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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

POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
CITIZEN POWER,
CITIZENS COALITION,
AND
NATURAL RESOURCES DEFENSE COUNCIL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
poulos@occ.state.oh.us

Theodore Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
(412) 421-7029 (Telephone)
robinson@citizenpower.com

Joseph P. Meissner, Counsel of Record
Matthew D. Vincel
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
(216) 216-687-1900 (Telephone)
jpmeissn@lasclev.org
mvincel@lasclev.org
Citizens Coalition

Henry Eckhart
50 West Broad Street, #2117
Columbus, OH 43215
(614) 461-0984 (Telephone)
(614) 221-7401 (Facsimile)
henryeckhart@aol.com
Natural Resources Defense Council

April 30, 2010

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I. INTRODUCTION AND STATEMENT OF THE CASE

On March 23, 2010, Ohio Edison Company, the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("FirstEnergy" or the "Company") filed an application ("ESP Application"[1]) to request approval of their proposed electric security plan ("ESP") proposal that could determine prices consumers will pay for generation, transmission, and distribution service. The ESP filing included a Stipulation and Recommendation ("Stipulation"[2]) that provided 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).[3]

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

[2] The Stipulation was designated "Joint Ex. 1."

[3] Stipulation at 2.

FirstEnergy filed a Motion for Waiver with its ESP Application, requesting waiver of most of the filing requirements that pertain to an ESP. In response to this demand, 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, an Entry by the Public Utilities Commission of Ohio ("PUCO" or "Commission") granted most of the waiver requests, but denied FirstEnergy's request for waiver of the filing requirements regarding financial projections.[4]

Another case before the PUCO that figures prominently in the record of this case ("ESP Case") is the Company's filing of a market rate offer ("MRO") application on October 20, 2009 (Case 09-906-EL-SSO, "MRO Application" in the "MRO Case"). A case before the Federal Energy Regulatory Commission ("FERC") that also figures prominently in the record of this ESP Case was filed by the Company in August 2009 to switch the transmission operations of its 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

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

December 17, 2009.[5] FERC determined that a transmission owner that switches RTOs "should be prepared to assume the costs attributable to [its] decisions."[6]

II. THE REVIEW PROCESS UNDER OHIO LAW HAS BEEN TRUNCATED.

A. Standard Service Offer Applications Under Ohio Law

Ohio's recently enacted legislation regarding the regulation of electric utilities, Sub. S.B. 221 ("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."[7] The MRO Case involved a proceeding according to R.C. 4928.142, while the ESP Case involves a proceeding according to R.C. 4928.143.

1. Standard Service Offer applications under an MRO

R.C. 4928.142(B) provides that "the Commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing [R.C. 4928.142] requirements." The MRO Case, which was filed on October 20, 2009, is long overdue for a decision according to this statutory requirement. The Commission can and should provide for FirstEnergy's SSO to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric

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

[6] "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).

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

service"[8] by issuing a long overdue decision to modify and approve a MRO for customers as recommended by members of the Ohio Consumer and Environmental Advocates ("OCEA") in the MRO Case.[9]

R.C. 4928.142(A) provides for compliance with Commission rules that support and reinforce Ohio policy for the electric industry. The Company submitted materials in the MRO Case in response to the Commission's extensive filing requirements, which are stated in Ohio Adm. Code 4901:35-03(B).

2. Standard Service Offer applications under an ESP

FirstEnergy proposes an ESP in the instant proceeding, which is partly governed by the requirements of R.C. Chapter 4928 and, more particularly, R.C. 4928.143. R.C. 4928.143(C)(1) provides that the "commission shall issue an order . . . for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility . . ., not later than *two hundred seventy-five days* after the application's filing date." FirstEnergy filed its first ESP application on July 31, 2008, soon after enactment of S.B. 221.[10] The new ESP

[8] R.C. 4928.02 (State Policy).

[9] *In re FirstEnergy's 2009 MRO Case*, Case No. 09-906-EL-SSO, Initial Post-Hearing Brief by OCEA Members (January 8, 2009). This course would also serve the other State policies stated in R.C. 4928.02.

