BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	)	Case No. 12-1230-EL-SSO

SECOND ENTRY ON REHEARING

The Commission finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (TE) (collectively, FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On April 13, 2012, FirstEnergy filed an application pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO) ending May 31, 2016 (Co. Ex. 10). The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application included a stipulation and recommendation (Stipulation) agreed to by various parties regarding the terms of the proposed ESP (ESP 3).

(3) The hearing in this proceeding commenced on June 4, 2012, and concluded on June 8, 2012.

(4) On July 18, 2012, the Commission issued its Opinion and Order in this proceeding, adopting the Stipulation and approving the ESP 3.

(5) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(6) On August 17, 2012, applications for rehearing were filed by the Northeast Ohio Public Energy Council (NOPEC), Sierra Club, the Environmental Law and Policy Center (ELPC), and Interstate Gas Supply, Inc. (IGS). Moreover, joint applications for rehearing were filed by OCC and Citizen Power (OCC/CP) and by the Retail Energy Supply Association, Direct Energy Services, LLC, and Direct Energy Business, LLC (Suppliers).

(7) On August 27, 2012, FirstEnergy and Nucor Steel Marion, Inc., (Nucor) each filed memoranda contra the applications for rehearing.

(8) On September 12, 2012, the Commission granted rehearing for the purpose of further considering the matters raised in the applications for rehearing.

(9) Moreover, on July 31, 2012, the Ohio Consumers' Counsel (OCC) filed a motion to take administrative notice of certain documents filed by the Companies in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, et al. (*Portfolio Cases*). Further, in their joint application for rehearing, OCC/CP request that the Commission take administrative notice of the audit reports filed in *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR (*AER Case*).

(10) In support of its request that administrative notice be taken of documents filed in the *Portfolio Cases*, OCC argues that FirstEnergy filed these documents with the Commission; thus, the documents are not subject to reasonable dispute. OCC claims that the documents would allow the Commission to approximate the incremental lost distribution revenue the Companies seek to collect from customers for the years 2013 through 2015. Further, OCC claims that the information in these documents is responsive to discovery served upon FirstEnergy and that

the Companies failed to supplement their responses to that discovery as required by Rule 4901-1-16(D)(3), Ohio Administrative Code (O.A.C.).

(11) On August 27, 2012, the Companies filed a memorandum contra the motions to take administrative notice. On August 30, 2012, OCC/CP filed a motion to strike the memorandum contra, contending that the filing was not timely pursuant to the procedural schedule established by the attorney examiner on April 19, 2012. FirstEnergy filed a memorandum contra the motion to strike on September 4, 2012. OCC/CP filed a reply to the memorandum contra the motion to strike on September 7, 2012. The Commission finds that the memorandum contra was not filed in the time period established by the attorney examiner for this proceeding. Entry (April 19, 2012) at 3. Therefore, the motion to strike should be granted.

(12) The Commission notes that the Supreme Court of Ohio has held that there is neither an absolute right for nor a prohibition against the Commission's taking administrative notice of facts outside the record in a case. Instead, each case should be resolved on its facts. The Court further held that the Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995) (citing *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988)).

(13) With respect to the requests of OCC/CP for administrative notice of documents in the record of the *Portfolio Cases* and the *AER Case*, the Commission finds that FirstEnergy has not had an opportunity prepare for, explain or rebut the evidence for which OCC seeks administrative notice. Likewise, the other signatory parties to the Stipulation filed in this proceeding have not had an opportunity to prepare for, explain or rebut this evidence. The record of the instant proceeding has closed; OCC's requests for administrative notice were made on July 31, 2012, and August 17, 2012, after the completion of the hearing on June 8, 2012, and after the issuance of the Opinion and

Order in this proceeding on July 18, 2012. Moreover, the hearing in the *AER Case* has even not commenced. Thus, no witness has sponsored the documents for which OCC/CP seek administrative notice, no corrections, if necessary, have been made to the documents, no foundation has been laid for their admission, and the documents have not been admitted into the record of the *AER Case*.

Further, the Commission finds that FirstEnergy and the signatory parties to the Stipulation would be prejudiced by the taking of administrative notice of these documents. The Commission has already issued its Opinion and Order in this proceeding. OCC/CP ask the Commission to reject or modify FirstEnergy's approved ESP 3, based at least in part on these documents. It would be unfair for the Commission to reject or modify the ESP 3 based upon evidence that FirstEnergy and the signatory parties have not had an opportunity to prepare for, explain or rebut. On the other hand, OCC/CP will not be prejudiced if the Commission does not take administrative notice of these documents. The hearing has been held in the *Portfolio Cases* and scheduled in the *AER Case*. OCC/CP was free to raise any relevant issues in the *Portfolio Cases* and will be free to raise any issues regarding these documents that are relevant to the *AER Case*.

Further, the Commission notes that Attachment 1 to OCC/CP's application for rehearing appears to be derived from the documents from the *Portfolio Cases* for which OCC/CP sought administrative notice. Because we have declined to take administrative notice of the documents from which Attachment 1 was derived and because Attachment 1 has not been admitted into evidence in this proceeding, Attachment 1 will be disregarded by the Commission.

(14) In its application for rehearing, NOPEC claims in its seventh assignment of error that the Commission violated the due process rights of NOPEC and other non-signatory parties when it failed to afford the parties adequate time to prepare for the case. OCC/CP claim, in their fifth assignment of error, that the Commission erred by

violating the due process rights of the non-signatory parties in this case. In support of this assignment of error, OCC/CP claim that the timeline for this case was inadequate and prejudiced the non-signatory parties. OCC/CP claim in their application for rehearing that the Companies requested a waiver from their obligation to provide notice of their application through newspaper publication and that the Commission granted this waiver and did not order FirstEnergy to publish a newspaper notice. OCC/CP also allege that the Commission's rulings affected intervention in contravention of the law. Further, OCC/CP claim that the Commission erred by taking administrative notice of information contained in the Companies' previous standard service offer cases.

Likewise, NOPEC claims in its eighth assignment of error that the Commission violated the due process rights of NOPEC and other non-signatory parties when the Commission unlawfully took administrative notice of portions of the record in the Companies' previous standard service offer cases despite the fact that the parties did not have knowledge of, or an opportunity to explain and rebut the facts administratively noticed. ELPC also claims, in its second assignment of error, that the Opinion and Order improperly affirmed the attorney examiners' ruling taking administrative notice of evidence from the previous standard service offer cases.

(15) In its memorandum contra, FirstEnergy argues that the procedural schedule did not deny the parties the opportunity for thorough and adequate participation in the proceeding. For example, the Companies claim that the procedural schedule permitted OCC to serve six rounds of discovery and present testimony for three witnesses, including an outside consultant. FirstEnergy also denies that the procedural schedule affected the intervention of parties in this proceeding, noting that no party was denied intervention.

