BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Non-Market-Based Services Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company	)))))	Case No. 18-1818-EL-RDR

REPLIES TO COMMENTS ON STAFF REPORT SUBMITTED BY OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

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INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") have consistently explained[1] how they satisfied the stipulated conditions of their second Electric Security Plan[2] ("ESP II"), entitling them to recover from customers all Legacy RTEP[3] costs incurred, net of refunds received from PJM Interconnection, LLC ("PJM"). Pursuant to Paragraph 6 of their Commission-approved Stipulation with Staff and other parties, the Companies agreed not to seek recovery of certain Legacy RTEP costs from their retail customers. However, Paragraph 6 of the Stipulation included an important proviso (the "Satisfaction Clause") that all the Companies' obligations with respect to Legacy RTEP costs would be satisfied if the Federal Energy Regulatory Commission ("FERC") issued an order or there was an appellate court decision whereby the Companies' customers avoid at least $360 million of Legacy RTEP costs:

> 6. The Companies collectively agree not to seek recovery through retail rates from Ohio retail customers of Legacy RTEP Costs for the longer of: (1) the five year period from June 1, 2011 through May 31, 2016 or (2) when a total of $360 million of Legacy RTEP Costs has been paid for by the Companies and has not been recovered by the Companies in the aggregate through retail rates from Ohio retail customers. If FERC issues an order or there is an appellate decision that results in the ATSI zone avoiding responsibility for payment of Legacy RTEP Costs on a load ratio share basis such that Ohio retail customers of the Companies avoid at least $360 million of such Legacy RTEP Costs, all obligations of the Companies under this Agreement with respect to Legacy RTEP costs will be satisfied.[4]

[1] The Companies most recently explained this in their Initial Comments filed in this matter on March 29, 2019.
[2] Case No. 10-388-EL-SSO.
[3] Legacy RTEP costs are costs billed by PJM for 500 kV and above RTEP projects which were approved by the PJM board prior to June 1, 2011 to ATSI and, in turn, to the Companies. ESP II, Case No. 10-388-EL-SSO, Second Supplemental Stipulation (filed July 22, 2010) at 5, Paragraph 5.
[4] ESP II Second Supplemental Stipulation (filed July 22, 2010), at 5, Paragraph 6 (emphasis added). In these Replies to Comments, the original stipulation, the first supplemental stipulation and the second supplemental stipulation will be collectively referred to as the "Stipulation" or "ESP II Stipulation."

In the following years, the Companies paid PJM hundreds of millions of dollars in Legacy RTEP charges, without recovery from retail customers. Meanwhile, the Companies used best efforts to successfully challenge the allocation of certain RTEP costs, including Legacy RTEP costs, before FERC and appellate courts. And, once the appellate courts agreed with FirstEnergy and remanded the case to FERC for further proceedings, FirstEnergy was instrumental in negotiating the terms of the settlement agreement that ultimately was filed with FERC; as reflected by the fact that FirstEnergy's attorney signed the filing letter that was included when the settlement was filed on June 15, 2016. On May 31, 2018, FERC entered an order (the "FERC Order") approving a settlement that substantially altered PJM's cost allocation methodology, resulting in a FERC litigation outcome that ultimately provided Legacy RTEP savings to the Companies' customers greater than $360 million. Upon entry of the FERC Order, the Companies' customers immediately avoided responsibility for Legacy RTEP costs totaling over half a billion dollars – well in excess of the stipulated $360 million threshold under the Satisfaction Clause.[5] At that time, all of the Companies' obligations with respect to Legacy RTEP costs — including the obligation not to seek recovery of all Legacy RTEP costs — were satisfied, and the Companies became entitled to recover all Legacy RTEP costs from their retail customers.

