**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 R.C. § 4928.143 in the Form of an Electric Security Plan. | ) | Case No. 12-1230-EL-SSO |

# JOINT REPLY BRIEF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND CITIZEN POWER


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## I. INTRODUCTION

On June 22, 2012, the Office of the Ohio Consumers' Counsel ("OCC") and Citizen Power filed their Joint Initial Post-Hearing Brief ("Joint Brief") in the above-captioned matter pursuant to the Attorney Examiners established briefing schedule for this case, in order to protect the interests of all 1.9 million residential customers of FirstEnergy. Initial briefs were also filed by numerous other parties in this case.[1]

On June 26, 2012, OCC and Citizen Power filed a corrected Joint Initial Brief ("Joint Initial Brief").[2]

[1] Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy" or "Companies"), the Staff of the Public Utilities Commission of Ohio ("Commission" or "PUCO"), Interstate Gas Supply, Inc. ("IGS"), Material Sciences Corporation, Industrial Energy Users-Ohio ("IEU"), Exelon Generation Company, LLC ("Exelon"), Ohio Power Company ("OPCO"), Northeast Ohio Public Energy Council ("NOPEC") and Northwest Ohio Aggregation Coalition ("NOAC") (jointly filed), EnerNoc, Ohio Energy Group ("OEG"), Ohio Schools Council, Sierra Club, AEP Retail Energy Partners, LLC ("AEP Retail"), and Environmental Law and Policy Center ("ELPC").

[2] See Corrected Joint Initial Brief at 1, 3, 8, 16, 18, 19, 77, 86 and 87 (June 26, 2012).

OCC and Citizen Power jointly reply herein to the initial briefs of the other parties ("Joint Reply Brief"). The history of the case is incorporated herein as presented in the background section of OCC's and Citizen Power's Joint Initial Post-Hearing Brief.

## II. ARGUMENT

### A. The ESP 3 Fails To Provide Significant Benefits To Customers.

#### 1. FirstEnergy's proposed three-year auction product for achieving stable prices instead cloaks higher prices for customers.

Switching 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. "Future generation supply and prices for the American Transmission System Incorporated ("ATSI") zone must be considered highly uncertain at this time, due to the large amount of plant retirements, the numerous planned transmission upgrades, and the uncertain market reaction to provide new generation, demand response and energy efficiency capacity."[3]

The ATSI zone is constrained[4] and will have generally higher prices than the surrounding areas of the grid.[5] In their brief, the PUCO Staff indicates that they have considered the arguments of the opponents of the Stipulation and urge the Commission to do the same.[6] But it appears that the PUCO Staff could not have considered the concerns regarding the ATSI zone. Specifically, during cross-examination, a witness for the

[3] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 17.

[4] AEPR Hearing Ex. No. 1.

[5] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 17.

[6] Post-Hearing Brief of PUCO Staff at 1.

PUCO Staff indicated that he had only become aware of the constraints in the ATSI while attending the hearing on this matter.[7]

The proposal by FirstEnergy to include energy auctions for a three-year product under the current high uncertainties in the ATSI zone will result in extremely high energy prices which will be collected from FirstEnergy's customers. This proposal by FirstEnergy does not support that policy of the state to provide customers with reasonably priced electricity services.[8]

What the FirstEnergy utilities' proposal does support was described in the testimony of OCC witness James Wilson.[9] He testified that FirstEnergy Solutions ("FES") (the affiliate of the FirstEnergy utilities) stands to benefit from the higher auction clearing prices that will result from the uncertainties and risks that cause other bidders to raise their offer prices is undisputed.[10] Extending the auction to include 2015-2016 under the current circumstances substantially raises the risk suppliers must take on, which will raise the auction offer prices, clearing price and cost to consumers. FirstEnergy has not offered any evidence to dispute the fact that FES does NOT face the same degree of uncertainty and risk as its competitors because their portfolio of generation assets are within the ATSI zone. The three-year auction proposal appears to be a step to fully maximize the earnings of FES for providing energy to FirstEnergy's

[7] Hearing Trans. Vol. II at 254-255.

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

[9] OCC witness James Wilson has over 25 years of consulting experience, primarily in the electric power and natural gas industries. *See* OCC Hearing Ex. No. 9, Direct Testimony of James Wilson Att. JFW-1 (June 22, 2012).

[10] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 7-8 (June 22, 2012).

customers in the ATSI zone. And if the Commission approves the Stipulation, it will be to the detriment of FirstEnergy's customers and to electric competition in Ohio.

FirstEnergy relies on the testimony of Mr. Stoddard in an effort to rebut the concerns regarding the extraordinary uncertainty in the ATSI zone.[11] In regards to those concerns, OCC witness James Wilson testified that this past spring, PJM Interconnections, LLC ("PJM") scrambled to evaluate the potential reliability impacts of the requested retirements by FirstEnergy and to identify needed transmission upgrades to accommodate the retirements.

These impending retirements and the necessary transmission upgrades result in extraordinary uncertainty about energy, ancillary services and capacity supply conditions, and resulting prices, in the ATSI zone for the coming months and years.[12] The announced retirement of approximately 20% of the total quantity of capacity needed for reliability[13] is a factor driving uncertainty in the ATSI zone. Mr. Stoddard acknowledges that 20% of the capacity in the zone was announced for retirements, and cannot identify another time and place on earth when this occurred.[14] But Mr. Stoddard disagrees that this is driving uncertainty on the basis that the retirements are already announced, and no new capacity can be built within the timeframe of ESP 3.[15]

Mr. Stoddard is missing the point. Even if the loss of capacity is known, the ***impact*** of the retirements on prices in the ATSI zone is still to be seen.[16] That ***impact***

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[11] FirstEnergy Initial Brief at 40 (June 22, 2012).

[12] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 11 (May 21, 2012).

[13] Id. at 12.

[14] Cross-examination of Stoddard by Ms. Yost, Trans. Vol. IV at 124.

[15] FirstEnergy Initial Brief at 40 (June 22, 2012).

[16] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 5 (May 21, 2012).

(price of energy) is highly uncertain. And based on the results of the RPM base residual auction ("BRA") for the delivery year 2015/2016, which produced capacity prices almost three times higher than the previous capacity prices, that impact is expected to be extremely high energy prices.

In its attempt to convince the Commission that all is well in the ATSI zone, FirstEnergy relies on the testimony of Mr. Stoddard. This was not a good move for FirstEnergy. FirstEnergy states in their brief "Mr. Stoddard testified that Mr. Wilson's concerns regarding transmission upgrades are unwarranted" and cites to Mr. Stoddard's Rebuttal testimony (at page 13) for support.[17] But that is not what Mr. Stoddard said.

Mr. Stoddard does not state anywhere in his testimony that Mr. Wilson's concerns are unwarranted. Mr. Stoddard testified that "[w]ith regard to transmission upgrades, the PJM Board of Managers has approved a slate of transmission upgrades aimed at addressing reliability concerns related to plant deactivations throughout the PJM footprint. Many of these upgrades address ATSI zone reliability. The set of transmission upgrades and the expected timing is now well known to the market."[18] And in direct contradiction to FirstEnergy's argument, Mr. Stoddard testifies that there are substantial risks about future energy prices.[19] Such a statement supports the concerns expressed by OCC witness James Wilson about energy prices.[20] In any case, it is well known to participants in the Transmission Expansion Advisory Committee ("TEAC") and Regional Transmission and Expansion Planning ("RTEP") processes that the approved

[17] FirstEnergy Initial Brief at 41 (June 22, 2012).

[18] FirstEnergy Hearing Ex. No. 14, Rebuttal Testimony of Mr. Stoddard at 13 (June 7, 2012).

[19] Id. at 14.

[20] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 11 (May 21, 2012).

transmission upgrades are regularly reassessed and PJM may adjust which projects will be built, and when.[21]

Furthermore, Mr. Stoddard's testimony with regard to transmission upgrades,[22] upon which FirstEnergy relies, should be discounted by the Commission. Mr. Stoddard testified that he has never attended a Transmission Expansion Advisory Committee (TEAC) meeting.[23] He initially testified that the transmission upgrades had been vetted by the TEAC[24] prior to the April 6, 2012 posting.[25] He was wrong. He claimed the existence of a document he could not name.[26] He changed his testimony as to whether the transmission upgrades reflected in the RPM auction planning parameters had been vetted (first saying they had,[27] then later testifying that he had no personal knowledge that they were vetted by the TEAC),[28] and he also changed his testimony as to whether it would be imprudent for PJM to reflect upgrades that had not been vetted in the RPM auction planning parameters. (He first testified it would be imprudent,[29]and later changed his testimony and said that it was not imprudent in this case.).[30]

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[21] Cross-examination of Wilson by Mr. Dortch, Trans. Vol. II at 105 (June 5, 2012).

[22] FirstEnergy Initial Brief at 41-42 (June 22, 2012).

[23] Cross-examination of Stoddard by Ms. Yost, Trans. Vol. IV at 110 (June 8, 2012).

[24] Id. at 105.

[25] Id. at 104; *See also* FirstEnergy Hearing Ex. No. 14, Rebuttal Testimony of Mr. Stoddard at 10 (June 7, 2012).

[26] Id. at 106 110, 113, 115-116.

[27] Id. at 105; *See also* FirstEnergy Hearing Ex. No. 14, Rebuttal Testimony of Mr. Stoddard at 10 (June 7, 2012).

[28] Id. at 116-117.

