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

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S APPLICATION FOR REHEARING

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The Northeast Ohio Public Energy Council ("NOPEC"), through counsel and pursuant to R.C. 4903.10, and O.A.C. 4901-1-35, hereby requests rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") in this proceeding on March 31, 2016 ("Order"). NOPEC submits that the Commission's Order is unlawful and unreasonable based on the following grounds:

A. The Commission's Order is Unlawful Because it Failed to Consider the Effect of the Nonbypassable Rider RRS on Large-Scale Government Aggregation as Required by R.C. 4928.20(K).

B. The Commission Erred in Approving the Severability Provision of the Third Stipulation and Recommendation by Not Modifying it to Permit Payments Made under Rider RRS to be Refunded in the Event a Court of Competent Jurisdiction Invalidates the Rider, like the Commission did in the Ohio Power Company PPA Opinion and Order.

C. The Commission Erred in Not Rejecting the Third Stipulation and Recommendation's Transition Provision.

D. The Commission Erred in Applying the Test for Approving Partial Stipulations to the Third Stipulation and Recommendation.

1. The First Prong: The Commission erred in finding that the settlement is the product of serious bargaining among capable, knowledgeable parties with a diversity of interests.

2. The Second Prong: The settlement is unlawful because it violates numerous statutes, regulatory principles and practices.

a. Rider RRS is unlawful because it does not fall under any of the provisions of R.C. 4928.143(B). In Re Application of Columbus Southern Power Co., et al., 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655.

i. It is unlawful to include a provision related to "a financial limitation on customers shopping" in an ESP. R.C. 4928.143(B)(2)(d); CSP II.

(a) Common usage of the term "customer shopping" is synonymous with the term "customer switching" and reveals the General Assembly's intent under R.C. 4928.143(B)(2)(d) only to permit provisions in an ESP that would limit customer switching. R.C. 1.42.

(b) The Commission's finding that Rider RRS provides stability and certainty is unreasonable and against the manifest weight of the evidence.

ii. The Commission erred by finding that Rider RRS, as a part of the "Economic Stability Program," meets the requirements of an economic development program under R.C. 4928.143(B)(2)(i).

b. Rider RRS is Unlawful Because It Requires Customers to Fund an Unlawful, Anti-competitive Subsidy Under R.C. 4928.02(H).

i. The subsidy customers are being asked to pay is anti-competitive.

c. Rider RRS is unlawful because it permits the recovery of unlawful transition charges prohibited by R.C. 4928.38.

d. The settlement is unlawful because it includes Rider GDR and a new unbundled distribution rate rider in the ESP contrary to the Ohio Supreme Court's ruling in CSP II.

e. The settlement is unlawful because the Commission erred in applying the ESP v. MRO test set forth in R.C. 4928.143(C)(1).

i. The Legislative History of SB 221

ii. The Ohio Supreme Court's Precedent

iii. The Rules of Statutory Construction Require that R.C. 4928.143(C)(1) Be Construed Consistent with Legislative Intent. R.C. 1.49.

iv. Appropriate application of the ESP v. MRO Test

(a) The Commission erred in its quantitative analysis because it failed to remove Rider RRS and shareholder funding from the ESP v. MRO test, and failed to quantify the costs of Riders GDR, DCR, and Unbundled Distribution Rate Rider.

(b) It is Unlawful to Value the Placeholder GDR and Unbundled Distribution Rate Rider at Zero.

(c) It is unlawful not to quantify Rider DCR as a cost of the ESP.

(d) The Commission erred by not excluding the economic development, job retention and low income funding from the quantitative analysis.

(e) Even if the Commission could consider qualitative factors in determining whether an ESP is more favorable than an MRO, it is unlawful to consider qualitative factors that fall outside of the provisions of R.C. 4928.143(B).

3. The Third Prong: It is unlawful to bootstrap approval of an ESP, which fails the ESP v. MRO test, by considering alleged qualitative benefits that fall outside of R.C. 4928.143(B).

E. The Commission erred in granting the Companies' motion to strike arguments regarding the Legislative History of S.B. 221.

1. The draft legislation and bill analyses of SB 221 constitute its legislative history, which the Commission is permitted to consider pursuant to R.C. 1.49.

2. Ohio Supreme Court precedent permits the Commission to consider the draft legislation and LSC bill analyses as authority to support its interpretation of legislative intent.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its initial brief, the Northeast Ohio Public Energy Council ("NOPEC") explained that it is a regional council of governments established under R.C. Chapter 167, and is the largest governmental retail energy aggregator in the State of Ohio. It is comprised of approximately 200 member communities in the thirteen (13) northern Ohio counties of Ashtabula, Lake, Geauga, Cuyahoga, Summit, Lorain, Medina, Trumbull, Portage, Huron, Columbiana, Mahoning, and Seneca. NOPEC provides electric aggregation service to approximately 500,000 retail electric customers – or nearly one-third of the retail electric customers located in the service territories of two FirstEnergy Corp. operating companies: The Cleveland Electric Illuminating Company ("CEI") and Ohio Edison Company ("OE").[1]

Since the enactment of SB 3 in 1999, NOPEC has been an active participant in Ohio's deregulated electric generation market,[2] arranging electric supply contracts for its customers that will result in savings of more than $300 million through 2019, when its current contract expires. Significantly, NOPEC's current contract is with FirstEnergy Solutions Corp. ("FES"), an affiliate of CEI and OE. Under this contract, FES provides NOPEC customers with full-requirements retail electric service for a nine-year period, from January 1, 2011 through December 31, 2019. The publicly available terms of this competitively bargained-for contract show that NOPEC's

[1] IGS Exhibit 13 (White Supplemental) at 6.

[2] See R.C. 4905.03.

residential customers pay a fixed 6% off their EDU's price to compare, and its small commercial customers pay a fixed 4% off the price to compare during the contracts' nine-year term.[3]

The most controversial provision of the Companies'[4] electric security plan ("ESP IV") is the proposed nonbypassable rider under which all distribution customers must pay a return of, and on, FES's investment in the Sammis and Davis Besse generating facilities, as well as FES's share of power from the Ohio Valley Electric Corporation ("OVEC Entitlement") (collectively "PPA Units"). Specifically, the Companies propose to enter into a purchase power agreement with FES under which they would purchase the power of the PPA Units and sell these resources' capacity, energy and ancillary services into PJM Interconnection, LLC ("PJM"). The full costs of these resources plus a return on invested capital, net of associated market revenues, would be recovered from all distribution customers through the nonbypassable Retail Rate Stability Rider ("Rider RRS).[5]

The record in this proceeding shows that during the remainder of the NOPEC/FES supply contract (through 2019), NOPEC's customers will be required to pay an additional, nonbypassable charge for FES' generation through Rider RRS.[6] NOPEC customers would be harmed by being required to give up their bargained-for FES discount and pay FES twice for generation. As explained below, Rider RRS is unlawful because, among other reasons, it violates R.C. 4928.20(K), which protects large-scale governmental aggregations from the harmful effect of nonbypassable charges.

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[3] Tr. XXII at 4591 (Wilson Re-Cross). The Companies did not contest these terms at hearing, but only argued that they were confidential. Tr. XXII at 4592-4594. These terms are publicly available as reported by FirstEnergy Corp.'s own news release. http://www.prnewswire.com/news-releases/firstenergy-solutions-and-nopec-enter-into-nine-year-agreement-78317142.html.

[4] The "Companies" refer to FirstEnergy Corp.'s operating companies: CEI, OE and The Toledo Edison Company ("TE").

[5] OCC/NOPEC Ex. 4 (Wilson Direct) at 5

[6] OCC/NOPEC Ex. 9 (Wilson Second Supplemental) at 8; Companies Ex. 33 (Ruberto Direct) at Ex. JAR-1.

NOPEC's immediate concern is that its customers not pay twice for FES' generation. NOPEC's broader concern is with the interference Rider RRS would have on Ohio's ability to ensure effective competition in the provision of retail electric service, as required by statute.[7]

II. GROUNDS FOR REHEARING

A. The Commission's Order is Unlawful Because it Failed to Consider the Effect of the Nonbypassable Rider RRS on Large-Scale Government Aggregation as Required by R.C. 4928.20(K).

R.C. 4928.20(K) was enacted as a part of SB 221. It provides:

> The commission shall adopt rules to ***encourage and promote large-scale governmental aggregation in this state***. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. ***Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected***, that would be established under that plan, except any nonbypassable generation charges that relate to any cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. [Emphasis supplied.]