Further, FirstEnergy and Nucor claim that the Commission properly affirmed the ruling of the attorney examiner granting administrative notice at the hearing. FirstEnergy argues that parties were placed on notice that the

Companies sought administrative notice seven weeks prior to the hearing. FirstEnergy also claims that OCC/CP, NOPEC and ELPC all had the opportunity to seek in discovery the specific documents that FirstEnergy intended to rely upon and that the parties failed to do so.

Nucor argues that the Commission properly took administrative notice of portions of the record from the prior standard service offer cases. Nucor represents that ESP 3 is, in large part, an extension of the Companies current ESP. Further, Nucor notes that the request to take administrative notice was contained in both the application and the Stipulation, both of which were filed on April 13, 2012, and that no party raised any objection or concern about the request until after the hearing commenced. Nucor claims that NOPEC and OCC/CP knew, or should have none, from the beginning of this proceeding, that FirstEnergy and other parties were seeking incorporation of parts of the record from the prior cases into the record of the current proceeding since the request was included in both the application and the Stipulation.

(16) With respect to the allegations regarding a lack of due process in this proceeding, the Commission thoroughly addressed these issues in the Opinion and Order in this proceeding. Opinion and Order at 21-23, 46-47. The only new issue raised is the issue of published notice. OCC/CP claim that the Companies requested a waiver from their obligation to provide notice of their application through newspaper publication and that the Commission granted this waiver and did not order FirstEnergy to publish a newspaper notice. These claims are misleading. The Companies requested a waiver from the requirement that they provide a *proposed* notice for publication as part of their application contained in Rule 4901:1-35-04(B), O.AC. Entry (April 25, 2012) at 6. Although this waiver was granted, the Commission subsequently ordered FirstEnergy to publish notice of the application and the three public hearings held in this proceeding. Entry (May 9, 2012) at 2-3. Further, at the evidentiary hearing, the proofs of publication of the newspaper notice were admitted into the record (Tr. II at 271; Co. Ex. 5). Thus, the Commission finds that OCC/CP's allegations that

published notice was not provided are misleading and have no merit.

Regarding the claims that the Commission unlawfully affirmed the ruling of the attorney examiners to take administrative notice of a limited set of documents, we find that no new issues have been raised on rehearing and that the Commission fully addressed all issues in the Opinion and Order in this proceeding. Opinion and Order at 19-21.

Accordingly, rehearing on these assignments of error should be denied.

(17) In its first assignment of error, ELPC argues that the Opinion and Order in this proceeding improperly finds that the Companies filed a complete application pursuant to Rule 4901:1-35-03, O.A.C. Specifically, ELPC contends that the Companies failed to include in their application a complete description of the ESP and testimony explaining and supporting each aspect of the ESP as required by Rule 4901:1-35-03(C)(1), O.A.C. ELPC acknowledges that the Commission approved several waivers of the filing requirements but notes that provision (C)(1) was not included in the approved waivers.

(18) The Commission finds that rehearing on this assignment of error should be denied. The Commission finds that the application (Co. Ex. 1), including both the Stipulation and the accompanying testimony, met the minimum requirements of Rule 4901:1-35-03(C)(1), O.A.C. The Stipulation contains a full and detailed description of all terms and conditions of the ESP 3. Moreover, ELPC had the opportunity in discovery to seek any additional explanation of the provisions of the ESP 3 necessary for its understanding of the application, and ELPC had the opportunity, at hearing, to cross examine FirstEnergy's witness Ridmann on the application but did not take advantage of that opportunity. Finally, the Commission notes that our approval of the ESP 3 was based upon the entire record in this proceeding, including all testimony and exhibits admitted into evidence, rather than only the information contained in the application.

(19) NOPEC claims, in its fourth assignment of error, that the Commission erred in concluding that the Stipulation satisfies the three-part test for determining the reasonableness of a Stipulation and, in its fifth assignment of error, that the Commission erred in concluding that the Stipulation is the product of serious bargaining because three primary residential customer advocates were effectively excluded from the bargaining process. Similarly, in their first assignment of error, OCC/CP claim that the Commission erred by finding the Stipulation to be reasonable under the three-prong test for the consideration of settlements. Specifically, OCC/CP claim that the Commission erred, as a matter of law, in adopting a Stipulation that lacked the necessary diversity of interests among those signing the Stipulation.

OCC/CP argue that the Commission should have ascertained the motivations of Ohio Partners for Affordable Energy and the Cleveland Housing Network, the Empowerment Center and the Consumer Protection Association in signing the Stipulation. OCC/CP claim that these parties' interests can be determined solely by the benefits these parties received under the Stipulation. Moreover, OCC/CP claim that these parties conducted no discovery prior to signing the Stipulation, did not cross-examine a single witness and did not file briefs in this proceeding. OCC/CP contend that the failure to conduct discovery or submit evidence allows the Commission to infer the parties' motivations in signing the Stipulation.

(20) FirstEnergy responds that the Stipulation was the product of serious bargaining among capable, knowledgeable parties because it was supported by parties representing diverse interests and was developed as part of a settlement process that excluded no one. FirstEnergy notes that the parties to the Stipulation represent customers from every class, municipalities and generation suppliers. Moreover, FirstEnergy claims that all parties participating in the previous ESP proceeding were given an opportunity to review a draft of the Stipulation and discuss it with the Companies before the Stipulation was filed (Co. Ex. 3 at 9-10, 13-14; Tr. III at 26).

(21) The Commission finds that rehearing on these assignments of error should be denied. OCC/CP's arguments in support of their assignment of error lack any evidentiary or legal support. The Commission notes that OCC/CP make allegations regarding the motivations of signatory parties in signing the Stipulation without citing to any testimony or other evidence in support of their allegations. OCC/CP claim that signatory parties conducted no discovery prior to signing the Stipulation but cite to no record evidence in support of this claim. Further, OCC/CP do not explain why it was necessary for these parties to conduct discovery if the parties were satisfied with the draft Stipulation. The Commission notes that counsel for CP also did not make an appearance at the hearing in this proceeding, did not present any witnesses, and did not cross-examine any witnesses. Therefore, we find that a party's motivations in a proceeding cannot be inferred based simply on the extent of the party's participation in the hearing.

Likewise, although OCC/CP claim that the Commission erred, *as a matter of law*, in adopting a Stipulation that lacked the necessary diversity of interests among those signing the Stipulation, the arguments raised by OCC/CP are bereft of legal authority. OCC/CP cite to no statutes, no Supreme Court rulings, and no Commission decisions in support of their arguments. In fact, the Commission already has rejected arguments that any one party, including OCC, must agree to a Stipulation in order to meet the first prong of the three-part test for the consideration of stipulations. *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (February 2, 2005) at 18; Entry on Rehearing (March 23, 2005) at 7. With respect to the arguments raised by NOPEC, the Commission finds that NOPEC has raised no new arguments in support of its assignment of error. All of the arguments raised by NOPEC were considered, and rejected, by the Commission in our Opinion and Order. Opinion and Order at 24-27.