[10] The hearing in the 2008 ESP case was scheduled sixty-seven days after FirstEnergy filed its application. *In re FirstEnergy's 2008 ESP Proposal*, Entry at 1 (September 20, 2008). Despite having an additional one hundred twenty-five days to decide this subsequent ESP case, the hearing in this ESP Case began only twenty-eight days after FirstEnergy filed its ESP Application.

Application contains a "subsequent" FirstEnergy ESP that, as established under Ohio law, can be reviewed for 275 days before a decision.[11]

The additional time provided for an ESP compared to for a MRO corresponds to its potential added complexity, a situation that is presented in FirstEnergy's ESP Application.[12] Approval of an ESP requires the additional determination by the PUCO that the ESP "is more favorable in the aggregate as compared to the expected results [under a MRO]."[13] "The burden of proof in the proceeding shall be on the electric distribution utility."[14]

R.C. 4928.143(A) provides for compliance with Commission rules that support and reinforce Ohio policy for the electric industry. The Company submitted extensive requests for waiver of the Commission's rules regarding ESP applications, which are stated in Ohio Adm. Code 4901:35-03(C).[15] On April 6, 2010, the Commission granted extensive waivers based on the allegations made by FirstEnergy in its ESP Application and the Stipulation that the ESP proceeding is "the culmination of a lengthy process

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[11] The Commission's rules amplify the contents of R.C. Chapter 4928 regarding involving interested persons in an ESP proceeding. Ohio Adm. Code 4901:1-35-06 provides "[i]nterested persons wishing to participate in the hearing . . . *forty-five days* [to intervene] after the issuance of the entry scheduling the hearing."[11] The Attorney Examiner reduced this period to *twelve days*. Entry at 3 (March 24, 2010).

[12] State Representative Matt Lundy emphasized this point at a local public hearing. North Ridgeville ESP Tr. at 10-11(April 21, 2010) ("When we in the legislature were working on he energy bill of 2008 [i.e. S.B. 221], we stressed the importance of a thorough process where applications should be reviewed for up to nine months"). North Ridgeville Council President Kevin Corcoran warned against an abbreviated process that might, again, result in "unintended consequences." North Ridgeville ESP Tr. at 19-20 (April 21, 2010).

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

[14] Id.

[15] *In re FirstEnergy 2010 ESP Proceeding*, Case No. 10-388-EL-SSO, FirstEnergy Motion for Waivers (March 23, 2010).

beginning with FirstEnergy's application to FERC for RTO realignment . . . ."[16] The Commission denied FirstEnergy's request for waiver of "financial projections, provided for in Rule 4901:1-35-03(C)(2), O.A.C., * * * [b]ecause the Commission believes that these financial projections are essential to our consideration of the application and stipulation."[17] That "essential" information was filed on April 13, 2010, well after the PUCO Staff executed the Stipulation.

B. Process-Related Requirements Under Ohio Law

1. Administrative notice of another record

a. The PUCO may not take administrative notice of the record in another case to lessen FirstEnergy's burden of proof.

The PUCO's Entry approved the procedure proposed by FirstEnergy to expedite consideration of the ESP Application without examination of the applicable law.[18] The finding regarding administrative notice seems to have been entirely guided by a desire for rapid approval of the ESP Application. 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.*:

[16] Id., Entry at 4, ¶(10) (April 6, 2010). The record only contains evidence that one or two meetings took place in early December, 2009, followed by meetings that began again in late February 2010. OCC ESP Ex. 2 at 12 (Gonzalez). This matter is explored further in this Post-Hearing Brief.

[17] Id.

[18] FirstEnergy never submitted a motion and supporting argument regarding its requested administrative notice of the record in the pending MRO case. Consequently, no opposing arguments were offered in memoranda contra FirstEnergy's proposal. Applications for rehearing was the first opportunity parties had to address the proposed procedure.

> 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.*[19]

The *Canton Storage* Court quoted from an earlier case where "'The commission's procedure eliminated the necessity for Transit Homes making its own record before the commission.'"[20] 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.[21]

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."[22] 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.

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[19] *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).

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

[21] 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).