On brief, NOPEC asked the Commission to consider the effect of Rider RRS on large-scale government aggregations.[8] Although the Commission recognized that NOPEC raised this issue,[9] the Order nevertheless fails to consider it as required by R.C. 4928.20(K) and in violation of R.C. 4903.09.

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[7] See R.C. 4928.02(H) (ensuring effective competition in the provision of retail electric service is a policy of this state).

[8] NOPEC Initial Br. at 3-5, 26-29.

[9] Order, at 102.

As explained on brief, in assessing the effect of the nonbypassable Rider RRS on large-scale governmental aggregation, the Companies did no more than assume governmental aggregation customers would be subject to the same risks and alleged delayed benefits as all other customers.[10] Indeed, Companies' witness Ruberto testified that the Companies performed no studies on the effect of Rider RRS on large-scale governmental aggregations such as NOPEC.[11] The Companies' analysis merely restates the obvious: the effect of a nonbypassable charge is that it is applied to all customers. The legislature clearly understood as much and intended more by creating this special statutory provision.

In historical context, large-scale governmental aggregation has been an important part of Ohio's retail electric market design since SB 3 became effective in 2001, and has provided an important choice to residential and small commercial customers. The Commission's market monitoring reports show that approximately 66%, 65% and 72% of residential sales in Ohio Edison ("OE"), Toledo Edison ("TE"), and Cleveland Electric Illuminating ("CEI") companies services territories, respectively, are from a CRES provider. Moreover, the NOPEC aggregation supplies approximately 500,000 customers, or nearly one-third of the residential and commercial customers in the CEI and OE service territories.[12] To date, NOPEC's electric aggregation program has saved NOPEC residential and small commercial customers hundreds of millions of dollars.

It is against this backdrop that the legislature enacted special provisions and protections in SB 221 to encourage and promote governmental aggregation in this state, including protecting large-scale governmental aggregation from an ESP's interference with the generation rates

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[10] Application, Companies Ex. 1 at 21; Companies Ex. 7 (Mikkelsen Direct) at 31.

[11] Tr. XXIII at 2871-2872 (Ruberto Direct).

[12] See footnote 1.

agreed upon between the governmental aggregator and its chosen supplier. Significant here, NOPEC contracted with the Companies' affiliate, FES, to supply full-requirements electric service to its aggregation for a *nine* year period, from January 1, 2011 through December 31, 2019 – a period longer than the eight-year term of the proposed ESP and Rider RRS in this case. The publicly available terms of the contract show that residential customers pay a fixed 6% off their EDU's price to compare, and small commercial customers pay a fixed 4% off the price to compare during the contracts' nine year term.[13] The NOPEC contract demonstrates that the proposed Rider RRS is unlawful and unreasonable for the following reasons.

As the legislature intended, NOPEC has successfully arranged, on its own, to hedge against potential volatile price increases by (1) basing its contract upon the SSO price of service and (2) reducing that price by a fixed 6% for residential customers and a fixed 4% for small commercial customers. By basing the NOPEC price on the SSO's price to compare, NOPEC has taken advantage of the laddered SSO auctions that will provide price stability for its customers. NOPEC has further provided for price stability by arranging a fixed percent off the price to compare. Unlike Rider RRS, this percent off the price to compare will apply whether market prices for electricity increase or decrease in the future. And, unlike under Rider RRS, when market prices are low, NOPEC customers are not subject to a surcharge and, indeed, receive the benefit of the same fixed percent off the PTC for an even lower rate.

As the legislature intended, NOPEC (and FES) embraced the competitive marketplace to provide consumers with an innovative nine-year contract that resulted in guaranteed savings in their electric rates. However, this PPA proposal now attempts to change the bargain the parties struck. NOPEC customers currently are paying FES for full-requirements generation service

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[13] See footnote 3.

through 2019. It is uncontroverted that, once Rider RRS becomes effective, NOPEC's customers will pay an additional amount for this same generation service in the form of the nonbypassable Rider RRS – effectively paying twice – until their contract through NOPEC expires on December 31, 2019.[14] In considering the effect of the nonbypassable Rider RRS on large-scale governmental aggregation customers, the Commission should conclude that NOPEC customers will be harmed by paying this unbargained-for surcharge, that Rider RRS does not encourage or promote large-scale governmental aggregation, and that it is unlawful to make NOPEC customers subject to Rider RRS.

B. The Commission Erred in Approving the Severability Provision of the Third Stipulation and Recommendation by Not Modifying it to Require Payments Made under Rider RRS to be Refunded in the Event a Court of Competent Jurisdiction Invalidates the Rider, like the Commission did in the Ohio Power Company PPA Opinion and Order.

Although the Commission had instructed the Companies to include in their ESP a severability provision that would continue the other benefits of the ESP in the event Rider RRS were invalidated, the Third Stipulation and Recommendation contained a provision that would permit the parties to negotiate in good faith to restore Rider RRS to its equivalent value. The provision also provided that amounts collected under Rider RRS would not be refunded to customers in the event Rider RRS were invalidated.[15] In its Order, the Commission modified the severability provision such that the Commission reserved the right to modify the Stipulation if there is a change to PJM's tariffs or rules which prohibits the PPA Units from being bid into PJM

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[14] OCC/NOPEC Ex. 9 (Wilson Second Supplemental) at 13; Companies Ex. 33 (Ruberto Direct) at Att. JAR-1. See discussion below which explains that NOPEC residential customers' current 6% guaranteed savings will be reduced by Rider RRS during at least its first three years. FirstEnergy's own projections would not provide customers a 6% credit to their bill until 2029 – which is five years after the ESP ends.

[15] Companies Ex. 154 at 8-9.

auctions.[16] The Commission erred in not modifying the Stipulation to remove the prohibition against refunds if Rider RRS was invalidated.

Importantly, in Ohio Power Company's PPA case, also decided March 31, 2016, the Commission correctly found that the similar severability provision in Ohio Power's Stipulation should be modified such that the prohibition against providing customer refunds should be removed in the event its similar PPA Rider were invalidated.[17] There is no factual difference between the Companies and Ohio Power's refund provisions in the severability language of each utility's Stipulation and no basis for the Commission to treat the severability provisions differently in its two PPA Opinions and Orders issued the same day. NOPEC seeks rehearing to permit a refund of customer funds paid under Rider RRS in the event it is invalidated by a court of competent jurisdiction.

C. The Commission Erred in Not Rejecting the Third Stipulation and Recommendation's Transition Provision.

In its initial brief, NOPEC explained that the Third Stipulation and Recommendation's Transition Provision should be rejected.[18] However, the Commission's Order fails to address this issue. Because the proposed ESP IV is for a term of eight years, the Commission is required to review it in year four to determine (1) whether it is still meeting the ESP v. MRO test and will continue to do so throughout ESP IV's term, and (2) whether the prospective effect of continuing the ESP is substantially likely to provide the Companies with excessive returns on equity.[19] Under this provision, if the Commission were to determine that the ESP IV should be terminated

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[16] Order at 92.

[17] See *In Re Ohio Power Company*, Case No. 14-1693 (Opinion and Order, March 31, 2016) at 87.

[18] NOPEC Initial Br. at 76-77.

[19] R.C. 4928.143(E).

under these tests, Rider RRS and Rider DCR revenues would continue to be collected for the initially approved eight year term.[20]

The legislature clearly provided for the "four-year check-up" in R.C. 4928.143(E) to protect consumers against future uncertainties, including future electricity prices and equity returns. The Transition Provision eliminates this statutory protection, is unlawful and must be rejected.

In addition, the Transition Provision improperly inserts language into R.C. 4928.143(E). Specifically, it requires the Commission to consider quantitative and qualitative factors[21] in conducting the ESP v. MRO test and, among the qualitative factors, consider the "financial health of the utilities."[22] Consideration of the "financial health of the utilities" is not one of the items specifically set for in R.C. 4928.143(B), therefore it may not lawfully be considered as a part of the ESP v. MRO under the Ohio Supreme Court's decision in *CSP II* (discussed below).

Finally, the Transition Provision provides that the ESP may be terminated only if the Commission finds that ***each*** utility has significantly excessive earnings. In other words if two of the three utilities involved in this proceeding are deemed to have significantly excessive earnings, the stipulation would permit them to continue to do so for four more years. This provision clearly is unreasonable, and is also unlawful: R.C. 4928.143(E) requires the Commission to consider the earnings of the individual electric distribution company. The remedy provided if the individual company's earnings are excessive is to terminate the ESP as to that company. Permitting the company to continue to receive substantially excessive earning is unlawful. The Stipulation's Transition Provision should be summarily rejected

[20] Companies Ex. 154 (Third Stipulation, Section V.K.) at 18; Tr. XXXVI at 7564-7565.

