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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 Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)	Case No. 10-388-EL-SSO
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service.	)	Case No. 09-906-EL-SSO

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, CITIZEN POWER, AND NATURAL RESOURCES DEFENSE COUNCIL

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September 24, 2010

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CITIZEN POWER,
AND
NATURAL RESOURCES DEFENSE COUNCIL

The undersigned parties, pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), apply for rehearing of the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "the Commission") on August 25, 2010 in the above-captioned case. The undersigned parties submit that the Commission's Order, is unreasonable and unlawful in the following particulars:

A. The Commission Erred to the Extent It Altered the Pleadings and the Record in the Case, as Provided in the Combined Stipulation Between a Subset of Parties, to Exclude the Full Participation of Non-Signatories and to Support the Order.

B. The Commission Erred, Such as to Show Misapprehension, Mistake or Willful Disregard of Duty, When It Failed to Address the Prejudicial Manner in Which Notice Was Provided to the Public and in Which Local Public Hearings Were Conducted.

C. The Commission Erred by Approving a Market Alternative to Determine SSO Rates that Includes Impermissible Rate Plan Elements.

D. The Commission Erred When It Took Administrative Notice of the Record in Another Case to Eliminate a Portion of FirstEnergy's Burden of Proof.

E. The Commission Erred When It Disregarded Requirements Regarding Distribution Ratemaking and Reliability.

F. The Commission Erred When It Pre-Determine that Certain Parties May Not Fully Participate in an Audit Proceeding Based Upon their Decision to Not Sign the Combined Stipulation.

G. The Commission Erred When It Pre-Determined that Certain Parties May Not Fully Participate in Development of the REC Procurement Process Based Upon their Decision to Not Sign the Combined Stipulation.

H. The Commission Erred Regarding Its Determination of Interruptible Rates Because the Order Conflicts with a Previous Commission Determination, Is Not Supported by the Facts in the Record as to Show Misapprehension, Mistake or Willful Disregard of the Commission's Duty, and Violates R.C. 4903.09 that Requires Opinions Based Upon Findings of Fact.

I. The Commission Erred in Its Treatment of Lost Distribution Revenues in Rates Because the Order Conflicts with a Previous Commission Determination, Is Not Supported by the Facts in the Record as to Show Misapprehension, Mistake or Willful Disregard of the Commission's Duty, and Violates R.C. 4903.09 that Requires Opinions Based Upon Findings of Fact.

J. The Commission Erred to the Extent It Relied Upon an Agreement between FirstEnergy and the PUCO Staff Based Upon a Process that Unlawfully Delegates the Commission's Authority and that May Have Resulted in an Agreement that Conflicts with an Earlier Commission Decision.

K. The Commission Erred Because the ESP that the Commission Claims It Approved is Not "More Favorable in the Aggregate as Compared to the Expected

Results that Would Otherwise Apply Under [an MRO]," in Violation of this Requirement Stated in R.C. 4928.143.

L. The Commission Erred Because Its Order Is Based Upon the Evaluation Criteria for Partial Settlements that Is Outdated, as Revealed in the PUCO's Order Concerning the Rate Plan for 2009-2011.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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I. INTRODUCTION AND STATEMENT OF THE CASE

A case before the Federal Energy Regulatory Commission ("FERC") that figures prominently in the above-captioned cases was filed in August 2009 by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy" or the "Company") and their affiliated companies to switch the transmission operations of affiliated American Transmission System, Incorporated ("ATSI") from one regional transmission organization ("RTO") to another -- from the footprint of the Midwest Independent System Operator ("MISO") to PJM

Interconnection, Inc. ("PJM"). The Company's request before FERC for waiver of legacy regional transmission expansion plan ("RTEP") charges by PJM was denied on December 17, 2009.[1] FERC determined that a transmission owner that switches RTOs "should be prepared to assume the costs attributable to [its] decisions."[2]

On October 20, 2009, FirstEnergy filed for a market rate offer ("MRO") (Case 09-906-EL-SSO, "MRO Application" in the "MRO Case"). FirstEnergy presented a plan to conduct a series of auctions (part of a competitive bidding process, "CBP") and a rate design to determine standard service offer ("SSO") rates for its customers. The PUCO Staff reviewed the MRO Application and determined that the statutory requirements for approval of a MRO CBP were satisfied. The matter first went to hearing on December 15, 2009. According to the evidence presented, the minimum requirements for approval of FirstEnergy to conduct a CBP under a MRO are met. For example, Section I of the PUCO Staff's Comments, adopted by PUCO Staff Witness Strom, reaches this conclusion.[3]

On March 23, 2010, FirstEnergy filed another application ("ESP Application"[4]) to request approval of what the Company claimed was an electric security plan ("ESP") that could determine prices consumers will pay for generation, transmission, and distribution service. A fundamental feature of FirstEnergy's proposal was a CBP that heavily

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[1] *American Transmission Systems, Inc.*, FERC Docket Nos. ER09-1589-000, et al., Order Addressing RTO Realignment Request and Complaint (December 17, 2009).

[2] "*Transmission owners* that seek to change RTOs should be prepared to *assume the costs attributable to their decisions*. ATSI is permitted to balance the benefits it associates with its decision to join PJM under its existing tariff against the costs it anticipates it will incur in exiting the Midwest ISO and joining PJM to determine whether such a move is cost-justified. * * * We see no basis to modify the existing RTO rules simply because a particular cost allocation makes a *transmission owner's business decision* more expensive." *American Transmission Systems, Inc.*, FERC Docket Nos. ER09-1589-000, et al., Order Addressing RTO Realignment Request and Complaint at ¶113 (December 17, 2009) (emphasis added).

[3] Staff MRO Ex. 1 (Staff Comments, Section I) and Staff MRO Ex. 2 (Strom).

[4] FirstEnergy ESP Ex. 1 (including schedules).

depended upon the CBP proposed by the Company in the MRO Case. The scant filing included a Stipulation and Recommendation ("Stipulation"[5]) entered into with some (not nearly all) the parties that provided among other matters, that FirstEnergy "may render th[e] Stipulation and ESP null and void" if it was not approved as filed by May 5, 2010 (just 43 days after filing).[6]

FirstEnergy's Application contained a request that the Commission make use of the record in FirstEnergy's MRO Application in Case No. 09-906-EL-SSO that contained testimony and other supporting information regarding the proposed CBP to auction load to determine SSO prices. FirstEnergy's Application stated that the Companies "request that the Commission take administrative notice of the evidentiary record established in the MRO filed by the Companies, Case No. 09-906-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding."[7] An Attorney Examiner Entry was issued the next day (March 24, 2010) ("AE Entry") that, among other matters, set April 13, 2010 as the date for intervenor testimony (21 days after the filing) and set April 20, 2010 as the hearing date (28 days after the filing).

On April 6, 2010, the Commission issued an entry (i.e. the PUCO's Entry) that rejected concerns about the time line of the case being rushed and the inadequate opportunity for review, stating that the Application and its Stipulation appear to be the "culmination of a lengthy process" and that the PUCO was acting "in light of the process and information provided in other proceedings . . . ."[8] The PUCO's Entry granted FirstEnergy's "request[ ] that the Commission take administrative notice of the record in

[5] Joint ESP Ex. 1.

[6] Stipulation at 2.

[7] Application at 3.

[8] PUCO's Entry at 4, ¶(10) (April 6, 2010).

Case No. 09-906-EL-SSO for purposes of this proceeding."[9]

Following the April hearing, briefs were filed on April 30, 2010.[10] The Commission issued an Entry on Rehearing on May 13, 2010, which stated:

> [T]he Commission believes that additional information regarding the impact of the proposed ESP on customer's bills is necessary before we can consider the Joint Stipulation. Therefore, pursuant to Rule 4901-1-34, O.A.C., the Commission directs that the evidential hearing in this proceeding resume on June 17, 2010 . . . . Further, the Commission directs its Staff to present a detailed analysis of the impact of the proposed ESP on customer's {sic} bills. Staff's testimony regarding the analysis should be pre-filed seven days prior to the hearing.

The supplemental hearing was rescheduled, and took place on June 21, 2010. Robert Fortney testified for the PUCO's Staff. FirstEnergy sought to enter a supplemental stipulation ("Supplemental Stipulation"[11]) into the record. Over the objection of the OCC, the Supplemental Stipulation was presented for the record and supported without the submission of pre-filed testimony. FirstEnergy Witness Ridmann was cross-examined regarding the Supplemental Stipulation by counsel for parties that opposed the partial settlement.

Another supplemental hearing was scheduled, and took place on July 29, 2010. FirstEnergy's Second Supplemental Stipulation[12] (collectively with the Stipulation and Supplemental Stipulation, the "Combined Stipulation") was presented for the record, accompanied by the testimony of FirstEnergy Witness Ridmann.[13] OCC testimony by

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[9] Id. at 2, ¶(6) (April 6, 2010).

[10] See, e.g., Post-Hearing Brief by the Office of the Ohio Consumers' Counsel, Citizen Power, Citizens Coalition, and the Natural Resources Defense Council (April 30, 2010) ("OCEA Brief").

[11] Joint ESP Ex. 2.

[12] Joint ESP Ex. 3 (Second Supplemental Stipulation) and 3A (signature page).

[13] FirstEnergy ESP Ex. 12.

Wilson Gonzalez was also entered into the record.[14] Mr. Ridmann's testimony stated that negotiations with additional parties resulted in additional benefits stemming from new provisions contained in the Second Supplemental Stipulation.[15] OCC Witness Gonzalez's testimony addressed problems with the language contained in the Second Supplemental Stipulation, noting that the benefits claimed by Mr. Ridmann would be diminished or absent as the result of possible interpretations of the language.[16]

The Commission issued its Opinion and Order ("Order") on August 25, 2010. The instant pleading applies for rehearing from that Order.

II. ARGUMENTS ON ASSIGNMENTS OF ERROR

A. The Commission Erred to the Extent It Altered the Pleadings and the Record in the Case, as Provided in the Combined Stipulation Between a Subset of Parties, to Exclude the Full Participation of Non-Signatories and to Support the Order.

1. The Commission May Not Exclude Briefs Simply to Support its Order.

The Combined Stipulation provides that "any briefs that were filed [by Signatory Parties] in response to the filing of the Stipulation and Recommendation which were not in support of this ESP are hereby withdrawn."[17] The briefs described in this provision of the Combined Stipulation include briefs jointly filed with non-signatory parties. For example, the OCC, Citizen Power, and NRDC -- non-signatories to the Combined

[14] OCC ESP Ex. 8. OCC Witness Jonathan Wallach's Supplemental Testimony was also entered into the record regarding problems with FirstEnergy's latest plan for the bidding procedure. OCC ESP Ex. 9 (Wallach). Those recommended changes, intended to reduce the price paid for generation service by all of FirstEnergy's customers., were adopted in the Order. Order at 33-34.

[15] FirstEnergy ESP Ex. 12 at 4-5 (Ridmann).

[16] OCC ESP Ex. 8 at 2-10 (Gonzalez) ("wording contained in the Second Supplemental Stipulation threatens to impair the claimed benefits that the new provisions could bring," id at 10).

[17] Second Supplemental Stipulation, Joint Ex. 3 at 9, ¶9.

Stipulation -- filed a joint brief with the Citizens Coalition[18] (a signatory to the Second Supplemental Stipulation) on April 30, 2010. The procedure of eliminating briefs filed by non-signatories to a stipulation based upon nothing other than the agreement of signatories is unprecedented and unlawful. The Order does not modify that portion of the Combined Stipulation, and therefore adopts this overreaching attempt to limit the participation of non-signatories in these proceedings.[19]

Participation in proceedings before the Commission is governed by R.C. 4903.221 and various provisions in the Ohio Administrative Code.[20] The Commission has failed to make any determinations, factual or legal, that should limit the participation in these cases of non-signatories who jointly filed briefs with a parties that later became a signatory to the Combined Stipulation.

The failure of the Commission to modify this provision in the Combined Stipulation may be an oversight since a brief filed by the OCC, Citizen Power, and NRDC (i.e. referred to in the Order as the Ohio Consumer and Environmental Advocates, or "OCEA") is referred to throughout the Order.[21] Whether intended or unintended, the failure of the Commission to reject that portion of the Combined Stipulation regarding the withdrawal of briefs submitted by parties that oppose the Combined Stipulation should be revisited and cured upon rehearing.

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[18]Post-Hearing Brief of the Office of the Ohio Consumers' Counsel, Citizen Action, Citizen Coalition, and the Natural Resources Defense Council (April 30, 2010).

[19] The insufficiency of the Combined Stipulation in this regard was the subject of testimony by OCC Witness Gonzalez. OCC ESP Ex.8 at 9 (Gonzalez). No testimony was presented in support of this specific provision in the Second Supplemental Stipulation.

[20] See, e.g., Ohio Adm. Code 4901-1-11.

[21] See, e.g., Order at 20, 21, 22, 23, 24, and so on.

2. The Commission May Not Modify the Record Based Upon the Agreement of Stipulating Parties Whose Sole Aim is to Support their Position and any Order that Adopts the Proposed Stipulation.

The Combined Stipulation also provides that "filed testimony [by Signatory Parties] . . . in response to the filing that were not in support of this ESP are hereby withdrawn."[22] The subject of this portion of the Second Supplemental Stipulation is not prefiled expert testimony, but is rather *sworn testimony* that was entered into the record by the Attorney Examiner at hearing following cross-examination and the opportunity for all parties to state their objections to its inclusion as part of record. Due to the PUCO's directive that the record in Case No. 09-906-EL-SSO be incorporated into the record of Case No. 10-388-EL-SSO, the testimony contained in Kroger Exhibit 1, Constellation Exhibits 1 and 1A, NOPEC/NOAC Ex. 1, Nucor Ex. 1, and AICUO Ex. 1 would be unlawfully "withdrawn" under the terms of the Combined Stipulation if the Commission does not take action to alter that result. The record evidence does not belong to the parties who submitted it so that they can withdraw the testimony,[23] but it is rather the public's record of sworn testimony in the proceedings that may not be altered by the agreement of certain parties to support their desired result.

After-the-fact alteration of the record, without any explanation and without any evidentiary basis, is another manner in which the participation in proceedings is limited without justification under the controlling law stated in R.C. 4903.221 and various provisions in the Ohio Administrative Code.[24] The record has been relied upon in these cases by non-

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[22] Second Supplemental Stipulation, Joint Ex. 3 at 9, ¶9.

[23] The term used in the Second Supplemental Stipulation is "their" filed testimony. The parties were not required to present testimony at hearing, but witnesses were presented who submitted sworn testimony that was admitted to the record (after accompanied, sworn responses to questions on cross-examination) by the Attorney Examiner after all argument was heard regarding admissibility.

[24] See, e.g., Ohio Adm. Code 4901-1-11.

signatory parties and alteration of the record, without any legal basis, limits the arguments that such non-signatories may make. The appeals process, initiated as provided for by R.C. 4903.13 and the transmission of the record to the Supreme Court as provided in R.C. 4903.21, would be irreparably harmed if the Commission altered the record for no reason other than to support the result favored in the PUCO's entries and orders. Such a process is counter-intuitive and inconsistent with the policies embodied in American jurisprudence. Upon rehearing, the Commission must reject that portion of the Combined Stipulation that provides for the withdrawal of testimony that cannot lawfully be withdrawn.

B. The Commission Erred, Such as to Show Misapprehension, Mistake or Willful Disregard of Duty, When It Failed to Address the Prejudicial Manner in Which Notice Was Provided to the Public and in Which Local Public Hearings Were Conducted.

The Order refers to "objections regarding the scope and conduct of . . . the public hearings in this proceeding," and brushes the irregularities away with the conclusion that the objections were "meritless" and that the undersigned parties were "not prejudiced by any of the disputed issues."[25] The Commission is apparently content with efforts made, in its name, to misinform the public and further mute criticism of the deal struck (as stated in the Stipulation). The misinformation, as shown below, was directed at supporting FirstEnergy's positions and was therefore prejudicial to the undersigned parties who continue to oppose the adoption of the Combined Stipulation.

ESP and MRO applications share procedural requirements.[26]

> The commission shall set the time for hearing of a filing under section 4928.142 [i.e. a MRO filing] or 4928.143 [i.e. an ESP filing] of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory.

[25] Order at 20.

[26] R.C. 4928.141(B) (emphasis added).

The Commission approved a newspaper notice in its Entry on April 12, 2010 and announced local public hearings. The newspaper announcements were published on April 16, 2010[27] for local public hearings beginning on April 19, 2010 (Akron and Toledo on the first night). Three days notice of the local public hearings is completely inadequate to provide for public input on the ESP Application. Even if members of the public became aware of the hearings on such short notice, interested persons must have additional time to reorder their schedules to accommodate the newly announced hearings and to prepare their public testimony. The turnout for the initial local public hearings was sparse, owing to this inadequate notice, and participation at later hearings increased. Several members of the public who testified at the local hearings expressed concern over the short notice and its impact on participation by the public.[28]

The manner in which the local public hearings were conducted was inappropriate for the purpose of providing members of the public an opportunity to share their views on

[27] FirstEnergy ESP Ex. 7 (proofs of publication).

[28] See, e.g., Cleveland ESP Tr. at 35 (April 20, 2010) (John Carney) ("We got know {sic} notice of this public hearing last week, and you're getting some people here, but I sure think there are more people who would have an interest in this case."); Cleveland ESP Tr. at 46 (April 20, 2010) (Tom Mendelsohn) ("It seems that it is hastily being brought for determination without sufficient time to provide for public hearings with a sufficient amount of time to get an appropriate number of people here to provide a variety of different input."); Garfield Heights ESP Tr. at 32 (April 20, 2010) (Erwin Zaretsky) ("One other point I want to make by the way. I think it's very important. Someone alluded to this also. The notification that I got that the meeting was going to be held, the hearings are going to be held this week was eight days ago."); North Ridgefield ESP Tr. at 12 (April 21, 2010) (State Representative Matt Lundy) ("In closing, I would urge that the PUCO do a better job of explaining these complex applications to consumers, much like the one before us this evening. Break it down so that consumers can actually understand what the application is about. Provide more advanced notice of these hearings. To my understanding, there was about a 1-week notice of these hearings, which I'm still a little troubled by; I think we should have as much advance notice as possible. Don't allow the utility companies' lawyers to badger witnesses, as I understand took place in Toledo recently. And make sure the process is long and thorough."); North Ridgefield ESP Tr. at 18-19 (April 21, 2010) (North Ridgeville Council President Kevin Corcoran) ("I'm opposed to the ESP. First of all, as Mr. Lundy had said, the advanced notice of hearings is something that's lacking. I'm very impressed that we've had this many people show up with as little notice as we did, but that's because a lot of them are on an e-mail mailing list and found out about this; otherwise, you probably wouldn't have this huge of a turn-out. One of the things that I think is important going into the future is, consumers don't really find out about these kinds of hearings and what the results of approval of any kind of requests are going to be until after the fact. And that's something that it would be nice for people to get some kind of advanced warning as to: This is the request, this is what it could do to your bill. So that way they have an opportunity to be notified of that, and then have an opportunity to come and speak either for or against an issue.").

the ESP. For example, the floor was opened to FirstEnergy counsel at the April 19, 2010 hearing in Akron before the public was invited to speak. FirstEnergy counsel argued for the Company's proposal, announcing that the ESP proposal "includes a rate freeze, and so we're trying to take care of the distribution as well within the context of a comprehensive Electric Security Plan."[29] In contrast to FirstEnergy's presentation, the ESP proposal contains provisions for quarterly adjustment of distribution rates and not a rate freeze.[30]

The early meetings also featured a handout by the PUCO Staff that included the false statement: "Distribution rates would remain frozen through May 2014."[31] The handout declared that the ESP proposal "[e]nsures price stability and an adequate supply of electricity,"[32] implying that that the alternative would be unstable prices and an inadequate supply of electricity that could scare the public.[33] Finally, the handout declared that the "proposed ESP was filed with an agreement with the parties involved in the case," and named the Ohio Consumers' Counsel ("OCC") on the next page as a party to the case along with a list of parties that executed the Stipulation.[34] Counsel for the OCC and Citizen Coalition objected to this characterization at the Cleveland hearing,[35] and the Attorney Examiner directed members of the public to the Commission's web site

[29] Akron ESP Tr. at 9 (April 19, 2010) (FirstEnergy Counsel Miller).

[30] Stipulation at 14 ("Rider DCR shall be adjusted quarterly").

[31] The PUCO handout from the early meetings was displayed by two members of the public at the later meeting in North Ridgeville. The handout was made part of the record at that local public hearing. North Ridgeville ESP Tr. at 33-34 (April 21, 2010) (Kos Ex. 2 and Fenderbosch Ex. 2).

[32] Id.

[33] Comment was again made by at the local public hearings. See, e.g., North Ridgefield ESP Tr. at 22 (April 21, 2010) (North Ridgefield Council President Kevin Corcoran) ("Slide number 5 talks about insuring price stability and an adequate supply of electricity; I see no evidence of this. Since FirstEnergy would have the right to increase rates quarterly, I failed to see the stability of the price. Are we having problems with supply? Again, I see no evidence of this. No reports of blackouts or brownouts, so I'm not sure where the problem of supply is and why there's a concern.").

[34] North Ridgeville ESP Tr. at 33-34 (April 21, 2010) (Kos Ex. 2 and Fenderbosch Ex. 2).

[35] Cleveland ESP Tr. at 58-60 (April 20, 2010) (Reese and Meissner).

to determine the positions taken by various parties.[36] Aside from the incorrect listing of the OCC as a stipulating party,[37] the handout did not list parties that opposed the Stipulation.[38] In the Commission's quasi-judicial role and that of its representatives who preside over the local public hearings, the PUCO should avoid any appearance at local public hearings that its role is to persuade the public to favor the proposed ESP proposal rather than to invite comment. Misinforming the public compromises the Commission's appearance as an impartial, neutral factor-finder that is imbued with the responsibility to render an independent decision.

Another statement by FirstEnergy counsel should raise the PUCO's concern. FirstEnergy counsel stated the following in Akron:

> One of the things we're really happy about and excited about is that the Electric Security Plan will provide over approximately $280 million of customer benefits that how these customer benefits are incurred is the *company absorbing certain costs*. For example, the company will provide $3 million in economic development and job support, $1.5 million to low-income assistance programs, a *six percent discount to percentage, percentage of income payment plan* {sic}.[39]

By stating that benefits are provided by FirstEnergy "absorbing certain costs," FirstEnergy counsel stated that the benefit related to a PIPP discount is provided by the applicant electric distribution utilities, and not as the result of a sole source contract in the Stipulation with their affiliated generating company (FirstEnergy Solutions).[40] The statement is either false, or it accurately reflects the mixing of regulated distribution and

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[36] Id. The harm caused by the handout could not be remedied by members of the public viewing the PUCO's web site because that would take additional time that the public did not have before testimony was due at the local public hearings.

[37] The Kroger Company is also incorrectly listed as a signatory, but it is a non-opposing party. Id.

[38] See North Ridgeville ESP Tr. at 29 (April 21, 2010) (Jennifer Fenderbosch) ("it does not state any of the parties that are against this proposed rate increase").

[39] Akron ESP Tr. at 11 (April 19, 2010) (FirstEnergy Counsel Miller) (emphasis added).

[40] Stipulation at 8.

competitive non-distribution business (i.e. FirstEnergy and FirstEnergy Solutions) that is prohibited by corporate separation.[41] The former would be another source of misinformation to the public at the local public hearings. The latter would be a clear violation in a case where, ironically, the Stipulation recommends that the PUCO accept FirstEnergy's existing corporate separation plan without further investigation or review in a pending case.[42]

Upon rehearing, the Commission should recognize the irregularities regarding the manner in which notice to the public and local public hearings were conducted. Corrective action should be taken such that the irregularities are not repeated. Furthermore, the Commission should reject the provisions in the Combined Stipulation regarding approval of FirstEnergy's corporate separation plan and include in the PUCO's investigation of that plan the statements of FirstEnergy representatives at the local public hearings.

C. The Commission Erred by Approving a Market Alternative to Determine SSO Rates that Includes Impermissible Rate Plan Elements.

The Commission approved FirstEnergy's reliance upon the competitive wholesale market in its Order, a MRO feature to determine SSO rates for FirstEnergy's customers.[43] The controlling statute for the action taken by the Commission is R.C. 4928.142, not R.C. 4928.143 that is evaluated in the Order.[44] R.C. 4928.142 contains test criteria for the Commission to evaluate, and not the test between alternatives that the PUCO mistakenly

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[41] See, e.g., Ohio Adm. Code 4901:1-37-04(A)(1) ("Each electric utility and its affiliates that provide service to customers within the electric utility's service territory shall function independently of each other") and Ohio Adm. Code 4901:1-37-04(D) ("Shared representatives . . . shall clearly disclose upon whose behalf their public representations are being made").

[42] Stipulation at 30 ("corporate separation plan in Case No. 09-462-EL-UNC shall be approved as filed").

[43] Order at 8, ¶(1).

[44] See, e.g., id. at 7.

applied to FirstEnergy's circumstances. Presumably the General Assembly, in crafting Sub. S.B. 221 that revised R.C. Chapter 4928, considered reliance upon the market for generation service to be the means by which such service should be priced if market conditions permitted. The benefits for customers that resulted from the May 2009 auction appear to validate that judgment.

Ohio's recently enacted legislation regarding the regulation of electric utilities, Sub. S.B. 221, altered R.C. Chapter 4928. Pursuant to R.C. 4928.141, the utility's SSO may be established "in accordance with section 4928.142 or 4928.143 of the Revised Code."[45] R.C. 4928.142 provides for a rate plan that involves a MRO based upon a CBP, and states criteria that must be satisfied before the Commission relies upon the market to determine aggregate generation prices. R.C. 4928.143 provides for SSO rates based upon an alternative to a market rate.

The purpose served by the criteria stated in R.C. 4928.142 is to assure that wholesale market development supports a competitive supply process that protects customer interests. A CBP is the basis to obtain generation service to provide SSO service to non-shopping customers upon the satisfaction of the criteria. The statutory requirements were addressed in the Company's MRO Application[46] and associated testimony. Section I of the PUCO Staff's Comments, adopted by PUCO Staff Witness Strom, also reaches this conclusion.[47] The record in this case supports the determination

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[45] R.C. 4928.141(A).

[46] Application, Sections II (CBP process), IV (RTO requirements), V (Commission requirements), and VI (state policy).

[47] Staff Ex. 1 (Staff Comments, Section I) and Staff Ex. 2 (Strom). While the Staff Comments state that "Staff cannot recommend approval of the Companies' MRO" "[g]iven the present RTO issues" (Staff Ex. 1 at 6), the legal basis for approval of a MRO framework depends upon meeting the statutory criteria. Staff's *policy* recommendations are, however, important to the design of the CBP to serve the Ohio policy in the public interest. FirstEnergy's design should be changed.

that the minimum requirements for approval of a MRO are met, and the Order authorizes a CBP.

Meeting the minimum criteria stated in R.C. 4928.142 does not end the Commission's review, and is not the end of PUCO regulation related to the determination of rates for generation service. R.C. 4928.142 contains a rulemaking requirement to govern MRO applications, and the Commission's rules must generally ensure the satisfaction of Ohio's policy stated in R.C. 4928.01.[48] In addition to the Commission's general oversight authority over distribution utilities,[49] R.C. 4928.142 provides that retail rates shall be "as prescribed by the commission." The Order approves portions of the Combined Stipulations that relate to these Commission functions.[50]

The Commission's decision to approve the competitive market path also means that the PUCO has chosen to depart from the administrative determination of rates provided for in an ESP. The provisions contained in R.C. 4928.143(B)(2) no longer apply under the competitive market alternative, and the provisions in the Combined Stipulations that address matters beyond the CBP and rate design are not permitted by Ohio law. For example, FirstEnergy and the Commission may no longer mix the pricing of generation service and distribution service in rate plans that provide SSO pricing.[51]

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[48] R.C. 4928.06(A) ("the commission shall adopt rules to carry out this chapter"). For example, Ohio Adm. Code 4901:1-35-03(B)(3) requires "a description of [the utility's] corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code. . . ." That plan is currently under review in Case No. 09-462-EL-UNC, and its contents may be disputed by the undersigned parties as well as by other parties. However, for purposes of this case, the issue is whether the Commission has approved a corporate separation plan for FirstEnergy that governs its existing operations. FirstEnergy has gained such an approval. See, e.g., Staff Ex. 1 at 20 (Staff Comments, Section I).

[49] R.C. 4905.06.

[50] See, e.g., Order at 9, ¶(6).

[51] The large increases in distribution rates resulting from the DCR (Order at ¶(13)) and lost revenue provisions (Order at ¶(20)) in the Combined Stipulations are not permitted in an MRO setting.

Upon rehearing, the Commission should revisit and revise its Order, moving forward with the PUCO's CBP but eliminating components from the Combined Stipulation that may not be approved under R.C. 4928.142.

D. The Commission Erred When It Took Administrative Notice of the Record in Another Case to Eliminate a Portion of FirstEnergy's Burden of Proof.

1. The PUCO took administrative notice of the record in the MRO case without any basis in law.

In its Order, the Commission fundamentally departs from the structure provided in Ohio's governing law regarding SSO plans -- R.C. Chapter 4928 -- and approves a deal with FirstEnergy that contains elements not permitted in plans based upon a CBP intended to restrain prices. Even in the Commission's unlawful alternative to approval of a MRO plan -- an unlawful alternative referred to in the Order as FirstEnergy's ESP -- the Commission unlawfully permitted the truncation of the proceeding by incorporating the record from FirstEnergy's initial MRO proposal in order to lessen the Company's burden of proof and frustrate attempts to oppose the deal.

A PUCO's Entry approved the procedure proposed by FirstEnergy to expedite consideration of the ESP Application without examination of the applicable law. The finding regarding administrative notice seems to have been entirely guided by a desire for rapid approval of the Stipulation. The matters that are proper subjects of administrative notice by the PUCO were examined by the Supreme Court of Ohio in *Canton Storage & Transfer Co. v. Public Util. Comm.*:

> We have . . . held that consolidation of cases and the exchange of testimony is *impermissible where it eliminates a portion of a party's burden of proof.*[52]

[52] *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 9, 647 N.E.2d 136, 144 citing *Motor Service. Co. v. Public Util. Comm.* (1974), 39 Ohio St.2d 5, 68 O.O.2d 3, 313 N.E.2d 803 (emphasis added).

The *Canton Storage* Court quoted from an earlier case where " '[t]he commission's procedure eliminated the necessity for Transit Homes making its own record before the commission.'"[53] As further argued below, the Commission's administrative notice of the record in the pending MRO case significantly reduces FirstEnergy's burden of proof regarding the ESP Application, and is both unreasonable and unlawful.[54]

Canton Storage is also informative regarding the relationship between prejudice to a party and the burden of proof under circumstances where administrative notice is taken of an existing record. In *Canton Storage*, the Court held that "[a]dministrative notice of the testimony . . . prejudiced the protestants because the applicant's burden of proof was reduced by this use of the testimony."[55] Again, the reduction in FirstEnergy's burden of proof regarding the ESP Application is prejudicial to the cases of non-signatories to the Stipulation, and the administrative notice taken by the Commission is both unreasonable and unlawful.

2. The PUCO took administrative notice of the record in the MRO case and thereby unlawfully eliminated a portion of FirstEnergy's burden of proof.

An ESP is the subject of R.C. 4928.143, where the "burden of proof in the proceeding shall be on the electric distribution utility."[56] The Application, including all of its attachments, fails (among its failures) to document the proposed plan "relating to the supply and pricing of electric generation service" that is required of an ESP under R.C. 4928.143(B). FirstEnergy's testimony, filed as required by the March 24, 2010 procedural schedule, similarly fails to provide the required support. Supplemental

[53] Id., quoting from *Motor Service* at 12, 68 O.O.2d 7, 313 N.E.2d 808.

[54] The Supreme Court of Ohio has held that "trial courts may not take judicial notice of their own proceedings in other cases even when the cases involve the same parties." *State ex rel. Everhart v. Mcintosh*, 115 Ohio St. 3d 195; 196, 2007-Ohio-4798; 874 N.E. 2d516, 517 (citations omitted).

[55] Id. at 8-9.

[56] Id.

testimony by FirstEnergy Witness Ridmann was submitted to encourage the Commission to adopt a total settlement package and not to deal with generation service. FirstEnergy relies upon the record in the MRO case, Case No. 09-906-EL-SSO, to meet its burden of proof regarding most of its proposal to conduct a competitive bidding process beginning on June 1, 2011. The Commission's administrative notice of the record in the pending MRO case is intended to cure that problem and result in approval of the Application.

As stated in *Canton Storage*, the Commission's administrative notice may not "*eliminate[ ] a portion of a party's burden of proof.*"[57] That is not only the effect, but apparently the purpose of the administrative notice in this case. As a result, the PUCO's Order addresses an ESP by unlawfully and unreasonably relying upon administrative notice of the record in an MRO case, which should be corrected on rehearing.

E. The Commission Erred When It Disregarded Requirements Regarding Distribution Ratemaking and Reliability.

1. Distribution Ratemaking Statutes Have Not Been Satisfied.

The Commission approved FirstEnergy's proposal to increase distribution rates on a quarterly basis by an average annual $161 million during the proposed ESP period.[58] The Stipulation states that the "quarterly Rider DCR update filing will *not be an application to increase rates* within the meaning of R.C. § 4909.18."[59] The Commission's approval of that provision of the Combined Stipulation violates, however, the often quoted legal rule that the "Commission is a creature of statute, and lacks the

[57] *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 9, 647 N.E.2d 136, 144 citing *Motor Service. Co. v. Public Util. Comm.* (1974), 39 Ohio St.2d 5, 68 O.O.2d 3, 313 N.E.2d 803 (emphasis added).

[58] OCC ESP Ex. 2 at 14 (Gonzalez), citing Stipulation at 14.

[59] Joint ESP Ex. 1, Stipulation at 15.

authority to amend or ignore the requirements imposed by the General Assembly."[60] As stated by OCC Witness Gonzalez, the "increases charged to customers through Rider DCR would be for costs for the delivery of standard distribution service (e.g. not for new technology, such as for smart grid). The Stipulation provision that proposes that quarterly increases in ordinary distribution rates do not fit the description of an increase in rates is absurd." [61]

On rehearing, the Commission must not confuse the provision contained in R.C. 4928.143 (i.e. to the extent that the Commission actually approved an ESP) that permits an ESP to contain distribution rate components with the ability to ignore the procedural requirements for the implementation of such components. To confuse the two would lead to the violation of R.C. 4909.18, a matter beyond the PUCO's discretion. The Commission must reject the provision in the Combined Stipulation regarding the manner in which distribution rate increases would be implemented under FirstEnergy's rate plan in order to comply with Ohio law. FirstEnergy's application for distribution increases, which are permitted by the terms of the Combined Stipulation, must be considered applications to increase rates pursuant to R.C. 4909.18 in order to comply with Ohio law.

2. Distribution Reliability Has Not Been Addressed as Required by Statute.

The governing statutes regarding ESP applications and their review also contain requirements regarding distribution service that have not been satisfied. R.C. 4928.143(B)(2)(h) states:

> As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B) (2) (h) of this section

[60] *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097; *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 4, 647 N.E.2d 136.

[61] OCC ESP Ex. 2 at 14 (Gonzalez) (footnote within testimony omitted).

> [regarding distribution service], the commission shall examine the reliability of the electric distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

The examination prescribed by statute was not conducted, and such an examination is a statutory prerequisite for approval of the provisions related to distribution rates and service (i.e. to the extent that the Commission actually approved an ESP).

Not only did the Commission not perform such an examination, there is a paucity of information in the record regarding the uses that FirstEnergy will make from the revenues that will result from the quarterly increases in distribution rates (including whether distribution reliability will be affected). The only manner in which this important issue is addressed in the Order is a statement that the Commission "expects that reasonable management will carry out the investments funding by Rider DCR to achieve significant improvements in distribution reliability and energy efficiency."[62] This statement of reliance upon the future action of regulated entities to address unidentified (by the Company, stipulation parties, or the PUCO) issues regarding distribution service does not satisfy the statutory requirement that the PUCO conduct its examination before approval of an ESP. On rehearing, the Commission must take actions to satisfy these statutory requirements or disapprove of the provisions in the Combined Stipulation regarding distribution rates and service.

F. The Commission Erred When It Pre-Determine that Certain Parties May Not Fully Participate in an Audit Proceeding Based Upon their Decision to Not Sign the Combined Stipulation.

The Order states that non-signatories parties are "free to negotiate with FirstEnergy for the right to participate along with the Signatory Parties" in proceedings

[62] Order at 40.

connected with Rider DCR.[63] Participation in Commission proceedings that determine distribution rates is a right of parties who satisfy the requirements stated in 4903.221 and various provisions in the Ohio Administrative Code.[64] Such participation is not a matter that should be negotiated -- with the inevitable loss associated with such negotiations (since FirstEnergy will seek something in return) -- with the regulated entity. It is both preposterous and unlawful for the Commission to delegate its authority regarding who may fully participate in proceedings before the PUCO. In a recent example of the right to participate conferred by statute, the Supreme Court of Ohio held that the PUCO abused its discretion in denying the OCC's intervention in a case before the Commission, and that the OCC should have been granted intervention.[65]

The process described in the Combined Stipulation involves quarterly filings and annual audits regarding increases in distribution rates with a final reconciliation filing in July 2014.[66] Following FirstEnergy applications,[67] only the PUCO "Staff and Signatory Parties [are entitled to] file their recommendations and/or objections within 120 days after the filing of the application," and the proposed rates automatically go into effect

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[63] Order at 40.

[64] See, e.g., Ohio Adm. Code 4901-1-11.

[65] *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006). Other statutory provisions come to play regarding the OCC, whose authority is conferred by statute. For example, R.C. 4911.02 states that the OCC "[s]hall have all rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, *and other matters*. . . ." (Emphasis added.) R.C. 4911.14 confers jurisdiction on the OCC "to every case that . . . another party brings before the public utilities commission involving the fixing of any rate . . . by any public utility."

[66] Joint ESP Ex. 3, Second Supplemental Stipulation at 4, ¶3.

[67] The Second Supplemental Stipulation and the Order, read in tandem, are confusing regarding the timing and nature of proceedings to oversee distribution rate increases. The Second Supplemental Stipulation refers to "objections . . . after the filing of the application." Id. The only FirstEnergy filings that could be considered applications are the "*quarterly filings*." Id (emphasis added). However, the Order states that stipulating parties negotiated "to participate in the DCR [annual] *audits*." Order at 40 (emphasis added). It is not clear what proceedings will exist in which even stipulating parties may fully participate.

without any such objections.[68] FirstEnergy has 150 days following the date of its application to "resolve any objections," and failure to do so results in an "expedited hearing process."[69] The Combined Stipulation therefore excludes non-signatories from the most substantial portion of the proceeding that oversees the setting of new distribution rates. The *a priori* limitation upon parties from full participation in such proceedings cannot be justified under Ohio law.

FirstEnergy's efforts to limit the parties to reviews of its applications to increase rates should have been rejected in the Order as a matter of sound regulatory principle and as a matter of compliance with Ohio law.[70] Upon rehearing, the Commission's failure to reject the exclusion of parties from the audit proceedings based upon whether the parties executed the Combined Stipulation must be corrected.

G. The Commission Erred When It Pre-Determined that Certain Parties May Not Fully Participate in Development of the REC Procurement Process Based Upon their Decision to Not Sign the Combined Stipulation.

The Order also states that non-signatories parties are "free to negotiate with FirstEnergy for the right to participate along with the other parties" in the development of the renewable energy credit ("REC") procurement process.[71] The exclusion of non-signatories stated in the Second Supplemental Stipulation[72] is similar to the severe

[68] Id.

[69] Id.

[70] Members of the public are concerned about efforts to reduce PUCO oversight. See, e.g., North Ridgeville ESP Tr. at 52-52 (April 21, 2010) (Ed Bueche) ("As I read through FirstEnergy's filings on 10-388, I was amazed by the amount of actual rates identified in the riders. It read as though it were a book of blank checks it wanted the PUCO to authorize. It certainly confirmed the writings in the Plain Dealer that indicated that FirstEnergy was attempting to minimize oversight with pre-approved, non-pubic, behind-closed-doors, poker table sessions. We need more oversight in the interest of the public, not less.").

[71] Order at 40.

[72] Joint ESP Ex. 3, Second Supplemental Stipulation at 1.

limitation placed upon non-signatories regarding the DCR audit process. OCC Witness Gonzalez testified on the issue:

> The language excludes stakeholders that may make contributions to the RFP [i.e. Request for Proposal] process -- stakeholders such as the OCC that are parties to this case and stakeholders that may be interested in environmental issues that are not parties to this case. The purposeful exclusion of interested stakeholders from a collaborative process limits information and useful perspectives. Such exclusions are poor public policy, and should be rejected by the Commission.[73]

Participation in the RFP process should not be negotiated -- with the inevitable loss associated with such negotiations (since FirstEnergy will seek something in return) -- with the regulated entity.[74] The inevitable result is a loss to the public whose interest should be the Commission's primary concern.

FirstEnergy's efforts to limit the parties to discuss REC development should have been rejected in the Order as a matter of sound regulatory principle and law.[75] Upon rehearing, the Commission's failure to reject the exclusion of parties from the REC development process based upon whether the parties executed the Combined Stipulation must be corrected.

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[73] OCC ESP Ex. 8 at 3 (Gonzalez).

[74] *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006). Other statutory provisions come to play regarding the OCC, whose authority is conferred by statute. For example, R.C. 4911.02 states that the OCC "[s]hall have all rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, *and other matters*. . . ." (Emphasis added.) R.C. 4911.14 confers jurisdiction on the OCC "to every case that . . . another party brings before the public utilities commission involving the fixing of any rate . . . by any public utility."

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H. The Commission Erred Regarding Its Determination of Interruptible Rates Because the Order Conflicts with a Previous Commission Determination, Is Not Supported by the Facts in the Record as to Show Misapprehension, Mistake or Willful Disregard of the Commission's Duty, and Violates R.C. 4903.09 that Requires Opinions Based Upon Findings of Fact.

1. The Order conflicts with Commission decisions regarding collections to cover the costs associated with interruptible service.

FirstEnergy proposed that its Peak Demand Reduction ("PDR") Rider collect from all customers the costs incurred with the Interruptible Generation Service Opportunity ("IGSO") offering.[76] Yet, the IGSO offering is designed for participation by only large commercial and industrial customers.[77] In addition, those large commercial and industrial customers who participate in the program would receive additional benefits that other customers will not receive.[78] The program is designed to enable large commercial and industrial customers to elect when and how many megawatts of demand reduction they are able to provide, and at what price.[79] OCC Witness Gonzalez testified that the Company's position to collect charges from residential customers who are not eligible to participate in the program is inconsistent with other aspects of the Application (i.e. Rider DSE) and Commission precedent. The proposal contained in the Combined Stipulation should not have been adopted by the Commission.[80]

OCC Witness Gonzalez testified that residential customers should not be required to contribute to the cost for customer interruptible programs used to meet the PDR requirements if large customers are not required to contribute to the cost of residential

[76] FirstEnergy MRO Ex. 4 at 11 (Fanelli).

[77] FirstEnergy MRO Ex. 5 at 6-7 (Paganie).

[78] MRO Tr. Vol. 1 at 45-46 (December 15, 2009) (Paganie).

[79] Id.

[80] OCC MRO Ex. 1 at 14 (Gonzalez).

PDR programs.[81] One of the purposes of the IGSO offering is to provide certain customers with an additional demand-side management ("DSM") option *and* help the Company meet its PDR requirements under R.C. Section 4928.66.[82]

Mr. Gonzalez pointed out, and FirstEnergy Witness Paganie agreed during cross-examination, that programs implemented according to the DSE riders (such as the existing Residential Customer Direct Load Control Thermostat program) will also be counted upon by the Company to meet the Company's PDR requirements.[83] The Company's DSE Rider states that its purpose is, in part, to provide customers with DSM options and help the Company meet its peak demand reduction requirements under R.C. Section 4928.66 -- just like the PDR riders.[84] Yet, FirstEnergy's Application proposed to allocate the costs of the DSE programs differently than the costs of the programs recovered through the PDR riders. The DSE programs are allocated on a rate schedule/class specific basis, which is inconsistent with the allocation to all customers under the PDR riders.

OCC Witness Gonzalez testified that the Commission should modify the Company's proposal and incorporate the interruptible program into the Company's Energy Efficiency and Peak Demand Reduction filing and collect such program costs through Rider DSE.[85] In addition, Mr. Gonzalez testified that the Commission should

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[81] OCC MRO Ex. 1 at 14 (Gonzalez).

[82] See MRO Application, Schedule 2, Rider PDR at 14 (OE), at 35 (CEI), and at 56 (TE) (under the "Provisions" section: "The charge set forth In this Rider recovers costs not recovered through Rider DSE, which costs are associated with requests for proposals issued by the Company to assist in securing compliance with the peak demand reduction requirement in Section 4928.66, Revised Code.").

[83] MRO Tr. Vol. 1 at 44-45 (December 15, 2009) (Paganie).

[84] MRO Application, Schedule 2, Rider PDR at 14 (OE), at 35 (CEI), and at 56 (TE).

[85] OCC MRO Ex. 1 at 14 (Gonzalez).

accept the rate design principle that DSM program costs should be recovered from the customer class the program targets.[86]

Mr. Gonzalez's position is consistent with the proposed DSM cost recovery agreed upon in the ESP settlement in Case No. 08-935-EL-SSO. That settlement states "that the allocation of costs will be on a rate schedule/class specific basis or as otherwise recommended as part of the energy efficiency collaborative . . . ."[87] Mr. Gonzalez also pointed out that the principle that DSM program costs be collected from the customer class the program targets is also adhered to in settlements reached in the Duke ESP case (Case No. 08-920-EL-SSO) and the DP&L ESP case (Case No. 08-1094-EL-SSO), as well as in AEP's recent DSM portfolio settlement in Case No. 09-1089-EL-POR.[88]

On rehearing, the Commission should modify the result in the Order to ensure that any program costs recovered for implementation of DSM programs is recovered from the customer class the program targets.

2. Changes are not permitted to Commission decisions without any record basis or explanation based upon the record.

The Order states that an earlier order merely concluded that "there was *insufficient information* in the record in . . . [an earlier] proceeding to make th[e] determination [regarding whether interruptible demand reductions are incremental]."[89] The record in this case did not provide any information to support the Commission's reversal of its position, a matter that is not discussed in the Order and a violation of the requirement stated in R.C. 4903.09 that the Commission make "findings of fact and

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[86] Id.

[87] Id.. footnote 17, quoting from *In re FirstEnergy ESP Application*, Case Nos. 08-935-EL-SSO, et. al., Stipulation and Recommendation at 21 (February 19, 2009).

[88] OCC MRO Ex. 1 at 14, footnote 17 (Gonzalez).

[89] Order at 40 (emphasis sic).

written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

FirstEnergy's Combined Stipulation demands reversal of a previous PUCO decision, a result approved in the Order despite the absence of record evidence to support the result. The new plan for the ELR and OLR interruptible programs "include a modification to the existing tariffs providing that all interruptible capabilities for peak demand reductions after 2008 shall be deemed 'incremental' for purposes of meeting the 2011 through 2013 benchmarks."[90] In response to a FirstEnergy application for certain waivers concerning energy efficiency and peak demand requirements, the Commission issued an order that is not recognized in the terms of the Combined Stipulation (i.e. the Stipulation conflicts with the order).[91] The consequences of the earlier Commission order, combined with the absence of record evidence in these cases to support a change in the Commission's earlier result, is not recognized in the Order.

The Commission's order in the case on the interruptible programs was issued on March 10, 2010 (during the period for settlement discussions in these cases), stating: "Having provided clarification regarding Rule 4901:1-39-05(E), O.A.C. [regarding the treatment of interruptible loads], as requested by FirstEnergy, the Commission lacks sufficient information in the record regarding the incremental peak demand reductions that the companies' qualifying 2009 programs were designed to achieve, *compared to the reductions that the programs in place in the preceding year had been designed to achieve.*"[92] The previously existing ELR and OLR loads must be considered in

[90] OCC ESP Ex. 2 at 18 (Gonzalez), citing the ELR and OLR tariffs contained in Attachment B of the Company's ESP Application.

[91] *In re FirstEnergy 2009 Energy Efficiency and Peak Demand Reductions*, Case Nos. 09-535-EL-EEC, 09-536-EL-EEC, and 09-537-EL-EEC.

[92] Id., Finding and Order at 6 (March 10, 2010) (emphasis added).

determining whether loads subject to those programs are "incremental." As OCC Witness Gonzalez observed, "the Company had approximately 400 megawatts of interruptible load. Therefore, only truly incremental peak demand reductions over the existing 400 megawatts in 2008 should be counted as incremental savings and counted towards the peak demand reduction requirements."[93]

The Commission previously agreed, in its March order, with the position stated by Mr. Gonzalez. The record is devoid of evidence to contradict this result, and the Order does not base the decision upon any findings of fact. The Commission should adjust its Order, consistent with the Commission's earlier determination in Case Nos. 09-535-EL-EEC, 09-536-EL-EEC, and 09-537-EL-EEC regarding the Company's interruptible programs.

I. The Commission Erred in Its Treatment of Lost Distribution Rates Because the Order Conflicts with a Previous Commission Determination, Is Not Supported by the Facts in the Record as to Show Misapprehension, Mistake or Willful Disregard of the Commission's Duty, and Violates R.C. 4903.09 that Requires Opinions Based Upon Findings of Fact.

The Commission's Order fails to address the Company's proposed collection of lost distribution revenues, the subject of extensive testimony before the Commission. According to Stipulation, Section E3:

> During the term of this ESP, the Companies shall be entitled to receive lost distribution revenue for all energy efficiency and peak demand reduction programs approved by the Commission. Such lost distribution revenues do not include approved historical mercantile self directed projected {sic}. The Signatory Parties agree that the collection of such lost distribution revenues by the Companies after May 31, 2014 is not addressed nor resolved by the terms of this stipulation.

[93] OCC ESP Ex. 2 at 19 (Gonzalez), citing information provided at the technical conference conducted on April 5, 2010. Curtailable service provider parties are concerned about the additional payment to the ELR customers (subsidized by others) by means of the EDR Rider. Such subsidies distort the competitive market for interruptible service. DR Coalition ESP Ex. 1 at 11 (Campbell) ("high compensation relative to market prices in RPM").

This provision of the Stipulation will cost residential customers an estimated $6.78 million in 2012, $14.5 million in 2013, and $23 million in 2014 ($9.53 million if collection ends May 31, 2014).[94] When combined with lost revenue collection authorized in the previous ESP stipulation, residential customers will pay an estimated $21 million in lost revenues in 2012, $28.7 million in 2013, and $37.2 million in 2014 ($23.7 million if collection ends May 31, 2014).[95] Unlike distribution lost revenue settlements in other cases that have a clear termination date, FirstEnergy is apparently free under the terms of the Stipulation to negotiate for more lost revenue recovery at the end of the term of the proposed ESP.[96]

FirstEnergy never submitted any evidence on the subject of whether the Company will actually lose revenues from energy efficiency programs.[97] As discussed in the testimony of NRDC Witness Sullivan, one of deficiencies inherent in lost revenue recovery mechanisms is that they can restore revenue to the utility that was never lost in the first place. The lost revenue recovery allowed in the Combined Stipulation and estimated above would be charged to customers *whether or not* the Company actually loses revenue: the FirstEnergy could over-collect its distribution rate requirement from the residential and small commercial customer classes and still collect "lost revenues." This over-collection could happen from any factor that increases usage, such as economic growth or weather that leads to higher electricity consumption.

The Commission did not approve a proposal for lost revenues under similar circumstances that involved the distribution utilities affiliated with American Electric

[94] NRDC ESP Ex. 1 at 3 (Sullivan).

[95] Id. at 4.

[96] OCC ESP Ex. 2 at 36-37 (Gonzalez).

[97] The testimony of FirstEnergy Witness Ridmann does not mention lost revenue recovery.

Power ("AEP"). In the AEP case, the Commission found that "the record fail[ed] to establish what revenue is necessary to provide AEP-Ohio with the opportunity to recover its costs and earn a fair and reasonable return."[98] The Commission stated it could not determine from the proposal in a stipulation submitted in that case whether lost revenue recovery was "reasonable," and rejected AEP's proposal.[99] Similarly, in the instant case that involves FirstEnergy, nothing in the record supports the reasonableness of the lost revenue provision of the stipulation.

As in the case that involved AEP's proposal, the Commission should again reject the lost revenue provision proposed by FirstEnergy in the Combined Stipulation. Like the case that involved the AEP utilities, the Commission should require FirstEnergy to propose "a mechanism to achieve revenue decoupling."[100]

J. The Commission Erred to the Extent It Relied Upon an Agreement between FirstEnergy and the PUCO Staff Based Upon a Process that Unlawfully Delegates the Commission's Authority and that May Have Resulted in an Agreement that Conflicts with an Earlier Commission Decision.

A provision in the Combined Stipulation regarding the continuation of storm damage deferrals shows that the Commission has unlawfully delegated its responsibilities and thereby abrogated its duties and responsibilities as stated in the Revised Code.[101] The Stipulation filed in March 2010 contains provision that requires action within thirty days of the filing for the Stipulation -- a period that is long past -- upon which the Commission is silent in its Order. OCC Witness Gonzalez observed:

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[98] *In re AEP Energy Efficiency Portfolio Case*, Case No. 09-1089-EL-POR, et al., Order at 26 (May 13, 2010).

[99] Id.

[100] Id.

[101] See, e.g., *Loveland Edn. Assn. v. Loveland City School Dist.* (1979), 58 Ohio St.2d 31.

> The Stipulation is vague regarding the treatment of the extended deferrals related to storm damage expense. The Stipulation states that the "storm damage deferrals shall be dependent upon deferral criteria being agreed upon by the Staff and the Companies, with such agreement being sought within thirty days of the filing of this Stipulation." Some aspect of the requested deferrals is apparently subject to continuing negotiations between two parties to the Stipulation (i.e. FirstEnergy and the PUCO Staff).[102]

The thirty days has now passed for the agreement with Staff, and no information has been presented (in the Order or otherwise) regarding how storm damage deferrals will be treated as the result of the Commission's approval of the Combined Stipulation. The delegation of the PUCO's authority to its Staff is unlawful, and has been rejected by the Commission in other instances based upon sound regulatory practice.[103]

The PUCO Staff's agreement to additional deferrals (if this has occurred) is inexplicable considering the Commission's policy pronouncement against new storm damage deferrals. The Commission stated in Case No. 07-551-EL-AIR, FirstEnergy's distribution rate case, that it "will not grant FirstEnergy authority to defer expenses related to storm damage indefinitely."[104] The PUCO stated that it would end this treatment "the earlier of December 31, 2011, or upon the effective date of the Commission's order in FirstEnergy's next distribution rate case."[105] Upon rehearing, the PUCO should reject the provision for additional storm damage deferrals and the provision regarding the approval of the PUCO Staff regarding such deferrals.

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[102] OCC ESP Ex. 2 at 20 (Gonzalez), quoting Stipulation at 22.

[103] See, e.g., *In re Duke's Post-MDP Service Case*, Case Nos. 03-93-EL-ATA, et al., Entry on Rehearing at 10 (November 23, 2004). The agreement of the PUCO Staff raises the legal issue presented in the instant pleading, but that legal issue is linked to practical problems. The Commission acts by vote in open session. In contrast, it is not clear how the PUCO Staff would express its agreement with a FirstEnergy proposal and the Order lends no clarity to the situation.

[104] *In re FirstEnergy's 2007 Distribution Rate Proceeding*, Case No. 07-551-EL-AIR at 43 (January 21, 2009).

[105] Id.

K. The Commission Erred Because the ESP that the Commission Claims it Approved is Not "More Favorable in the Aggregate as Compared to the Expected Results that Would Otherwise Apply Under [an MRO]," in Violation of this Requirement Stated in R.C. 4928.143.

The Order agrees with the undersigned parties that the payment "legacy RTEP charges is key to determining whether the Combined Stipulation benefits ratepayers and the public interest," but is incorrect that these parties have not cited "any FERC or Federal Court precedents in support of [their] position." The Order is also incorrect that the analysis provided in OCC Witness Gonzalez' testimony "is of little probative value" after the Second Supplemental Stipulation was presented to the PUCO since the net benefit to rejecting the Combined Stipulation outweighs the benefits from the Second Supplemental Stipulation that are stated in the Order.

The undersigned parties cited the only relevant FERC precedent on the issue of the assignment of legacy RTEP costs regarding ATSI's switch to PJM (i.e. the FERC order, which is a matter of first impression).[106] In response to an application by FirstEnergy and its affiliated companies (including ATSI) to switch ATSI's operation to the PJM footprint, FERC issued an order on December 17, 2009 (during the MRO hearing). FERC stated:

> *Transmission owners* that seek to change RTOs should be prepared to *assume the costs attributable to their decisions.* ATSI is permitted to balance the benefits it associates with its decision to join PJM under its existing tariff against the costs it anticipates it will incur in exiting the Midwest ISO and joining PJM to determine whether such a move is cost-justified. * * * We see no basis to modify the existing RTO rules simply because a particular cost allocation makes a *transmission owner's business decision* more expensive."[107]

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[106] OCEA Brief at 55 (April 30, 2010).

[107] *FirstEnergy Service Company, Inc.*, FERC Docket No. ER09-1589, Order Addressing RTO Realignment Request and Complaint, ¶113 (December 17, 2009) (emphasis added), cited in OCC ESP Ex. 2 at 30 (Gonzalez).

Under this FERC statement in the case at FERC regarding ATSI's switch to PJM, there are no "additional benefits provided by the second supplemental stipulation" attributable to non-recovery of legacy RTEP charges.[108] The remaining financial benefit stemming from the Second Supplemental Stipulation, "$12 million over the term of the proposed ESP,"[109] is small in comparison with the values considered in OCC Witness Gonzalez' present value analysis (which the Commission agrees are "key").[110]

OCC Witness Gonzalez presented a net present value analysis of the ESP compared to a scenario of an MRO and the possibility of a distribution rate case filed by FirstEnergy that would be effective January 1, 2012.[111] The analysis was presented as part of the test whether the proposed ESP "is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code [regarding SSO by means of a MRO]."[112] Mr. Gonzalez' summary tables presented three such scenarios[113] using different assumptions than those used in FirstEnergy Witness Ridmann's present value analysis.[114] All of Mr. Gonzalez' scenarios incorporate the assumption that the benefit of FirstEnergy not passing through RTEP charges to retail customers through 2016, and that the benefit of not charging

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[108] Order at 32. The comparison of the RTEP numbers presented in this case is, in any event, a simple matter. The original value placed by FirstEnergy Ridmann was $321.3 million. FirstEnergy ESP Ex. 8, WRR Attachment 1.

[109] Id.

[110] Regarding the other, non-monetary provisions in the Second Supplemental Stipulation, OCC Witness Gonzalez testified that "troublesome wording contained in the Second Supplemental Stipulation threatens to impair the claimed benefits that the new provisions could bring to FirstEnergy's proposed ESP." OCC ESP Ex. 8 at 10 (Gonzalez). Mr. Gonzalez' concerns regarding the "troublesome wording" were not addressed in the Order.

[111] OCC Witness Gonzalez discusses his adjustments and additions to the table presented by FirstEnergy Witness Ridmann in his pre-filed testimony. OCC ESP Ex. 2, beginning at 23 (Gonzalez). Slight corrections to the text and tables were made on the witness stand. OCC ESP Ex. 2-A.

[112] R.C. 4928.143, referred to generally in OCC ESP Ex. 2 at 5 (Gonzalez).

[113] OCC ESP Ex. 2-A, Corrected Schedules WG-1, WG-1A, WG-1B.

[114] FirstEnergy ESP Ex. 4, WRR Attachment 1 (Ridmann).

MISO exit and PJM integration fees, is zero. All three scenarios are also the same regarding lost revenue differences between the proposed ESP as well as the differences on the issue of a discount for PIPP customers and the expected results of the Company's inaugural implementation its "Smart Grid" program.

The first scenario displays the net present value comparison between the proposed ESP with an MRO assuming that the additional distribution revenues collected by FirstEnergy from customers is $303 million as stated in FirstEnergy Witness Ridmann's testimony.[115] This scenario contrasts that result with FirstEnergy's ability to collect sixty percent of the added distribution rate case revenues assumed by FirstEnergy Ridmann. The result is an additional $183 million present value cost of the proposed ESP as compared to the expected results from the alternative MRO-based result.[116]

The second scenario displays the net present value comparison between the proposed ESP with an MRO assuming that the additional distribution revenues collected by FirstEnergy from customers is $390 million as permitted by the Stipulation.[117] This scenario again contrasts that result with FirstEnergy's ability to collect sixty percent of the added distribution rate case revenues assumed by FirstEnergy Ridmann. The result is an additional $255 million present value cost of the proposed ESP as compared to the expected results from the alternative MRO-based result.[118]

The third scenario displays the net present value comparison between the proposed ESP with an MRO assuming that the additional distribution revenues collected by FirstEnergy from customers is $303 million as stated in FirstEnergy Witness

[115] Id. (simple sum of amounts shown on line (8)).

[116] OCC ESP Ex. 2-A, Corrected Schedule WG-1, line (21).

[117] Stipulation at 14.

[118] OCC ESP Ex. 2-A, Corrected Schedule WG-1A, line (21).

Ridmann's testimony.[119] This scenario contrasts that result with FirstEnergy's ability to collect zero percent of the added distribution rate case revenues assumed by FirstEnergy Ridmann. This scenario recognizes that FirstEnergy's claim that a distribution rate case would increase distribution rates is unproven.[120] The result is an additional $322 million present value cost of the proposed ESP as compared to the expected results from the alternative MRO-based result.[121]

The present value analysis favors the MRO, and rejection of the ESP that the Commission claims it approved in the Order. Upon rehearing, the Commission should reject the Combined Stipulation and approve a modified MRO that provides the greatest aggregate benefit to customers.

L. The Commission Erred Because Its Order Is Based Upon the Evaluation of Criteria for Partial Settlements that Is Outdated, as Revealed in the Order Concerning the Rate Plan for 2009-2011.

1. Three criteria were used to review the Combined Stipulation.

The Commission's consideration of a partial stipulation has been discussed in a number of Commission cases,[122] and again in the Order.[123] Among other places, the Ohio Supreme Court has addressed its review of stipulations in *Consumers Counsel v.*

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[119] Id. (simple sum of amounts shown on line (8)).

[120] OCC Witness Gonzalez's testimony documents the inability of FirstEnergy to support the increases requested in its last distribution rate case. OCC Ex. 4 at 25-26 (Gonzalez). Increases in that case were partly based on the Commission's response to "exigent circumstances" that no party or witness has suggested would be considered in a newly filed rate case. Id. at 26, citing In re FirstEnergy's RCP Proceeding, Case No. 05-1125-EL-ATA, Order at 9 (January 4, 2006). The existing DSI Rider was approved as part of the existing ESP, ordering over $100 million in collections for distribution service just 2 months after the Order was issued in the distribution rate case. *In re FirstEnergy's 2008 ESP Proceeding*, Case No. 08-935-EL-SSO, Order at 11-12 (March 25, 2009) (sales figures provided by FirstEnergy ESP Ex. 4, WRR Attachment 1); *In re FirstEnergy's 2007 Distribution Rate Case*, Case No. 07-551-EL-AIR, Order (January 21, 2009).

[121] OCC ESP Ex. 2-A, Corrected Schedule WG-1B, line (21).

[122] See, e.g., *CG&E ETP Case*, PUCO Case No. 99-1212-EL-ETP, et al., at 65 (July 19, 2000).

[123] Order at 20.

Public Util. Comm., (1992), 64 Ohio St. 3d 123, 125. The Court in *Consumers' Counsel* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

> 1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
>
> 2. Does the settlement, as a package, benefit ratepayers and the public interest?
>
> 3. Does the settlement package violate any important regulatory principle or practice?[124]

The undersigned parties submit that the Stipulation, which "recommend[s] that the Commission approve the ESP set forth in th[e] Stipulation," violates the criteria set out by the Commission and the Ohio Supreme Court.[125]

2. SSO cases after the enactment of S.B. 221 present additional problems that should be considered in the evaluation of settlements.

The circumstances surrounding this case and preceding cases that involved FirstEnergy reveal that an additional consideration, related to the criterion regarding "serious bargaining," should constitute its own criterion for the evaluation of settlements. The problem is partly reflected in the insightful opinion of Commissioner Roberto in FirstEnergy's initial ESP case filed in 2008:

> When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.

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[124] *Consumers' Counsel v. Public Util. Comm.* (1992), 64 Ohio St. 3d 123, 126.

[125] Stipulation at 5.

> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest - or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully *all terms and conditions of this stipulation.*[126]

Commissioners Centolella and Lemmie stated similar concerns.[127] As reflected in Commissioner Roberto's opinion, the bargaining position of FirstEnergy relative to other parties in the last (i.e. the initial) ESP proceeding was strengthened by the ability of FirstEnergy to reject the results from a fully litigated SSO proceeding. Such asymmetrical bargaining positions should be recognized in the Commission's evaluation of settlements.

The present circumstances reflect a related asymmetry in bargaining positions that also results from the provisions contained in Sub. S.B. 221. OCC Witness Gonzalez testified on the subject:

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[126] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1-2 (March 25, 2009) (citations omitted, emphasis added).

[127] Id., Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring at 2 (March 25, 2009) ("need to be taken into account when considering the weight to be given to this stipulation" and "The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of issues.").

> As is well known by the parties and the Commission, the sequence of events related to FirstEnergy's initial ESP case, Case No. 08-935-EL-SSO, shows that FirstEnergy is in a unique position to withdraw its proposed rate plan in the event that it disagrees with the Commission's determinations. In the present circumstances, FirstEnergy also negotiated from the unique position that it could continue to pursue its pending MRO application and *not propose an ESP at all* unless it was satisfied that the ESP settlement was *more favorable for the Company than an MRO*. This asymmetry in negotiating positions lessens the weight of every non-FirstEnergy party's execution of the resulting Stipulation as an expression of the parties' fundamental support for the package.[128]

FirstEnergy proposed an ESP proceeding, and negotiated the Combined Stipulation, under circumstances where all the evidence presented in the MRO Case stated that the statutory requirements for approval of an MRO were met.[129] Thereafter, the Combined Stipulation was framed from FirstEnergy's advantageous negotiating position.

In light of Commissioner Roberto's insight -- expanded upon by OCC Witness Gonzalez in the context of an SSO proceeding following the initial ESP filing by FirstEnergy -- a criterion (italicized) should be separated from the first criterion stated in *Consumers' Counsel* in order to augment and update the evaluation of settlements.

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

2. *Is the settlement a product of negotiations among parties occupying symmetric bargaining positions, and asymmetric positions did not affect the settlement results?*

3. Does the settlement, as a package, benefit ratepayers and the public interest?

4. Does the settlement package violate any important regulatory principle or practice?

[128] OCC ESP Ex. 2 at 10-11 (Gonzalez) (footnotes omitted, emphasis added).

[129] See, e.g., *In re FirstEnergy's 2009 MRO Proposal*, Case No. 09-906-EL-SSO, Initial Post-Hearing Brief of OCEA Members at 6 (January 8, 2010). FirstEnergy and the OCC supported moving to an MRO, and the Staff Comments found that the statutory requirements are met. Staff Comments, Staff MRO Ex. 1.

In the event the answer to the new, second criterion stated above is negative, "all terms and conditions of this stipulation" should be carefully reviewed as recommended by Commissioner Roberto. That review should affect the Commission's consideration of the settlement as a "package" in the PUCO's last two criteria.[130]

3. The weight given to parties' adoption of the stipulation should be discounted due to the asymmetric bargaining positions in the negotiations.

Commissioner Roberto's insight regarding the seriousness of negotiations in a case alleging to feature an ESP -- expanded upon by OCC Witness Gonzalez under circumstances where FirstEnergy was not required to file an ESP at all -- should concern the PUCO in the evaluation of the Combined Stipulation. The statutory framework set by S.B. 221 is, of course, the most critical factor that "creates a dynamic that is impossible to ignore."[131]

The imprint of the asymmetric positions of the signatories is evident from the face of the Combined Stipulation. The Stipulation begins by stating that if the PUCO does "not approve the ESP as filed . . . by May 5, 2010, then the *Companies may render this Stipulation and ESP null and void* and the Application filed with this Stipulation shall be considered withdrawn upon filing of a written notice with the Commission."[132] The "Procedural Aspects" of the Stipulation state that the "*Companies have the right to withdraw and terminate the Application and the ESP* if the Commission or any court of

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[130] Regardless of whether a criterion is formally added, the Commission's evaluation should recognize -- as part of an evaluation of the first criterion if not by a separately stated criterion -- the asymmetric bargaining positions in ESP negotiations. This situation seems also influenced by fear that return cannot be made to an ESP after approval of an MRO. R.C. 4928.142(F). If return to an ESP were permitted by law, a utility would not offer lower rates in a subsequent ESP proposal and the fear is unjustified.

[131] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part at 1 (March 25, 2009).

[132] Stipulation at 2 (emphasis added).

competent jurisdiction, rejects all or any part of the ESP."[133] The Stipulation also states that the procedural provisions in the Stipulation "do not impair the right of the *Companies to withdraw and terminate the ESP at any time* prior to approval of the Application and ESP by the Commission."[134] As stated by OCC Witness Gonzalez, the Second Supplemental Stipulation is worded with such bias towards taking away benefits that were negotiated that the benefits may be largely nullified.[135] These provisions are all biased in the direction of FirstEnergy. The asymmetry in the negotiating process is embedded and documented in the Combined Stipulation itself.

The statutory framework that framed the asymmetric negotiating process, documented in the Stipulation itself, compels two conclusions. As OCC Witness Gonzalez states:

> Th[e] asymmetry in negotiating positions lessens the weight of every non-FirstEnergy party's execution of the resulting Stipulation as an expression of the parties' fundamental support for the package. The Stipulation is favorable for FirstEnergy, but not for the public.[136]

The other conclusion follows from Commissioner Roberto's analysis: the Commission must carefully review every term and condition in the settlement documents, and must be willing to make changes in keeping with Ohio law and sound regulatory policy.

On rehearing, the Commission should (at a minimum) frame the test of the Combined Stipulation in terms of the four prong test stated above. Finding that the

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[133] Id. at 34 (emphasis added).

[134] Id. (emphasis added).

[135] OCC ESP Ex. 8 at 2-10 (Gonzalez). For example, Mr. Gonzalez points out that any benefit from paragraph 1 in the Second Supplemental Stipulation hinges on the meaning of the word "inhibits" as it relates to the effect of Commission or court disapproval of the Combined Stipulation. Id. at 3-4. Despite this testimony, no attempt is made in the Order to clarify what that word means.

[136] OCC ESP Ex. 2 at 11 (Gonzalez).

asymmetrical bargaining positions resulted in a flawed settlement, the Commission should order revisions to the Combined Stipulation to serve the public interest.

III. CONCLUSION

The Commission should reject the Combined Stipulation because it is less favorable in the aggregate than an MRO alternative. The Stipulation also fails the test, which should be updated and augmented, for the approval of a settlement. The Commission should abrogate its Order and approve a modified MRO plan to set SSO rates for service to customers beginning June 1, 2011.

In the alternative, the Commission should revisit problems with the Combined Stipulation that are the subject of this Application for Rehearing. Upon rehearing, the Commission should modify its Order regarding the matters complained of in this Application for Rehearing.

Respectfully submitted,

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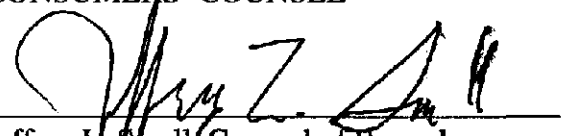

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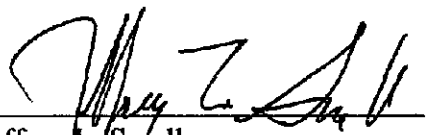
CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was served on the persons stated below, electronically (as instructed by the Attorney Examiner), this 24th day of September, 2010.



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