[29] Id. at 103; *See also* FirstEnergy Hearing Ex. No. 14, Rebuttal Testimony of Mr. Stoddard at 10 (June 7, 2012).

[30] Id. at 117.

Another bad move by FirstEnergy was to allege in its brief that Mr. Stoddard's testimony regarding transmission upgrades "was corroborated by a PJM Staff Whitepaper, entitled, 'Transmission Expansion Advisory Committee (TEAC) Recommendations to the PJM Board,' dated May 2012.'"[31] That PJM Staff Whitepaper exposes Mr. Stoddard's lack of knowledge regarding the transmission upgrades and corroborates OCC witness Wilson's testimony regarding the extraordinary uncertainty in the ATSI zone.

PJM has determined that the transmission upgrades needed for the ATSI zone (because of the announced generation retirements) cannot be put in place in time to accommodate some of the requested deactivation dates.[32] OCC witness James Wilson testified that when PJM reviews a request for deactivation and has concerns regarding reliability issues, as a last resort, PJM may request that the unit remain on and designate it as a "Reliability Must Run" (RMR). [33] Mr. Stoddard testified that "[t]he unit may choose not to do so, in which case PJM can't force it to operate."[34]

But upon cross-examination, Mr. Stoddard admitted that he was not aware that PJM was pursuing Reliability Must Run (RMR) agreements.[35] Apparently Mr. Stoddard never read the PJM Staff Whitepaper before he testified in this proceeding. Had he read the PJM Staff Whitepaper, or even just the "Executive Summary" on the first page, he would have been aware that PJM Staff has concluded that "[b]ased on the expected in-

[31] FirstEnergy Initial Brief at 41 referring to FirstEnergy Hearing Ex. No. 8 ("PJM Staff Whitepaper") (June 22, 2012).

[32] FirstEnergy Hearing Ex. No. 8 at page 1; PUCO Staff Hearing Ex. No. 1.

[33] Cross-examination of James Wilson by Mr. Kutik, Trans. Vol. II at 122 (June 5, 2012).

[34] Cross-examination of Stoddard by Ms. Yost, Trans. Vol. IV at 120-121 (June 8, 2012).

[35] Id. at 120-123.

service date of some of the transmission upgrades included in this [PJM Staff Whitepaper], RMR agreements are being pursued."[36] One would think that such information would be vital to the analysis of an expert who testified that OCC witness "Mr. Wilson greatly overstates the degree of uncertainty in the PJM markets during the Company's proposed ESP 3 period."[37]

One thing is certain—the necessary transmission upgrades to maintain reliability in the ATSI zone will not be in-service in time to accommodate all of the intended deactivation dates.[38] Although FirstEnergy's rebuttal witness did not know that PJM was seeking RMR agreements,[39] OCC witness James Wilson knew[40] and FirstEnergy knew.[41] And PJM has identified 5 units owned by FirstEnergy Solutions (Ashtabula 5, Eastlake 1; Eastlake 2; Eastlake 3, and Lake Shore 18) as RMR units for 2013.[42]

FirstEnergy's assertion that "Mr. Stoddard's testimony on these points was corroborated by a PJM Staff Whitepaper …"[43] makes one question whether FirstEnergy read all of the PJM Staff Whitepaper. The "points" from Mr. Stoddard's testimony regard the reliability concerns in the ATSI zone being addressed by "[t]he set of transmission upgrades and the expected timing is now well known to the market."[44] But Mr. Stoddard and FirstEnergy are both wrong.

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[36] FirstEnergy Hearing Ex. No. 8 at page 1.

[37] FirstEnergy Hearing Ex. No. 14, Rebuttal Testimony of Mr. Stoddard at 3 (June 7, 2012).

[38] FirstEnergy Hearing Ex. No. 8 at page 1 and PUCO Staff Hearing Ex. No. 1.

[39] Cross-examination of Stoddard by Ms. Yost, Trans. Vol. IV at 122 (June 8, 2012).

[40] Cross-examination of James Wilson by Mr. Kutik, Trans. Vol. II at 122 (June 5, 2012).

[41] PUCO Staff Hearing Ex. No. 1.

[42] *Id.*

[43] FirstEnergy Initial Brief at 41 (June 22, 2012).

[44] FirstEnergy Initial Brief at 41 (June 22, 2012); FirstEnergy Hearing Ex. No. 14, Rebuttal Testimony of Mr. Stoddard at 13 (June 7, 2012).

The PJM Staff Whitepaper indicates that the actual transmission upgrades and their in-service dates are not known. Specifically, the PJM Whitepaper states that "[a]lthough upgrades will be required to address reliability violations for these deactivations, based on initial analysis the number and scope of upgrades required for these deactivations is expected to be less than those described in this report."[45] This is consistent with OCC witness Wilson's testimony that it is not clear whether all of the transmission upgrades will ultimately be constructed and put in service.[46] And as discussed above, PJM is pursing RMR agreements,[47] including RMR agreements for 5 units owned by FES.[48] FirstEnergy's own witness, Mr. Stoddard, testified that RMR agreements are sought when there is "a transmission construction delay."[49]

No one disputed OCC witness Wilson's testimony that risks that are three or more years in the future are difficult to hedge.[50] And as hedging becomes more difficult, suppliers include larger risk premiums in their bids or decline to participate in the auctions.[51] Larger risk premiums mean higher rates for customers.[52] And customers should not be forced to pay higher rates so that "[t]he limited amount of three-year procurement proposed by the Companies in this proceeding will have the effect of mitigating rate impacts that may be caused by energy and capacity prices in the last year of the proposed ESP 3 period, by blending these later-year prices in with prices for the

[45] FirstEnergy Hearing Ex. No. 8 at page 12.

[46] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 5, 17 (May 21, 2012).

[47] FirstEnergy Hearing Ex. No. 8 at page 1.

[48] PUCO Staff Hearing Ex. No. 1.

[49] Cross-examination of Stoddard by Ms. Yost, Trans. Vol. IV at 121 (June 8, 2012).

[50] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 23 (May 21, 2012).

[51] Id.

[52] Id.

earlier part of the proposed ESP 3 period."[53] If FirstEnergy's customers want price stability, then they can shop and enter into a long-term contract with a competitive retail electric provider.[54]

FirstEnergy and witness Stoddard suggest that if a three-year product is not used in the upcoming auctions, it simply shifts risk from suppliers to consumers, and the three-year product can be understood as providing "insurance" against future price increases. There is no dispute that forward prices for 2015-2016 could rise or fall in the years following the upcoming auctions.

However, it is not correct that this is simply an issue of risk allocation. Auctioning a three-year product creates additional risks and additional risk premium that does not exist if the product is shorter-term, due to the increased uncertainty three years out, and greater difficulty hedging that far out. That's a cost that simply goes away if a shorter-term product is used. Accordingly, going to a three-year product, under these circumstances, does not benefit FirstEnergy's customers who will have to pay for the higher risk premiums in rates for their electric service.

### 2. The Companies mischaracterize the existence of stable distribution rates.

The Companies continue to mischaracterize the ESP 3 proposal as "includ[ing] a distribution base rate-freeze through May 31, 2016 * * *. This provision serves to help stabilize the distribution portion of customer rates for another two years, by continuing

[53] FirstEnergy Hearing Ex. No. 14 at 19.

[54] *See* PUCO website regarding offers from competitive retail electric suppliers. (Administrative notice taken of the Commission's "Apples to Apples" comparison at Transcript Vol. II at pages 170-171.)

the distribution rate freeze instituted by the current ESP."[55] However, in the very next paragraph of the Companies Initial Brief, they praise Rider DCR.

The Rider DCR provision is a significant provision of the ESP 3 because it allows the Companies to collect from customers up to $405 million in distribution investment costs over the two-year term of the ESP 3, with a large proportion of those increases being collected from residential customers.[56] Considering the large potential cost recovery through Rider DCR, it is difficult to comprehend the Companies expressing that: "the ESP 3's distribution provisions provide additional certainty and stability to customer rates."[57]

While the cost recovery may not be through existing distribution rates; Rider DCR is; however, used for the collection of "related taxes and a return on and of plant in service associated with distribution, subtransmission, general and intangible plant."[58] This is not unlike the Companies' cost collection through existing distribution rates. Therefore, it is disingenuous for the Companies to represent to the Commission that the Stipulation freezes distribution rates, when it also allows the Companies to collect from customers up to $405 million for investments in the Companies' distribution infrastructure during the term of the ESP 3.

Given a choice between a distribution rate case and the quarterly reconciled and annually capped and audited Rider DCR, the OCC and Citizen Power would prefer a rate

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[55] FirstEnergy Initial Brief at 12 (June 22, 2012).

[56] See OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 9 (May 21, 2012). See also OCC Hearing Ex. No. 4 (Through March 2012, 43.4 % of actual DCR revenues have been collected from residential customers.).

[57] FirstEnergy Initial Brief at 12 (June 22, 2012).