[21] As explained below, it is unlawful to consider qualitative factors in the ESP v. MRO test.

[22] Companies Ex. 154 (Third Stipulation, Section V.K.) at 18.

D. The Commission Erred in Applying the Test for Approving Partial Stipulations to the Third Stipulation and Recommendation.

In approving partial stipulations offered to resolve proceedings before it, the Commission traditionally considers a three-prong analysis, which was endorsed by the Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Comm*., 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992):

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is a diversity of interests among the stipulating parties?
2. Does the settlement package violate any important regulatory principle or practice?
3. Does the settlement, as a package, benefit ratepayers and the public interest?

NOPEC asserts below that it is error to adopt the partial stipulation test in ESP proceedings. NOPEC also submits that the Commission erred in applying this test to the facts of this case for the following reasons.

1. The First Prong: The Commission erred in finding that the settlement is the product of serious bargaining among capable, knowledgeable parties with a diversity of interests.

The Commission found that the signatory parties to the Partial Stipulation represent a diversity of interests.[23] To the contrary, a large number of parties with considerable experience before the Commission in ESP proceedings and with diverse interests have refused to sign the stipulation. These include millions of residential customers (OCC, NOPEC, NOAC), commercial customers (OMAEG), environmental interests (Sierra Club, Environmental Defense Fund, Environmental Law and Policy Center) and CRES suppliers (PJM Power Providers, The Electric Supply Association, and Retail Energy Supply Association).[24] Accordingly, the Commission must give considerable weight to the diversity of interests opposing this partial

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[23] Order at 43.

[24] OCC/NOPEC Ex. 11 (Kahal Second Supplemental) at 29.

stipulation. Considering the diversity of interests of the parties opposing the partial stipulation, the Commission erred by finding that the Partial Stipulation meets the first prong of the test.[25] Moreover, the Commission erred by not finding, as recognized by former Commissioner Cheryl Roberto, that bargaining cannot be said to be "serious" in the context of an ESP proceeding when the EDU, here the Companies, has the statutory ability to unilaterally reject any modification to the proposed electric security plan.[26]

2. The Second Prong: The settlement is unlawful because it violates numerous statutes, regulatory principles and practices.

As discussed previously, the Commission erred in approving the settlement because neither the settlement nor the Commission's Order considers the effect of Rider RRS on large-scale government aggregations required by R.C. 4928.20(K).[27] Moreover, the settlement violates several other statutes, practices and principles.

a. Rider RRS is unlawful because it does not fall under any of the provisions of R.C. 4928.143(B). *In Re Application of Columbus Southern Power Co., et al.,* 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655.

The most controversial provision of ESP IV is the Companies' request for approval of the nonbypassable Rider RRS under which all distribution customers must pay a return of and on FES' investment in the PPA Units. The threshold question presented is whether the Companies' proposed Rider RRS is lawful under Ohio law. Significantly, the Ohio Supreme Court has held that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an ESP. *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶

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[25] OCC/NOPEC Ex. 11 (Kahal Second Supplemental) at 28-30.

[26] OCC/NOPEC Ex. 11 (Kahal Second Supplemental) at 6-7, citing to the Companies' 2008 ESP case, *In Re FirstEnergy*, Case No. 08-935-EL-SSO, Second Finding and Order (March 25, 2009), Roberto concurring in part and dissenting in part.

[27] NOPEC Initial Br. at 3-5, 26-29.

31-35], 945 N.E.2d 655 (hereinafter, "*CSP II*"). Lacking confidence that its proposed Rider RRS fits any of the criteria of R.C. 4928.143(B)(2), the Companies provided various alternative approaches for the Commission's consideration.[28] Their first three alternatives are based on the language of R.C. 4928.143(B)(2)(d), which provides that an ESP may include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service…

The Commission rejected the Companies' argument that Rider RRS could be included in an ESP because it was a nonbypassable charge, and thus was related to "bypassability."[29] The Commission also declined to rule on whether Rider RRS was related to "default service."[30] Instead, it found that Rider RRS could be included in the ESP as a "financial limitation on customer shopping" under R.C. 4928.143(B)(2)(D); and also that Rider RRS is part of an "economic development plan" under R.C. 4928.143(B)(2)(i).

i. It is unlawful to include a provision related to "a financial limitation on customers shopping" in an ESP. R.C. 4928.143(B)(2)(d); CSP II.

In finding that Rider RRS is a "financial limitation on customer shopping," the Commission's Order acknowledges that the rider does not impose a "physical" limitation on shopping. Rather, the Order reasons that the "Rider RRS would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service."[31]

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[28] Companies Ex. 155 (Mikkelsen Fifth Supplemental) at 9.

[29] Order at 108-109.

[30] Order at 109.

[31] Order at 109.

However, the Commission erred because R.C. 4928.143(B(2)(2)(d) provides only for a "physical" limitation on customer shopping.

(a) Common usage of the term "customer shopping" is synonymous with the term "customer switching" and reveals the General Assembly's intent under R.C. 4928.143(B)(2)(d) only to permit provisions in an ESP that would limit customer switching. R.C. 1.42.

Key to the determination whether Rider RRS constitutes a "limitation on customer shopping" is the interpretation of this phrase and, specifically, whether the phrase contemplates a "physical" or a "financial" limitation on customer shopping. Resolution requires a determination of legislative intent. In this regard, R.C. 1.42 provides:

> Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

The Ohio Revised Code,[32] as well as Commission and Ohio Supreme Court precedent, are replete with references that use the term "shopping" synonymously with the word "switching."[33] Common usage dictates that the term "customer shopping" refers to customers who physically "switch" to CRES providers.

To accept that R.C. 4928.143(B)(2)(d) contemplates a "financial" limitation on shopping, the word "financially" must be read into the statute. Recently addressing the rules of statutory construction in Commission proceedings, the Ohio Supreme Court stated:

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[32] See, *e.g.*, R.C. 4928.40(A)(1) ("…such ***<u>shopping incentives</u>*** by customer class as are considered necessary to induce, at the minimum, a twenty per cent load ***<u>switching rate by customer class</u>*** halfway through the utility's market development period but not later than December 31, 2003." [Emphasis added.])

[33] *In Re Ohio Consumers' Counsel*, 109 Ohio St.3d, 206-Ohio-2110, 847 N.E.2d 1184, ¶ 21; *In Re Elyria Foundry*, 114 Ohio St.3d 305, 2007-Ohio-4146, 871 N.E.2d 970, at ¶ 72.

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[34] [Emphasis added.]

The Commission's addition of the word "financial" to the statute contravenes its plain meaning and the intent of the General Assembly to provide the Commission only with the authority to limit customer switching to CRES providers. Thus, the proper interpretation of the phrase at issue is that an ESP may include a provision relating to limitations on customers physically switching to a CRES provider.

The Commission's determination that R.C. 4928.143(B)(2)(d) permits a "financial" limitation on customer shopping contravenes legislative intent, as determined by R.C. 1.42, and is unlawful. Moreover, without its express inclusion in the items listed in R.C. 4928.143(B)(2)(a)-(i), such a financial limitation on customer shopping is forbidden by *CSPII.*

(b) The Commission's finding that Rider RRS provides stability and certainty is unreasonable and against the manifest weight of the evidence.

The Commission's finding that Rider RRS will have the effect of providing retail rate stability and certainty "in theory" offers little comfort to Ohio's consumers. The Commission found that when wholesale prices rise, Rider RRS will mitigate the increase in market prices.[35]

However, as OCC/NOPEC witness Wilson explained, proposed Rider RRS would be updated annually and the net Rider RRS amounts incurred in one year would not appear on a

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[34] *In Re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

[35] Order at 109.

customer's bill until the next year as a credit or charge. Dr. Wilson testified that, due to this lag, it is likely that the annual Rider RRS updates could move in the same direction as forward market rates. Thus, there is no assurance that Rider RRS would move in the opposite direction as the market and, further, it cannot be assumed that the Rider RRS will tend to hedge or stabilize customers' rates.[36] Indeed, the likelihood that the rider will move in the same direction of market prices will only exacerbate price volatility for consumers, rather than produce rate stability.

