BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	:	Case No. 14-1297-EL-SSO

POST-HEARING BRIEF

SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

The Third Supplemental Stipulation and Recommendation (stipulation) presented in this case enhances the benefits to rate payers identified in the Toledo Edison Company, Ohio Edison Company and the Cleveland Electric Illuminating Company's (FE or the Companies) Application and addresses the concerns raised by the Staff of the Public Utilities Commission of Ohio (Staff) and other parties in this proceeding. The Stipulation

is supported by a broad and diverse group of 19 stakeholders.[1] The plan represents compromises by FE and the other Signatory Parties and provides for a balanced outcome for all stakeholders. Approval would give the stakeholders what is needed, stability today and predictability for tomorrow.

DISCUSSION

I. The stipulation meets the three-part test for reasonableness.

Rule 4901-1-30, O.A.C, authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such agreements are to be accorded substantial weight.[2] The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior

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[1] The signatory parties, who represent a variety of diverse interests, include the Ohio Power Company; the Staff; low-income customer advocates – Ohio Partners for Affordable Energy (OPAE), the Council for Economic Opportunities in Greater Cleveland, the Consumer Protection Association, the Cleveland Housing Network, Citizens Coalition; industrial and commercial advocates – the Ohio Energy Group (OEG), Nucor Steel Marion, and Material Sciences Corporation; union workers-IBEW Local 245; a city and its residents, Akron; smaller enterprises-Council of Smaller Enterprises; a large commercial business-Kroger competitive retail electric suppliers – Interstate Gas Supply, Inc. (IGS), higher education- Association of Independent Colleges and Universities of Ohio; and EnerNOC, Inc..

[2] *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d at 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

Commission proceedings.[3] In considering the reasonableness of a stipulation, the Commission has used the following criteria;

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve cases.[4] When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support remains operative. While the Commission "may place substantial weight on the terms of a stipulation," it "must determine, from the evidence, what is just and reasonable."[5] The agreement of some parties is no substitute for the procedural protections reinforced by the evidentiary support requirement.[6]

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3 See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (Order on Remand) (Apr. 14, 1994); *Ohio Edison Co*., Case No. 92-1463-GA-AIR, *et al*. (Opinion and Order) (Aug. 26, 1993); *Ohio Edison Co*., Case No. 89-1001-EL-AIR (Order on Remand) (Aug. 19, 1993); *The Cleveland Electric Illumination Co.*, Case No. 88-170-EL-AIR (Opinion and Order) (Jan. 31, 1989); and *Restatement of Accounts and Records (Zimmer Plant)*, Case No, 84-1187-EL-UNC (Opinion and Order) (Nov. 26, 1985).

4 *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994), citing, *Consumers' Counsel*, *supra*, at 126.

5 *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992).

6 *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46 (2011).

The signatory parties, and the Commission staff, respectfully submit that the stipulation here satisfies the reasonableness criteria, and that the evidence of record supports and justifies a finding that its terms are just and reasonable.

A. Serious Bargaining

The Stipulation is the product of serious negotiations among knowledgeable parties. The list of parties that signed the stipulation represents a variety of diverse interests, which include the Companies; the Staff; low-income customer advocates – Ohio Partners for Affordable Energy (OPAE), the Council for Economic Opportunities in Greater Cleveland, the Consumer Protection Association, the Cleveland Housing Network, Citizens Coalition; industrial and commercial advocates – the Ohio Energy Group (OEG), Nucor Steel Marion, and Material Sciences Corporation; union workers-IBEW Local 245; a city and its residents, Akron; smaller enterprises-Council of Smaller Enterprises; a large commercial business-Kroger competitive retail electric suppliers – Interstate Gas Supply, Inc. (IGS), higher education- Association of Independent Colleges and Universities of Ohio and EnerNOC, Inc.[7] The signatories are a listing of the major users of power in the FE service territories and the Staff. The signatory parties have an extensive history of participation and experience in matters before the Commission.

[7] FE Ex. 154 (Third Supplemental Stipulation and Recommendation).

The Stipulation that has been proposed in this case is the result of a lengthy process of negotiation involving experienced counsel representing members of many stakeholder groups[8]. The Companies met with the various parties both prior to and during the evidentiary hearing to discuss areas of potential settlement. These parties were involved in the earlier phase of this case and have been involved in many Commission cases over the years. During the case, the Companies responded to over 3,700 questions, and participated in 25 days of depositions.[9] The Parties then participated in over 40 days of evidentiary hearing. Parties signing the stipulation were capable and knowledgeable about the issues raised in this case.