(22) In support of its first assignment of error, OCC/CP also claim that the Commission erred when it determined that the Stipulation, as a package, benefits ratepayers and the public interest, as such determination is in violation of the

State policy set forth in Section 4928.02(A), Revised Code, mandating the availability of reasonably priced electric service. OCC/CP claim that the three-year auction process will not result in reasonably priced retail electric service. OCC/CP cite to the testimony of OCC witness Wilson that uncertainty regarding future prices creates risks that will result in expected risk premiums for market participants, which in turn raises costs to be paid by FirstEnergy customers (OCC Ex. 9 at 17).

OCC/CP further contend that the Commission erred when it disregarded distribution ratemaking and reliability in approving the ESP 3. OCC/CP contend that there is a significant disconnect between the timing of the reliability study performed by Staff witness Baker and the commencement of the ESP 3 on June 1, 2014. OCC/CP also claim that there must be a nexus between the annual audits and the Companies' annual performance reviews in order to ensure that the Companies are not dedicating excessive resources collected through Rider DCR to enhance distribution service.

OCC/CP also claim that the Commission's use of deferrals and carrying charges to extend the period for recovery of the costs of renewable energy credits results in unreasonably priced retail electric service and that the Commission erred by failing to require a reduction in the deferred charges for renewable energy credits to reflect that FirstEnergy has paid unreasonably high prices for renewable energy credits. OCC/CP claim that extending recovery of the costs of renewable energy credits over three years, as approved by the Commission in the ESP 3, will result in carrying charges of $680,000 for year 2011 (OCC Ex. 5) and that such carrying charges will continue, at different amounts, from 2012 through 2016. OCC/CP further claim that the Commission should grant rehearing in light of the auditors' reports filed in the *AER Case*, to ensure that the Companies only recover prudently incurred costs.

Moreover, OCC/CP claim that the energy efficiency and peak demand reduction charges result in customers paying unreasonably priced retail electric service in violation of

Section 4928.02(A), Revised Code. Specifically, OCC/CP claim the Commission erred by deciding that the costs of economic load response and optional load response programs should be collected from all customer classes instead of only from non-residential customers. OCC/CP cite to OCC witness Gonzalez's testimony that these program costs should be assigned to the respective non-residential customer classes whose customers are eligible to participate in the programs (OCC Ex. 11 at 41-42).

OCC/CP also allege that the Commission erred in its treatment of the lost distribution revenues that customers pay to the Companies because the Opinion and Order is not supported by the facts in the record and the collection of lost distribution revenue will lead to unreasonably priced retail electric service. OCC/CP raise concerns that, if the collection of lost distribution revenue is not capped by either a dollar amount or a time period, the balances can grow quite large. OCC/CP acknowledge that the collection of lost distribution revenue is only authorized through the term of the ESP 3 but argue that the Commission may, at some point in the future, authorize further collection of lost distribution revenue in the Companies' next standard service offer proceeding.

(23) FirstEnergy replies that the ESP 3 Stipulation benefits ratepayers and the public. FirstEnergy claims that laddered procurement strategy in ESP 3 employs a recognized risk mitigation strategy that will reduce rate volatility and enhance stability in the cost of electricity (Co. Ex. 14 at 14, 17-18). The Companies also argue that Rider DCR benefits customers and fosters reliable service by balancing the interests of all parties. FirstEnergy notes that the ESP 3 Stipulation merely extends Rider DCR and that, through the investments funded by Rider DCR and its predecessor, the Companies have been able to meet all of their reliability standards (Staff Ex. 2 at 5-6).

FirstEnergy also argues that spreading out the recovery of renewable energy costs benefits customers. The Companies claim that the unrebutted evidence at hearing demonstrates that the charges for the recovery of renewable energy will be lower due to ESP 3 (Co. Ex. 3 at

15). Further, FirstEnergy contends that its energy efficiency and demand reduction programs are reasonable. In response to OCC/CP's claim that residential customers should not pay for credits provided to interruptible customers, FirstEnergy notes that OCC's expert witness admitted that all customers, including residential customers, benefit from the interruptible programs (Tr. III at 99).

In its memorandum contra, Nucor agrees that extension of the interruptible programs provides substantial benefits. Nucor argues that the record demonstrates that the costs of the economic load rider credits are below the market price for capacity in the short term. Moreover, Nucor argues that the interruptible programs provide considerable benefits beyond capacity, claiming that the programs assist in achieving the statutory peak demand reduction benchmarks and provide significant economic development and job retention benefits.

In addition, the Companies argue that the Commission's approval of the recovery of lost distribution revenue was reasonable. The Companies claim that the recovery of lost distribution revenue simply keeps the Companies whole for the period of ESP 3 that distribution rates are frozen. The Companies also note that the authority to recover lost distribution is not unlimited but terminates with the end of ESP 3.

(24) The Commission finds that rehearing should be denied with respect to OCC/CP's first assignment of error. OCC/CP rely solely upon the testimony of OCC witness Wilson in support of the allegation that the three-year auction product will not result in reasonably priced electric service. However, the Commission was not persuaded by this testimony. The record establishes that a laddered approach is a reasonable form of risk management (Co. Ex. 14 at 3). Even OCC witness Wilson conceded that the staggering or laddering of auction products is an acceptable method to manage risks and that laddering will provide more stable prices than buying on a year-by-year basis (OCC Ex. 9 at 19; Tr. II at 137, 138-139, 154, 164). NOPEC witness Frye also agreed that laddering of auction

products is a reasonable method of minimizing risk and volatility (Tr. III at 49).

However, OCC witness Wilson also testified that, although a three-year auction product will smooth out generation costs, the "extraordinary uncertainty" or "extraordinary risk" in the market today will cause suppliers to include larger risk premiums in their bids, resulting in higher prices in the auction (OCC Ex. 9 at 23-24; Tr. II at 116, 146, 161). The record also reflects that Mr. Wilson previously testified in the *MRO Case* that the period before the proposed auction in that case was a period of "substantial uncertainty" and "extraordinary uncertainty" (Tr. II at 150-153, 158-159, 160-161). Moreover, Company witness Stoddard testified that many of the risk factors raised by Mr. Wilson are not extraordinary (Co. Ex. 14 at 13-14). We find that the OCC witness Wilson's repeated invocations of "extraordinary uncertainty" at different times and in response to different applications by the Companies undermines his testimony that the generally appropriate approach of including a three-year product with other products on a staggered basis should not apply in this particular case. Therefore, the Commission concludes that OCC/CP have cited to no credible evidence that the ESP 3 will not result in reasonably priced electric service.

Further, we find that OCC/CP's claim of a disconnect between the timing of the reliability study performed by Staff witness Baker and the commencement of the ESP 3 to be unconvincing. The record reflects that Staff witness Baker based his recommendation on reliability data from calendar year 2011 (Tr. II at 221-222). This data represents the most recent calendar year data available at the time of the hearing in this proceeding. Reliance upon the most recent data available does not create a disconnect and certainly does not violate the statutory requirements of Section 4928.143(B)(2)(h), Revised Code. With respect to OCC/CP's concerns that the Companies are dedicating excessive resources to enhanced distribution service, OCC/CP are free to raise that issue at the time of the annual audits on the Rider DCR. However, the Commission notes that the first annual review of the Rider DCR has been completed, and that no concerns regarding excessive spending by the Companies were raised. *In the Matter of the Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 11-5428-EL-RDR, Finding and Order (August 22, 2012).