Dr. Wilson also testified that SSO customers would be served under staggered supply contracts established through periodic competitive auctions. These blended SSO rates would reflect forward prices at the time of the auction and, forward prices for delivery periods a few years out tend to be stable, resulting in fairly stable rates over time. Dr. Wilson also explained that customers taking service under contracts with CRES suppliers could choose offerings (including fixed price contacts) that control how their electric supply would be priced as market prices rise and fall, balancing cost, risk and other considerations.[37]

The Commission offers no citations or analysis to support its finding, in violation of R.C. 4903.09. NOPEC presumes the Commission's finding is based upon the testimony of the Companies' witness Strah. Mr. Strah dismissed Dr. Wilson's legitimate methods to mitigate market fluctuation by stating that the SSO and CRES contracts are not long-term solutions. He reasoned that the SSO was limited to the three-year term of an ESP, that CRES contracts are typically offered for a period of one year and that no CRES contracts were offered for a period greater than three years.[38] Mr. Strah's testimony, offered before the Third Stipulation and

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[36] OCC/NOPEC Ex. 4 (Wilson Direct) at 13, 50.

[37] Id.

[38] Companies' Ex. 4 (Strah Direct) at 11, 13.

Recommendation was filed, ignores that the proposed ESP term is now eight years. Moreover, Mr. Strah failed to consider the effect of Rider RRS on large-scale governmental aggregation.[39] Had he done so, he would have learned that NOPEC, which serves approximately a third of the customers in the CEI and OE service territories, has an existing contract with FES to serve its aggregation members for a period of *nine* years – longer than the three year CRES contracts on which Mr. Strah relies, and even longer than the ESP IV's proposed eight year term.[40] The publicly available terms of this competitively bargained-for contract show that NOPEC's residential customers pay a fixed 6% off their EDU's price to compare. This is significant because Mr. Strah testified that the Companies' residential customers would pay a charge under Rider RRS during the first three years of the ESP (2019), but they would not receive a 6% credit on their bill until 2029 (which now is 5 years after ESP IV would end).[41]

Under their existing FES contract, NOPEC residential customers *already* are receiving a 6% discount and will enjoy their 6% discount whether market prices increase or decrease, unlike under Rider RRS. Mr. Strah's testimony confirms that Rider RRS does not benefit NOPEC's customers, who have successfully mitigated the effect of prices increases in the competitive market, as the legislature intended. Rider RRS provides only costs and no benefits to NOPEC's customers.

ii. The Commission erred by finding that Rider RRS, as a part of the "Economic Stability Program," meets the requirements of an economic development program under R.C. 4928.143(B)(2)(i).

The Commission's Order finds that Rider RRS may be included in an ESP under R.C. 4928.1343(B)(2)(i), because it is part of an economic development plan. Without analysis, the

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[39] Such consideration is required by R.C. 4928.20(K).

[40] Tr. XXII at 4591 (Wilson Re-Cross Examination).

[41] Companies Ex. 13 (Strah Direct) at 12.

Commission found that the PPA Units have a significant economic impact upon the regions in which they are located.[42] The Commission's order is fundamentally flawed because no evidence of record demonstrates, and the Commission did not find, that the PPA Units will close if Rider RRS is not approved. Indeed, Companies' witness Rose's wholesale price projections provide a healthy return of and on legacy capital, as well as an additional surplus of $2 billion over the initial 15 year term of Rider RRS.[43] OCC/NOPEC witness Wilson's testimony makes clear that prices must be substantially lower than witness Rose's projections to warrant retirement.[44] According to the Companies' own projections, market revenues will be sufficient to keep the plants economical without the need for Rider RRS.[45]

To support its finding that Rider RRS is an economic development program, the Commission unreasonably relies on the testimony of Companies' Witness Murley, who conducted a study on the economic impact of the Sammis and Davis-Besse plants. The study examines plant level data supplied by FES, along with "multipliers" derived from a regional economic impact model. Using this approach, the study identifies the economic impact of the plants in terms of total jobs and economic output.

Witness Murley's study has aspects that are not accurate. First, the economic "output" of the plants cited by Witness Murley is mostly a measure of the value of generation supply from selling power into the PJM at the two plants.[46] This is not a useful measure of economic impact, and removal of these values dramatically lowers the asserted adverse economic impact of the

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[42] Order at 109-110.

[43] OCC/NOPEC Ex. 7 (Kahal Direct) at 38.

[44] Id.

[45] Id. at 39.

[46] OCC/NOPEC Ex. 7 (Kahal Direct) at 45 ("For Sammis, this is $502 million out of a total of $586 million.").

plants' retirement.[47] Witness Murley's study also assumes that if Davis-Besse shuts down, then all employees and contractors are laid off immediately, with no additional considerations.[48] Witness Murley entirely fails to consider that if Davis-Besse were to close, there would first be a decommissioning process that would be an enormous undertaking, requiring significant economic resources, including a large on-site staff and contractors.[49] As a result, Davis-Besse would remain a considerable source of economic activity even if it were to close.[50]

In addition, Ms. Murley's study is fundamentally flawed because it gives no consideration to the far reaching adverse impacts of Rider RRS if FES and the Companies elect *continued* operation of uneconomic plants. In a scenario with very low wholesale market prices, Rider RRS allows the plants to survive, albeit with significant ratepayer subsidization reflected in increased retail electric rates—while the Companies earn guaranteed profits.[51]

Importantly, Ms. Murley's study ignores the fact that retail electric rate increases have a significant detrimental impact on the service area economics of the Companies. Large electric rate increases can adversely affect the local economy. Residential customers have less disposable income, thereby having less to spend in the local economy.[52] For residential customers, Rider RRS is analogous to experiencing a tax increase with no corresponding benefit in the form of more public services. Commercial customers may respond to retail rate increases

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[47] Id. (asserting that "[a] far more valid measure is the modeled impact on personal income, which totals about $170 million for both plants combined (inclusive of multiplier effects)"—a much lower figure than the asserted adverse impact of $1 billion).

[48] Id.

[49] Id.

[50] Id.

[51] OCC/NOPEC Ex. 7 (Kahal Direct) at 39.

[52] Id. at 42.

due to Rider RRS by raising prices to cover the added cost of doing business.[53] As noted by OCC/NOPEC witness Kahal, "[t]his effect further reduces the net disposable income of the households in the [Companies'] service area, furthering reducing employment through multiplier impacts."[54]

Ohio's critical manufacturing sector also will be adversely affected by Rider RRS.[55] Ohio's manufacturers must compete with other manufacturers regionally, in the U.S., and globally. Retail rate increases impair their competitiveness, thereby further reducing local employment.[56] Witness Murley's study gives no consideration to the adverse ripple impacts of Rider RRS on the northern Ohio economy if the Companies continue operations of uneconomic plants and Ohio consumers are faced with large electric increases.

b. Rider RRS is Unlawful Because It Requires Customers to Fund an Unlawful, Anti-competitive Subsidy Under R.C. 4928.02(H).

The Commission's Order finds that Rider RRS does not provide an anti-competitive subsidy. Although numerous parties' arguments are based on the plain language of R.C. 4928.02(H), the Commission does not address that statutory provision or its prior case construing it. Instead, the Commission found that Rider RRS does not provide an anti-competitive subsidy because all customers will be charged the Rider RRS rate.[57] The Order misses the point. The rider provides FES with an anti-competitive subsidy by ensuring a return of, and on, its investment in the PPA Units, a subsidy that no other Ohio competitive retail electric service provider has.

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[53] Id.

[54] Id.

[55] *See* OMAEG Ex. 17 at 5 (noting that in 2010, Ohio had the highest level of manufacturing activity among the Midwestern states).

[56] OCC/NOPEC Ex. 7 (Kahal Direct) at 42.

[57] Order at 110.

R.C. 4928.02(H) provides that it is the policy of this state to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, ***including by prohibiting the recovery of <u>any generation-related costs through distribution or transmission rates.</u>*** [Emphasis supplied.]

Rider RRS is a distribution rate under the authority of *In Re Ohio Power Company*, Case No. 10-1454-EL-RDR Finding and Order (January 11, 2012) (the "*Sporn Case*"). In the *Sporn Case*, AEP Ohio sought to recover the closing costs associated with its Sporn Unit 5 generating facility through a stand-alone rider, the Plant Closure Cost Recovery Rider ("PCCRR"). The costs included the unamortized balance plant balance that remained on AEP Ohio's books (approximately $56.1 million). The PCCRR rider clearly was a rate to recover the costs of generation-related service, but AEP Ohio sought to recover the charge from all distribution customers as a nonbypassable charge, and called the rider a "distribution" charge in its application.

