ESPs and/or other options should be explored so that FirstEnergy will have a steady, long-term supply of interruptible load on hand to bid into the PJM BRAs on a regular basis.

[26] Tr. Vol. I at 283-286.

[27] *Id.* at 286.

[28] *Id.* at 286, 310.

[29] *Id.* at 310.

[30] *Id.* at 311.

Although this issue need not be resolved in this ESP case, we recommend that the Commission find the opportunity to consider and resolve this issue prior to the next auction.

D. OCC's Proposals With Respect to Riders ELR and OLR Should be Rejected

OCC is the only non-signatory party to submit testimony on Riders ELR and OLR. Importantly, OCC does not recommend that Riders ELR or OLR be rejected or significantly changed. Instead, OCC makes a recommendation about the proper forum to address these interruptible rates, and a second recommendation concerning how the costs of these rates should be allocated. The Commission should decline to adopt these recommendations.

1. Riders ELR and OLR should be approved in this proceeding

OCC argues that since Riders ELR and OLR would be used by the Companies to help meet their peak demand reduction requirements under Section 4928.66 of the Revised Code, the Companies' energy efficiency and peak demand reduction ("EE/PDR") portfolio proceeding would be a more appropriate venue to address these rates.[31] However, as discussed above, Rider ELR provides many more benefits in addition to helping FirstEnergy meet its statutory benchmarks. Moreover, unlike other EE/PDR programs, these riders are rates and therefore are appropriately considered and improved in a rate proceeding like this ESP proceeding.

Riders ELR and OLR should be considered and approved in this ESP proceeding, and not deferred until the EE/PDR portfolio proceeding. These riders were approved as

[31] Corrected Joint Initial Brief by the Office of the Ohio Consumers' Counsel and Citizen Power ("OCC Brief") at 38.

part of FirstEnergy's first ESP, and were approved again as part of ESP II.[32] Unlike the energy efficiency programs included in FirstEnergy's EE/PDR portfolio, Riders ELR and OLR are *rates* that have been approved under the statutory standard for rates as part of FirstEnergy's previous two rate plans. OCC points to no statute or regulation that requires that interruptible rates can only be considered (or even can or should be considered) in EE/PDR portfolio proceedings. And, in fact, other types of rates that provide or could potentially provide peak demand reduction benefits (such as FirstEnergy's time-of-use and critical peak pricing rates) have been approved in rate proceedings and not in portfolio proceedings.[33] Accordingly, Riders ELR and OLR should be approved in this ESP proceeding as proposed.

2. The allocation and recovery of ELR and OLR costs under Rider DSE1 is appropriate, as these rates provide benefits that span all customer classes

OCC's second argument with respect to Riders ELR and OLR is that the costs associated with these riders should be recovered from only the non-residential customer classes, not from all customer classes as is currently done through Rider DSE1.[34] However, at the hearing, OCC witness Mr. Gonzalez agreed that these interruptible rates provide benefits to all customers, not just non-residential customers. For example, Mr. Gonzalez agreed that having the economic interruption option under Rider ELR could cause suppliers to make lower bids in the generation auctions than they

[32] Tr. Vol. III at 98.

[33] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of an Experimental Critical Peak Pricing Rider, a Revised Generation Service Rider Which Includes a Time-of-Day Option, and an Experimental Real Time Pricing Rider,* Case No. 09-541-EL-ATA, Finding and Order (January 20, 2010).

[34] OCC Brief at 38-39.

otherwise would have made in the absence of the economic interruption option, thereby potentially lowering generation rates for all of FirstEnergy's SSO customers.[35] Similarly, Mr. Gonzalez agreed that if an ELR customer is interrupted in response to a system emergency, this provides a reliability benefit to all FirstEnergy customers, even those customers that take generation service from a competitive supplier instead of from FirstEnergy.[36] Of course, to the extent that FirstEnergy can bid interruptible load into the PJM BRAs or supplemental auctions, this would also provide a broad benefit by reducing capacity costs that are included in the generation rates of all customers.

OCC's point seems to be that since the costs of residential load control programs are currently borne only by residential customers, the costs of interruptible rates designed for large industrial customers should be treated the same way.[37] However, if OCC's contention is that residential programs provide the same broad-based benefits as Rider ELR, then it seems that OCC has its argument backwards – having acknowledged that Rider ELR provides benefits that are enjoyed by all customers, it would make far more sense for OCC to argue that the costs of the residential load control programs should be treated in the same way as the costs of ELR are treated, rather than the other way around.

Nucor does not know whether the residential Direct Load Control Thermostat Program that OCC references provides the same level of benefit to all customers as ELR does (for example, it does not appear that the residential load control program has an

[35] Tr. Vol. III at 99.

[36] *Id.* at 99-100.