[22] Id. at 8-9.

b. The PUCO's Entry took administrative notice of the record in the pending 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."[23] The ESP Application, including all of its attachments and amendments, 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 and entered into the ESP record, similarly fails to provide the required support. FirstEnergy apparently intends to rely upon the record in the pending 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 apparently intended to cure that problem and result in rapid approval of the ESP Application.

As stated in *Canton Storage*, the Commission's administrative notice may not "*eliminate[ ] a portion of a party's burden of proof.*[24] That is not only the effect, but apparently the purpose of the administrative notice in this case. As a result, the PUCO's Entry regarding taking administrative notice of the record in the MRO Case is unreasonable and unlawful.

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[23] Id.

[24] *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).

2. Right to ample discovery

R.C. 4903.082 requires "ample rights of discovery" in proceedings before the Commission. The AE Entry provided for expedited discovery on a ten-day basis,[25] but the consequence of the procedural schedule was that intervening parties have been limited to discovery without the possibility of following up on initial responses. Such follow-up discovery can be important, whether the respondent to the discovery is cooperative with the requests or not. The Commission should have provided an opportunity to repeat this sequence of discovery in order to provide "ample rights of discovery."[26]

Even discovery issued on the day of the AE Entry and then followed up by discovery issued the day the first round responses were received -- i.e. based upon the hypothetical where discovery is timely answered, without dispute -- would have resulted in receipt of the follow-up discovery on the original due date for intervenor testimony.[27] FirstEnergy asked for a Commission order by no later than May 5, 2010,[28] and the AE Entry stated that the expedited procedural schedule was due to FirstEnergy's proposal to conduct a competitive bid in July 2010.[29] The ESP Application, the timing of which FirstEnergy controlled, was filed too late to meet the requirement that intervenors receive

[25] AE Entry at 3, ¶(8).

[26] R. C. 4903.082.

[27] The due date for intervenor testimony was later delayed by two days, in recognition that FirstEnergy's only ESP witness (Mr. Ridmann) went on vacation following submission of the Application and was not available for deposition before the due date originally set for intervenor testimony. Entry at 1 (April 8, 2010).

[28] ESP Application at 1; Stipulation at 2.

[29] AE Entry at 2, ¶(6).

"ample" discovery (i.e. pursuant to R.C. 4903.082)[30] in an open, transparent, and fair proceeding before any decision is rendered regarding whether a July 2010 auction (proposed in the ESP Application) should take place in Ohio.[31]

The totality of the procedures set out in the AE Entry result in the denial of intervenors' right to ample discovery.[32]

3. Notice to the public and the manner in which public hearings were conducted

ESP and a MRO applications share procedural requirements.[33]

> 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

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[30] During the hearing, the Attorney Examiners questioned the inadequacy of discovery without a showing that a discovery dispute existed. See, e.g. ESP Tr. Vol. 1 at 239-240; ESP Tr. Vol. 2 at 451; ESP Tr. Vol. 3 at 737-738; and ESP Tr. Vol. 4 at 906-907. The absence of a discovery dispute is entirely different than lack of time to make all the discovery inquiries (including depositions) needed to make a party's case.

[31] If the purpose of a July 2010 auction is to "lock in" low prices, the Company's sworn testimony disputes the effectiveness of holding an early auction. FirstEnergy Witness Schnitzer testified that "forward market prices for power to be delivered in future years already reflect the market's judgment" that electricity prices will increase. *In re FirstEnergy's 2009 MRO Proposal*, Case No. 09-906-EL-SSO, FirstEnergy Ex. 13 at 38 (Schnitzer); accord, OCC MRO Ex. 4 at 6 (Wilson) ("actual prices in the future delivery years may be higher or lower").

[32] The AE Entry was the subject of a timely Motion for Interlocutory Appeal dated March 29, 2010. On the first day of hearing, an AE denied certification of the issue to the Commission, stating that the scheduling issues in this case did not "raise[ ] [a] new or novel question of law or policy" and the scheduling was in an area "this Commission has constantly and consistently allowed examiners to do in these types of proceedings." ESP Tr. Vol. 1 at 45 (April 20, 2010). Pursuant to Ohio Adm. Code 4901-1-15(F), the OCC "raise(s) the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief . . . prior to the issuance of the commission's opinion and order or finding and order in the case." The AE ruling was incorrect. A proceeding of this magnitude has never been conducted on a schedule even approaching that which was required in the AE Entry.