With respect to the arguments concerning the recovery of the costs of renewable energy resources, the Commission notes that we have opened a review of these costs in the *AER Case* and that a procedural schedule and hearing date for the issues raised in the audit reports have been established. *AER Case*, Entry (October 31, 2012). OCC/CP are free to raise any issues regarding excessive costs of renewable energy resources in that proceeding. The only issue decided in this proceeding was to allow the Companies to spread the costs over three years due to the sharp declines in standard service offer load due to increased customer shopping demonstrated in the record of this proceeding (Tr. I at 257-258).

Regarding OCC/CP's claim that the costs of economic load response and optional load response programs should be collected from non-residential customers rather than all customer classes, the Commission notes that OCC witness Gonzalez agreed that the existence of the interruptible load as part of the standard service offer load may lead to lower SSO generation prices (Tr. III at 99-100). Mr. Gonzalez also acknowledged that the economic load response and optional load response programs have an economic development component in order to promote manufacturing in this state (Tr. III at 166). The Commission finds that, since the evidence reflects that these programs tend to lower SSO generation prices as well as promote both economic development and compliance with the peak demand reduction provisions of Section 4928.66, Revised Code, all customers, including residential customers, benefit from these programs. Accordingly, the Commission affirms our conclusion that the costs of these programs should be recovered from all customers.

With respect to lost distribution revenue, the Commission has opened a proceeding to explore new rate designs which promote energy efficiency and properly align the interests of electric utilities with their customers. *In the matter of Aligning Electric Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation,* Case No. 10-3126-EL-UNC, Entry, (December 29, 2010). Further, pursuant to this investigation, the Commission has approved, on a pilot basis, new rate designs where the utility, customers and other interested stakeholders have been able to reach agreement. *In re Columbus Southern Power Company and Ohio Power Company,* Case Nos. 11-351-EL-AIR et al., Opinion and Order (December 14, 2011) at 7, 9-10; *In re Duke Energy Ohio,* Case Nos. 11-3549-EL-SSO, Opinion and Order (November 22, 2011) at 34. Moreover, the Commission may, with the Companies' concurrence, institute a modified, revenue neutral rate design during the term of the ESP 3. Opinion and Order at 40. However, the Commission notes that lost distribution revenue, which is based upon measurable and verifiable energy savings, is directly related to the statutory mandates for energy efficiency savings contained in Section 4928.66, Revised Code. There is no basis in the record of this case for instituting an arbitrary cap on lost distribution revenue, as proposed by OCC/CP, while the statutory mandates for energy efficiency savings increase every year.

(25) In its first assignment of error, Sierra Club argues that the Commission erred by applying the wrong standard for evaluating the Companies' approach to the PJM 2015/2016 base residual auction. Sierra Club contends that, under Section 4928.143(B)(2)(h), Revised Code, the Commission must examine whether the customers' and the utility's interests are aligned. Sierra Club claims that, in the Opinion and Order, the Commission improperly shifted the burden of proof onto the parties opposed to the Stipulation. Further, Sierra Club claims in its second assignment of error that the record before the Commission establishes that FirstEnergy's approach to the 2015/2016 base residual auction did not serve customer interests. In addition, in its third assignment of error, Sierra Club contends that the Commission erred by not addressing FirstEnergy's conduct with respect to customer interests and the Companies' profits. In addition, OCC/CP allege

that the Commission erred by finding that the Companies' actions bidding energy efficiency and peak demand response resources into PJM's 2015/2016 base residual auction were reasonable.

(26) FirstEnergy responds that these assignments of error simply repeat arguments previously rejected by the Commission in the Opinion and Order. FirstEnergy notes that claims regarding its conduct in the 2015/2016 base residual auction are not at issue in this case but are more properly addressed in three other cases pending before the Commission. Further, FirstEnergy claims that the record demonstrates that the Companies' concerns over the ownership of energy efficiency savings were legitimate (Tr. I at 287-289). The Companies further allege that Sierra Club's witness made no specific recommendations and was unable to quantify, with certainty, the impact of the Companies' bidding strategy (Tr. I at 357-358).

(27) With respect to the arguments raised by OCC/CP and Sierra Club regarding the Companies' participation in the 2015/2016 base residual auction, the Commission reiterates that this proceeding was opened to consider the Companies' application to establish an electric security plan pursuant to Section 4928.143, Revised Code, rather than to investigate the Companies' participation in the base residual auction. The Commission has opened a proceeding to investigate the Companies' participation in the 2015/2016 base residual auction. *In the Matter of the Commission's Review of the Participation of The Cleveland Electric Illuminating Company in the May 2012 PJM Reliability Pricing Model Auction*, Case No. 12-814-EL-UNC. The only nexus claimed by OCC/CP and Sierra Club between the base residual auction and this case was the Companies' proposal to bid certain demand response resources into the base residual auction. However, even this tenuous link was severed because the procedural schedule did not permit approval of the proposed ESP 3 prior to the base residual auction.

Moreover, Sierra Club's reliance upon Section 4928.143(B)(2)(h), Revised Code, with respect to this assignment of error, is misplaced. Section

4928.143(B)(2)(h), Revised Code, explicitly relates to "distribution service" and Sierra Club has not demonstrated that the base residual auction, which establishes prices for generation capacity, has any nexus with distribution service. Further, Sierra Club incorrectly claims that the Commission placed the burden of proof upon intervenors and applied the standard of review from Section 4905.26, Revised Code, to this proceeding. Consistent with Section 4928.143(C)(1), Revised Code, FirstEnergy bore the burden of proof in this proceeding and nowhere did the Commission apply the standard for review from Section 4905.26, Revised Code. In addition, the Commission notes that OCC/CP misrepresent the Commission's ruling in the Opinion and Order, claiming that the Commission found that the Companies' actions were "reasonable." However, the Commission only determined that the limited record in this proceeding, which was not initiated to investigate the Companies' actions in the base residual auction, did not demonstrate that the Companies' actions were unreasonable.

Moreover, the Commission finds that all of the remaining arguments raised by Sierra Club and by OCC/CP in support of these assignments of error were considered by the Commission and rejected in the Opinion and Order. Opinion and Order at 38. Accordingly, rehearing on these assignments of error should be denied.