[37] OCC Brief at 39.

economic interruption option like Rider ELR). Nevertheless, if OCC wishes to make the case that the Direct Load Control Thermostat Program or any other residential load control programs provide significant benefits to all customers and therefore should be allocated and recovered differently, OCC certainly could try to make that case in FirstEnergy's EE/PDR portfolio proceeding.

In summary, the evidence in this case demonstrates that Rider ELR and OLR interruptible load provides benefits to all customers, not just non-residential customers, and therefore the costs of these programs should continue to be recovered from all customer classes under Rider DSE1, consistent with previous FirstEnergy ESPs.

E. The Attorney Examiner Properly Took Administrative Notice of Certain Limited Portions of the Record from the ESP II Case, Including Nucor Witness Dr. Goins' Testimony

At the hearing, FirstEnergy reiterated the request first set forth in the Stipulation and its Application that the Attorney Examiner take administrative notice of the record in Case Nos. 10-388-EL-SSO, which includes the record from Case No. 09-906-EL-SSO (the MRO case).[38] In response to the request of Attorney Examiner, FirstEnergy and Nucor specified portions of the record in these cases for which they requested administrative notice.[39] In the case of Nucor, we requested that notice be taken of the direct testimony of Nucor's witness Dr. Dennis Goins in Case No. 09-906-EL-SSO.[40] Dr. Goins' testimony deals with cost allocation and rate design issues in general, and interruptible rates in particular. This testimony supports certain key parts of the rate

[38] Tr. Vol. I at 26.

[39] Tr. Vol. III at 10-20.

[40] *Id.* at 19.

design adopted in ESP II and proposed to be extended in ESP III (including Rider ELR), and therefore is directly relevant to this case.

In their initial brief, NOPEC and NOAC argue that taking administrative notice of these materials is "improper and in violation of Ohio law, and general principles of due process and fairness."[41] We are surprised at the fervor of NOPEC and NOAC's complaint about administrative notice being taken of this evidence, given that this exact same issue was litigated in the ESP II proceeding, and the Commission ruled in favor of taking administrative notice of the full record in Case No. 09-906-EL-SSO (over the initial objection of NOPEC and NOAC, among other parties).[42] We are even more surprised at NOPEC and NOAC's specific attack on administrative notice being taken of Nucor's evidence, given that: (i) NOPEC and NOAC did not raise an objection to administrative notice being taken of Nucor's evidence in their request for interlocutory appeal, filed on June 11, 2012[43] and subsequently denied;[44] and (ii) nothing in Dr. Goins' testimony is adverse to any positions NOPEC and NOAC have taken in this case, or even touches on issues NOPEC and NOAC have addressed in this case.

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[41] *Joint Initial Post-Hearing Brief of the Northeast Ohio Public Energy Council and the Northwest Ohio* Aggregation Coalition ("NOPEC/NOAC Brief") at 19.

[42] Case No. 10-388-EL-SSO, Entry on Rehearing (May 13, 2010).

[43] Case No. 12-1230-EL-SSO, Joint Consumer Advocates' Interlocutory Appeal from the June 6, 2012 Attorney Examiner's Ruling Regarding Administrative Notice.

[44] Case No. 12-1230-EL-SSO, Entry (June 21, 2012).

1. NOPEC and NOAC's claim that Nucor "sprung" its request for administrative notice on the parties is not supported by the record, and these parties had every opportunity to contest or rebut Nucor's evidence

NOPEC and NOAC complain that "Nucor sprung [its] request for administrative notice on the parties on the third day of the evidentiary hearing in this case, thereby denying all of the parties the opportunity to review such testimony and cross-examine the unavailable witness."[45] This statement borders on hyperbole – Nucor did not "spring" its request for administrative notice on anyone, and parties in this case had ample opportunity to review and rebut Nucor's evidence.

The request for incorporation of the record in the ESP III Stipulation is identical to the request contained in the ESP II Stipulation.[46] In that case, administrative notice was taken of the whole record in Case No. 09-906-EL-SSO, notwithstanding the fact that that case considered an MRO application instead of an ESP application. Several parties, including NOPEC and NOAC, objected to the incorporation of the record from the MRO case, and the issue was extensively argued, briefed, and ultimately decided by the Commission.[47] Then, the issue was raised again on rehearing after the Commission ruled on the ESP II proposal, and the Commission denied rehearing.[48] In short, the administrative notice issue was a major issue in the last ESP case that was litigated just

[45] NOPEC/NOAC Brief at 21.

[46] ESP III Stipulation at 44 ("The Signatory Parties request that the Commission take administrative notice of the evidentiary record established in Case No. 10-388-EL-SSO, and thereby incorporate by reference that record for purposes of and use in this proceeding."); ESP II Stipulation at 33 ("The Signatory Parties request that the Commission take administrative notice of the evidentiary record established in the MRO, Case No. 09-906-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding.").

[47] Case No. 10-388-EL-SSO, Entry on Rehearing (May 13, 2010).