Several parties opposing the Stipulation argue that the Signatory Parties do not represent a variety of diverse interests. These claims are baseless. As mentioned above, both the Staff and a variety of diverse interests, which include low-income customer advocates, industrial and commercial advocates, commercial customers, competitive retail electric suppliers, a city and its residents, higher education institutions and a union were signatory parties. Although the conclusion that the Stipulation results from serious bargaining among knowledgeable parties is obvious, that does not prevent opposing parties from challenging it. In sum, the stipulation is the product of serious negotiations among knowledgeable parties.

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8 FE Ex. 155 (Fifth Supplemental Direct Testimony of Eileen M. Mikkelsen) at 8-9.

9 *Id*. at 8.

B. Public Interest

The benefits of the proposed Stipulation to the public are large and broad. The Stipulation provides that[10]:

- The term of the ESP will be modified to an eight year term from June 1, 2016 to May 31, 2024, subject to reconciliation. (Section V.A.1 at 7);

- The retail rate stability rider (Rider RRS) will be reduced to a term from June 1, 2016 to May 31, 2024, subject to reconciliation. (Section V.B.1 at 7);

- The Commission may terminate the specific charge or credit of Rider RRS for any generation unit upon its sale or transfer pursuant to R.C. 4905.26. (Section V.B.1 at 7);

- FE will provide an aggregate credit of up to $100 million to the RRS during years five through eight. (Section V.B.2 at 7);

- FE will commit to a rigorous annual review process under which the Commission will review all actions taken when selling the output from the generating units into the market and costs resulting therefrom for reasonableness under the facts known at the time. FE and not customers will be responsible for any adjustments made by the Commission. (Section V.B.3.a. at 8);

- FirstEnergy Solutions Corporation fleet information on any cost component will be provided to Staff on reasonable request as it conducts a reasonableness review of cost components for the generation units included in the rider. (Section V.B.3.b. at 8);

- Rider RRS will be severable in that if a Court of competent jurisdiction invalidates Rider RRS in whole or part, the balance of the ESP will continue. (Section V.B.3.c. at 8);

- FirstEnergy will take steps to advocate for market enhancements at the wholesale level such as a longer-term capacity product, informing the Staff first and providing a public, quarterly update to the

[10] FE Ex. 154 (Third Supplemental Stipulation and Recommendation at 7-18).

Commission on the state of the wholesale market. (Section V.D. at 9);

- FE commits to a grid modernization initiative by filing a business plan within 90 days for the Commission's consideration. This plan will include a specific timeline, sharing of data with customer consent, certain specific examples, and a decoupling mechanism. The parties agree to support defined rate recovery if this mechanism is approved and FE will provide semi-annual updates of its progress on this initiative. (Section V.D. at 9-10);

- For the term of the ESP FE will not seek a waiver of the personal service requirement on the day of disconnection of service. (Section V.D.3. at 10);

- FE commits to a goal of reducing carbon emissions by 90% by 2045 and will file reports of its progress every five years. (Section V.E.1. at 11) at 28-29);

- FE will evaluate battery investments. (Section V.E.2. at 11);

- FE will submit a plan to reactivate its EE/PDR Portfolio Plan offerings with a goal of over 800,000 MWh of annual energy savings and will include a program to aid customers in making smart energy choices using information targeted to the individual customers. (Section V.E.3. at 11);

- To the extent Staff deems it necessary to comply with federal law or rules FE will acquire 100 MW of new Ohio solar or wind resources as part of a strategy to diversify Ohio's energy portfolio. (Section V.E.4. at 12);

- FE will file a proposal seeking approval of a straight fixed variable cost recovery mechanism by April 3, 2017 with a specified phase-in. (Section V.F. at 12-13);

- There will be a distribution rate freeze for the term of the ESP. (Section V.G.1. at 13);

- There are a number of rate design provisions that will aid economic development. (Section V.G.4.a. at 14-15);

- Funds will be provided to a number of organizations to further energy efficiency programs. (Section V.G.4.b. at 15);

- Nearly $1.4 million will be provided annually to assist low-income customers. (Section V.G.4.c. at 16);
- $24 million will be provided to support economic development or conservation programs in Ohio. (Section V.I.2. at 17);
- The Rider NMB pilot is expanded to include more customers. (Section V.H.6. at 17); and
- FE will maintain its headquarters and nexus of its operations in Akron, Ohio. (Section V.G.1.3. at 17).