In the *Sporn Case*, the Commission recognized that whether a charge is to be classified as a distribution rate is dependent upon the class of customers to which it is applied. If a charge is applied to all distribution customers, it is considered a distribution rate. In *Sporn*, the Commission disallowed the PCCRR, finding:

> Additionally, the Commission notes that [AEP Ohio's] recovery of the closure costs would be contrary to the state policy found in Section 4928.02, Revised Code. That policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service***. [AEP Ohio] seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR***.[58] [Emphasis added.]

[58] *See Ohio Power*, Order (February 25, 2015) at 19.

In this case, under the *Sporn Case* precedent, the nonbypassable Rider RRS also would be charged to all distribution customers and, thus, be considered a distribution charge. The plain language of R.C. 4928.02(H) prevents the Commission from allowing recovery of ***any*** generation-related costs through distribution rates. Because Rider RRS charges all distribution customers for the cost of the PPA Units' generation, it is considered to be a distribution rate and is prohibited by R.C. 4928.02(H).[59] Indeed, in *Electric Power Supply Assoc., et al. v. FirstEnergy Solutions, et al.*, 155 FERC ¶ 61,101 (2016) ("FERC Order"), FERC prohibited the Companies from making any transactions under the PPA, until further review, because the PPA could force the Companies' captive distribution customers to cross-subsidize their unregulated generation affiliates.[60]

The Commission's Order also is unlawful because it fails to explain its departure from its precedent in *Sporn*.

i. The subsidy customers are being asked to pay is anti-competitive.

Rider RRS creates an anti-competitive subsidy by requiring all of the Companies' customers to underwrite the generation costs of the PPA Units. Rider RRS requires ratepayers to guarantee that the PPA Units' generation earn a profit by covering the difference in the revenues from the sale of the power and the cost of generation. This guarantee is a benefit to FES, which owns Sammis and Davis Besse, and an interest in OVEC. It is a subsidy to FES regardless of whether it produces a credit for retail customers in any particular year and an anti-competitive benefit that other competitive retail or wholesale providers do not enjoy.

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[59] See *In Re Elyria Foundry Company*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176,

[60] EPSA, at P 65.

Moreover, OCC/NOPEC witness Sioshansi recognizes other anti-competitive consequences of the Rider RRS. He explains that the rider could incentivize the Companies to cause lower-cost power from the PPA Units to be withheld from the market to the benefit of the Companies' affiliated unregulated generation in PJM.[61]

Rider RRS is unlawful under Ohio law because it provides an anti-competitive subsidy to FES.

c. Rider RRS is unlawful because it permits the recovery of unlawful transition charges prohibited by R.C. 4928.38.

Rider RRS guarantees that the Companies will recover from their customers a return of, and on, their investment in the PPA Units. This guarantee, which is meant to subsidize the Companies and FES from what otherwise will occur in the wholesale electric markets, constitutes an unlawful transition charge under R.C. 4928.38. The subsidy provided by Rider RRS contravenes Ohio law which explicitly requires the Companies (and FES) to be "on [their] own in the competitive market."[62]

In its Order, the Commission found that Rider RRS did not constitute a transition charge. It reasons that transition costs are costs that are "unrecoverable in a competitive market," and that under its analysis, Rider RRS will result in a net credit to customers over the 8-year term of the ESP.[63] However, the Ohio Supreme Court recently clarified that transition costs are those that are "not recoverable through market-based rates." *In Re Application of Columbus S. Power Co.*, Slip Opinion 2016-Ohio-1608 (April 21, 2016), at 6 ("*Columbus S. Po*wer"). The revenues that the Companies will collect under Rider RRS are not from "market-based rates." Rather,

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61 OCC/NOPEC Ex. 1 (Sioshansi Direct) at 16-17 .

62 R.C. 4928.38.

63 Order at 112.

they are collected from customers based upon the legacy costs of the PPA Plants, which were to be collected before the market development period ended in December 2010. Id.

Further, the Order ignores that it is undisputed that in the first three years the ESP, Rider RRS will result in a net charge to customers. Rider RRS violates the explicit language of R.C. 4928.38 that, after the market development period, the Companies are to be "on [their] own in the competitive market." By approving Rider RRS as a "form of rate insurance,"[64] the Companies and FES are not on their own during the first three years of the ESP, or even during its entire 8-year term. During times of low energy prices, customers will pay the Rider RRS charge.[65]

Even the Commission acknowledges that its projections of net credits are "simply predictions" that "may be proven wrong in the future, particularly over an eight-year time frame."[66] Indeed, R.C. 4928.143(E) recognizes as much by requiring a utility with an ESP term longer than three years, to make a filing in the fourth year to assure that it still is more favorable in the aggregate than and MRO. Rider RRS provides the Companies and FES with a crutch in the marketplace for the entire eight year period.

When SB 3 was enacted in 1999, it permitted Ohio's electric utilities the opportunity to collect "transition revenues"[67] to "assist it in making the transition to a fully competitive retail electric generation market."[68] However, the recovery of transition charges was permitted for only a limited period of time.[69] Utilities could collect certain transition costs until the end of the

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[64] Order at 80.

[65] Id.

[66] Order at 86.

[67] "Transition revenues" are defined under R.C. 4928.39.

[68] R.C. 4928.37.

[69] R.C. 4928.38.

market development period, which ended December 31, 2005.[70] The collection period for transition costs identified as regulatory assets expired on December 31, 2010.[71] The Companies recovered past, sunk investments through transition charges from 2001 through 2010 in the amount of nearly $7 billion ($6,911,427,628).[72]

The General Assembly expressly provided that the Ohio electric utility was "wholly responsible for whether it is in a competitive position after the market development period,"[73] In fact, R.C. 4928.38 prohibits the PUCO from authorizing transition revenues or "any equivalent revenues" except as provided by statute. And if this authority is not clear enough, R. C. 4928.141 also explicitly provides that a standard service offer, "shall exclude any previously authorized allowances for transition costs."

The dollars the Companies are to collect under the first three years of Rider RRS are transition revenues (or the equivalent of transition revenues) that the PUCO cannot impose on customers after the end of the statutory market development period. The market development period ended on December 31, 2010. On January 1, 2011, at the latest, the Ohio General Assembly proclaimed that Ohioans are protected from paying make-whole charges and revenue guarantees to their electric utilities for generation service.

d. The settlement is unlawful because it includes Rider GDR and a new unbundled distribution rate rider in the ESP contrary to the Ohio Supreme Court's ruling in *CSP II.*

As stated previously, the Ohio Supreme Court recently held that only the nine items enumerated in R.C. 4928.143(B)(2) may be included in an ESP. *CSP II,* 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35]. The Commission's Order goes to great lengths to attempt to justify

[70] R.C. 4928.38.

[71] R.C. 4928.39.

[72] OCC Ex. 25 (Rose Direct) at 18.

[73] R.C. 4928.38.

including Rider RRS in the ESP, consistent with *CSP II*; however, the Commission gave no analysis to whether the new Government Directives Rider ("Rider GDR") also falls within the nine items listed in R.C. 4928.143(B)(2), as well as the zero-amount placeholder rider the Commission approved to capture unbundled distribution costs, as proposed by Interstate Gas Supply ("Unbundled Distribution Rate Rider").[74] Rider GDR will recover costs related to future government directives. The proposed Rider GDR and the Unbundled Distribution Rate Rider do not meet any of the nine elements of R.C. 4928.143(B)(2). Because the riders do not fall within any of the nine items listed, the Commission's inclusions of the rider in the ESP was unlawful.

e. The settlement is unlawful because the Commission erred in applying the ESP v. MRO test set forth in R.C. 4928.143(C)(1).

R.C. 4928.141 provides that an electric distribution utility may seek approval of a market rate offer ("MRO") or ESP as its SSO. R.C. 4928.142 and 4928.143 specify the standards for MROs and ESPs, respectively. 4928.143(C)(1) sets forth the standard that the Commission must follow when approving an electric distribution utility's proposed ESP:

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

In applying the test, the Commission considered: (1) the SSO price of generation to customers (R.C. 4928.143(B)(1)); (2) other quantifiable provisions (R.C. 4928.143(B)(2)), and (3) qualitative provisions (for which there is no statutory authority). Under the Commission's analysis, these three elements are combined (in the "aggregate") and compared to the results that would be obtained under R.C. 4928.142, if the SSO were proposed in the form of an MRO. From

[74] Order at 98.

this comparison, the Commission found that the proposed ESP, in the aggregate, is more favorable than an SSO in the form of an MRO.[75]

NOPEC currently is challenging such analysis in the Ohio Supreme Court.[76] The appeal specifically concerns whether the language "in the aggregate" permits the Commission to consider the qualitative (or non-quantifiable) benefits of a proposed ESP, in addition to its quantifiable costs. The legislative history of 2007 Am.Sub.S.B. 221, Effective July 31, 2008 ("SB 221"),[77] and the Court's precedent show that the Commission is limited to considering quantifiable costs only.

i. The Legislative History of SB 221[78]

R.C. 4928.143(C)(1) was enacted as a part of SB 221, which underwent significant changes in the Ohio Senate and House after being introduced in the Senate on October 4, 2007. This history shows that the legislature has consistently intended the SSO as an MRO to be a market-based price developed through a competitive bidding process, and that the SSO as an ESP be a cost-based price. The ESP price evolved over the various versions of SB 221 from a traditional rate base/cost of service analysis based upon the valuation of its facilities and costs to provide service, to one that permits a utility to propose a pricing methodology, which price could be adjusted through the additional cost items provide in R.C. 4928.13(B)(2).