[58] Id.

case. The Companies attempt to selectively use the record to twist OCC witness Gonzalez' position by quoting in their Initial Brief the following excerpt from the transcript: "[i]ndeed OCC Witness Wilson Gonzalez testified that Rider DCR contains features that would not be available under a rate case, including quarterly reconciliations, annual audits and caps."[59] Mr. Gonzalez never stated that the features of the Rider DCR were superior to a rate case. In fact, Mr. Gonzalez' position, as stated in his direct testimony, is just the opposite, "the Stipulation is less beneficial to customers (i.e., more costly to customers) than if the Companies sought to increase rates through a fully litigated distribution rate case."[60]

As OCC witness Gonzalez points out in his direct testimony, a distribution rate case would afford all parties and the PUCO an extensive period to review any rate increase request, including inquiries in discovery, the consideration of expert testimony, and the presentation of argument by all affected persons to assure that the resulting distribution rates approved by the Commission are just and reasonable.[61] Also, a prudence review exists under a rate case, but not a DCR audit.[62]

The rate case process served FirstEnergy's customers well in the last FirstEnergy distribution rate case filed in 2007. In the past, such a deliberative process has most often led to an eventual reduction of the Companies' original rate increase request. The distribution rate case filed in 2007 -- the first in a decade for each FirstEnergy EDU – contained a request for $340 million in annual rate increases. However, the Commission

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[59] Id.

[60] OCC Hearing Ex. No. 11 , Direct Testimony of Wilson Gonzalez at 22 (May 21, 2012).

[61] R.C. 4909.15.

[62] Tr. Vol. III at 151-152 (Gonzalez) (June 6, 2012).

awarded the Companies just $137 million in annual rate increases,[63] and even that increase included amounts not normally awarded in rate cases according to standard regulatory principles and practices.[64]

The record also reflects the PUCO Staff's favorable position on rate cases. On cross-examination, Mr. Fortney stated: "I like rate cases. I believe that that's what the Commission staff, especially the utility department of the Commission staff, does best."[65] The features of Rider DCR received no such endorsement from Mr. Fortney, or discussion in the Staff's Initial Brief.

The Commission should reject the Stipulation or modify it so that the Companies may seek distribution rate increases under the applicable law rather than rely on the Rider DCR for recovery of distribution-related investments.

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[63] *In re FirstEnergy 2007 Distribution Rate Case*, Case No. 07-551-EL-AIR, Order at 48, paragraph (23) (January 21, 2009).

[64] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 22-23 (May 21, 2012) citing.

The Order in *In re FirstEnergy RCP Case*, Case No. 05-1125-EL-ATA, at 9 (January 4, 2006) stated:

> [W]e find that *exigent circumstances exist* to deviate in a controlled way from the above stated public utility regulatory principles. * * * We are mindful that such deferrals must be scrutinized to assure that the costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of the Companies, and in excess of expense amounts already included in the rate structures of each of the Companies. We will approve the deferral concept in this case premised upon the understanding that the expenses related to infrastructure improvement and the increased expenses for maintenance of infrastructure and reliability will yield necessary improvements that otherwise would have been realized, for company financial reasons, over a much longer period of time.

(Emphasis added.) This 2006 Order resulted in the increased distribution rates above those that would have otherwise been approved in the 2007 distribution rate case. *In re FirstEnergy 2007 Distribution Rate Case*, Case No. 07-551-EL-AIR, Order, at 11 (January 21, 2009). No claim of "exigent circumstances" has been made that would provide similar increases in a newly filed rate case.

[65] Tr. Vol. II at 265 (Fortney) (June 5, 2012).

### 3. The Companies cannot count the foregone collection of the Regional Transmission Expansion and Planning Costs agreed to in the ESP 2 case as a benefit of the ESP 3 case.

The Companies admit in their Initial Brief that they "continue their commitment not to seek cost recovery from retail customers for Midwest ISO ("MISO") exit fees and PJM Interconnections, LLC ("PJM") integration costs."[66] The Companies have reaffirmed a commitment they made in the ESP 2 Case (Case No. 10-388-EL-SSO). No more, no less. In fact, FirstEnergy has confirmed that if the Commission rejected the Companies' ESP 3 proposal, FirstEnergy would not change the terms of the ESP 2 Stipulation.[67]

Nevertheless, the Companies continue to argue that the foregone collection of Regional Transmission Expansion and Planning ("RTEP") costs is a benefit of the ESP 3. The Companies stated: "[t]his provision benefits customers by providing certainty to customers that they will not have to pay $360 million in Legacy RTEP Costs imposed by FERC/RTO in accord with the Stipulation's provision."[68] Inasmuch as the Companies' obligation under the ESP 2 Stipulation is not contingent upon approval of the ESP 3 proposal, it is an incorrect characterization for the Companies to treat this as a benefit of the ESP 3 Stipulation.

The Companies argue that $39 million of the foregone RTEP cost collection be considered a benefit of the proposed ESP 3.[69] The Companies' argument is illogical for a

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[66] FirstEnergy Initial Brief at 13 (June 22, 2012).

[67] NOPEC and NOAC Joint Hearing Ex. No. 1, Direct Testimony of Mark Frye at 5 (May 21, 2012) citing MRF-1 (FirstEnergy's response to NOPEC Set 1 INT-11) (June 22, 2012).

[68] FirstEnergy Initial Brief at 14 (June 22, 2012).

[69] Id. at 28 (June 22, 2012).

couple of reasons. First between June 1, 2011 and March, 2012, the Companies have only been charged $6.1 million for RTEP Legacy Costs.[70] Furthermore, FirstEnergy witness Ridmann admitted on cross-examination that FirstEnergy does not expect to be charged the entire $360 million prior to the expiration of the ESP 3 term.

> Q. Okay. I guess my question for the five-year period of the ESP II and ESP III, in that period that will terminate in May 31, 2016, do the companies anticipate they will have been billed a total of $360 million in RTEP costs by that time?
>
> A. I think it's pretty clear from my attachment 1 where the RTEP estimate goes out past May of '16, that we would not collect or not forego all the 360 million by the time ESP III is concluded.[71]

The Companies' witness thus admitted that the RTEP benefit itself has been overstated in that customers will not receive the full $360 million benefit touted by the Companies.[72] Therefore, the Commission should reject any attempt by the Companies to include even a portion of the RTEP cost collection forgiveness as a benefit of the ESP 3 Case.

#### 4. Economic development funding represents transfer payments, not benefits to customers.

The Companies in their initial brief argue that continuing to provide economic development funding provides benefits to FirstEnergy customers.[73] Taking it a step further, the Companies' argument is: "[t]he statutory criteria for electric security plans

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[70] OCC Hearing Ex. No. 7. (The fact that $6.1 million has only been charged to FirstEnergy through March 2012 should call into question the actual benefit the forgiveness of the collection RTEP legacy costs was in the evaluation of the ESP versus the MRO in ESP 2).

[71] Tr. Vol. I at 229-230 (Ridmann) (June 4, 2012).

[72] See also FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at Attachment WRR-1 (April 13, 2012).

[73] FirstEnergy Initial Brief at 18 (June 22, 2012); see also FirstEnergy Hearing Ex. No. 1. Stipulation at 34-37 (April 13, 2012).

authorize and anticipate that such plans will include provisions for economic development."[74] The economic development provisions contain funding amounts the Companies will give to other parties for signing the Stipulation,[75] as well as, non-bypassable discounts that are collected from customers under Rider EDR.[76]

However, to authorize the Companies to include economic development funding in their ESP proposal does not mean that the proposal is a benefit to customers. Although Mr. Ridmann's quantitative analysis included the economic development funding,[77] OCC Witness Gonzalez explained in his direct testimony why these provisions should be excluded from Mr. Ridmann's quantitative analysis of the Companies' ESP 3. Mr. Gonzalez stated:

> They are gross benefits in that these payments are merely transfer payments made at the expense of other customers who are required to pay either through delta revenue collection or through collection from the DSE rider.[78]

Because the cost of the benefits provided to the Cleveland Clinic and to the Domestic Automakers are ultimately recovered from other customers, the economic development provisions should not be considered a benefit of the ESP 3 proposal , but instead are better characterized as transfer payments.

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[74] FirstEnergy Initial Brief at 18 (June 22, 2012).

[75] FirstEnergy Hearing Exhibit No. 1, Stipulation and Recommendation at 34 (Cleveland Clinic).

[76] Id. at 37.

[77] See also FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at Attachment WRR-1 (April 13, 2012).

[78] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 33 (May 21, 2012).

### B. The ESP 3 Is Not More Favorable In The Aggregate For Customers Than The Expected Results From An MRO.

The challenge for the Companies is to demonstrate that the ESP 3 proposal is more favorable in the aggregate than an MRO. The law requires the Companies to meet that burden. R.C. 4928.143 (C)(1) states:

> The burden of proof in the proceeding shall be on the electric distribution utility. * * *, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.

The Companies put forth quantitative and qualitative factors that allegedly demonstrate how FirstEnergy's proposed ESP 3 passes the statutory test.[79] However, the major quantitative factor – RTEP cost collection forgiveness – is a double-count and not appropriate for consideration in this case because it was an obligation the Companies agreed to in the ESP 2 Case. The other quantitative and qualitative factors were demonstrated to be illusory or not a benefit for consumers.[80] Therefore, the ESP 3 cannot be shown in the aggregate to be more favorable than an MRO, and the Commission should reject or modify the Stipulation in this case, in accordance with Ohio law.

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[79] FirstEnergy Initial Brief at 23-27 and 34-45 (June 22, 2012).

[80] See Joint Initial Brief at 48-65 (June 22, 2012).

### 1. The quantitative benefits for customers are not more favorable than a MRO.

#### a. Foregoing RTEP cost recovery is not a benefit of the ESP 3 proposal.

As argued *supra*, inasmuch as the Companies' obligation under the ESP 2 Stipulation is not contingent upon approval of the ESP 3 proposal, it is an incorrect characterization for the Companies to treat this as a benefit of the ESP 3 Stipulation. The attempt to recycle the same benefit from the ESP 2 Case to the ESP 3 Case should be viewed as a desperate measure by the Companies to find value where there is none in order to speciously improve the outcome of the quantitative test.