(28) NOPEC, in its sixth assignment of error, claims that the Commission erred in approving the Stipulation because the terms in the Stipulation violate important regulatory principles and practices, including allowing the collection of deferred carrying charges to be excluded from the SEET calculation. Similarly, OCC/CP claim that the Commission erred in concluding that the Stipulation did not violate any regulatory principles. Specifically, OCC/CP claim that that the exclusion of deferred carrying charges from the SEET calculation violates an important regulatory principle because it deviates from the Commission precedent set in *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test*, Case No. 10-1261-EL-UNC, Opinion and Order (January 11, 2011) (*AEP-Ohio*

SEET Case). OCC/CP also claim that the Commission erred in its approval of the SEET calculation because the Opinion and Order is not supported by the facts in the record and therefore violates Section 4903.09, Revised Code.

(29) In its memorandum contra, FirstEnergy replies that the Commission appropriately determined that certain deferrals should be excluded from the SEET calculation. FirstEnergy contends that this exclusion was consistent with Commission practice and that the Commission approved a similar exclusion in ESP 2. FirstEnergy claims that the Commission has determined that the treatment of deferrals should be determined on a case-by-case basis in SEET proceedings. *In the Matter of the Investigation into Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order (June 20, 2010) at 16.

(30) The Commission finds that rehearing on these assignments of error should be denied. As FirstEnergy points out, prior to the *AEP-Ohio SEET Case*, the Commission ruled that the treatment of deferrals, for purposes of SEET, should be determined on a case-by-case basis. In the Opinion and Order, the Commission explained that our ruling in the *AEP-Ohio SEET Case* was not applicable to the instant proceeding. Opinion and Order at 48. Accordingly, we find that there is no violation of an important regulatory principle by the Stipulation and that the Commission fulfilled its obligations under Section 4903.09, Revised Code.

(31) In its first assignment of error, NOPEC claims that the ESP 3 is not "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code" (ESP v. MRO Test), thereby failing the ESP v. MRO Test in Section 4928.143(C)(1), Revised Code. Similarly, NOPEC claims in its second assignment of error that the Commission erred in concluding, without evidentiary support, that it would award FirstEnergy a $405 million rate increase during the two-year period of the ESP 3 for purposes of the ESP v.

MRO Test. In its third assignment of error, NOPEC claims that the Commission erred in developing non-existent qualitative benefits within the ESP 3 to satisfy the ESP v. MRO Test.

Likewise, in their second assignment of error, OCC/CP claim that the Commission erred in deciding that the proposed ESP 3 was more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code, in violation of Section 4928.143(C)(1), Revised Code.

In support of its assignments of error, NOPEC claims that the proposed ESP 3 fails a quantitative analysis under Section 4928.143(C)(1), Revised Code. NOPEC commends the Commission for correctly removing any benefits associated with the RTEP obligation from the *ESP 2 Case* but contends the Commission failed to complete the quantitative analysis. NOPEC further contends that the Commission ignored the evidence to conclude that the estimated results of a distribution rate case and the proposed amounts to be recovered through Rider DCR would result in a wash for Ohio ratepayers. NOPEC claims that any alleged qualitative benefits associated with the three-year auction product in the ESP 3 are outweighed by uncertainty in the energy market and that other qualitative benefits are insufficient and unreasonable.

In support of their second assignment of error, OCC/CP claim that the Commission erred in finding that the ESP 3 met the ESP v. MRO Test. OCC/CP claim that the Commission erred by concluding that the costs of Rider DCR and the costs of a distribution rate case are a wash for customers.

OCC/CP further claim that the Commission erred by concluding that the PIPP auction benefits support the ESP over an MRO. OCC/CP contends that the Companies had ample time to bid the PIPP load out through a competitive process and the likelihood that the Ohio Department of Development (ODOD) will exercise its authority under Section 4928.54, Revised Code, to aggregate the PIPP for a competitive bid load is extremely remote.

Moreover, OCC/CP argue that the Commission erred by not recognizing that the low-income fuel funds provide an indirect benefit for FirstEnergy by assisting customer in paying their bills and should be excluded as a quantitative benefit of ESP 3. OCC/CP also contend that the Commission erred by concluding that shareholder funding for assistance to low-income customers should be considered as a qualitative benefit of the ESP 3.

OCC/CP also claim that the Commission erred by concluding that the ESP is more favorable in the aggregate for customers than an MRO under a qualitative analysis. OCC/CP argue that it was unreasonable for the Commission to modify the bid schedule for a three-year product in order to capture current lower generation prices and blend those with potentially higher prices in order to provide rate stability for customers as a purported benefit. OCC alleges that, in light of the approval of Rider DCR, it was unreasonable for the Commission to consider the extension of the distribution rate case "stay out" for two additional years as a benefit for customers.

In addition, OCC/CP contend that the Commission erred in its determination that the extension of the economic load response program was a qualitative benefit of the ESP 3. OCC/CP further allege that it was unreasonable for the Commission to consider the additional benefits provided by the Stipulation to interruptible industrial customers, schools, and municipalities as a benefit to the ESP.

(32) FirstEnergy responds that ESP 3 provides at least $21.4 million more in quantifiable benefits compared to an MRO. The Companies claim that the Commission correctly determined that the cost of Rider DCR was a "wash" when compared to a rate case. The Companies deny NOPEC's contention that the Commission's finding was without record support; the Companies note that both Company Witness Ridmann and Staff Witness Fortney testified at length on this issue (Tr. I at 125-130; Staff Ex. 3 at 4). Further, the Companies assert that there is no reason to believe that, if the Companies' costs are recoverable under Rider DCR, those same costs would not be recoverable in a distribution rate case.

Further, the Companies assert that ESP 3 provides a quantifiable benefit to PIPP customers. FirstEnergy rejects OCC/CP's claim that the PIPP discount benefits its affiliate; instead, the Companies claim that PIPP customers benefit through the six percent discount and that other customers may benefit if the discount reduces Universal Service Rider charges. Moreover, the Companies claim that the record does not support OCC/CP's claim that other generation suppliers were prepared to participate in an auction to serve the PIPP load (Tr. III at 134). Further, the Companies claim that the ESP 3 benefits low income customers through grants to fuel funds. FirstEnergy disputes OCC/CP's claim that the Companies receive an indirect benefit by helping at-risk customers pay their bills; FirstEnergy notes that the Companies recover bad debts from all customers through uncollectible riders. Therefore, the Companies' financial position is not improved simply because at-risk customers can pay their bills.

Moreover, FirstEnergy claims that the Commission properly considered the qualitative benefits provided by ESP 3. FirstEnergy notes that NOPEC witness Frye acknowledged that the Commission could consider qualitative benefits in the ESP v. MRO Test and that the Commission could approve an ESP even where the ESP's proposed generation prices were greater than market-based prices (Tr. III at 36).

In response to claims that potential prices in the ESP 3 are too uncertain to know whether customers will receive any benefits, the Companies claim that OCC/CP miss the point. Risk and volatility mitigation strategies are most prudently employed during times of the greatest uncertainty, and all witnesses who addressed this issue during the hearing agreed that a laddered procurement strategy is a widely accepted and reasonable strategy to mitigate risk and volatility (Tr. II at 139; Tr. III at 49; Tr. III at 141; Tr. I at 172; Co. Ex. 4 at 5).