On April 29, 2010, one day before briefs were due according to the expedited briefing schedule, the PUCO Chairman issued a statement stating that the Commission "will not issue a decision on the application by May 5, 2010" and that that Commission "want[s] to assure all parties involved in this case that our goal is to issue a fair and balanced decision on FirstEnergy's request." The extended decision-making period for the Commission does not, of course, provide the "parties involved in this case" a greater opportunity to formulate their cases (or event to submit written arguments).

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

of general circulation in each county in the utility's certified territory.

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[34] 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.

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

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.[35]

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 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."[36] In contrast to FirstEnergy's presentation, the ESP proposal contains provisions for quarterly adjustment of distribution rates.[37]

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[35] 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.").

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

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

The early meetings also featured a handout by the PUCO Staff that included the false statement: "Distribution rates would remain frozen through May 2014."[38] The handout declared that the ESP proposal "[e]nsures price stability and an adequate supply of electricity,"[39] implying that that the alternative would be unstable prices and an inadequate supply of electricity that could scare the public.[40] 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.[41] Counsel for the OCC and Citizen Coalition objected to this characterization at the Cleveland hearing,[42] and the AE directed members of the public who assembled to comment on the ESP Case to the Commission's web site to determine the positions taken by various parties.[43] Aside from the incorrect listing of the OCC as a stipulating party,[44] the handout did not list

[38] 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).

[39] Id.

[40] 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.").

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

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

[43] Id. Any 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.

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

parties that oppose the Stipulation.[45] In the Commission's quasi-judicial role and that its representatives 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.

Another statement by FirstEnergy counsel should raise considerable PUCO 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}.[46]

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).[47] The statement is either false, or it accurately reflects the mixing of regulated distribution and competitive non-distribution business (i.e. FirstEnergy and FirstEnergy Solutions) that is prohibited by corporate separation.[48] The former would be another source of

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[45] 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").

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

[47] Stipulation at 8.

[48] 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").

misinformation to the public at the local public hearings. The latter would be a clear violation in a case where the Stipulation recommends that the PUCO accept FirstEnergy's existing corporate separation plan without further investigation or review in a pending case.[49]

4. Striking of OCC testimony regarding the economic development portion of the stipulation in relation to important regulatory principles and practices.

On the third day of hearing, the attorney examiners granted motions to strike sections of testimony by OCC Witness Ibrahim and OCC Witness Gonzalez based upon relevancy, and struck sections of these testimonies that addressed concerns that important regulatory principles and practices are violated by the Stipulation.[50] Pursuant to Ohio Adm. Code 4901-1-15(F), the OCC "raise(s) the propriety of th[ose] ruling[s] as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief . . . prior to the issuance of the commission's opinion and order or finding and order in the case." The OCC is prejudiced because this testimony addressed the specific types of information that are necessary to review the $70 million deal for the Cleveland Clinic and discounted electricity for unnamed domestic automaker facilities.[51]

Dr. Ibrahim was not permitted to state that the information supporting the "economic development" deals is inconsistent with the Commission policies reflected in Ohio Administrative Code provisions that address reasonable arrangements for economic

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

[50] ESP Tr. Vol. 3 at 687 (AE Bojko).

[51] See Stipulation at 26-29.

development.[52] The regulatory procedures for these types of deals in Ohio Adm. Code 4901:1-38 were established to protect the interests of the residential customers and other stakeholders, and the Commission's policies should not be ignored even if the rules are not controlling with respect to the permissibility of approval in an ESP.[53]

When a ruling is in error and a party is prejudiced by the ruling, the Commission should reverse the evidentiary ruling.[54] The attorney examiners erred in this case by striking, as not relevant, Dr. Ibrahim's opinion that the settlement package violates important regulatory principles and practices as reflected in Ohio Adm. Code 4901:1-38. The stricken testimony identified the type of information required by Ohio Adm. Code 4901:1-38 for economic development arrangements and why the Commission should use these rules as guidelines for the evaluation of provisions in the Stipulation.[55] Testimony by Mr. Gonzalez was stricken on this same basis.[56] The OCC proffered the stricken testimony by Dr. Ibrahim, stating that the attorney examiners decision "affects our ability to demonstrate that the settlement violates the [Commission's] policies, regulatory

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[52] Ohio Adm. Code 4901:1-38-03; ESP Tr. Vol. 3 at 687 (AE Bojko).