#### b. The Rider DCR does not meet the statutory requirements and is not a benefit of the ESP 3 proposal for customers.

The Companies take extensive liberties with the Rider DCR in their quantitative analysis. The Companies want the Commission to include the Rider DCR in the ESP versus MRO comparison either through recognition of regulatory lag, or by considering Rider DCR a wash with hypothetical distribution rate cases.[81] Neither treatment serves the Companies goal of establishing their ESP proposal to be more favorable in the aggregate than an MRO.

If Rider DCR is compared to the outcome of two hypothetical rate cases during the ESP 3 term recognizing the impacts of regulatory lag, then the MRO is more favorable than the ESP by $29 million according to FirstEnergy's own witness.[82]

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[81] FirstEnergy Initial Brief at 29 (June 22, 2012).

[82] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at Attachment WRR-1 (April 13, 2012).

The argument that the Rider DCR and distribution rate relief are a wash during the term of the ESP 3 for purposes of the ESP versus MRO comparison causes other problems. The Companies in making this argument are relying on the AEP-Ohio ESP Case, Case No. 11-346-EL-SSO.[83] But the Commission rejected the AEP-Ohio ESP Stipulation in a subsequent Entry on Rehearing.[84] That case is currently pending once again before the Commission. The Companies reliance on the AEP-Ohio ESP Stipulation in thus misguided.

Furthermore, it is unrealistic to believe that if the Companies did not collect the $405 million through the Rider DCR, then they would file distribution rate cases and recover those same costs.[85] As noted above, in the last FirstEnergy rate case the Companies requested $340 million in annual rate increases for more than a decades worth of distribution-related investments by FirstEnergy.[86] The Commission; however, reduced the amount to $137 million in annual rate increases,[87] and even that increase included amounts not normally awarded in rate cases according to standard regulatory principles

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[83] FirstEnergy Initial Brief at 30 (June 22, 2012).

[84] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan ("AEP ESP Case"),* Case No. 11-346-EL-SSO, et al, Entry on Rehearing at 11 (February 23, 2012).

[85] FirstEnergy Initial Brief at 26 (June 22, 2012) citing Fortney Testimony at 4-5.

[86] Ohio Schools Council Initial Brief at 6 (June 22, 2012).

[87] *In re FirstEnergy 2007 Distribution Rate Case*, Case No. 07-551-EL-AIR, Order at 48, paragraph (23) (January 21, 2009).

and practices.[88] Therefore, the Companies argument that they would recover of a like amount of DCR distribution-related investments (e.g. $405 million) through traditional rate case treatment does not pass muster.

The Companies challenge Wilson Gonzalez' testimony that: "Rider DCR should not be approved because the Companies were required to [meet the requirements] of R.C. 4928.143(B)(2)(h)."[89] But OCC and Citizen Power made extensive arguments that established, (1) the reliability standards were achieved in 2011, long before FirstEnergy filed its proposed ESP 3,[90] (2) the information about customer expectations will be stale by the beginning of the ESP 3 term,[91] (3) the Companies' and customers' expectations are not aligned,[92] (4) Resources dedicated to enhanced distribution service are

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[88] OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 22-23 (May 21, 2012) citing.

The Order in *In re FirstEnergy RCP Case*, Case No. 05-1125-EL-ATA, at 9 (January 4, 2006) stated:

> [W]e find that *exigent circumstances exist* to deviate in a controlled way from the above stated public utility regulatory principles. * * * We are mindful that such deferrals must be scrutinized to assure that the costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of the Companies, and in excess of expense amounts already included in the rate structures of each of the Companies. We will approve the deferral concept in this case premised upon the understanding that the expenses related to infrastructure improvement and the increased expenses for maintenance of infrastructure and reliability will yield necessary improvements that otherwise would have been realized, for company financial reasons, over a much longer period of time.

(Emphasis added.) This 2006 Order resulted in the increased distribution rates above those that would have otherwise been approved in the 2007 distribution rate case. *In re FirstEnergy 2007 Distribution Rate Case*, Case No. 07-551-EL-AIR, Order, at 11 (January 21, 2009). No claim of "exigent circumstances" has been made that would provide similar increases in a newly filed rate case.

[89] FirstEnergy Initial Brief at 30 (June 22, 2012).

[90] Joint Initial Brief at 26 (June 22, 2012).

[91] Id. at 28 (June 22, 2012).

[92] Id. at 29 (June 22, 2012).

excessive[93] and (5) There is no remedy to address excessive distribution-related spending in the annual DCR audit cases.[94]

The PUCO Staff is aligned with the Companies' position on the DCR provision of the Stipulation. Staff states:

> The DCR is a successful mechanism. The proof is in the pudding. The companies meet their reliability criteria. There should be a very good reason to change something that is working and achieving the intended result. No such reason exists here. The DCR mechanism properly aligns the interest of the ratepayers in reliable service with the necessary means for the companies to provide that service.[95]

The Staff, in its brief to support its stated position, relies on the testimony of Staff witness, Mr. Baker.[96] However, as was argued in the Joint Initial Brief, the alignment that Mr. Baker is testifying to is an alignment that existed in 2011. Despite Mr. Baker's conclusion that the alignment between EDUs' and their customers' expectations exist, the record in this case is void of evidence that shows such alignment for the ESP 3 period of June 1, 2014 through May 31, 2016.

OCC and Citizen Power are not advocating for a degradation in service quality. However, OCC and Citizen Power also do not want FirstEnergy "gold plating" its distribution system. As was argued in the Joint Initial Brief, it is unclear what the influx of nearly $1.8 billion in additional distribution revenues between 2009 and May 31, 2016 will have on the Companies' actual reliability performance.[97] Therefore, as the statute

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[93] Id. at 30 (June 22, 2012).

[94] Id. at 31 (June 22, 2012).

[95] Staff Initial Brief at 10 (June 22, 2012).

[96] Id. at footnote 23 (June 22, 2012).

[97] Joint Initial Brief at 56 (June 22, 2012) (Increased Distribution Revenues from the Companies most recent distribution rate case: $137 million per year for 7 years (2009-2015) and $68 million for ½ of 2016 = $1.027 billion plus $390 million (for ESP 2) and $405 million (for ESP 3) = $1.822 billion.)

requires, the Staff cannot conclude that the Companies were dedicating sufficient resources to the reliability of their distribution systems.[98]

For all those reasons, the Commission should determine that the DCR provision in the Stipulation does not meet the statutory requirements under R.C. 4928.143(B)(2)(h), and is not a quantitative benefit of the ESP 3 Case or for customers.

### c. The PIPP discount is not unique to the ESP 3 and should not be viewed as a benefit of the ESP 3 proposal.

The Companies also argue that a benefit of the proposed ESP 3 is the discount FES provides to the PIPP customers under the exclusive bilateral contract arrangement with FirstEnergy under the Stipulation.[99] The arguments are that no other supplier has committed to serve the PIPP load at below market price.[100] What FirstEnergy fails to state is that no suppliers -- other than FirstEnergy's generation affiliate -- have been given the opportunity through an open bid, request for proposal ("RFP") or auction arrangement to demonstrate a willingness to vie for the opportunity to serve that load, and at what price such supplier might be willing to offer in order to serve that load.

The Companies attempt to shift the burden of proof to the parties in opposition to this provision of the Stipulation by stating:

> But OCC, RESA and Direct Energy presented no evidence to show that an auction would provide a greater benefit to PIPP customers than the 6 percent discount provided under the Stipulation. None of the witnesses who recommended a separate auction for the PIPP load did any analysis to show that an auction would generate a price lower than that offered by the Stipulation.[101]

[98] R.C. 4928.143(B)(2)(h).

[99] FirstEnergy Hearing Ex. No. 1, Stipulation and Recommendation at 9 (April 13, 2013).

[100] Companies Initial Brief at 33 (June 22, 2012).

[101] FirstEnergy Initial Brief at 33 (June 22, 2012).

It is unclear what analysis the Companies would find persuasive. To turn the argument where it belongs is to ask why the Companies have not conducted a competitive bid to ascertain if there are interested suppliers willing to serve the load, and if the 6 percent discount provided by the Companies affiliate is indeed the benefit alleged by the Companies.

The Staff in this case appears in lock step with the Companies' position on this issue. The Staff in their Initial Brief state:

> This is a very good thing for the non-PIPP customers who will see lower arrearages as a result. Although this is an unadulterated good for the ratepayers, some parties still complain. Unless and until someone steps forward offering to provide service to the PIPP customers at a greater discount, this provision should be recognized as the public benefit that it is.[102]

However, the Staff's argument suffers from the same weakness as the Companies' argument. Under what process and when exactly have suppliers in Ohio been given the opportunity to step forward and offer to provide service to PIPPP customers? However, if such an opportunity were offered to suppliers, the Staff might find that the benefit to be an even greater unadulterated good for ratepayers.

One attribute that the ESP 3 Case has over the ESP 2 Case is time. This point is made by RESA and Direct Energy in their Initial Brief. RESA and Direct Energy stated:

> Thus, FirstEnergy, following a Commission decision in this case, has plenty of time to conduct a simple RFP asking if any supplier was willing to contract for more than a 6% discount. An RFP would establish a true, proven worth of the exclusive contract for the PIPP load. The proposed contract between FirstEnergy and its affiliate cannot be considered an arms-length negotiation.[103]

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[102] PUCO Staff Initial Brief at 9-10 (June 22, 2012).