[48] Case No. 10-388-EL-SSO, Third Entry on Rehearing at 5 (February 9, 2011).

two years ago. Any party to that case (especially NOPEC and NOAC, who were among the parties actively opposing administrative notice in the ESP II case) should have been aware that administrative notice of the ESP II record, which includes the MRO record, was likely to be taken in this case – *particularly since the Stipulation contained the exact same request for administrative notice as was contained in the ESP II Stipulation.*[49]

In the current ESP III case, Nucor relied in part upon the Commission's affirmative decision on incorporation of the record in the ESP II case and the fact that no party objected to the record incorporation request in the current ESP III case (which would have been expected if a non-signatory party had an objection, given that this was a contentious and high profile issue in the ESP II case) in making its determination not to file testimony in support of ESP III. Under the ESP III Stipulation, signed by Nucor, the Commission was requested to take administrative notice – in effect this request was on behalf of Nucor, as a signatory to the Stipulation, making it unnecessary for Nucor to submit its own separate request.

On the first day of the hearing, FirstEnergy noted that the request for administrative notice in the Stipulation had not been ruled on, and asked the Attorney Examiner to take administrative notice of the ESP II record.[50] Initially, no party opposed the request, but when the Attorney Examiner questioned whether the whole ESP II record needed to be incorporated, several parties objected – NOPEC and NOAC were

[49] It should be noted that NOPEC and NOAC eventually did become parties to the ESP II Stipulation, thereby agreeing to the administrative notice provision. ESP II Order at 7.

[50] Tr. Vol. I at 26.

not among the parties to object.[51] The Attorney Examiner directed FirstEnergy to provide a list of materials from the ESP II case that it wanted incorporated into the record, and stated that "administrative notice will be liberally taken."[52] Importantly, the Attorney Examiner never specifically denied FirstEnergy's request for administrative notice of the entire ESP II record.

On the third day of the hearing, FirstEnergy provided a limited list of materials from the ESP II and MRO cases that it asked the Attorney Examiner to take administrative notice of.[53] Since FirstEnergy's list did not include Dr. Goins' testimony, Nucor's attorney requested that the Attorney Examiner also take administrative notice of this testimony.[54] Later in the day, the Attorney Examiner granted both FirstEnergy's and Nucor's requests.[55]

If NOPEC and NOAC had a concern about the evidence contained in Dr. Goins' testimony, they had ample opportunity to address these concerns well prior to the hearing. First, NOPEC and NOAC could have immediately objected to the request for the incorporation of the ESP II record contained in the ESP III Stipulation, which was filed on April 13. Alternatively, it could have presented its own responsive evidence in the form of testimony. NOPEC and NOAC did none of these things, and even on the first day of the hearing, expressed no objection to the incorporation of the *entire ESP II record,*

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[51] *Id.* at 27-28.

[52] *Id.* at 29.

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

[54] *Id.* at 19. Unlike on the first day of the hearing, NOPEC and NOAC did object to the specific administrative notice requests of FirstEnergy and Nucor on the third day of the hearing. *Id.* at 15, 17, 19.

[55] *Id.* at 170-71.

even after the Attorney Examiner questioned the need for the incorporation of the entire record. NOPEC and NOAC should not be heard now to complain about lack of due process or fairness with respect to the incorporation of Nucor's evidence.

2. The Attorney Examiner's decision to take administrative notice of Nucor's evidence in this case is consistent with Ohio law

The Attorney Examiner's decision to take administrative notice of parts of the record in the ESP II proceeding was well within the bounds of Ohio law. As in the ESP II case, NOPEC and NOAC were not prejudiced in this case because all parties were on notice from the very day that the Stipulation was filed that the signatory parties were requesting that administrative notice be taken of the record in the ESP II case, and all parties had ample opportunity to respond to this evidence (NOPEC and NOAC could have responded to Nucor's evidence in either the ESP II or ESP III cases, but did not).[56] Further, incorporation of the ESP II record in no way lessens or eliminates FirstEnergy's burden of proof. NOPEC and NOAC's objections to the incorporation of Nucor's evidence, therefore, should be rejected.[57]

III. CONCLUSION

Nucor respectfully requests that the Commission approve FirstEnergy's ESP III Stipulation, including clarifying that customers did not have to sign an extension by May 3, 2012 in order to be eligible to participate on Rider ELR for the term of ESP III.

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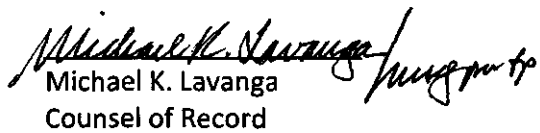
[56] *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1,8 (1995); *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 186 (1988).

[57] As noted in our initial brief, we believe that the evidence from the previous cases, including Dr. Goins' testimony, provides additional useful information and context for the Commission in evaluating the ESP III proposal. However, even without these additional portions of the record from the previous cases, we believe that there is sufficient evidence in this case to support approval of the ESP III proposal. We recommend that the Commission so find.

Respectfully submitted,



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