In addition, the Companies argue that the Commission has previously rejected OCC/CP's claim that the distribution rate freeze provision in the ESP has been negated by Rider DCR. Opinion and Order at 56; *In re FirstEnergy*, Case No.

10-388-EL-SSO, Opinion and Order (August 25, 2010) (*ESP 2 Case*) at 36. Moreover, the Companies claim that, while changes in net plant may be equivalent between Rider DCR and a rate case, Rider DCR does not permit recovery of any other increased costs of the Companies, which would be permitted in a rate case. Further, OCC witness Gonzalez admitted that Rider DCR provides a number of benefits over a rate case, including quarterly reconciliation and annual audits (Tr. III at 139-141).

Finally, with respect to the interruptible programs, the Companies note that OCC witness Gonzalez testified that the interruptible program provides a benefit to all customers by assisting the Companies in meeting statutory demand reduction requirements (Tr. III at 99, 102). Moreover, the demand response resources may be bid into future base residual auctions, potentially reducing capacity prices and generating revenue to offset the costs of the interruptible programs (Co. Ex. 4 at 3-5).

(33) With respect to the arguments raised regarding Rider DCR, the Commission notes that NOPEC and OCC/CP misrepresent the fundamental nature of Rider DCR. Under the Stipulation, Rider DCR allows the Companies to "earn a return on and of plant in service associated with distribution, subtransmission, and general and intangible plant" not included in the rate base of the Companies' last distribution case (Co. Ex. 1, Stip. at 19; Tr. III at 39). In a distribution rate case, the Commission is required to determine the valuation, as of the date certain, of property used and useful in rendering public utility service. Section 4909.15, Revised Code. Therefore, to the extent that the Companies have made capital investments since the last distribution rate case, those investments will be recovered to an equal extent, through either Rider DCR or distribution rates, provided that the property is used and useful in the provision of distribution service. For this reason, Staff witness Fortney testified that, over the long term, the Companies will recover the equivalent of the same costs, and that, for purposes of the ESP v. MRO Test, the costs of the proposed Rider DCR and that the costs of a potential distribution rate case should be considered equal (Staff Ex. 3 at 4-5). The Commission notes that both the

Companies and consumers benefit from distribution mechanisms authorized by Section 4928.143(B)(2)(h), Revised Code, such as Rider DCR. The Companies benefit from the mitigation of regulatory lag in their distribution rates. Consumers benefit from caps in rate increases in the short term and more gradual rate increases in the future (Tr. III at 141).

The Commission further notes that OCC/CP have cited to no testimony or other evidence to explain how the shareholder-funded contributions to the fuel funds constitute an indirect benefit for the Companies in light of the riders in place which recover uncollectible expenses from other ratepayers. Similarly, OCC/CP have cited to no testimony or other evidence in the record in support of their assertion that the likelihood is extremely remote that ODOD will exercise its authority under Section 4928.54, Revised Code, to procure a competitive bid for the PIPP load. However, the Commission will reiterate that nothing in ESP 3 precludes ODOD from acting under Section 4928.54, Revised Code. Therefore, the six percent discount for the PIPP load provided for under ESP 3 is a minimum discount, and, if a better price can be obtained by ODOD through a competitive bid, that competitive bid will prevail over the provisions of ESP 3.

Moreover, NOPEC wholly fails to cite to any testimony or evidence in the record explaining why the qualitative benefits of ESP 3 are insufficient or unreasonable. As a preliminary matter, the record indicates widespread agreement with respect to the need to examine both qualitative and quantitative benefits under the ESP v. MRO Test. Staff witness Fortney opined that the ESP 3 contained qualitative benefits which the Commission should consider (Staff Ex. 3 at 3-4). NOPEC's witness Frye agreed that the Commission may approve an ESP under the ESP v. MRO Test even if the ESP included rates higher than market rates (Tr. III at 36); likewise, OCC expert Gonzalez agreed that the Commission can consider both quantitative and qualitative benefits in the ESP v. MRO Test (Tr. III at 135).

Further, the record fully supports our finding that the ESP 3 provides a qualitative benefit for customers by smoothing generation prices and mitigating the risk of volatility. Opinion and Order at 56. NOPEC's witness Frye and OCC expert Gonzalez both concurred that laddering auction products is a reasonable approach to minimize risks and volatility (Tr. III at 49; Tr. III at 141-142). Mr. Gonzalez further opined that gradual increases in rates are consistent with the ratemaking principle of gradualism (Tr. III at 141). Further, OCC witness Wilson agreed that the laddering or blending of auction products will result in less volatility of rates (Tr. II at 154). Staff witness Fortney testified that the blending of auction products will provide rate stability and that the distribution rate case "stay out" provision will provide rate certainty, predictability and stability for customers (Staff Ex. 3 at 3).

Finally, the Commission finds that the remaining arguments in support of the assignments of error raised by NOPEC and OCC/CP were fully considered and rejected by the Commission in the Opinion and Order. Opinion and Order at 48-57.

(34) In its ninth assignment of error, NOPEC claims that the Commission erred by approving FirstEnergy's corporate separation plan as part of the Stipulation without a formal, detailed review of the plan. Likewise, OCC/CP claim in their fourth assignment of error that the Commission erred by approving FirstEnergy's corporate separation plan.

(35) FirstEnergy responds that the Commission appropriately approved the Companies' corporate separation plan. The Companies claim that ESP 3 contained a provision that simply sought to maintain the preexisting Commission approval to the Companies' corporate separation plan, which was unchanged since the Commission approved the plan as part of the current ESP. *ESP 2 Case* at 16.

(36) The Commission notes that the corporate separation plan filed in Case No. 09-462-EL-UNC and approved by the Commission in the *ESP 2 Case* was incorporated by reference into the application and Stipulation filed in this proceeding. Therefore, the corporate separation plan is, by definition, unchanged since our approval of the *ESP 2 Case*.

Further, the Commission notes that, even if there were changes to the corporate separation plan, such changes do not necessitate a formal, detailed review as claimed by NOPEC. Rule 4901:1-37-06, O.A.C., provides that proposed changes to a corporate separation plan are approved automatically unless the Commission orders otherwise within 60 days of the filing or the proposed change or unless the proposed change relates to the sale or transfer of generation assets. Moreover, the Commission finds NOPEC's claims that the corporate separation plan was approved in the *ESP 2 Case* without an in-depth review to be disingenuous. NOPEC was a signatory party to the combined stipulations in the *ESP 2 Case,* which provided for approval of the corporate separation plan filed in Case No. 09-462-EL-UNC; as a signatory party to the combined stipulations, NOPEC recommended their approval by the Commission. Finally, the Commission notes that neither NOPEC nor OCC/CP cite to any testimony or other evidence in the record of this case substantiating their objections to the unchanged corporate separation plan. Although the Companies bear the burden of proof in this proceeding, NOPEC and OCC/CP have failed to identify any evidence in the record of this case in support of their claims.