[103] RESA and Direct Energy Initial Brief at 7 (June 22, 2012).

Because the delivery of the PIPP service is not slated to begin until June 1, 2014, there is ample time for the Companies to conduct a competitive bid to serve the PIPP load and determine if the speculative benefit included in Mr. Ridmann's quantitative analysis can be justified.[104]

The Companies further look to OCC, RESA and Direct Energy to provide evidence that a company other than FES would provide a 6 percent discount.[105] The suppliers seem to believe that serving the PIPP load at below market is not as preposterous as the Companies would like the Commission to believe.

> We know that the migration risks for PIPP customers differs from regular customers because PIPP customers cannot shop . So the migration of risk of supplying PIPP is less than what suppliers in the auction for the general load will face. It could be that suppliers would be willing to discount the auction bid by more than 6% to serve PIPP customers, knowing that unlike the standard service customers, PIPP customers cannot leave for a CRES supplier if the market rate for power decreases.[106]

The Commission should consider rejecting or modifying the Stipulation in this case by providing for the PIPP load to be auctioned separately with 6 percent as the floor discount to allow for the largest possible benefit from the market for PIPP customers.[107]

#### 2. The qualitative benefits identified by FirstEnergy will not elevate the ESP proposal to be more favorable in the aggregate than a MRO for customers.

As pointed out in the OCC/Citizen Power Joint Initial Brief, the qualitative benefits listed by the Companies are illusory, and should not be considered benefits when

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[104] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at Attachment WRR-1 (April 13, 2013).

[105] FirstEnergy Initial Brief at 33 (June 22, 2012).

[106] RESA and Direct Energy Initial Brief at 7 (June 22, 2012).

[107] Id. at 23 (June 22, 2012).

comparing the proposed ESP 3 to an MRO.[108] Nevertheless, the Companies in their Initial Brief offer a list of alleged qualitative benefits that should be disregarded by the Commission in determining whether in the aggregate, the ESP 3 is more favorable than a MRO.[109]

**a. The economic development provisions, of the Stipulation, are not true benefits of this ESP for customers.**

The Companies tout the economic development provisions of the ESP 3 which provides "credits for large customers, including those with interruptible load participating under the Companies' Rider ELR; credits for large automaker facilities; and financial support for the Cleveland Clinic."[110] As argued *supra,* because the cost of the economic development benefits are ultimately collected from other customers, the economic development provisions of the Stipulation should not be considered a benefit of the ESP 3 proposal, but rather transfer payments.

**b. The alleged benefits from the rate design under the ESP 3 should not be considered.**

The Companies state: "[t]he proposed rate design under ESP 3 continues to support gradualism through the Companies' Rider EDR, which provides credits to non-standard residential customers, schools and municipalities."[111] The Companies leave any substantive description of the benefit derived from this Stipulation provision to the reader's imagination. But it is interesting to note that OCC, the statutory representative

[108] Joint Initial Brief at 59-65 (June 22, 2012).

[109] FirstEnergy Initial Brief at 34-36 (June 22, 2012).

[110] Id. at 34 (June 22, 2012).

[111] FirstEnergy Initial Brief at 34 (June 22, 2012).

of all FirstEnergy residential customers, opposes the ESP 3 proposal,[112] as does the Ohio Schools Council.[113] Two of the three groups specifically identified as beneficiaries of this Stipulation provision are opposing the Stipulation. Therefore, the Commission should not give this provision any qualitative value.

#### c. Extended collection of renewable energy credit costs is not a true benefit for customers.

The Companies allege that an additional rate design benefit of the ESP 3 include the extended collection of renewable energy credit costs.[114] However, as is the case with utility cost collection you can pay them now or you can pay them later.[115] However, to defer costs and pay them later involves paying carrying charges. For the year 2011 the Companies accrued nearly $680,000 in carrying charges associated with Rider Alternative Energy Resource ("AER") deferrals.[116] And those carrying charges will continue and carry forward at different levels into the 2012 through 2016 timeframe.[117]

As was pointed out in the Joint Initial Brief, the separate impacts -- deferring of AER costs and blending current lower auction prices with the anticipated higher capacity and energy prices -- appear to work at cross purposes.[118] The recommendation from OCC and Citizen Power was instead to auction a one- or two-year product as recommended by OCC witness Wilson and keeping the AER Rider as is, thereby

[112] See generally Joint Initial Brief (June 22, 2012).

[113] See generally Initial Brief of the Ohio Schools Council (June 22, 2012).

[114] FirstEnergy Initial Brief at 34 (June 22, 2012).

[115] It is interesting to note that the ESP 3 Stipulation has also removed the word "reasonable" from the costs of renewable contracts that flow through the AER Rider. This is a change from the more consumer friendly language contained in ESP 2. Tr. Vol. II at 46-47 (Ridmann) (June 5, 2012).

[116] OCC Hearing Ex, No. 5.

[117] Tr. Vol. I at 224 (Ridmann) (June 4, 2012).

[118] Joint Initial Brief at 63 (June 22, 2012).

accomplishing a similar price-smoothing effect without customers having to pay the Companies' carrying charges. The deferral of AER costs with future recovery of carrying charges, should not be mistaken as a qualitative benefit of the Companies' ESP 3 proposal.

#### d. The low-income fuel funds are an indirect benefit for FirstEnergy.

In FirstEnergy's witness Mr. Ridmann's quantitative analysis, he considered the fuel funds in that analysis.[119] In the Joint Brief, OCC and Citizen Power challenged Mr. Ridmann's quantitative calculation because, except for the administrative fees absorbed from the Companies' contribution, the remaining fuel fund (90 %) is actually an indirect benefit to the Companies.[120] In the Companies Initial Brief, the Companies argue that funding for low-income customers through the Community Connections program under ESP 3 is a qualitative benefit.[121] However, as OCC and Citizen Power pointed out in the Joint Initial Brief, any consideration of the Companies contribution to a fuel fund as a quantitative or qualitative benefit, must be diluted because of the indirect benefit the Companies derived from receiving fuel fund dollars back for low-income bill payment assistance.[122] Therefore, the Commission should not consider the Companies' contribution to a fuel fund as quantitative or qualitative benefit of the ESP 3 Case.

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[119] FirstEnergy Hearing Ex. No. 3, Direct Testimony of William Ridmann at WRR-1 (April 13, 2012).

[120] Joint Initial Brief at 56-57 (June 22, 2012).($4,050,000 of the annual fuel fund contribution of $4,500,000 should be considered an indirect benefit for FirstEnergy.).

[121] FirstEnergy Initial Brief at 34 (June 22, 2012).

[122] Tr. Vol. I (Ridmann) at 57 (June 4, 2012).

#### e. A base distribution rate freeze cannot be considered a benefit of FirstEnergy's ESP 3.

The Companies are misguided in their contention that there is a base distribution rate freeze for the term of the ESP 3, and that it will provide an additional level of price predictability.[123] In light of the Rider DCR, as argued *supra*, it is disingenuous for the Companies to ignore the proposed $405 million in distribution-related investment cost recovery in this case. In fact in the quantitative analysis, the Companies have argued that Rider DCR should be considered a wash with distribution rate relief.[124]

The Commission Staff has argued "[t]he DCR is simply a somewhat smoother, less "lumpy" means to bring the same costs into rates as would be done through the rate case process.[125] In reality the Stipulation does not provide a distribution rate freeze as advertised, but rather disguises the increase in the Rider DCR collection from customers. Therefore, the Commission should not consider the characterization of a distribution rate freeze as a qualitative benefit.

## C. The Stipulation Does Not Pass the Three-Prong Standard to Warrant Commission Approval.

### 1. The Stipulation is not the product of serious bargaining.

#### a. All Parties in this case did not have the opportunity to participate in serious negotiations.

The Companies discuss in their brief the extensive negotiations that took place in the 10-388-EL-SSO and the 09-906-EL-SSO Cases.[126] However, this is a unique case,

[123] FirstEnergy Initial Brief at 35 (June 22, 2012).

[124] Id.

[125] PUCO Staff Initial Brief at 7 (June 22, 2012).

[126] FirstEnergy Initial Brief at 45-46 (June 22, 2012).

with a unique settlement proposal before the Commission for approval. What happened in the past cannot be relied upon to remedy the failings in this case.

The uncontroverted evidence in this proceeding points to the first prong not being met. The only parties invited to individual negotiations with the Companies that led to the filing of the ESP, were the parties to the prior ESP.[127] The time spent negotiating was short and supporting documents during the negotiations were lacking.[128] Unlike other proceedings, the parties to the case did not meet together as a group even once before the filing of the Stipulation.[129] Therefore, there was no opportunity for participants to hear the views of other parties and raise objections or otherwise determine the full effect of the Stipulation on their clients' interest.

As was argued by OCC and Citizen Power in their Joint Initial Brief, the settlement process utilized by FirstEnergy in this case, violates the spirit, if not the letter, of the Ohio Supreme Court's admonition of exclusionary settlement processes.[130] Although the Ohio Supreme Court acknowledged that not all parties need to participate in all settlement meetings,[131] the "shuttle negotiations" that took place in reaching this Stipulation are close enough to the types of exclusionary settlement discussions about which the Ohio Supreme Court had "grave concerns…."[132]

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[127] Tr. Vol. I. (Ridmann) at 35-38 (June 4, 2012).

[128] *See* OCC Ex. Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 7 (May 21, 2012).