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[75] Order at 120.

[76] Ohio Supreme Court Case No. 13-513.

[77] The Order, at 37, strikes NOPEC's reliance on statute's legislative history. NOPEC also seeks rehearing of this aspect of the Order below.

[78] NOPEC is aware that this Ohio Supreme Court has stated in the past that "no legislative history of statutes is maintained in Ohio." See *State v. Dickinson*, 28 Ohio St.2d 65, 67, 275 N.E.2d 599 (1971) ("*Dickinson*"). However, R.C. 1.49 specifically sanctions the examination of "legislative history," and the Court has done so before and after *Dickinson*. See *Caldwell v. State*, 115 Ohio St. 458, 154 N.E. 792 (1926), and *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157 (2010) (examining the documents maintained on the Ohio General Assembly's web site). Copies of the Senate and House versions of SB 221, and related bill analyses of the Legislative Service Commission are all linked on the Ohio General Assembly's website at http://www.legislature.state.oh.us/analyses.cfm?ID=127_SB_221&ACT=As%20Enrolled, and are contained in the Appendix to the Initial Brief.

As introduced, the legislation was structured such that the either an MRO or ESP could be approved if the Commission deemed them just and reasonable, and they complied with the state policies contained in R.C. 428.02.[79] However, in the legislation, as passed by the Senate, the standard for approving an MRO changed significantly and required not only a finding that the offer and price were just and reasonable and compliant with R.C. 4928.02, but also that the price determined for each customer class under the MRO was to be "more favorable than, *or at least comparable to*," the price for each customer class under an ESP. (Emphasis supplied.)[80] However, in the version of the legislation as reported by the House, the legislature significantly expanded the costs that could be recovered through the ESP under R.C. 4928.143(B)(2). Accordingly, it placed a check on the costs to be recovered under an ESP, as a consumer protection provision, such that the ESP's costs could not be greater than the price resulting from an MRO. Moreover, the legislature removed the state policy considerations from the criteria the Commission may consider under the ESP v. MRO test.[81] The processes for developing the MRO and ESP remained essentially the same in the version of SB 221 as Passed by the General Assembly, except that the standard of review importantly required that the ESP be "more favorable" than an MRO.[82]

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[79] See Appendix A to NOPEC's Initial Brief. SB 221 as Introduced, Section 4928.14(B)(1), Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Introduced. SB 221 as Passed in the Senate, Section 4928.14(D)(1).

[80] See Appendix B to NOPEC's Initial Brief. SB 221 as Passed in the Senate, Section 4928.14(D)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the Senate.

[81] See Appendix C to NOPEC's Initial Brief. SB 221 as Reported in the H. Public Utilities, Section 4928.143(B)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities.

[82] See Appendix D to NOPEC's Initial Brief. SB 221 as Passed by the General Assembly, Section 4928.143(C)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Passed by the General Assembly.

ii. The Ohio Supreme Court's Precedent

The Ohio Supreme Court has had two opportunities to interpret the scope of items that could be considered in reviewing an ESP. First, it recognized that the nine provisions listed in R.C. 4928.143(B)(2)(a)-(i) require the Commission to make a quantitative determination. It recognized that eight of the items "implicitly require" the Commission to consider "certain costs." *In Re Application of Columbus Southern Power Co., et al*., 128 Ohio St. 3d 402, 2011-Ohio-958 [¶26], 945 N.E.2d 501 (hereinafter, "*CSP I*"). The ninth item (R.C. 4928.143(B)(2)(e) (App. Appx. at 214.) also requires a quantitative analysis because it permits an automatic increase in any component of the "price" of an ESP.[83]

In a later decided case, the Commission recognized that all nine of the R.C. 4928.143(B)(2) factors provided for "cost recovery" and limited the items to be considered by the Commission in approving an ESP only to those cost provisions specifically enumerated. *In Re Application of Columbus Southern Power Co., et al*., 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 655 (hereinafter, "*CSP II*").

Considered together, the cases show that the Commission can modify the "price" in R.C. 4928.143 (B)(1) by considering cost of service factors, if it so chooses. *CSP I*. The Commission also can modify the "costs" to be recovered in the ESP under R.C. 4928.143(B)(2)(a)-(i). What

[83] To be clear, the Court in *CSP I*, at ¶ 27, stated:

Moreover, while it is true that the commission must approve an electric security plan if it is 'more favorable in the aggregate' than an expected market-rate offer…that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider 'pricing and all other terms and conditions.' Thus, the commission must consider more than price in determining whether an electric security plan should be modified.

This language cannot be construed to mean that the Commission may look at an unlimited number of factors in addition to "price." Rather, as construed by *CSP II*, infra, it becomes clear that the Commission is limited in its analysis to consider the items listed in R.C. 4928.143(B)(1) and (2), e.g., the price contained in R.C. 4928.143(B)(1) and the cost factors listed in R.C. 4928.143(B)(2), as discussed subsequently.

the Commission cannot do is add additional items to be considered in this quantitative analysis, including qualitative items. *CSP II*.

iii. The Rules of Statutory Construction Require that R.C. 4928.143(C)(1) Be Construed Consistent with Legislative Intent. R.C. 1.49.

The Legislature intended, and the Ohio Supreme Court confirmed, that the Commission is limited, in reviewing an ESP, to considering the quantitative factors listed in R.C. 4928.143(B) (the "price" in R.C. 4928.143(B)(1) and the "costs" in R.C. 4928.143(B)(2)). Accordingly, R.C. 4928.143(C)(1) must be construed consistent with that intent. R.C. 1.49. R.C. 4928.143(C)(1) provides in part:

> …the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its *pricing and all other terms and conditions*, including any deferrals and any future recovery of deferrals, *is more favorable in the aggregate* as compared to *the expected results that would otherwise apply under [an MRO derived under] section 4928.142 of the Revised Code*. (Emphasis supplied.) [App. Appx. at 215.]

A review of this provision makes clear that the term "pricing" is a reference to the price to be proposed in R.C. 4928.143(B)(1), while the reference to "all other terms and conditions" refers to the specifically enumerated items for which cost recovery can be had under R.C. 4928.143(B)(2)(a)-(i), because no other items may be considered in reviewing an ESP. *CSP II*. The Commission's charge is then to consider whether the ESP price and costs, combined (i.e., "in the aggregate") are "more favorable" than the price developed through a competitive bidding process under the MRO provisions contained in R.C. 4928.142.

iv. Appropriate application of the ESP v. MRO Test

The Commission performed the traditional analysis of the ESP v. MRO test,[84] which considers three elements: (1) the SSO price of generation to customers,[85] (2) other quantifiable provisions,[86] and (3) qualitative provisions. In addressing the test's first element, the Commission found that the SSO price of generation to customers would be established through the competitive bid process under R.C. 4928.143(B)(1) and would be equivalent to the results that would be obtained under the MRO provided in R.C. 4928.142.[87] NOPEC does not disagree with that analysis as to the first element.

As stated above, the legislative history and statutory construction of R.C. 4928.143 do not permit the Commission to consider "qualitative" benefits in performing the ESP v. MRO test. As explained below, the "qualitative" benefits alleged by the Companies have been confused with the "public benefit" analysis the Commission performs when considering partial stipulations. Specifically, the legislative history of R.C. 4928.143 demonstrates that the state policy provisions of R.C. 4928.02, which form the bases for the public benefit analysis, are not to be included in the ESP v. MRO test.[88]

Accordingly, whether the Companies' proposed ESP is more favorable in the aggregate than an MRO rests on a determination of whether the identifiable costs, or quantifiable benefits, of the ESP are greater than the cost of an MRO.