[53] ESP OCC Ex. 1 at 5 (Ibrahim).

[54] *Cincinnati Bell Telephone Company v. Public Util. Comm.* (1984), 12 Ohio St. 3d 280.

[55] ESP Tr. Vol. 3 at 687-691 (e.g. the proffered testimony identifies the type of information required by O.A.C. Chapter 4901:1-38 and why it is crucial for an analysis of these provisions, "The procedures in O.A.C. 4901:1-38 were established to protect the interests of the residential customers and other stakeholders, including that of the incumbent utility (i.e., FirstEnergy).").

[56] ESP Tr. Vol. 3 at 744.

principles and practices."[57] A similar proffer of evidence was made regarding the importance of Mr. Gonzalez' testimony.[58]

The attorney examiner's ruling ignores the OCC's right to establish that the Commission has established "guidelines" for the amount and type of information that should be provided for these types of arrangements. As a result, the OCC has not been afforded the opportunity to sufficiently address the third criterion of the Commission's test for evaluating settlements -- i.e. "Does the settlement package violate any important regulatory principle or practice?"[59]

Dr. Ibrahim was not permitted to testify that the Commission should reject the arrangements in the Stipulation for the Cleveland Clinic and for the Domestic Automaker Facilities because the provisions lacked the information needed to attempt the necessary analysis.[60] Dr. Ibrahim's conclusion that the procedures in Ohio Adm. Code 4901:1-38 should be adhered to in this case -- i.e. more detailed information should be provided -- is supported by PUCO Staff conceding that Staff was not aware of how many facilities would be eligible for the discounts carved out for the "Domestic Automaker Facilities"[61] or why only "Domestic" or "Automaker" facilities are worthy of such a discount.[62] The PUCO Staff also could not quantify how much of the Cleveland Clinic's expansion proposal would not be completed if other customers -- including residential customers --

[57] ESP Tr. Vol. 3 at 691 (Poulos).

[58] ESP Tr. Vol. 3 at 744 (Small).

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

[60] OCC ESP Ex. 1 at 5 (Ibrahim) (April 15, 2010).

[61] ESP Tr. Vol. III at 580 (Fortney).

[62] ESP Tr. Vol. III at 580 (Fortney) ("I assume it was to promote buy American").

did not contribute $70 million (5% of the estimated $1.4 billion cost) to the project for the Cleveland Clinic.[63]

C. Recommendation Based Upon the Flawed ESP Process

The ESP Case is beset with procedural problems and should not be approved, while the fully litigated MRO Case lies dormant months after the ninety-day statutory deadline for a decision in such cases has passed. The proper course under these circumstances is for the Commission to modify and approve a MRO for customers as recommended by OCEA members in the MRO Case.[64]

III. SUMMARY OF RECOMENDATIONS

The ESP Application, and the Stipulation that it is based upon, should be rejected. The ESP is also less favorable in the aggregate compared with a MRO. The Stipulation does not satisfy the criteria set out by the Commission in the evaluation of settlements.

The minimum statutory requirements stated in R.C. 4928.142 are satisfied so that FirstEnergy should proceed with a MRO as provided for under that section of Ohio law. Instead of approving the proposed ESP, a modified version of the proposals in the MRO Case as proposed by OCEA members should be approved.[65] The Commission should order significant changes to the competitive bidding process ("CBP") to serve the policy of the State of Ohio as stated in R.C. 4928.02.

As ordered by the Commission, administrative notice was taken of the record in the MRO Case that focused on a CBP process that is needed regardless of whether an

[63] ESP Tr. Vol. III at 595 (Fortney).

[64] *In re FirstEnergy's 2009 MRO Case*, Case No. 09-906-EL-SSO, Initial Post-Hearing Brief by OCEA Members (January 8, 2009). This course would also serve the other State policies stated in R.C. 4928.02.

[65] Id.