[129] *Id.*

[130] *Time Warner AxS v. Public Util. Comm'n.* (1996), 75 Ohio St.3d 229, 1996 Ohio 224, 661 N.E.2d 1097, n. 2.

[131] *Id.*

[132] *Id.*

The Companies tout that the Stipulation includes nineteen signatory parties and six additional non-opposing parties.[133] Nevertheless, as a result of FirstEnergy's exclusionary settlement process, some interested parties in this case who did not participate in FirstEnergy's prior ESP (such as AEP Retail and the Sierra Club) were excluded from the negotiations, and their perspectives could not be reflected in the Stipulation's results. Further, it should be noted that 16 parties who did not sign the Stipulation have intervened since the filing of the Application.[134] Therefore, the Companies' claim of a broad range of ESP discussions is questionable in light of the fact that there are almost as many signatory parties on the settlement (19), as parties off the settlement (16).

This is a case where the Companies have rushed this process, and left many parties on the outside of the settlement. Certainly the concerns raised regarding the Parties' asymmetrical bargaining positions by certain Commissioners in a prior FirstEnergy SSO case, should also be raised as concerns in this case.[135] Therefore, the Commission should determine that the Stipulation was not the product of serious bargaining.

[133] Companies Initial Brief at 46 (June 22, 2012).

[134] These parties and the dates they intervened are as follows: The Office of the Ohio Consumers' Counsel, Interstate Gas Supply, Inc., Exelon Generation Company, LLC, Constellation NewEnergy, Inc, Natural Resources Defense Council. (April 16, 2012), Direct Energy Services, LLC , Direct Energy Business, LLC, Dayton Power and Light Company, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition (April 18, 2012), AEP Retail Energy Partners, (April 20, 2012), The Sierra Club (April 23, 2012), Ohio Power Company, Ohio Environmental Council (April 25, 2012), Retail Energy Supply Association (April 27, 2012), Cleveland Municipal School District (May 3, 2012).

[135] See Joint Initial Brief at 10-11 (June 22, 2012) citing *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (March 25, 2009) at 1-2 . also citing *Id.* at Concurring Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie at 2 (March 25, 2009).

### b. There is a lack of diversity of interests on the Stipulation.

The Companies state that the diversity of the signatory parties is not diminished because OCC, NOPEC and NOAC oppose the Stipulation.[136] The Companies also take solace in the fact that Staff and a large municipality are signatory parties, and these parties according to FirstEnergy "represent the interests of all customers including residential customers."[137] However, the Staff's Initial Brief fails to make this claim.[138] In addition, the City of Akron is one community with a limited number of customers out of the approximately 1.9 million residential customers served by FirstEnergy, and is located in one of FirstEnergy's three EDU's service territory and whose stated interest in this case is as follows:

> Akron is a significant customer of Ohio Edison Company and therefore the nature and extent of its interest lies partly in the potential relationship between this proceeding and the prices that Akron may pay for electric service. Akron is also vitally interested in supporting initiatives undertaken to maintain and expand employment in the region and reduce the energy intensity of the economy. And, these important subjects are also addressed in the above-mentioned Application or Stipulation and Recommendation.[139]

However, opposing the Stipulation are NOPEC and NOAC who collectively represent the interests of nearly 700,000 residential and small commercial customers in nearly 180

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[136] FirstEnergy Initial Brief at 47 (June 22, 2012).

[137] FirstEnergy Initial Brief at 47 (June 22, 2012).

[138] PUCO Staff Initial Brief at 3-4 (June 22, 2012).

[139] *In re FirstEnergy ESP 2,* Case No. 10-388-EL-SSO, Motion to Intervene by the City of Akron at 4 (April 5, 2010). See Entry at 2 (April 19, 2012) ("In its application, FirstEnergy requests that all parties who participated as intervenors in the ESP 2 be granted intervention in this proceeding without the need for the filing of additional motions. The attorney examiner finds that this request is reasonable and should be granted.").

communities in all three FirstEnergy EDU's service territories.[140] 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 and thus fails to meet the first prong of the Commission's standard for judging stipulations.

The Stipulation fails to meet the first prong of the Commission's standard for judging stipulations because the Stipulation in this case arose from negotiations that were exclusionary and in violation of the *Time Warner Case*. Furthermore, the Signatory Parties, in this case, lack the necessary diversity because the Stipulation does not include a signatory party that represents **all** of FirstEnergy's residential customers. Therefore, the Commission should reject or modify the Stipulation in this case.

### 2. The Stipulation does not benefit ratepayers and is not in the public interest.

#### a. The unprecedented unknowns should cause the Commission concern for customers over FirstEnergy's ESP 3 proposal to implement a three-year auction at this time.

The Companies make the argument that "[t]he Stipulation proposes to adopt an ESP that contains essentially the same provisions as the current ESP – an ESP that has produced several successful SSO auctions that have benefited customers with reasonably priced generation service."[141] However, past performance is not an indicator of future success. What is not known in this case should cause the Commission concern.

First, let's review what is known. The current low capacity and energy prices experienced cannot be locked in to the future, unless those prices happen to equal market

[140] NOPEC and NOAC Joint Initial Brief at 3-4 (June 22, 2012).

[141] FirstEnergy Initial Brief at 50 (June 22, 2012).

participants' expectations regarding fair prices or future deliveries, and the forward curve reflects those expectations.[142] The base residual auction conducted on May 7, 2012 resulted in significantly higher capacity prices in the ATSI zone.[143] The increase in capacity costs experienced in the ATSI zone can be attributable to certain extraordinary events that led to that outcome.

The extraordinary events in the ATSI zone were well documented. FirstEnergy's switch from the Midwest ISO ("MISO") to PJM took place on June 1, 2011.[144] PJM created the ATSI zone since FirstEnergy's migration to PJM. FirstEnergy, recently announced the retirement of 20 percent of its base load generation that resides in the ATSI zone.[145] PJM has determined that the ATSI zone is constrained, thereby limiting the ability of FirstEnergy to import power at critical times of the year.[146] These factors all contributed to the significant increase in capacity costs between delivery year 2014/15 of $125.99/MW-day[147] and for delivery year 2015/2016 of $357/MW-day.[148]

That summarizes what is known. What is not known is what is in store for energy prices in the future for FirstEnergy customers under the ESP 3 proposal. And the fact that this uncertainty exists is agreed upon universally by the expert witnesses in this case. FirstEnergy witness Ridmann admitted he cannot predict the future of energy prices.[149]

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[142] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 21 (May 21, 2012).

[143] .AEP Retail Hearing Ex. No. 1, Base Residual Auction Results at 1.

[144] Tr. Vol. I (Ridmann) at 84-85 (June 4, 2012).

[145] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 12 (May 21, 2012).

[146] AEP Retail Hearing Ex. No. 1, 2015/2016 Base Residual Auction Results.

[147] Id. at 5.

[148] Id. at 1.

[149] FirstEnergy Hearing Ex. No. 4 at 6, Supplemental Testimony of William Ridmann (April 23, 2012). ("While no one can know with certainty, * * *,").

OCC witness James Wilson does not know.[150] NOPEC and NOAC witness Mark Frye does not know.[151] FirstEnergy rebuttal witness Stoddard does not know.[152] Because stable prices do not equate to lower prices, the Commission should have some concerns in this case that the impacts of the uncertainty that exists in the ATSI zone cannot be quantified for potential impacts on customers' bills.

The Companies supplied typical bill analysis to provide evidence on the impact future capacity prices may have on their customers.[153] However, the analysis done by the Companies could not include the energy prices to be derived from future auctions that have not yet occurred. Therefore, the Companies clearly disclaimed the resulting analysis by stating: "[t]he impacts on typical bills for the period June 1, 2015 through May 31, 2016 are unknown at this time and are largely dependent upon the results of future competitive solicitations * * *."[154]

The Commission should be leery of over-reliance upon the historical success of the FirstEnergy auctions under prior ESP Stipulations. The unprecedented unknowns in this case will impact the generation portion of a customers' bill. The significant increase in the capacity charges from the recent BRA may be a harbinger for increased energy prices resulting from future auctions. The PUCO Staff weighs in on this issue by stating:

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[150] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 19 (May 21, 2012) ("Q28. Would the proposed change [to the competitive bid process] lead to lower generation prices for customers? A. This is uncertain.").

[151] Joint NOPEC and NOAC Hearing Ex. No. 1, Direct Testimony of Mark Frye at 8 (May 21, 2012). (Q. Would the impact on residential and small consumers of changing length of certain auction products ultimately be positive or negative? A. No one knows.).

[152] FirstEnergy Hearing Ex. No. 14, Rebuttal Testimony of Robert Stoddard at 16 (June 7, 2012) (The three-year product that the Companies propose to secure are a form of insurance against unknown future prices.).

[153] OCC Hearing Ex. No. 8.

[154] Id.

"What is certain however is that the laddering that comes with the Stipulation must, as a matter of mathematical necessity, reduce the volatility of prices."[155] However, reducing volatility of prices is not the equivalent of reducing prices. That is why the Staff's next statement in the brief -- "This is an exceptional benefit to all concerned"[156] -- as with the statement just quoted above it are absent of citation, and are merely superfluous. It is imperative for the Commission to appreciate fully that all this uncertainty makes it impossible for the Commission to render a decision with certainty that the FirstEnergy ESP 3 proposal will benefit ratepayers, and is in the public interest.