(37) In its tenth assignment of error, NOPEC contends that the Commission's approval of Rider DCR as part of the ESP 3 violates Section 4928.143(B)(2)(h), Revised Code. NOPEC contends that the failure of the Companies to bid more resources into the 2015/2016 base residual auction demonstrates that the Companies have not dedicated sufficient resources to reliability.

(38) The Commission finds that rehearing on this assignment of error should be denied. The definition of "retail electric service" in Section 4928.01(A)(27), Revised Code, clearly distinguishes the "generation service" component from the "distribution service" component. As discussed above, Section 4928.143(B)(2)(h), Revised Code, explicitly relates to "distribution service" and requires the Commission to examine the "reliability of the distribution system." NOPEC has not demonstrated in the record of this case that the base residual auction, which establishes prices for

generation capacity as part of "generation service," has any nexus with distribution service.

(39) NOPEC claims, in its eleventh assignment of error, that the Commission's approval of the ESP 3 violates Section 4905.22, Revised Code, by approving unjust and unreasonable rates. Similarly, in their fourth assignment of error, OCC/CP claim that the Commission erred by approving the Companies' unjust and unreasonable standard service offer proposal in violation of Section 4905.22, Revised Code.

(40) The Commission finds that rehearing on this assignment of error should be denied. NOPEC and OCC/CP have not demonstrated that Section 4905.22, Revised Code, is applicable to SSOs by electric utilities. Section 4928.05(A)(1), Revised Code, states, in relevant part:

> a competitive retail electric service supplied by an electric utility . . . shall not be subject to supervision and regulation . . . by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter.

Section 4905.22, Revised Code, is not one of the enumerated exceptions to this statute. The Commission notes that Division (A)(1) of Section 4928.05, Revised Code, also states that "[n]othing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code." However, NOPEC and OCC/CP have failed to make any argument that this provision incorporates Section 4905.22, Revised Code, into Sections 4928.141 through 4928.143, Revised Code.

(41) In their first assignment of error, the Suppliers argue that the Commission unreasonably and unlawfully adopted Rider AER, which distorts price signals and defers unnecessary carrying costs. The Suppliers argue that the modification of Rider AER will artificially depress the cost of Rider AER to customers in the near term to between 56 percent and 64 percent of what it would otherwise have been. The Suppliers allege that this skews the price signals for shopping customers and subjects nonshopping customers to unnecessary carrying costs. The Suppliers further claim that this provision of the Stipulation divides cost causation from cost responsibility.

(42) FirstEnergy responds that the current Rider AER charge is artificially high due to the use of a historic three-year baseline. The need for the deferrals is created because nonshopping customers are required to pay for renewable energy costs for customers that are currently shopping but were not shopping during the three-year baseline period. Moreover, the Companies contend that the record does not support the Suppliers' claim that competitive generation suppliers cannot spread their renewable energy costs over time (Tr. III at 83).

Nucor argues in its memorandum contra the applications for rehearing that the Commission reasonably approved the revision to Rider AER allowing the recovery of Rider AER costs to be spread over a longer period of time. Nucor states that spreading out these costs would have a significant benefit to current SSO customers, reducing Rider AER charges by between 56 percent and 64 percent. Therefore, the Commission had a reasonable basis to determine that the price smoothing impact of the change to Rider AER outweighed the effect of potential carrying costs.

(43) The Commission finds that the Suppliers have raised no new arguments on rehearing and that the Commission thoroughly considered and addressed the Suppliers' arguments in the Opinion and Order. Opinion and Order at 34-35.

(44) In their second assignment of error, the Suppliers claim that the Commission unreasonably and unlawfully adopted the provision of the Stipulation allowing the Companies to award a wholesale bilateral contract to provide power to PIPP customers outside of the public contract. The Suppliers contend that awarding a non-bid wholesale contract for PIPP customers is at odds with a competitive marketplace and runs contrary to Ohio's energy policies.

(45) The Commission finds that rehearing on this assignment of error should be denied. The Commission is required to balance the various state policies set forth in Section 4928.02, Revised Code, including the policy to protect at-risk populations. The Stipulation adopted by the Commission in this proceeding provides a guaranteed, minimum six percent discount for PIPP customers to assist these customers in paying their bills. In addition, other customers benefit as lower prices for PIPP customers should result in lower PIPP arrearages to be collected from all customers. Moreover, as discussed above, nothing in ESP 3 precludes ODOD from exercising its authority under Section 4928.54, Revised Code. Therefore, the six percent discount for the PIPP load provided for under ESP 3 is a minimum discount, and, if a better price can be obtained by ODOD through a competitive bid, that competitive bid will prevail over the provisions of ESP 3.

(46) The Suppliers argue in their third assignment of error that the Commission unreasonably and unlawfully failed to confirm the electronic data interchange (EDI) enhancements agreed to by FirstEnergy and did not address the additional recommendations for additional enhancements to the Companies' EDI system.

(47) FirstEnergy claims that the Commission has already thoroughly considered and rejected the Suppliers' arguments. The Companies claim that the Suppliers have not presented any evidence demonstrating that the EDI system impedes competitive retail electric service (CRES) providers from entering the market or raises costs to CRES providers.

(48) The Commission will clarify that the application for ESP 3 was adopted as modified by FirstEnergy by agreeing to the terms of the Fein letter (Co. Ex. 7). With respect to the remaining recommended enhancements to FirstEnergy, the Commission finds that the testimony in the record does not support the adoption of the recommendations at this time. However, the Commission notes that a working group has been reconvened to consider issues related to EDI, and we urge the Suppliers to pursue their recommendations through that collaborative forum rather than through litigation.

(49) In their fourth assignment of error, the Suppliers claim that the Commission unreasonably and unlawfully concluded that there was no record in this proceeding demonstrating that the absence of the purchase of receivables (POR) has inhibited competition. The Suppliers argue that the Commission should determine whether the proposed POR program is consistent with the policy objective "to ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective need." Section 4928.02(B), Revised Code. The Suppliers claim that the Commission has a duty to adopt and promote policies that promote competition. The Suppliers further argue that state policy requires more than just shopping; it requires that customers be provided with real choices. The Suppliers note that, for residential customers, government aggregation represents 96 percent of all shopping and that one supplier serves all but one of those aggregations.

In their fifth assignment of error, the Suppliers claim that the Commission unreasonably and unlawfully concluded that there is no evidence that circumstances have changed since the adoption of the stipulation in *WPS Energy Services, Inc., and Green Mountain Energy Company v. FirstEnergy Corp., et al.*, Case No. 02-1944-EL-CSS (*WPS Energy*) to justify abrogating that stipulation.

(50) IGS contends, in its first assignment of error, that the Commission's finding that there is no record in this proceeding demonstrating that the absence of the purchase

of receivables has inhibited competition is contrary to the manifest weight of the evidence and is inconsistent with the Commission's prior findings.

In its second assignment of error, IGS claims that the Commission's finding that there is no record in this proceeding that the Companies are under any legal obligation to purchase receivables misstates the standard for evaluating a term of an ESP and subjected the POR program proposed by IGS to a test that was not applied to any term of the ESP.