These benefits touch many customers and are self-explanatory. Staff asks that the Commission exercise its discretion to find that the stipulation, as a whole, benefits the public interest.

Some parties will argue that not all of the elements of the Stipulation were considered. Similarly, some will argue that Stipulation terms that are unrelated to the PPA should not be considered. The arguments have no merit. All of the opposing intervenors were part of the settlement discussions and now have an opportunity to challenge them in this case through the hearing process. Again, the Stipulation is to be evaluated as a package. The package, in this case, provides significant benefits to customers as mentioned above. Even if some attributes could have been evaluated separately, achieving them in one group is advantageous by enhancing the perception of stability for the future of FE and its customers. Furthermore, many of the Stipulation's package-attributes are subject to further Commission review.

Some will argue that the Stipulation is not in the public interest because the affiliated PPA will deter entry into the competitive generation market. On the contrary, the Stipulation will provide that the PPA units are managed efficiently and bid competitively

in the PJM markets with full Commission oversight to assure compliance.[11] In addition, although anti-competitive claims may be made, no quantitative analysis on either a wholesale or retail basis is provided. The argument should be rejected.

Overall the Stipulation, as a package, benefits ratepayers and is in the public's interest.

C. The Stipulation does not violate any important regulatory principle or practice, rather it promotes public policy.

The final prong of the Commission's three-part test is passed, as the Stipulation does not violate any important regulatory principle or practice. The terms of the Stipulation represent a compromise of the Signatory Parties. None of the individual provisions of the Stipulation is inconsistent with or violates any important Commission principle or practice. On the contrary, the compromise reached by the diverse set of Signatory Parties results in a Stipulation that promotes a number of the state policies expressed in Ohio Revised Code 4928.02, including:

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
>
> (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
>
> (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but

[11] FE Ex. 154 (Third Supplemental Stipulation and Recommendation at 8).

not limited to, demand- side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(N) Facilitate the state's effectiveness in the global economy.[12]

The Stipulation goes beyond not violating any important regulatory principles or policies; the Stipulation advances important regulatory policies and principles. For example, the Stipulation:

-supports economic development and job retention;

-supports competitive markets;

-encourages energy efficiency and peak demand reduction;

-protects at-risk populations through low income programs;

-benefits large industrial customers allowing them to better compete in global markets;

-supports advocacy for improvements in wholesale markets;

[12] R.C. 4928.02.

-promotes carbon reductions;

-hastens grid modernization; and preserves resource diversification.[13]

The terms of the Stipulation promote advancements in technology for infrastructure.[14] Likewise the terms of the Stipulation increase energy efficiency and a partnering with the other stakeholders to implement efficiency.[15] All of these matters are benefits of the Stipulation but also promote important regulatory principles and practices as incorporated by the Signatory Parties in the Stipulation.

The Stipulation benefits customers, is in the public interest, and is designed to provide adequate, safe, and reliable electric service.[16] The Stipulation also supports economic development and job retention in Ohio.[17] This Stipulation proposes a Revised Affiliate PPA that includes a lower fixed ROE.[18]

The Stipulation includes credits to customers that could amount to up to $100 million during the last four years of the PPA.[19] These benefits include: (1) changing the

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13 FE Ex. 155 (Fifth Supplemental Direct Testimony of Eileen M. Mikkelsen) at 10.

14 FE Ex. 154 (Third Supplemental Stipulation and Recommendation, Section V.D. at 9-10); (Section V.D. at 9-10).

15 *Id*. at Section V.G.4.b.at 15-16).

16 FE Ex. 155 (Fifth Supplemental Direct Testimony of Eileen M. Mikkelsen) at 10.

17 *Id*. at 9.

18 *Id*. at 7.