Furthermore, the PUCO Staff maintains that, in regard to the energy auctions, "it is a waste of time to debate which will lead to lower prices."[157] OCC and Citizen Power disagree. Any increase in the rates that customers will have to pay for their electric service (because of the implementation of a 3-year auction product) is vital to the Commission's determination whether the Stipulation, as a package, benefits ratepayers and the public interest.[158]

The Commission should be concerned because the RPM BRA results for capacity prices for the delivery year 2015/2016 of $357/MW-day is 2.6 times higher than the PJM RTO capacity prices for the same delivery year of $136/MW-day, or almost three times the prevailing capacity prices for the previous delivery year for PJM RTO and ATSI of $125.99/MW-day. Since the 2007/2008 delivery year, no other LDA in PJM experienced capacity prices close to the $357/MW-day price. In fact, for the delivery year

[155] PUCO Staff Initial Brief at 5. (June 22, 2012).

[156] Id.

[157] Id.

[158] *Consumers' Counsel*, 64 Ohio St.3d at 126, 592 NE 2$^{nd}$ at 1373.

2013/2014, EMAAC resource clearing prices were the highest ever in PJM at $245.00/MW-day.

PJM concluded that the ATSI LDA was an outlier because the zone "experienced a large concentration of generator retirements and resulting transmission constraints with relatively little lead time for new resources to make entry decisions coupled with the need for retrofits at existing coal units resulting in much higher prices than last year."[159] Due to retirements, the ATSI zone is constrained, at least for a while, and this is reflected in the RPM price. The relevance of this to the three-year product issue is that it creates risk of congestion and higher Locational Marginal Prices in the zone that are difficult to hedge in the short term. The message from the $357/MW-day capacity prices for the delivery year 2015/2016 (which is three years out) is loud and clear: The extraordinary uncertainties in the ATSI zone will result in extremely high energy prices for all years, especially if the Commission approves the Companies' request for a three-year energy auction product.

If there is no certain benefit for consumers, the Commission might wonder why FirstEnergy is so adamant about implementing the three-year auction product in this case. The answer lies close to home. An argument can be made that FirstEnergy's generation affiliate, FES, which may earn up to $550 million during the June 1, 2015 through May

[159] AEP Retail Hearing Ex. No. 1, Base Residual Auction Results.

31, 2016 time period,[160] is the true beneficiary in this case. And FES' costs may be passed on to FirstEnergy's customers.[161]

Therefore, the Commission should reject the Stipulation or modify the Stipulation by requiring the Companies to conduct a one- or two-year auction instead of a three-year auction. There may be a benefit to allowing additional time for the unprecedented uncertainties in the ATSI zone to be solved before locking into these prices for future generation costs for FirstEnergy's customers.[162]

**b. The ESP 3 is not more favorable in the aggregate for customers than as compared to the expected results that would otherwise apply under a market rate offer.**

The Companies argue that "the broad benefits of the ESP 3 meet the statutory test under R.C. 4928.143." There is no reason to rehash the arguments already made herein, and in the Joint Initial Brief.[163] The quantitative factors that have been reviewed at length demonstrate that in the aggregate, the ESP 3 **is not** more favorable than a MRO. Furthermore, the qualitative benefits are either illusory or not true benefits for customers, and should not be considered value for purposes of the statutory test. Finally, the Companies desire to push the Commission to implement a three-year auction during this period of extraordinary uncertainty in the ATSI zone should be reviewed with a high level of skepticism. There are few, if any, benefits for residential consumers in the

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[160] Tr. Vol. II (Hays) at 18-19 (June 5, 2012) Proffered: *Wholesale Power Prices in Northeast Ohio Will Go Up*, by John Funk, The Cleveland Plain Dealer (May 22, 2012) ("At least one Wall Street analyst on Monday estimated FirstEnergy would pull in an extra $550 million between June 1, 2015 and May 31, 2016 because of the auction.").

[161] Tr. Vol. I (Ridmann) at 203 (June 4, 2012).

[162] OCC Hearing Ex. No. 9, Direct Testimony of James Wilson at 7 (May 21, 2012).

[163] See generally Joint Initial Brief.

FirstEnergy ESP 3 proposal. And unfortunately, this approach may cost residential consumers hundreds of millions of dollars in generation and distribution costs.

Therefore, the Commission should determine that the FirstEnergy ESP 3 proposal does not benefit ratepayers and is not in the public interest, and should reject or modify the Stipulation.

### 3. The Stipulation violates important regulatory principles

#### a. The Parties did not have sufficient time to conduct discovery.

The Companies argue that parties had ample time to conduct discovery.[164] However stating that fact does not make it so. R.C. 4903.082 provides that "[a]ll parties and intervenors shall be granted ample rights of discovery." In addition, Ohio Adm. Code 4901-1-16(A) states: "The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery **in order to facilitate thorough and adequate preparation for participation in commission proceedings**." The procedural schedule in this proceeding failed to meet either requirement.

As discussed in the OCC/Citizen Power Joint Initial Brief, non-signatory parties had just 52 days to prepare for the hearing in this proceeding.[165] This is in a case where Ohio law provides the Commission 275 days to resolve an ESP case.[166] The consequence of the procedural schedule was that non-signatory parties have been limited in their ability to conduct follow up discovery on initial and later responses. Such follow-

[164] FirstEnergy Initial Brief at 52 (June 22, 2012).

[165] Joint Initial Brief at 86.

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

up discovery can be important, whether the respondent to the discovery is cooperative with the requests or not.

**b. The Stipulation's provision pertaining to SEET is unreasonable because it reduces the protection that SEET is intended to offer for customers.**

Not surprisingly, FirstEnergy has not cited to any evidence in the record of this proceeding that supports the notion that the deferred carrying charges should be excluded from the Significantly Excessive Earning Test (SEET) during the period of the ESP 3. There is simply none.

Instead, FirstEnergy relies on the tired argument that the same exclusion has been in both of the previous ESP stipulations and, therefore; this exclusion should be continued.[167] But it should be pointed out that the SEET-related provisions have changed and evolved in the prior ESPs. And it should be modified in this case. Specifically, in the stipulation regarding FirstEnergy's ESP 1, the revenues from the Delivery Service Improvement Rider ("DSI") were excluded in the calculation of return on equity ("ROE").[168] In the stipulation regarding FirstEnergy's ESP2, the revenues from a similar rider, Delivery Capital Recovery Rider ("Rider DCR") were **not** excluded in the calculation of ROE.[169]

As explained above, FirstEnergy's argument that the SEET provision in the ESP 3 Stipulation is a continuation of the SEET provisions of the last two ESP stipulations is simply not true. More importantly, the change in the SEET-related provisions in the ESP

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[167] FirstEnergy Brief at 53.

[168] PUCO Case No. 10-0388-EL-SSO, PUCO Staff Ex. No. 2, Testimony of Tamara S. Turkenton at pg. 4. (FirstEnergy requested and granted administrative notice.).

[169] ESP 2 Stipulation and Recommendation at 17 (PUCO Case No. 10-388-EL-SSO, March 23, 2010). (Administrative Notice taken by the Attorney Examiner.).

stipulations indicates that these SEET-related provisions have been changed, can be changed, and should be changed in this case to provide real protection to FirstEnergy's customers from excessive ESP rates.

FirstEnergy also argues that the Commission, in the "generic SEET proceeding," has indicated its preference in not modifying stipulations, to the extent the issue regarding the treatment of write-offs and deferrals in calculating the SEET is adequately addressed in the stipulation and the order approving the stipulation.[170]

OCC and Citizen Power do not challenge the Commission's deference to enforce a provision in a previously-adopted stipulation regarding the calculation of SEET as related to write-offs and deferrals. But this argument does not support the inclusion of such a provision in this case. To the contrary, the Commission's professed preference of not modifying the SEET-related provisions contained in a stipulation is exactly the reason that this provision that excludes deferred carrying charges from the SEET should be modified or rejected. Clearly, if the Stipulation (with this provision included) is accepted by the Commission, then any SEET review in the future is likely to exclude the impact of deferred carrying charges. The exclusion of deferred carrying charges from the SEET calculation, as is proposed in the Stipulation at issue, will invariably void or significantly weaken the SEET statute passed by the General Assembly to protect utility customers from excessive ESP rates.[171]

FirstEnergy also cites to the "generic SEET proceeding" regarding the Commission's finding that "Deferrals are a regulatory tool used by the Commission to

[170] FirstEnergy Brief at 54-55.

[171] *See* OCC and Citizen Power Joint Initial Brief at 44-47.

avoid rate shock to customers and as such can be a public benefit.[172] That may be so. But OCC and Citizen Power are arguing against the exclusion of deferred interest income in the SEET calculation. FirstEnergy, citing to the Commission's acknowledgement regarding deferrals, does not support a provision in the Stipulation that will unreasonably exclude deferred carrying charges (that are included in the reported earnings of the Companies based on generally accepted accounting principles) in the calculation of the ROE for the purposes of the SEET.

FirstEnergy makes a feeble attempt to portrait the testimony of OCC's witness as inconsistent or having a lack of clarity in a footnote.[173] In its brief, FirstEnergy states "Dr. Duann at first opined that reported financial results without adjustment should be used in calculating ROE for SEET purpose but readily belies that view as he recognizes "[e]extraordinary items or one-time events may be excluded."[174] This is clearly a case of selective editing. Dr. Duann's position is abundantly clear that the reported financial (accounting) results with the adjustment for extraordinary items or one-time events should be used in calculating the ROE for SEET purpose.[175] This is essentially the consensus of almost all parties in the "generic SEET proceeding."[176]

Finally, the Companies resort to the tactics of "this is no big deal". It argues that an actual analysis provided by Company witness, during cross-examination, showed the impact of excluding deferred carrying charges from SEET is minimal.[177] Well, a

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[172] FirstEnergy Initial Brief at 56.

[173] Id. at 53.

[174] Id. at 53, footnote 288.

[175] OCC Hearing Ex. No. 10 at 8-9, Direct Testimony of Dr. Daniel Duann.

[176] *See* Finding and Order at 12-16 in PUCO Case No. 09-786-EL-UNC (June 30, 2010).

[177] FirstEnergy Initial Brief at 56.

possible 2% addition to the ROE may be minimal in the eye of FirstEnergy. But this exclusion of millions of dollars from a potential SEET refund resulting from the 2% reduction in ROE is no small matter to the many customers of FirstEnergy who are already struggling to pay for electric service.

**c. The Open Ended and Uncapped Collection of Energy Efficiency induced lost distribution revenues ("LDR"), from customers, is unreasonable.**

The Companies stand to earn a significant amount of money on lost distribution revenues ("LDR"), if the Stipulation is not rejected or modified. The Companies argue that Mr. Gonzalez has supported the collection of lost revenues in the past and that any concern of the open ended nature of the energy efficiency induced lost revenue is unfounded.[178] However, Mr. Gonzalez rebutted the Companies' characterization of his position on LDR at hearing.

At the evidentiary hearing, Mr., Gonzalez stated:

> Q. Mr. Gonzalez, do you remember when Mr. Kutik was asking you some questions about lost distribution revenues and you cited some natural gas cases that involved OCC's participation in those cases?
>
> A. Yes, I remember.
>
> Q. Are you aware of other cases that have involved lost distribution revenues that you have been involved in?
>
> A. Yes. I filed testimony also in Dayton Power & Light's ESP 08-1094, I believe, and there I was -- I was very adamant that there be a cap on lost

[178] FirstEnergy Initial Brief at 57 (June 22, 2012).

> revenues because of the cumulative effect of that. I also filed in Case 11-351, the AEP distribution rate case. I expressed concern about growing levels of cumulative lost distribution revenues, especially as the benchmarks for energy efficiency increase. So -- so -- so, yes, I have testified on those issues in other cases besides the ones Mr. Kutik mentioned."

Furthermore, the $22.2 million the Companies attribute to Mr. Gonzalez as the "total potential amount" is a mischaracterization of his testimony and more importantly highly misleading.[179]

Mr. Gonzalez further elaborated on this point at the hearing by stating as follows: 1) The $22.2 million figure is conservative as it only represents the cumulative lost revenue total through programs and measures installed through 2012; 2) The lost revenue charges through the end of ESP 3 will be significantly higher since the Companies will have to meet an increasing energy efficiency annual benchmark; and 3) The benchmark for 2013 is .9 percent of the Companies' three year sales average. For 2014 through 2016 the benchmark is 1 percent of sales every year.[180] Therefore, customers will be subject to a large portion of lost revenue collection given the additional 3.5 percent of sales the Companies will have to reduce through energy efficiency over the ESP3 period. This significant amount of lost revenue has not been documented by the Companies in this case.

That the Companies have not provided a more complete record of the potential lost revenues this stipulation will saddle customers with, is egregious and inexplicable,

[179] Id. at 58.

[180] R.C. 4928.143.66(A)(1)(a).

given that the Companies are due to file their 2013-2016 Energy Efficiency/Peak Demand Reduction portfolio by July 31, in less than 5 weeks.[181] Witness Ridmann admitted that the upcoming three year portfolio "…ought to be getting pretty far along in the process…" when questioned by Attorney Examiner Price.[182] Companies' witness Ridmann also admitted that even after Chairman Snitchler had raised concerns over a lost-revenue mechanism, the Companies did not even consider another mechanism.[183] Contrary to what the Companies want us to believe, the Stipulation does not "resolve" the lost-revenue issue, but rather puts it off into the future. Meanwhile the Companies continue to collect an unreasonable amount of lost revenues.[184]

#### d. The costs of economic load reduction ("ELR") interruptible load programs for industrial commercial customers should be collected from the same customer classes that participate in the programs.

The Companies state that since the ELR program benefits all customers, all customers should pay.[185] Currently, residential direct load control programs funded exclusively by residential customers also benefit all customers, but non-residential customers do not contribute to the cost collection for the residential program.[186] Using

[181] The Companies have stated: "For 2013 – 2015 lost distribution revenue, the energy efficiency measures that will be employed during that period are currently being planned, and therefore an estimation of lost distribution revenue for that period based on the energy efficiency and demand reduction plan for years 2013 through 2015 is unavailable." OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at Attachment 4 (May 21, 2012).

[182] Tr. Vol. I (Ridmann) at 327 (June 4, 2012).

[183] Tr. Vol. I (Ridmann) at 179-180 (June 4, 2012).

[184] Companies initial brief at 23 (June 21, 2012).

[185] Id., at 59.

[186] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 05-1125-EL-ATA, Opinion and Order (January 4, 2006).

the Companies logic above, non-residential customers should help pay for any residential peak demand reduction program. To ensure symmetry and fairness in cost-recovery across customer classes, residential customers should not have to fund the highly subsidized ELR program.

#### e. The Companies acted unreasonably in bidding energy efficiency into the base residual auction, which cost customers.

The Companies' bid of 36 MWs into the PJM RPM BRA was underwhelming. Nevertheless, the Companies try to discredit the more reasonable 339 MWs calculated by Sierra Club witness Neme by emphasizing the term "ball park number" in their brief.[187] They also contend that witness Neme cannot possibly come up with a credible estimate of energy efficiency because "he has never been an employee of an investor-owned utility."[188] That witness Neme, when employed by the Vermont Efficiency Investment Corporation managed an energy efficiency portfolio and was involved in bidding in energy efficiency into the ISO New England capacity market, is surely more relevant than whether he ever worked at a utility.[189]

However, witness Neme's estimate of available FirstEnergy energy efficiency resources -- that should have been bid into the RPM BRA -- is significantly more realistic than the 36 MWs the Companies actually bid. FirstEnergy challenges Mr. Neme's estimates, but they do so with unclean hands. The reason is because the Companies refused to make available detailed information regarding its upcoming three-year energy

[187] FirstEnergy Initial Brief f at 70 (June 21, 2012).

[188] Id.

[189] Tr. Vol. I (Neme) at 344 (June 4, 2012).

efficiency and peak demand reduction portfolio.[190] Given the economic harm inflicted on its customers (estimated at over $600 million[191]) by not bidding a reasonable amount of energy efficiency into the RPM BRA, OCC and Citizen Power concur with witness Neme's conclusion that the Companies' proposal was imprudent.[192]

Therefore, the Commission should determine that the FirstEnergy ESP 3 energy efficiency bid proposal is seriously lacking and should reject or modify the Stipulation.

### D. IF THE COMMISSION DETERMINES THAT AN ESP IS PREFERRABLE TO AN MRO, THEN THE STIPULATION SHOULD BE MODIFIED.

In the Joint Brief of NOPEC and NOAC, these parties suggested an alternative to remedy the problems that are contained in the FirstEnergy ESP 3 proposal. NOPEC and NOAC stated:

> In the alternative, if the Commission determines that an ESP is preferable to a MRO, NOPEC and NOAC request that the Commission modify the ESP 3 Proposal as follows:
>
> 1. Eliminate the continuation of Rider DCR after May 31, 2014 and require the Companies to file for a distribution rate increase if they believe it is warranted;
> 2. Eliminate FirstEnergy's proposal to exclude income it receives from deferred charges from its SEET calculation;

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190 OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 4 (May 21, 2012).

191 Sierra Club Hearing Ex. No. 5, Direct Testimony of Christopher Neme at 3 (May 21, 2012) at 15.

192 Id. at 3.

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, but modify the auction products to cover two different terms—the first product would cover the final year of the current ESP (June 1, 2013 to May 31, 2014), while the second auction product would cover the two-year time period of the ESP 3 Proposal (June 1, 2014 to May 31, 2016) in order to provide the Commission with sufficient information to determine the need for "smoothing" of customer rates.[193]

OCC and Citizen Power would support each of the above modifications to the Stipulation as offered by NOPEC and NOAC, and in addition would recommend the following modification to the Stipulation:

Lost distribution revenues should be capped at 3 years of collection per energy efficiency measure.[194]

## III. CONCLUSION

The Commission should reject or modify the Stipulation in this case. The Stipulation violates all three prongs of the Commission's test for review of Stipulations.

[193] NOPEC and NOAC Joint Initial Brief at 24-25 (June 22, 2012).

[194] See OCC Hearing Ex. No. 11, Direct Testimony of Wilson Gonzalez at 37-41 (May 21, 2012).

Furthermore, the ESP is not more favorable in the aggregate than an MRO based upon the quantitative and qualitative factors relied on by the Companies, which have been shown to be illusory or not true benefits as touted by the Companies.

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

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

5. Remove the lost distribution revenues element from the Stipulation in this case and incorporate into the Companies' upcoming energy efficiency and peak demand reduction portfolio case. Otherwise, at a minimum, cap the lost distribution revenues at 3 years of collection per energy efficiency measure.

. Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Joint Reply Brief by the Office of the Ohio Consumers' Counsel and Citizen Power was served via Electronic Mail upon the following persons on this 29th day of June 2012.

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