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

[85] R.C. 4928.143(B)(1).

[86] R.C. 4928.143(B)(2).

[87] Order at 118.

[88] See Appendix C to NOPEC's initial brief. SB 221 as Reported in the H. Public Utilities, Section 4928.143(B)(1); Legislative Service Commission Bill Analysis, 127th General Assembly, SB 221: As Reported by the H. Public Utilities. Also note that the factors listed in R.C. 4928.02 are not included in the nine items listed in R.C. 4928.143(B), and cannot be considered in the ES v. MRO test per *CSP II*.

(a) The Commission erred in its quantitative analysis because it failed to remove Rider RRS and shareholder funding from the ESP v. MRO test, and failed to quantify the costs of Riders GDR, DCR, and Unbundled Distribution Rate Rider.

In performing the quantitative analysis, the Commission considered the alleged benefits to consumers from Rider RRS ($256 million), economic development funding ($24 million), low income funding ($19.1 million), and consumer advisor agency funding ($8 million), for a total alleged benefit of $307.1 million. The Commission erred in its quantification of each of these provisions and also erred by not quantify the costs to customers of Riders GDR, DCR, and the Unbundled Distribution Rate Rider.

As explained above, because Rider RRS is not one of the nine factors that can be included in an ESP per *CSP II*, it should be excluded from the ESP v. MRO test and its value should be reduced to zero. Moreover, if the PPA is never filed and approved by FERC, as required by the FERC Order, there will never be any of the "benefit" identify by the Commission to include in the ESP v. MRO test. In addition, because the low income funding and customer advisory agency funding is not provided in the nine items included in RC. 4928.143(B)(2), they also should be excluded from the ESP v. MRO test. The exclusion of these items effectively reduces the alleged benefit of the ESP to $24 million over the ESP's eight year term, or only $3 million per year.[89] The Commission also erred by not quantifying the costs to consumers of Riders GDR, DCR, and the Unbundled Distribution Rate Rider which likely offset the claimed $3 million per year alleged benefit.

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[89] The Commission confuses the state policy in R.C. 4928.02 with the limited items that can be included in an ESP under R.C. 4928.143(B). Low income funding and customer advisory agency funding falls within state policy considerations (R.C. 4928.02(L) (protect at-risk populations)), but do not fall within the limited categories contained in R.C. 4928.143(B).

(b) It is Unlawful to Value the Placeholder GDR and Unbundled Distribution Rate Rider at Zero.

As stated previously, only those items that are expressly listed in R.C. 4928.143(B) may be included in an ESP. The Commission approved a new Government Directives Rider ("Rider GDR") to recover costs related to future government directives. Rider GDR does not meet any of the nine elements of R.C. 4928.143(B)(2), and should be disallowed.

Nevertheless, the Commission approved the rider as a placeholder, with an initial rate of zero, which will be populated with costs during the eight-year ESP as governmental directives are issued. Because the rider currently would be set at zero and unidentified cost recovery would occur in future ESP years, Ohio's consumers currently cannot determine from the rider's costs. Without presently knowing how the rider may be quantified in the future, the Commission cannot consider and consumers cannot reasonably contest, under R.C. 4928.143(C)(1), whether the ESP is more favorable than an MRO. The Commission's finding unreasonably and unlawfully precludes review of Rider GDR's costs to be collected during the ESP's term for purposes of the statutory test. The Commission's approval of the placeholder rider also prevents the Companies from sustaining their burden of proof that the ESP is more favorable than an MRO under R.C. 4928.143(C)(1). Accordingly, the placeholder Rider GDR must be disallowed or, alternatively, absent the ability to quantify Rider GDR, the entirety of the Companies' ESP rejected. This same analysis is applicable to zero-based rider the Order approves for the Unbundled Distribution Rate Rider, as proposed by Interstate Gas Supply ("IGS").[90]

The Commission should reject this premature Rider GDR placeholder rider for several reasons, consistent with the Commission's denial of similar premature placeholder riders in other

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[90] Order at 98.

recent ESP cases.[91] First, the Companies do not provide a list of the costs or accounts they would seek to recover through Rider GDR, thereby creating an open-ended recovery vehicle for any costs that the Companies may incur. If the Companies believe that programs required by legislative or governmental directives would increase costs and cause a revenue deficiency, then the Companies should file a rate case to recover the costs related to the directives.[92] The Companies should not be able to recover the costs associated with the legislative or governmental directives absent a showing that any such costs actually cause revenue deficiencies.[93]

Rider GDR is also asymmetric, which compounds the excessive earnings concerns of single-issue ratemaking.[94] Under Rider GDR, the Companies have no obligation to file for rate reductions resulting from changes in governmental regulations. Additionally, because the Companies have far more information about their operations than the Commission, it would be difficult for the Commission to ensure that the utilities are fully compliant with their obligation to flow through cost reductions to customers.[95]

(c) It is unlawful not to quantify Rider DCR as a cost of the ESP.

The Commission's order authorized the Companies to continue the Delivery Capital Recovery Rider ("Rider DCR") during the period of ESP IV, with a modification to increase the

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91 *See In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order (Feb. 25, 2015), p. 63, where the Commission rejected AEP's proposed placeholder for potential NERC compliance and cybersecurity costs as premature.

92 OCC Ex. 18 (Effron Direct) at 23.

93 Id.

94 OCC/NOPEC (Kahal Direct) Ex. 7 at 34.

95 Id.

revenue caps for Rider DCR.[96] Specifically, the revenue caps for Rider DCR will increase annually by: $30 million for the period June 1, 2016 through May 31, 2019; $20 million for the period June 1, 2019 through May 31, 2022, and $15 million for the period June 1, 2022 through May 31, 2024. To be clear, these increases pertain only to annual increases to the allowable caps. Thus, with the increases, the annual caps would increase from $210 million in the 2016-2017 PJM planning year to $ $390 million in the 2023-2024 PJM planning year – and total $2.595 billion during the eight year term of ESP IV.[97]

OCC/NOPEC witness Kahal demonstrated that revenues associated with Rider DCR were a quantifiable cost of the ESP.[98] However, the Commission refused to quantify these costs as a part of the ESP v. MRO test, on the basis that the revenue requirements associated with the recovery of incremental distribution investments should be considered to be the "substantially equal," "over the long term," whether recovered through the ESP or through a distribution rate case, if an MRO were implemented.[99] NOPEC notes that the Companies' burden of proof is to show that the ESP is "more favorable" than an MRO, not "substantially equal." The Companies cannot sustain their burden of proof under the Commission's analysis. Further, the Commission did not identify the period of the "long term" mentioned in its order, in violation of R.C. 4903.09. If the "long term" extends beyond the eight year term of the ESP (which is likely due to the Commission's approval of the distribution rate freeze), the DCR costs must be quantified, because the ESP v. MRO analysis pertains only to costs and benefits incurred during the term of the ESP. R.C. 4928.143(B)(1) and (E).

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[96] Application, Company Ex. 1 at 13.

[97] Tr. XXXVI at 7573-7575 (Mikkelsen Cross).

[98] OCC/NOPEC Ex. 7 (Kahal Direct) at 23-24.

[99] Order at 119.

Moreover, the Commission's findings misstate the statutory test found in R.C. 4928.143(C)(1), which requires the Commission to compare "the electric security plan so approved…to the expected ***results that would otherwise apply under section 4928.142 of the Revised Code***." (Emphasis added.) The plain meaning of the statute clearly limits the Commission's analysis to the "expected results" of R.C. 4928.142, and does not contemplate consideration of the results of a distribution rate case.[100]

In addition, the Commission's analysis requires one to read into the statute words to the effect that the approved ESP should be compared to the expected results under R.C. 4928.142 **and a distribution rate case**. In considering the rules of statutory construction, the Ohio Supreme Court has found:

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[101] [Emphasis added.]

The Commission's interpretation of the statute unlawfully adds to the words chosen by the General Assembly. Had the General Assembly intended to include the expected results of a distribution rate case in the statutory test, it would have so stated.

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[100] R.C. 1.42.

[101] *In Re Columbus S. Power,* 138 Ohio St.3d 448, 2014-Ohio-462, 9 N.E.3d 1064, ¶ 26.

(d) The Commission erred by not excluding the economic development, job retention and low income funding from the quantitative analysis.