In its February 21, 2019 Report and Recommendation, Staff agrees that all the Companies' obligations with respect to Legacy RTEP costs have been satisfied.[6] The question Staff presented is whether that satisfaction entitles the Companies to recover Legacy RTEP costs of approximately $95 million, net of refunds received from PJM, that the Companies paid to PJM prior to May 31, 2018.[7] The Companies' initial Comments explained that the terms of the ESP II Stipulation entitle

[5] The benefits of the Companies' aggressive litigation and settlement efforts extended beyond the Companies' customers to all Ohio electric customers (estimated at more than $1.5 billion statewide).
[6] Staff Report at 2.
[7] *Id.*

the Companies to recover all Legacy RTEP costs, net of refunds received from PJM, without any limitations on the recovery based on when the Legacy RTEP costs were incurred.

The Office of the Ohio Consumers' Counsel ("OCC") and The Ohio Manufacturers' Association Energy Group ("OMAEG") filed initial comments opposing the Companies' right to recover any Legacy RTEP costs. Most of OCC's and OMAEG's initial comments are based on the incorrect premise that the Commission never adopted the stipulated Satisfaction Clause. These Replies explain why their reasoning is flawed. Once this misconception is dispelled, OCC's and OMAEG's remaining arguments fall flat. For the reasons explained in the Companies' initial Comments and these Replies, the Companies' customers have received Legacy RTEP benefits greatly in excess of those agreed upon in the ESP II Stipulation. For the Companies to receive the benefit of the bargain, the Companies must recover all Legacy RTEP costs, without limitation. To withhold recovery of Legacy RTEP costs would be unlawful and unreasonable.

REPLIES TO COMMENTS

A. The Commission's Approval of the ESP II Stipulation Included the Satisfaction Provision.

Much of OCC's and OMAEG's arguments in opposition to the Companies' recovery of all Legacy RTEP costs is based on the incorrect premise that the Commission never adopted the Satisfaction Clause in Paragraph 6 of the ESP II Stipulation.[8] OCC and OMAEG contend that the Commission's ESP II Order never mentioned this provision, either in the summary of Stipulation terms and conditions or in discussions of the Companies' Legacy RTEP commitments.[9] However, the omission of a direct reference or specific discussion of the Satisfaction Clause has no legal significance whatsoever.

[8] OCC Comments at 5-6; OMAEG Comments at 4-5.
[9] OCC Comments at 6 n.17.

The Ordering Paragraphs of the Commission's August 25, 2010 ESP II Order state that "[I]t is, therefore, ORDERED, That the Combined Stipulation, as modified by the Commission, be adopted and approved."[10] OCC's and OMAEG's Comments must concede that the ESP II Order contains no modification of the Satisfaction Clause, since they argue that the ESP II Order never even mentions the clause. Because the Commission did not modify the stipulation by eliminating the Satisfaction Clause, the clause is among the stipulated terms and conditions the Commission approved.

Moreover, not discussing the Satisfaction Clause in the ESP II Order's summary of the Stipulation is meaningless. The summary of the Stipulation is merely a non-exhaustive summary of stipulated terms and conditions, as its name indicates. Indeed, the Commission begins the summary with the caveat that "[t]he Combined Stipulation includes, *inter alia*, the following provisions." "*Inter alia*" means "among other things." The Commission did not intend to restate every term in the Stipulation. It is common for a Commission order to summarize and discuss a stipulation without restating and discussing each and every term and condition. Unless specifically modified or rejected, terms and conditions not specifically referenced in a Commission Order adopting a stipulation are no less legally binding and enforceable. To hold otherwise would require Commission orders to exhaustively restate and then specifically adopt each and every term in a given stipulation; a wasteful and nonsensical approach that is not required by law and that flies in the face of established Commission practice. There can be no credible doubt that the Commission was aware of and considered the Satisfaction Clause, since its discussion of the ESP vs. MRO test cites to paragraph 6 of the Stipulation, as well as Company witness testimony discussing the effect

[10] ESP II Opinion and Order, Case No. 10-388-EL-SSO (Aug. 25, 2010), at 47.

of the Satisfaction Clause.[11] In fact, OCC in its Comments invokes another Stipulation provision (Paragraph 5, which concerns the Companies' rights to satisfy a "best efforts" obligation through settlement), which is discussed further below. This provision is not included in the ESP II Order's summary or elsewhere discussed in the ESP II Order, either. Thus, even OCC does not believe its own argument.

For all these reasons, OCC's and OMAEG's argument that the Commission never adopted the Satisfaction Clause must be summarily rejected. Once this argument is rejected, OCC's suggestion that the Companies made an "absolute commitment to forgo collecting $360 million from customers in PJM transmission plant costs"[12] fails as well. All the Companies' commitments regarding Legacy RTEP costs are subject to the Satisfaction Clause.

B. The Satisfaction Clause Enhances ESP II's Benefits to Customers Under the ESP vs. MRO Test.

OCC argues that the Companies' "absolute commitment" to forego collecting $360 million in Legacy RTEP costs was important in the Commission's determination that ESP II passed the ESP vs. MRO test.[13] According to OCC, for the Commission to honor the Satisfaction Clause "would make a mockery of" the ESP vs. MRO test.[14] To the contrary, because the Companies met the conditions for triggering the Satisfaction Clause by using best efforts and successfully challenging PJM's RTEP allocation methodology before FERC and in court, customers have received an estimated benefit of $519 million in avoided Legacy RTEP costs. This is significantly

[11] The ESP II Order at page 44, in discussing the Companies' commitment to forego recovery of RTEP charges, cites to Company Ex. 12 at 4. This is the testimony of Company Witness William R. Ridmann, who testified on the referenced page that "customers received greater certainty that they will not pay for at least the first $360 million of Legacy RTEP costs billed to the Companies, provided PJM's cost allocation methodology is not substantially altered." Company Ex. 12 at 4 (emphasis added). The ESP II Order further cites to Joint Ex. 3 at 5. This is page 5 of the Second Supplemental Stipulation, which includes paragraph 6 and its Satisfaction Clause.
[12] OCC Comments at 6.
[13] OCC Comments at 6.
[14] *Id.*

more than the agreed upon $360 million in guaranteed Legacy RTEP cost savings that the Stipulation contemplated and that the Commission recognized in the ESP vs. MRO test. These benefits of the Companies' aggressive litigation and settlement efforts extend beyond the Companies' customers to all Ohio electric customers (estimated at more than $1.5 billion statewide). For these reasons, the Commission should reject OCC's argument.

C. The Companies' Agreement to Use "Best Efforts" to Litigate and Negotiate a Settlement on Customers' Behalf is Separate from and Has No Bearing on the Satisfaction Clause.

OCC incorrectly argues that Paragraph 5 of the ESP II Stipulation prohibits the Companies from activating Paragraph 6's Satisfaction Clause, thus nullifying all their obligations with respect to Legacy RTEP costs, by entering into a settlement that reduces the allocation of Legacy RTEP costs to the Companies' customers.[15] In Paragraph 5, the Companies agreed to use best efforts, including litigation, to mitigate the allocation of Legacy RTEP costs to the Companies and their customers:

> 5. The Companies, NOPEC and NOAC agree that the Companies have used, and the Companies agree to continue to use, best efforts to take actions at FERC and with PJM and PJM members to mitigate allocation of costs billed by PJM for 500 kV and above RTEP projects which are approved by the PJM board prior to June 1, 2011 to ATSI and, in turn, to the Companies ("Legacy RTEP Costs"). For purposes of this paragraph, "best efforts" shall be limited to advocating and litigating up to the Federal Circuit Court in favor of positions that would result in mitigating, to the maximum extent practicable, the Legacy RTEP Cost impact on Ohio retail customers of the Companies in FERC Docket Nos. ER 09-1589, EL10-6-000, EL05-121-000, and RM10-23-000. The Companies will provide Signatory Parties a report of actions taken by the Companies and their results pursuant to this paragraph prior to the expiration of the ESP on May 31, 2014. Nothing in this paragraph shall preclude the Companies from accepting or supporting a settlement which reduces the Companies' obligation for Legacy

[15] OCC Comments at 6-7.

> RTEP Costs, provided any settlement shall not abrogate the Companies' obligation in paragraph 6 below.[16]

OCC's suggestion that Paragraph 5 supersedes Paragraph 6 is incorrect. These two paragraphs must be considered together. Paragraph 5 commits the Companies to advocate and litigate in favor of mitigating the allocation of Legacy RTEP costs to their customers, with no specific amount of mitigated Legacy RTEP costs identified. Since Paragraph 5 narrowly defines "best efforts," the last sentence of the paragraph clarifies that the Companies are not prohibited from supporting a settlement that accomplishes this same goal, to the benefit of customers. However, Paragraph 5 also acknowledges that the Companies' act of supporting such a stipulation that mitigates the impact of Legacy RTEP costs, by an undefined amount, is still subject to Paragraph 6. In other words, even if the Companies were to support such a settlement, the Companies would still be bound by the specific terms and conditions of Paragraph 6. This is precisely what the Companies (and the Commission in its ESP II Order) have done here. The Companies met their obligations under Paragraph 5 by making best efforts to advocate for and support a settlement mitigating the Legacy RTEP impacts to their customers, and the settlement, as approved by FERC order, satisfies the Companies' commitments and the Satisfaction Clause under Paragraph 6. Therefore, OCC's arguments regarding Paragraph 5 must be rejected.

D. The Companies' Obligation to Prove They Have Foregone Recovery of $360 Million in Legacy RTEP Costs Was Nullified Through the Satisfaction Clause.

OCC's and OMAEG's Comments argue that the Companies can only satisfy their obligations with respect to Legacy RTEP costs if PJM has billed them for $360 million of Legacy RTEP costs without recovery from customers.[17] These arguments, however, ignore the critical proviso in the Satisfaction Clause, presumably because OCC and OMAEG refuse to acknowledge

[16] ESP II Second Supplemental Stipulation (filed July 22, 2010), at 5, Paragraph 5.
[17] OCC Comments at 7-11; OMAEG Comments at 5.

that the Commission adopted it. Through the Satisfaction Clause, the Companies' obligation not to seek recovery from customers of $360 million in Legacy RTEP costs was satisfied when FERC issued an order resulting in the Companies' customers avoiding at least $360 million of Legacy RTEP costs. Consequently, there is no need for the Companies to prove that they have foregone recovery of $360 million of Legacy RTEP costs.

In support of its argument that the Companies can only satisfy Paragraph 6's Legacy RTEP cost obligations by proving that they have foregone recovery of $360 million incurred and billed to the Companies by PJM, OCC relies upon a partial quotation of the ESP II testimony of Company Witness William R. Ridmann.[18] In an unfortunate example of selective quoting, OCC contends that Mr. Ridmann testified as follows to a benefit of the ESP II Stipulation:

> adding certainty to the level of recovery of legacy RTEP costs from the Companies' customers through a commitment to not seek recovery of Legacy RTEP costs for the longer of the five year period from June 1, 2011 through May 31, 2016 or *when a total of $360 million of Legacy RTEP costs have been paid for the Companies but not recovered through retail rates****[19]

Had OCC finished Mr. Ridmann's quote, however, instead of using ellipses, OCC would have revealed that Mr. Ridmann continued with an important caveat that emphasized the effect of the Satisfaction Clause:

> adding certainty to the level of recovery of Legacy RTEP Costs from the Companies' customers through a commitment to not seek recovery of Legacy RTEP Costs for the longer of the five year period from June 1, 2011 through May 31, 2016 or when a total of $360 million of Legacy RTEP Costs have been paid for by the Companies but not recovered through retail rates, <u>provided PJM's cost allocation methodology is not substantially altered</u>;[20]

[18] OCC Comments at 8-9.
[19] OCC Comments at 8-9 (quoting ESP II, Supplemental Testimony of William Ridmann (July 23, 2010), at 2 (emphasis added by OCC)).
[20] ESP II, Supplemental Testimony of William R. Ridmann, at 2, lines 6-12 (emphasis added).

Contrary to OCC's mischaracterization of Mr. Ridmann's testimony, the Companies, other stipulating parties, and the Commission understood that the Companies' commitment to forego recovery of $360 million of Legacy RTEP costs could be nullified through the Satisfaction Clause.

OCC also contends that the Companies cannot rely upon the Satisfaction Clause at this time because the Companies will not have avoided at least $360 million in Legacy RTEP costs under the FERC Order until a future date, which OCC substantially overstates. Paragraph 6, however, includes no such qualification on when customers avoid responsibility for payment of Legacy RTEP costs. Upon entry of the FERC Order, the Companies' customers' immediately avoided responsibility for Legacy RTEP costs, estimated to total over half a billion dollars, well in excess of the stipulated $360 million threshold. By the plain, unambiguous language of the Satisfaction Clause, the Companies are entitled to recover all Legacy RTEP costs.

E. The Companies' Rider NMB Filing and Responses to Staff Data Requests Demonstrate the Appropriate Treatment of Non-Legacy RTEP Refunds and Rider NMB Pilot Participants.

OCC also raises unsubstantiated concerns about the Companies' methodology of calculating Legacy RTEP costs to be recovered. First, OCC argues that the Commission should require the Companies to demonstrate that they have refunded all overcharges for non-Legacy RTEP projects, and that such refunds should not count toward the $360 million the Companies must forego collecting.[21] OCC's concerns about non-Legacy RTEP costs are unfounded. The Companies' Rider NMB filing and responses to Staff data requests demonstrated that the Companies are netting non-Legacy RTEP refunds against the Legacy RTEP costs incurred prior to the FERC Order, thereby reducing the remaining costs to be recovered from customers.

[21] OCC Comments at 11-12.

Second, OCC contends that the Commission should require the Companies to demonstrate that participants in the Companies' Rider NMB pilot program are appropriately levied charges and issued refunds based on the time they were on Rider NMB.[22] As explained in the Companies' Rider NMB filing and demonstrated in the Companies' responses to data requests, the calculation of the Rider NMB rates in this proceeding excludes Legacy RTEP costs and refunds associated with Rider NMB pilot participants

F. The Companies' Recovery of Carrying Charges is Reasonable.

In their initial Comments, the Companies explained why it is legal and appropriate for the Commission to authorize the Companies to include carrying charges in their recovery of Legacy RTEP costs. Carrying charges allow the Companies to remain financially indifferent to recovering the Legacy RTEP costs the Companies have paid PJM, net of refunds received from PJM, over a three-year period instead of a shorter period. The three-year recovery period is intended to reduce customers' bill impacts.

OMAEG argues that there is no legal authority for the Commission to authorize carrying charges for Rider NMB. While OMAEG attempts to parse OAC 4901:1-36-04, the fact remains that the Companies are already authorized by their tariffs to recover carrying charges under Rider NMB. The Companies' calculation of Rider NMB includes interest on any net over- or under-collection of non-market-based services-related costs.[23]

As the Companies' initial Comments explained, the request for carrying charges was limited to apply only as of the beginning of the proposed three-year amortization period, rather than for prior periods, even though the Companies suffered the lost time value of money. Therefore, the Companies' request for carrying charges is reasonable and should be approved. If

[22] OCC Comments at 12.
[23] See, e.g., Ohio Edison Company, P.U.C.O. No. 11, Sheet 119, 11th Revised Page 2 of 2 (effective March 1, 2019).

the Commission determines that the Companies may not recover carrying charges, then the Commission should allow the Companies to recover all Legacy RTEP costs incurred prior to the FERC Order, net of refunds to be received by PJM, over the next twelve months.

CONCLUSION

The Commission's ESP II Order approved an agreement among the Companies, Staff and other parties that authorizes the Companies to collect all Legacy RTEP costs under certain conditions. The Companies met those conditions by successfully challenging the allocation of Legacy RTEP costs by PJM to their customers, which led to the FERC Order resulting in the Companies' customers avoiding over half a billion dollars in Legacy RTEP costs. Therefore, the terms of Commission approved ESP II entitle the Companies to recover all Legacy RTEP costs from customers, without limitation. To hold otherwise would be unlawful and unreasonable. For these reasons, the Companies respectfully request the Commission approve the Companies' tariff update as initially proposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 15, 2019, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document and the undersigned has served electronic copies to the following parties:

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Summary: Reply Comments electronically filed by Mr. Scott J Casto on behalf of The Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company