Further, IGS alleges in its third assignment of error that the Commission's finding that there is no record that circumstances have changed since the adoption of the stipulation in *WPS Energy* to justify abrogating the stipulation is contrary to the manifest weight of the evidence and is inconsistent with the Commission's instruction to investigate this matter in the Commission review of Chapter 4901:1-10, O.A.C., initiated in *In the Matter of the Commission's Review of Chapter 4901:1-10, Ohio Administrative Code, Regarding Electric Companies,* Case No. 12-2050-EL-ORD (*Rule Review Case*).

Finally, in its fourth assignment of error, IGS claims that the Commission's failure to provide for this case to remain open to accommodate the results of the Staff investigation is unreasonable and may serve to prevent the implementation of Staff's recommendations in the *Rule Review Case.*

(51) The Companies respond that a POR program would increase costs for nonshopping customers (Tr. III at 68-70, 90). FirstEnergy notes that uncollectible expenses for CRES providers are generally higher than the Companies' uncollectible expenses (Tr. II at 189). Therefore, a POR program represents a potential increase in rates because the Companies would either absorb these higher costs or recover the higher costs from all customers. The Companies claim that shopping is flourishing in their service territories and the shopping levels in the Companies' service territories are the highest in the state (Tr. II at 19; Tr. III at 29-30). The Companies further note

that the fact that shopping may be accomplished through government aggregation does not mean that the contracts are not competitive and that state policy encourages shopping through government aggregations. Section 4928.20(K), Revised Code.

The Companies dispute IGS' and the Suppliers' claims that the Commission erred in noting that the Companies had no legal obligation to purchase marketers' receivables. The Companies claim that the absence of a legal obligation to purchase receivables is the distinguishing factor between the Companies and utilities with POR programs in Ohio cited by IGS and the Suppliers, representing that all of those programs were adopted by stipulation. The Companies further claim that IGS and the Suppliers fail to demonstrate that the Commission has the statutory authority to compel the Companies to adopt a POR program. In fact, FirstEnergy claims that the Commission's decision is consistent with Section 4928.02(H), Revised Code, which calls for the avoidance of anticompetitive subsidies.

Further, the Companies contend that the record supports the Commission's finding that circumstances have not changed since the adoption of the stipulation in *WPS Energy*. The Companies note that IGS witness Parisi acknowledged that circumstances have not changed (Tr. II at 213-214).

(52) The Commission finds that rehearing on these assignments of error should be denied. The Suppliers and IGS seek Commission modification of the proposed ESP to require FirstEnergy to implement a POR program. The Suppliers and IGS argue that the testimony of their witnesses demonstrates that a POR program would "promote" competition and that the Commission is required to promote competition pursuant to Section 4928.02(B), Revised Code. However, neither the Suppliers nor IGS have demonstrated that the absence of a POR program is a barrier to competition which precludes "the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms,

conditions, and quality options they elect to meet their respective needs." Section 4928.02, Revised Code.

In addition, the Commission notes that, although IGS and the Suppliers cite anecdotally to successful POR programs in Duke's electric service territory and to Ohio gas utilities, their witnesses simply ignored competition in the other electric utility service territories. There is no evidence in the record of any study which systematically compares any measure of competition between electric utilities which offer POR programs and those that do not, in Ohio or otherwise. However, the Commission notes that we have opened a separate investigation to determine whether there are any barriers to competition in the retail electric service market in this state. *In the Matter of the Commission's Investigation of Ohio Retail Electric Service Market*, Case No. 12-3151-EL-COI.

Moreover, as the Commission determined in the Opinion and Order, neither the Suppliers nor IGS have demonstrated that FirstEnergy is under any legal obligation to implement a POR program. Opinion and Order at 26. As we noted, in adopting the stipulation in *WPS Energy*, the Commission approved a waiver of any obligation of the Companies to purchase accounts receivable. As FirstEnergy points out, the absence of a legal obligation to purchase accounts receivable is a distinguishing factor between the Companies and the gas and electric utilities cited by the Suppliers and IGS.

Moreover, the Suppliers have not demonstrated that the stipulation in *WPS Energy* should be set aside. The Suppliers and IGS claim that the Commission erred in finding that there was no evidence that circumstances have changed since the adoption of the stipulation in *WPS Energy*. However, in claiming that this determination was against the manifest weight of the evidence, IGS elides the testimony of its own witness Parisi, who testified that no circumstances have changed (Tr. II at 213-214). Moreover, the testimony of Supplier witness Ringenbach cited by the Suppliers does not relate to how circumstances have changed in the market since the adoption of the stipulation; the testimony simply outlines Suppliers' concerns with the current system (RESA Ex. 3 at 8-12). The fact that Suppliers may no longer be satisfied with the remedy adopted in *WPS Energy* does not constitute a change in circumstances in the market.

In any event, the Commission fully considered the testimony of Ms. Ringenbach, concluded that the issues raised in her testimony should be addressed in a workshop in a separate docket, and directed Staff to determine, in that docket, whether additional steps are necessary to address the implementation of the stipulation. Opinion and Order at 42. IGS wrongly concludes that by directing the Staff to address these issues in the workshop, the Commission acknowledged that circumstances have changed since the adoption of the stipulation. However, in reaching this conclusion, IGS simply ignores our explicit direction that the workshop address the narrow issues "regarding the implementation of the stipulation in *WPS Energy with respect to customers on deferred payment plans*" rather than whether a POR should be adopted by FirstEnergy. *Id.*

With respect to IGS' argument that this proceeding should remain open in order to implement Staff's recommendations in the *Rule Review Case*, the Commission finds that this step is unnecessary. The Commission expects that FirstEnergy, and every other Ohio electric utility, will expeditiously implement all directives of the Commission and amendments to Chapter 4901:1-10, O.A.C., resulting from the *Rule Review Case*, including appropriate tariff revisions if necessary. There is no need to keep this docket open to address such changes. Rehearing on this assignment of error should be denied.

(53) Finally, the Suppliers argue that the Commission failed to address their recommendation that FirstEnergy be ordered to file a report in a new docket regarding the steps necessary to implement supplier consolidated billing with shut-off capability.

(54) The Commission notes that, in the *Rule Review Case*, the Suppliers will have an opportunity to propose amendments to our rules to implement supplier consolidated billing and to demonstrate to the Commission

that the proposed shutoff provisions are consistent with our statutory mandate to adopt rules providing for a "prohibition against blocking, or authorizing the blocking of, customer access to a noncompetitive retail electric service when a customer is delinquent in payments to the electric utility or electric services company for a competitive retail electric service." Section 4928.10(D)(3), Revised Code. Accordingly, rehearing on this assignment of error should be denied.

It is, therefore,

ORDERED, That the applications for rehearing be denied as set forth above. It is, further,

ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

GAP/MLW/sc

Entered in the Journal

JAN 30 2013

Barcy F. McNeal

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Secretary