As explained above, the Commission found that Rider DCR costs included in an ESP are "substantially equal" because the same distribution costs could be recovered through a rate distribution case over the "long term" if an MRO were implemented. The Commission found the stipulated economic development, low income funding, and customer advisory agency funding costs are benefits of an ESP because they cannot be obtained in an MRO.[102] However, the Commission ignores the analysis it made in support of cost recovery under Rider DCR – that if an MRO is implemented, the Commission may also consider the potential quantitative benefits that customers would receive through a distribution rate case. As such, if an MRO were implemented with a companion distribution rate case, the Companies and the parties could stipulate, as in this ESP proceeding, to provide economic development, low income funding, and customer advisory agency funding. Indeed, the Companies witness Mikkelsen admitted the ability to include these funds in a distribution rate proceeding.[103]

(e) Even if the Commission could consider qualitative factors in determining whether an ESP is more favorable than an MRO, it is unlawful to consider qualitative factors that fall outside of the provisions of R.C. 4928.143(B).

As stated above, qualitative benefits are not properly considered a part of the ESP v. MRO test. The Ohio Supreme Court has limited the items that can be included in an ESP to those expressly listed in R.C. 4928.143(B),[104] and the Court subsequently found that each of

[102] Order at 113, 119.

[103] Tr. XIII at 596.

[104] *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 402, 2011-Ohio-958, 945 N.E.2d 501 (hereinafter, "*CSP I*").

those items were "categories of cost recovery."[105] The statutory test, as confirmed by judicial interpretation, is meant to serve as a consumer protection provision, by limiting the rates that consumers pay under an ESP to less than those they would otherwise pay at market under an MRO. It is improper, and unlawful, to permit qualitative benefits to override the quantitative analysis that R.C. 4928.143(C)(1) expressly requires.

Nevertheless, in this proceeding, the Commission included "qualitative benefits" in the ESP. The Commission erred by including each of the following "benefits" in the ESP because they are not included in the nine items listed in R.C. 4928.143(B): (1) continuation of the distribution rate freeze, (2) continuation of multiple rate options and programs, (3) establishment of a "goal" to reduce CO_2 emissions, and (4) programs for resource diversity.[106]

Further, another four "qualitative benefits" identified by the Commission are so speculative that they cannot be considered benefits of this ESP at all, including (1) the "goal," but no obligation, to save 800,000 MWh of energy annually (by 2045) through reactivated energy efficiency programs, (2) the obligation to file future applications, with no obligation for approval, for smart grid deployment, utility battery technology, and to transition to straight-fixed variable rate design.[107]

Moreover, the alleged "qualitative" benefits to provide energy efficiency programs to small businesses, and deploy smart grid infrastructure, are based upon R.C. 4928.02(M) and (D), respectively,[108] and not R.C. 4928.143(B), in violation of *CSP II*.

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[105] *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 945 N.E.2d 655 (hereinafter, "*CSP II*").

[106] Order at 119.

[107] Order at 119-120.

[108] Order at 119.

3. The Third Prong: It is unlawful to bootstrap approval of an ESP, which fails the ESP v. MRO test, by considering alleged qualitative benefits that fall outside of R.C. 4928.143(B).

By creating "qualitative benefits" as a part of the statutory ESP v. MRO test, without statutory authority and in violation of Ohio Supreme Court precedent, the Commission has muddled the ESP v. MRO test and the traditional test for approving partial stipulations -- particularly the traditional test's third prong that considers whether, as a package, the partial stipulation benefits ratepayers and the public interest.

According to the Court's decision in *CSP II*, if the Commission is to consider "qualitative benefits" (which it cannot), the source of those benefits must come from R.C. 4928.143(B)(2). A construction of R.C. 4928.143(C)(1) that permits consideration of any alleged benefits beyond those nine items, renders R.C. 4928.143(B) and the ESP v. MRO test a nullity.

The Order's confusion of the partial stipulation test with the ESP v. MRO test is apparent. The Commission relies on many of the state policies in R.C. 4928.02 as independent authority to consider qualitative benefits under the ESP v. MRO test, and also items outside of R.C. 4928.143(B). While the Commission must review an ESP to ensure that its provisions do not violate the state policies contained in R.C. 4928.02,[109] the state policies are not contained in R.C. 4928.143(B) and, cannot be considered a part of the ESP for purposes of the test performed under R.C. 4928.143(C)(1).

To add to the confusion, the Order in this proceeding considers another set of "benefits" under the partial stipulation test, that were not considered as "qualitative benefits" under the ESP v. MRO test. If the ESP fails the ESP v. MRO test, it violates an important, indeed statutory, regulatory principle and must be denied regardless of additional benefits that may be

[109] *In Re Elyria Foundry*, 114 Ohio St.3d 305, 2007-Ohio-4146, 871 N.E.2d 970.

alleged. The Commission cannot use the alleged benefits identified in the third prong of the partial stipulation test to approve the settlement. Approval of the ESP simply cannot be bootstrapped through the partial stipulation standard.

Moreover, the additional benefits identified by the Order beginning at page 87 are not benefits of the ESP at all. The Order identifies each of the *AEP Ohio ESP III* factors as a benefit of the ESP. For the reasons listed in NOPEC's initial brief, they are not, because each of the factors was meant to ensure the reasonableness of Rider RRS. Because Rider RRS was approved based upon these factors, they cannot be considered an additional benefit of the ESP.

Finally, the Order lists several other benefits of the ESP beginning on page 92. The Order finds that these benefits are derived from R.C. 4928.02.[110] For the reasons stated above, and in NOPEC's initial brief, the Commission should reject these benefits under the ESP v. MRO test.

E. The Commission erred in granting the Companies' motion to strike arguments regarding the Legislative History of S.B. 221.

The Commission's Order found that arguments related to the legislative history of SB 221 should be stricken from NOPEC's initial brief because they reference information outside the record.[111] The Commission's finding is unlawful under R.C. 1.49 and Ohio Supreme Court precedent.

1. The draft legislation and bill analyses of SB 221 constitute its legislative history, which the Commission is permitted to consider pursuant to R.C. 1.49.

R.C. 1.49 provides in part:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

[110] Order at 92.

[111] Order at 37.

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(C) The legislative history.

It is beyond question that the draft legislation and bill analyses conducted thereon by the Legislative Service Commission ("LSC") constitute the legislative history of a statute. *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905 ("*Griffith*"). In addition, it is clear that record in this proceeding shows that R.C. 4928.143 is "ambiguous."

NOPEC's position on brief is clear: although the Ohio Supreme Court has held that ***only*** the ***cost*** factors contained R.C. 4928.143(B) may be included in an ESP, the Commission has found that it also can consider the "qualitative" benefits of an ESP under R.C. 4928.143(C)(1).[112] With such divergent views between the Court and the Commission, R.C. 4928.143 necessarily is ambiguous.

2. Ohio Supreme Court precedent permits the Commission to consider the draft legislation and LSC bill analyses as authority to support its interpretation of legislative intent.

The Commission found that it cannot consider the draft legislation and LSC bill analyses because they were not introduced at hearing also is without merit. The Commission cites no supporting case law for its determination; however, FirstEnergy in making its motion, relied on the unreported decision of *State v. Conyers*, 6th Dist. Lucas No. L-97-1327, 1998 Ohio App. LEXIS 3274 (July 17, 1998) to support its position that LSC analyses must be introduced at hearing and made a part of the record. However, the Ohio Supreme Court's subsequent decision in *Griffith* is controlling. *Griffith* came before the Ohio Supreme Court as an appeal from a procedural order of the Ohio Court of Claims, which dismissed a claim for lack of jurisdiction.

[112] See, *In Re Application of Columbus Southern Power Co., et al*., 128 Ohio St. 3d 402, 2011-Ohio-958 [¶26], 945 N.E.2d 501, in which the Ohio Supreme Court recognized that the items listed in R.C. 4928.143(B) "implicitly require" the Commission to consider "certain costs." See, also, *In Re Application of Columbus Southern Power Co., et al*., 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 6551, in which the Court recognized that all nine of the R.C. 4928.143(B)(2) factors provided for "cost recovery" and limited the items to be considered by the Commission in approving an ESP only to those cost provisions specifically enumerated.

No evidentiary record was made in the trial court, and yet the Ohio Supreme Court relied on draft bills and LSC bill analyses as authority to support its interpretation of legislative intent.

III. CONCLUSION

For the above reasons, NOPEC respectfully requests that the Commission grant rehearing consistent with the grounds NOPEC raises; that the Third Stipulation and Recommendation be rejected; and that the Companies' proposed ESP IV be denied because it fails to satisfy the ESP v. MRO test.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Rehearing was served *via electronic mail* upon the parties of record this 2nd day of May, 2016.

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