19 *Id*. at 3-4.

term of the ESP to eight years; (2) commitments to advocate at the federal level; (3) proposals to include enhancements to the competitive retail markets in Ohio; (4) commitments to enhance energy efficiency programs; (5) commitments to reduce the carbon emissions of power plants in Ohio; (6) commitments to seek to expand the wind and solar energy resources by 100 MW in Ohio; (7) commitments to file a rate decoupling plan and (7) commitments develop a plan for grid modernization.[20] FE has estimated that, over the term of the agreement customers are forecasted to receive $561 million in benefits related to the PPA.[21]

The Stipulation will also be subject to continuing review and oversight and should be approved. These are just a few of the abundant benefits provided by the Stipulation. These benefits further the important policy goals of the General Assembly and show that the stipulation meets the third prong of the Commission's three-part test on the reasonableness of a contested stipulation.

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[20] FE Ex. 155 (Fifth Supplemental Direct Testimony of Eileen M. Mikkelsen) at 3-6.

[21] *Id*. at 11.

II. The PPA Rider mechanism meets the necessary conditions established by the Commission.

In Case No. 13-2385-EL-SSO (The *ESP III Case*) the Commission asserted its authority in granting a PPA Rider request pursuant to R.C. 4928.143(B)(2)(d).[22] Accordingly, the Commission established a "placeholder PPA Rider" for the company with an initial charge of $0 for the term of the ESP.[23] The Commission further identified a set of necessary conditions that, at a minimum, must be satisfied in order for the Commission to consider approving a PPA Rider charge.[24] The set of necessary conditions[25] are as follows:

1. A demonstrated financial need of the generating plant;
2. The impact of a generating plant on grid reliability; including supply diversity;
3. Compliance with current and future environmental regulation;
4. The economic impact of the closure of a generating plant on electric prices and the economic development in the state;
5. An independent assessment of the impact of the closure of a generating plant on grid reliability and on pricing;
6. Rigorous commission oversight of the PPA rider;
7. Full information sharing with the Commission and Staff;

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22 *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO ("*ESP III Case*") (Opinion and Order at 24-25) (Feb. 25, 2015).

23 *Id.*

24 *Id.*

25 *Id.*

8. A sharing mechanism of the rider's financial risk between the company and its ratepayers; and

9. A severability provision.

In the initial phase of this hearing, the Staff had not endorsed the application. The Stipulation, however, addresses many of the Staff's concerns.

The Stipulation, importantly, both shortens the term of the PPA providing certainty to FE customers and lowers the ROE to 10.38%.[26] The Stipulation also provides that the Commission will have rigorous reviews of the PPA Rider in annual compliance reviews to ensure that actions taken by the Company when selling the output from generation units included in the PPA Rider into the PJM market were not unreasonable.[27] FE, not its customers, would be responsible for the adjustments made to the PPA Rider based on actions deemed unreasonable by the Commission, including any costs (after proper consideration of such costs and netting of any bonus payments) associated with performance requirements in PJM's markets.[28] Any determination that the costs and revenues included in the PPA Rider are unreasonable shall be made in light of the facts and circumstances known at the time such costs were committed and market revenues were received.[29]

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26 FE Ex. 154 (Third Supplemental Stipulation and Recommendation) at 7.

27 *Id*. at Section V.B.3.a. at 8.

28 *Id.*

29 *Id.*

The Stipulation also calls for full information sharing. FirstEnergy Solutions fleet information on any cost component will be provided pursuant to a reasonable Staff request (as determined by the Commission) as it conducts a reasonableness review of a specific cost component for the generation units included in the Affiliated PPA.[30] The Commission also has the option to terminate the charge for any unit upon unit sale.[31]

The Stipulation also calls for a sharing mechanism of the rider's financial risk between the company and its ratepayers. The RRS rate in year five of the plan will be credited an amount up to $10 million.[32] This will be followed by credits of $20 million in year six, $30 million in year seven, and $40 million in year eight.[33] This is a potential of $100 million over the term of the RRS.

Finally, the Stipulation contains a severability provision.[34]

Therefore, with Staff's concerns addressed, the Commission should approve the Stipulation here.

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30 FE Ex. 154 (Third Supplemental Stipulation and Recommendation, Section V.B.3.a.) at 8.

31 *Id*. at Section V.B.1) at 7.

32 *Id*. at Section V.B.2. at 7-8.

33 *Id.*

34 *Id*. at Section V.B.3.c. at 8.

CONCLUSION

The Stipulation meets all prongs of the three-part test. The Commission should adopt the Stipulation as its order in this case.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following Parties of Record, this 12th day of February, 2016.

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Summary: Brief Post-Hearing Brief submitted by Assistant Attorney General Thomas McNamee on behalf of the Staff of the Public Utilities Commission of Ohio. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio