

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

SECOND FINDING AND ORDER

Entered in the Journal on October 9, 2019

I. SUMMARY

{¶ 1} The Commission finds that Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company should be authorized to recover disputed Legacy RTEP charges.

II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services (CRES) necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

A. *The Companies' Second ESP*

{¶ 4} On August 25, 2010, the Commission issued an Opinion and Order approving a stipulation and two supplemental stipulations (Combined Stipulations), authorizing the Companies' second ESP for the period beginning June 1, 2011 through 2014. *In re Ohio*

Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co., Case No. 10-388-EL-SSO (*ESP II Case*). Among other terms, the Combined Stipulations authorized the Companies' Non-Market-Based Services Rider (Rider NMB). Rider NMB is a non-bypassable rider that is designed to recover non-market-based transmission-related costs, such as Network Integration Transmission Service (NITS) charges, imposed on or charged to the Companies by the Federal Energy Regulatory Commission (FERC) or PJM Interconnection, LLC (PJM). *ESP II Case*, Opinion and Order (Aug. 25, 2010) at 12. In the *ESP II Case*, the Companies also agreed to waive, in part, any right to seek recovery from retail customers of Legacy Regional Transmission Expansion Plan (RTEP) charges approved by PJM prior to American Transmission Systems, Inc. (ATSI)'s integration to PJM. Specifically, in paragraph 5 of Section C of the Combined Stipulations (hereinafter, Legacy RTEP Provision), FirstEnergy agreed to not seek recovery through retail rates of Legacy RTEP costs for the longer of: (1) during the period of June 1, 2011 through May 31, 2016; or (2) when a total of \$360 million of Legacy RTEP costs have been paid by the Companies and have not been recovered by the Companies through retail rates from Ohio customers. *ESP II Case*, Opinion and Order (Aug. 25, 2010) at 13, 32, 36, 44; Second Supplemental Stipulation (July 22, 2010) at 5. However, the second supplemental stipulation also contained a related provision. Paragraph 5 of Section C of the Combined Stipulations approved in the *ESP II Case* provides an exception (Satisfaction Clause) to the Legacy RTEP Provision:

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.*

ESP II Case, Second Supplemental Stipulation (Jul. 22, 2010) at 5 (emphasis added).

{¶ 5} On July 18, 2012, the Commission issued an Opinion and Order approving a stipulation between FirstEnergy and certain parties, which provided for an ESP for the

period beginning June 1, 2014, through May 31, 2016, pursuant to R.C. 4928.143. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO (*ESP III Case*). The Commission also clarified that the Companies should file annually an application, in a separate docket, for a review of certain riders approved in that proceeding, including Rider NMB. *ESP III Case*, Opinion and Order (July 18, 2012) at 44.

{¶ 6} The Commission also later approved the NMB Pilot Program, which allowed customers served under the program to be billed directly by PJM or their CRES provider and to no longer be subject to the Rider NMB rates. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (*ESP IV Case*), Opinion and Order (Mar. 31, 2016), Fifth Entry on Rehearing (Oct. 12, 2016).

B. History of this Proceeding

{¶ 7} On December 14, 2018, FirstEnergy filed an application and tariff pages reflecting revisions to Rider NMB in order to comply with the Commission orders in the Companies' *ESP III Case and ESP IV Case*. As part of its application, FirstEnergy argued that the settlement order contemplated in the *ESP II Case* was issued by FERC on May 31, 2018. *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,168 (2018). As a result, FirstEnergy proposed to: (1) recover from customers all RTEP charges incurred going forward; (2) retain refunds resulting from the May 31, 2018 FERC order; and (3) amortize over three years with 6.54 percent carrying charge the Legacy RTEP costs that FirstEnergy incurred and paid from 2012 through February of 2019 in excess of the refunds FirstEnergy will receive from PJM. By rule, interested persons had 40 days to file a motion to intervene and/or comments. Ohio Adm.Code 4901:1-36-03(F). No one timely filed a motion to intervene or comments in accordance with the rule.

{¶ 8} On January 30, 2019, seven days after the deadline to intervene, Ohio Consumers' Counsel (OCC) filed a motion for leave to file a motion to intervene out of time and a motion to intervene. OCC did not file any comments regarding the tariff update.

{¶ 9} On February 21, 2019, Staff filed its Review and Recommendation. Staff recommended that FirstEnergy be permitted to recover RTEP Legacy costs going forward but claimed that it was unclear whether FirstEnergy should recover past RTEP Legacy costs, which had been billed and paid to PJM over the last several years (Disputed Legacy RTEP costs).

{¶ 10} On February 27, 2019, the Commission issued our Finding and Order, which approved the application, in part, and indicated that the Companies' application may be unjust and unreasonable as to the Legacy RTEP Costs that exceed the costs to be refunded to the Companies by PJM, as detailed in Exhibit A, pages 4 through 6, of the application (Disputed Legacy RTEP Costs). The Companies were directed to file revised final tariffs, effective March 1, 2019, subject to review by Staff and the Commission, which excluded recovery of Disputed Legacy RTEP Costs and the proposed carrying charges. FirstEnergy filed the revised tariffs on February 28, 2019. Additionally, the Commission established a comment period solely on whether FirstEnergy should be permitted to recover Disputed Legacy RTEP Costs and the proposed carrying charges.

{¶ 11} On March 29, 2019, the Ohio Consumers' Counsel (OCC) filed an application for rehearing, arguing that the Commission's Finding and Order was unjust and unreasonable in two respects. As its first assignment of error, OCC argues that the Commission's Finding and Order failed to require FirstEnergy to demonstrate that it had met its commitment to customers to forgo collecting \$360 million of Legacy RTEP costs billed to it by PJM, noting that there was nothing in the application that affirmatively demonstrates that FirstEnergy has met this commitment. In its second assignment of error, OCC contended the Commission's Order was unjust and unreasonable because the comment process established was insufficient to address the complex factual and legal issues presented by FirstEnergy's application. Instead, OCC recommended that, given the significant dollar amounts at issue and the complexity of PJM billings, the Commission develop a full evidentiary record in regard to the Disputed Legacy RTEP Costs. On April

24, 2019, the Commission denied rehearing on both assignments of error contained in OCC's first application for rehearing. OCC filed a second application for rehearing on May 24, 2019, which was denied by operation of law.

{¶ 12} Ohio Manufacturers' Association Energy Group (OMAEG), OCC, and the Companies filed comments in this proceeding on March 29, 2019. Subsequently, on April 15, 2019, reply comments were filed by OCC, OMAEG, Industrial Energy Users-Ohio (IEU-Ohio), and FirstEnergy. In addition, Staff filed a supplemental review and recommendation on April 15, 2019, in lieu of reply comments.

C. *Comments Filed by the Parties*

{¶ 13} In its comments, OCC requests that the Commission confirm that FirstEnergy has met its commitment to customers and has indeed forgone collection of at least \$360 million of Legacy RTEP costs billed to it by PJM. In their initial and reply comments, both OCC and OMAEG dispute that FirstEnergy has met this obligation, claiming that the Satisfaction Clause relied upon by FirstEnergy was never adopted by the Commission. OCC and OMAEG reason that, since the Commission never explicitly references the Satisfaction Clause, the Commission did not adopt this specific provision of the Combined Stipulation. Instead, OCC claims that the Commission treated the Legacy RTEP Provision as an absolute commitment by the Companies, and OMAEG avers that the Commission repeatedly noted a \$360 million benefit to customers. *ESP II Case*, Opinion and Order at 13, 26, 32, 36, 44.

{¶ 14} OCC further claims that avoiding costs for PJM transmission projects over the next 45 years does not mean FirstEnergy's obligation to customers has been satisfied. OCC interprets the Opinion and Order in the *ESP Case II* as establishing a commitment to customers that FirstEnergy would not collect legacy transmission charges that were incurred and billed to FirstEnergy by PJM until \$360 million in Legacy RTEP costs have been paid by the Companies. *ESP II Case*, Opinion and Order at 13. In support of its interpretation, OCC points to the testimony of FirstEnergy witness Ridmann in the *ESP II Case*, who testified that the Combined Stipulation benefited ratepayers by:

[a]dding 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, *provided PJM's cost allocation methodology is not substantially altered.*

ESP II Case, Supplemental Testimony of William Ridmann (Jul. 23, 2010) at 2 (emphasis added). OCC reasons that, since FirstEnergy has paid to PJM \$224.4 million in Legacy RTEP charges and since PJM has refunded approximately half of those charges to the Companies, FirstEnergy has not foregone collection of \$360 million in Legacy RTEP Costs. OCC further claims that recovery of the remaining \$94.8 million in Disputed Legacy Costs would be inconsistent with the testimony of FirstEnergy's own witness. Therefore, according to OCC, FirstEnergy cannot seek to collect the Disputed Legacy RTEP Costs.

{¶ 15} Similarly, OCC contends that, under the Companies' avoided cost calculation, \$360 million of costs are not avoided until 2045. OCC argues that, under the terms of the Combined Stipulation, FirstEnergy cannot collect the Disputed Legacy RTEP Costs until the longer of the five-year period from 2011 to 2018 or when a total of \$360 million has been paid and not recovered. OCC reiterates its claim that the Satisfaction Clause was not adopted by the Commission, which precludes recovery of the Disputed Legacy RTEP Costs. However, OCC also claims that, even if the Commission had adopted the Satisfaction Clause, \$360 million of Legacy RTEP costs will not be avoided until 2045. Therefore, OCC reasons that FirstEnergy cannot collect the Disputed Legacy RTEP costs until 2045. In its reply comments, OMAEG supports this argument posed by OCC.

{¶ 16} In addition to its arguments that the Companies should not be permitted to recover Legacy RTEP costs, OMAEG recommends that, if the Commission allows for recovery of the Legacy RTEP costs at all, the Companies should not be permitted to recover

carrying costs. OMAEG notes that Staff opposed the recovery of carrying costs in the Staff Review and Recommendation filed on February 21, 2019. OMAEG disputes that Companies' reliance on Ohio Adm.Code 4901:1-36-04(A), arguing that the rule provides for carrying costs only where an annual reconciliation results in an over- or under-recovery of costs and that, in any event, the rule does not apply to Rider NMB because the rule provides that transmission cost recovery riders be bypassable while Rider NMB is non-bypassable. OMAEG concludes that the Companies agreed not to collect Legacy RTEP costs until specific conditions were met and that carrying charges should not be permitted in a normal amortization process that is occurring because of the Companies' agreement to delay collection of the Legacy RTEP costs. In its reply comments, OCC joined in OMAEG's opposition to the authorization of carrying charges in this case, contending that the Companies have not demonstrated that its financial integrity would be adversely affected if it is not allowed to collect carrying charges.

{¶ 17} FirstEnergy responds that the Commission's approval of the Combined Stipulations in the *ESP II Case* included the Satisfaction Clause. The Companies contend that the omission of a direct reference or specific discussion of the Satisfaction Clause has no legal significance whatsoever. FirstEnergy also notes that the Commission adopted the Combined Stipulation except as modified by the Commission. *ESP II Case*, Opinion and Order at 47. The Companies contend that, since the Commission did not modify the Combined Stipulations by eliminating the Satisfaction Clause, the Clause is among the stipulated terms and conditions the Commission approved. FirstEnergy also claims that the Companies have no obligation to prove that they have foregone recovery of \$360 million in Legacy RTEP costs as that provision was nullified through the Satisfaction Clause. FirstEnergy contends that, once FERC issued the order approving the settlement, the Companies' customers immediately avoided responsibility for Legacy RTEP costs estimated to total over \$500 million, well in excess of the \$360 million threshold stipulated in the Satisfaction Clause; thus, under the plain, unambiguous language of the Satisfaction Clause, the Companies are entitled to recover all Legacy RTEP costs. Further, the Companies claim

that the Satisfaction Clause actually enhanced the benefits to customers in the *ESP II Case* under the ESP v. MRO Test. R.C. 4928.143(C)(1). The Companies claim that the customers have received an estimated benefit of \$519 million in avoided Legacy RTEP costs, far more than the \$360 million guaranteed by the Combined Stipulations and relied upon by the Commission in the ESP v. MRO test in the *ESP II Case*.

{¶ 18} Finally, the Companies argue that the recovery of carrying charges is reasonable in this case. FirstEnergy contends that the carrying charges allow the Companies to remain indifferent, financially, to recovering the Disputed Legacy RTEP charges over a three-year period rather than a shorter period. The Companies also note that the request for carrying charges is limited to the proposed three-year recovery period rather than for prior periods.

{¶ 19} OCC also recommends that the Commission should require the Companies to demonstrate that non-legacy RTEP charges have been refunded to customers and that FirstEnergy should be precluded from commingling non-legacy RTEP refunds with the Companies' commitment to forgo \$360 million in Legacy RTEP charges. Further, OCC recommends that the Commission should require that credits and refunds are issued to those customers who were transmission customers at the time the charges were billed to FirstEnergy by PJM. OCC reasons that the fact that certain customers have opted out of Rider NMB should not change such customers' responsibility to pay for transmission project costs incurred (or refunds issued) during the time they were transmission customers.

{¶ 20} IEU-Ohio comments that, although the details of OCC's recommendation are unclear, OCC has not demonstrated any reasonable basis to charge Rider NMB pilot program customers additional amounts associated with Legacy RTEP projects. IEU-Ohio notes that customers in the pilot program will pay the full amount for Legacy RTEP costs, as billed by PJM, through their CRES providers or FirstEnergy. IEU-Ohio also claims that OCC's proposal amounts to an untimely request for rehearing of the Commission's decision in the *ESP IV Case*. IEU-Ohio contends that the Commission explicitly addressed the

treatment of the Legacy RTEP settlement benefits in the *ESP IV Case*, noting that the settlement benefits would continue to flow through Rider NMB. *ESP IV Case*, Opinion and Order at 67, citing *ESP II Case*, Opinion and Order at 13. IEU-Ohio argues that, since OCC failed to appeal this aspect of the *ESP IV Case*, it would be improper for the Commission to abrogate the decision in the *ESP IV Case* in this proceeding.

{¶ 21} In its supplemental review and recommendation filed on April 15, 2019, Staff clarified that it had independently reviewed, with information provided by PJM, the expected transmission costs/savings for ATSI as a result of the FERC order. Based upon this review, Staff determined that Ohio retail customers of the Companies avoid at least \$360 million of Legacy RTEP costs and that FirstEnergy had met its obligations from the *ESP II Case*.

D. Commission Decision

1. THE COMMENTS FILED BY OCC AND OMAEG WERE NOT TIMELY FILED.

{¶ 22} As a preliminary matter, the Commission finds that the comments of OCC and OMAEG related to whether the Companies should be permitted to recover Legacy RTEP costs were not timely filed. As explained below, OCC and OMAEG did not file any comments in the initial comment period established by rule. Then, after the Commission established a second comment period, narrowly limited to two issues, OCC and OMAEG filed comments which were significantly beyond the scope of the second comment period, addressing issues generally related to the Companies' filing, rather than the two issues for which the Commission solicited comments.

{¶ 23} The Companies filed their updates to Rider NMB, including the proposed recovery of Legacy RTEP costs, on December 14, 2018. By rule, comments, as well as motions to intervene, were due to be filed 40 days after the filing of the update (i.e., on January 23, 2019). Ohio Adm.Code 4901:1-36-03(F). All of the arguments raised later by OCC and OMAEG against recovery of the Legacy RTEP costs should have been made in the

comment period which ended on January 23, 2019. However, neither OCC nor OMAEG filed comments by January 23, 2019. Neither OCC nor OMAEG filed a motion for an extension of time to file comments, although OCC did file a motion for leave to file a motion to intervene out of time and a motion to intervene on January 30, 2019, seven days after the deadline to intervene.

{¶ 24} Subsequently, on February 21, 2019, Staff timely filed its Review and Recommendation. In its review, Staff agreed that the Companies had satisfied their obligations under the *ESP II Case* and recommended that the Companies be authorized to both recover future Legacy RTEP Costs as well as retain refunds associated with Legacy RTEP costs that the Companies have paid to date. However, Staff believed that it was unclear whether the Companies should be permitted to recover Legacy RTEP costs already paid by the Companies that exceeded the costs to be refunded to the Companies by PJM (Disputed Legacy RTEP Costs). Moreover, Staff recommended that, in the event the Commission authorized recovery of the Disputed Legacy RTEP costs, the Companies be permitted to amortize the Disputed Legacy RTEP costs over three years without carrying costs. Therefore, in the February 27, 2019 Finding and Order, the Commission established a comment period, limited to these two issues: “whether FirstEnergy should be permitted to recover Disputed Legacy RTEP charges [a subset of Legacy RTEP costs], and carrying charges.” Finding and Order (Feb. 27, 2019) at ¶ 16. The comments filed by OCC and OMAEG, on the other hand, are replete with arguments why no Legacy RTEP costs should be collected, rather than whether Disputed Legacy RTEP costs should be recovered. Accordingly, the Commission finds that any comments submitted by OCC and OMAEG beyond the two issues specified in the February 27, 2019 Finding and Order are untimely and should be rejected on that basis.

{¶ 25} Nonetheless, even if the comments submitted by OCC and OMAEG had been timely filed, which they were not, the arguments made in the comments filed by OCC and OMAEG are not persuasive. The Commission will address these issues below.

2. THE COMMISSION ADOPTED THE SATISFACTION CLAUSE.

{¶ 26} The primary argument made by OCC and OMAEG is that the Commission did not adopt the Satisfaction Clause when it adopted the Combined Stipulations in the *ESP II Case*. The arguments made by OCC and OMAEG are based on the claim that, since the Commission never explicitly mentions the Satisfaction Clause in the Opinion and Order in the *ESP II Case*, the Commission did not adopt the Satisfaction Clause. This argument is wholly without merit and should be rejected.

{¶ 27} First, in the Opinion and Order in the *ESP II Case*, the Commission addressed the arguments raised by the parties in favor of and opposed to the Combined Stipulations. If a provision was not referenced by a party in an argument in favor or opposed to the Combined Stipulations, or by a party seeking modification of the Combined Stipulations, it is likely that such provision would not be addressed by the Commission in the *ESP II Case*. In the *ESP II Case*, parties in favor of and against the Combined Stipulations raised numerous arguments regarding the Legacy RTEP Provision and its value to ratepayers. However, no parties raised any objections to the related Satisfaction Clause. Nonetheless, although the Satisfaction Clause was not explicitly discussed, there was a thorough discussion of the Legacy RTEP Provision and the litigation risk of whether Ohio retail customers would be held responsible for legacy RTEP charges. The Legacy RTEP Provision allocated to FirstEnergy the litigation risk for the first \$360 million in legacy RTEP charges; the Satisfaction Clause allocated to ratepayers the risk that FirstEnergy would be absolved of its obligation under the Legacy RTEP Provision because the future litigation or settlement would result in a savings to Ohio customers of at least \$360 million in projected legacy RTEP charges. Thus, under either the Legacy RTEP Provision or the Satisfaction Clause, Ohio ratepayers would save at least \$360 million in legacy RTEP charges. In the Opinion and Order of the *ESP II Case*, the Commission discussed the litigation risk and how the Combined Stipulations allocated the risk:

Although the Commission agrees with OCEA's statement that the likelihood that retail customers in Ohio will be required to pay the legacy RTEP charges is key to determining whether the Combined Stipulation benefits ratepayers and the public interest, we cannot accept OCEA's assumption that there is a zero probability that retail customers will be required to pay such charges without further clarification from FERC (Tr. III at 824-825) [footnote omitted]. OCEA does not cite to any FERC or Federal Court precedents in support of its position. The Commission believes that there are strong arguments to be made that Ohio retail customers should not be responsible for such charges. We also believe that there would be significant litigation regarding this issue at both the state and Federal level (Tr. III at 826-827, 840-843) and that the risk of Ohio ratepayers ultimately being required to pay the full amount of the legacy RTEP charges is substantially greater than zero (Staff Ex. 1 at 7-8). This Commission is unwilling to accept that risk in light of FirstEnergy's agreement in the Combined Stipulation to forgo recovery of the first \$360 million of such charges.

ESP II Case, Opinion and Order at 32.

Given that, in the Opinion and Order, the Commission is discussing the litigation risk surrounding the responsibility of Ohio retail customers for legacy RTEP charges, it is illogical to assume that the Commission did not intend to adopt both the Legacy RTEP Provision and the related Satisfaction Clause, which are the two key and interrelated provisions of the Combined Stipulations which address that litigation risk.

{¶ 28} We also reject the claim that, since the Satisfaction Clause was not contained in the summary of the Combined Stipulations in the *ESP II Case* Opinion and Order, the Commission did not intend on adopting the Satisfaction Clause when it adopted the Combined Stipulations. In the *ESP II Case* Opinion and Order, the Commission summarized, in 11 pages, the original stipulation and two supplemental stipulations filed in the *ESP II Case*, which totaled approximately 66 pages, excluding attachments. In light of

the fact that the Commission was summarizing a lengthy and complex set of three separate documents, the Commission noted that the “Combined Stipulation includes, *inter alia*, the following provisions ***”. *ESP II Case*, Opinion and Order, at 8 (emphasis in the original).

{¶ 29} According to Black’s Law Dictionary, *inter alia* means “among other things.” Thus, the Commission clearly indicated that there were additional provisions, terms, conditions, clauses and contingencies in the Combined Stipulations beyond the summary in the Opinion and Order. The purpose of the summary of a stipulation in any Commission order is to provide background and context for the arguments that follow the summary. In this case, since no party raised an objection to the Satisfaction Clause, it is unsurprising that a description of the Satisfaction Clause was not included in the summary.

{¶ 30} Finally, we note that, in the *ESP II Case*, the Commission explicitly adopted the Combined Stipulations in their entirety, except as modified by the Commission. In the Opinion and Order in the *ESP II Case*, the Commission ordered several clarifications and modifications of the Combined Stipulations in our discussion of the second prong of the three-prong test for the consideration of stipulations. *ESP II Case*, Opinion and Order (Aug. 25, 2010) at 33-36. The Commission concluded this discussion by finding that “subject to the modifications discussed above, the evidence in the record indicates that, as a package, the Combined Stipulation advances the public interest ***” (emphasis added). *Id.* at 36. Likewise, in the “Findings of Fact and Conclusions of Law,” the Commission states, in Finding (8), “[t]he Commission finds that the Combined Stipulation[s], as modified, meets the three criteria for adoption of stipulations, is reasonable, and should be adopted. *Id.* at 46. Finally, in the ordering paragraphs of the Opinion and Order, the Commission orders that “the Combined Stipulation[s], as modified by the Commission, be adopted and approved.” *Id.* at 47. Nowhere does the Commission state, or imply, that the Satisfaction Clause, or any other provision of the Combined Stipulation, was not adopted because it was not explicitly addressed by the Commission.

3. FIRSTENERGY HAS MET THE TERMS OF THE SATISFACTION CLAUSE.

{¶ 31} The Commission finds that the Companies have satisfied the provisions of the Satisfaction Clause and that their obligations under the Legacy RTEP Provision have been satisfied. We are not persuaded by OCC's claim that avoiding costs for PJM transmission projects over the next 45 years does not satisfy FirstEnergy's obligation to customers under the Combined Stipulations. OCC reads the Opinion and Order in the *ESP Case II* as establishing an "absolute commitment" to customers that FirstEnergy would not collect legacy transmission charges that were incurred and billed to FirstEnergy by PJM until \$360 million in Legacy RTEP costs have been paid by the Companies. *ESP II Case*, Opinion and Order at 13. OCC supports this interpretation by citing to the testimony of FirstEnergy witness Ridmann. However, Mr. Ridmann's testimony fatally undermines OCC's argument. In explaining the benefits of the Combined Stipulations, Mr. Ridmann testified that the Companies had made "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, *provided PJM's cost allocation methodology is not substantially altered.*" In fact, PJM's cost allocation methodology was substantially altered in a settlement approved by FERC on May 31, 2018. *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,168 (2018). In its Staff Review and Recommendation, Staff describes how the settlement approved by FERC reduces the ongoing cost allocation, for Ohio transmission zones, for the legacy RTEP projects. Working independently of the Companies and their methodology, and using information provided by PJM, Staff determined FERC has issued an order which 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. Staff Review at 2; Supplemental Staff Review at 1.

4. STAFF'S RECOMMENDATIONS SHOULD BE ADOPTED.

{¶ 32} In its application, FirstEnergy seeks carrying charges solely for the three-year recovery period, rather than for prior periods when the Companies have been paying the

Disputed Legacy RTEP Costs. However, we agree with Staff that carrying charges should not be authorized in this case (Staff Review and Recommendation (Feb. 21, 2019) at 2). Under the terms of the Combined Stipulations, recovery of the Legacy RTEP Costs was subject to inevitable delay. If the Satisfaction Clause was not fulfilled, recovery of Legacy RTEP Costs would have been delayed until the longer of: (1) the period of June 1, 2011, through May 31, 2016; or (2) when a total of \$360 million of Legacy RTEP Costs have been paid by the Companies and not recovered through retail rates from Ohio customers. In the event that the Satisfaction Clause was fulfilled, as it has been, recovery of Legacy RTEP Costs would only begin after an uncertain period during which the litigation was resolved. However, despite the inevitable delay, the Combined Stipulations did not provide for carrying charges, and we will not go beyond the terms of the Combined Stipulations here.

{¶ 33} In addition, we agree with Staff's recommendation that the recovery of Legacy RTEP costs should be subject to future audit and subsequent true-up, consistent with the terms of the Rider NMB tariff (Staff Review and Recommendation at 2).

5. EFFECT ON RIDER NMB PILOT PROJECT

{¶ 34} We are not persuaded by OCC's proposal regarding customers who have opted out of Rider NMB through the Rider NMB Pilot Program. We agree with IEU-Ohio that customers in the pilot program will pay the full amount for Legacy RTEP costs, as billed by PJM, through their CRES providers or FirstEnergy. No further adjustments of their bills, based upon their participation in the pilot program, is necessary or appropriate at this time.

6. NO HEARING IS NECESSARY IN THIS CASE.

{¶ 35} In the Entry on Rehearing issued on April 24, 2019, the Commission held that soliciting comments on the Disputed Legacy RTEP Costs was more than sufficient to provide all parties an opportunity to argue the treatment of the Disputed Legacy RTEP Costs, but that the Commission would consider scheduling this matter for hearing based upon the comments filed in this case. Having thoroughly reviewed all of the comments

filed in this proceeding, including the comments which were not timely filed, the Commission finds that it is unnecessary to hold a hearing in this matter. Although OCC and OMAEG raised numerous *legal* questions regarding the recovery of Legacy RTEP costs, neither OCC nor OMAEG contested any *factual* questions in this proceeding, including the key factual question of whether the FERC settlement resulted 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, as alleged by FirstEnergy and confirmed independently by Staff. In light of the absence of any contested factual questions, there is no need to hold an evidentiary hearing in this case.

III. ORDER

{¶ 36} It is, therefore,

{¶ 37} ORDERED, That FirstEnergy's application to revise Rider NMB be approved.
It is, further,

{¶ 38} ORDERED, That a copy of this Second Finding and Order be served upon all parties of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Dennis P. Deters

Approving in part and dissenting in part, with an opinion:

Daniel R. Conway

GAP/MJA/hac

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE
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CASE NO. 18-1818-EL-RDR

CONCURRING AND DISSENTING OPINION OF COMMISSIONER CONWAY

Entered in the Journal on October 9, 2019

{¶ 1} I concur in all aspects of the Opinion and Order save one: the recovery by ATSI and FirstEnergy from consumers of the \$94.8 million of Legacy RTEP costs incurred by ATSI that were not refunded by PJM to ATSI; and that one disagreement is simply regarding the timing of the recovery.

{¶ 2} I agree that FirstEnergy (and thus ATSI) should recover the \$94.8 million from consumers, but not until the \$360 million of benefits to consumers from the FERC-approved settlement that ATSI negotiated with PJM and the other stakeholders to the Legacy RTEP cost recovery litigation, calculated on a net present value basis, have been realized. In other words, while the FERC's order approving the ATSI settlement might be sufficient, according to the Second Supplemental Stipulation (the Satisfaction Clause), to satisfy any further obligations under the Combined Stipulations, it does not resolve the question of *when* FirstEnergy (and thus ATSI) may recover the \$94.8 million. In that regard, I believe that an appropriate reading of the Combined Stipulations is that recovery should not begin until consumers have actually avoided the \$360 million of Legacy RTEP costs. That would eliminate any risk that consumers might not receive the full \$360 million of benefits before being required to begin contributing to Legacy RTEP cost recovery.

{¶ 3} Once the realization of the \$360 million of benefits to FirstEnergy's customers, from the FERC settlement, has actually occurred, FirstEnergy would report to the Commission that the cross-over has occurred, make an application for recovery of the \$94.8

million, and upon our confirmation of the particulars, the Commission would approve the recovery.

{¶ 4} Also, because under my reading of the Combined Stipulations, customers should not be responsible for Legacy RTEP cost recovery until that point, no carrying charges would apply to the \$94.8 million recovery.

{¶ 5} Because today's Opinion and Order permits recovery to begin prior to the point when consumers have actually avoided the full \$360 million of Legacy RTEP costs, I respectfully dissent from that aspect of the order.

COMMISSIONER(S):

Approving:

Daniel R. Conway

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10/9/2019 2:13:40 PM

in

Case No(s). 18-1818-EL-RDR

Summary: Finding & Order that the Commission finds that Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company should be authorized to recover disputed Legacy RTEP charges. electronically filed by Docketing Staff on behalf of Docketing