MRO or proposed ESP is used to establish standard service offer ("SSO") generation rates.[66] The CBP must be modified to address the factual circumstances presented by FirstEnergy's proposal to switch ATSI's operations to the PJM footprint. Only twelve month contracts should be solicited for the next bidding in Ohio, and no more than two such solicitations should be approved by the Commission.

In the alternative, in the event that the Commission determines that more than twelve months of generation service should be obtained, multiple years' generation service should be obtained in twelve month contracts in order to minimize payment of the premium associated with the additional risk that exists for bidders during the period before ATSI's proposed integration into PJM.

A collaborative process, organized by the Commission and not by FirstEnergy, should be undertaken to work on issues regarding subsequent bidding procedures. A major topic for that process should be to design a portfolio approach that mixes long and short-term products to reduce the overall cost of energy supply for customers.

A prime objective of the Company's retail rate design should be to send the correct economic signal to customers concerning the varying costs of electricity. The Company's retail rate design proposes some limited measures to send the correct economic signal to large customers concerning the cost of electricity -- but the measures do not go far enough. Demand charges should be reintroduced into the retail generation rate design for large customers to establish a more effective price signal.

The Commission should modify the Company's proposal in the MRO Case so that a flat rate structure for RS customers (i.e. constant per kilowatt-hour rates over usage

[66] As stated by OCC counsel on the first day of hearing, use of the record in the MRO Case should not be understood as agreement to the taking of administrative notice to the record in the MRO Case. ESP Tr. Vol. 1 at 48 (Small).

levels) is established. This is a feature of the Stipulation in the ESP Case.[67] The residential rate structure should be consistent with the rate design for the seven other rate schedules proposed by FirstEnergy in Rider GEN and the Commission's decision regarding residential rates in FirstEnergy's most recent distribution rate case.

The Company's proposal in the MRO Case to eliminate the Residential Non-Standard Credit Provision in Rider EDR that was applied to residential service on a grandfathered basis at the time of the MRO application should be rejected.[68]

The Commission should ensure that any program costs that are collected from customers for implementation of demand-side management programs should be collected from the customer class that the programs target. The Company's position in both the MRO Case and the ESP Case -- i.e. charging residential customers who are not eligible to participate in a program -- is inconsistent with the Company's collection of program costs for all other demand-side management programs from only the customer class benefited.

IV. ARGUMENTS REGARDING THE COMPETITIVE BIDDING PROCEDURE AND RETAIL RATE DESIGN

A. The Commission Should Modify Competitive Bidding and Rate Design Features Common to Both the MRO and ESP Proposals.

The importance of providing for an effective competitive bidding process ("CBP") must receive due consideration in order to provide reasonable generation prices for FirstEnergy's customers. FirstEnergy's presentation of its basic proposal for the CBP and retail rate design for generation prices is contained in the Company's CBP

[67] Stipulation at 11 ("RS will have a flat rate structure").

[68] Residential rate design is the subject of Case No. 10-176-EL-ATA.

Application and its associated testimony. The CBP proposal has been "truncated" in the ESP Application, which provides for multiple auctions that provide three years of generation service rather than for an indefinite period. The CBP proposal in the ESP Case is barely mentioned in testimony, located in the testimony of FirstEnergy Witness Ridmann who merely states that the "CBP design mirrors in material respects the process that was used in the successful May 2009 auction . . . ."[69] FirstEnergy's burden of proof regarding the CBP proposal contained in the ESP has not been met regardless of whether the record in the ESP Case is considered or the combined MRO-ESP record is considered.

An important, negative feature of the ESP is the insistence of the signatory parties on Commission approval of the proposed CBP and retail rate design without any alteration.[70] The problems with the CBP and retail rate design in the MRO Case are the subject of considerable testimony. Owing to the extremely short procedural schedule in the ESP Case, the record has not been supplemented by any party to address the proposed CBP alterations. One CBP feature changed by the proposed ESP -- movement of the initial date for bidding to the month of July -- was the subject of testimony in response to Attorney Examiner questioning in the MRO Case. OCC Witness James Wilson stated that "probably the riskiest time for the passive seller is on the summer peak, that's the time when the prices really spike. If he hasn't made adequate arrangements and he has more load than he expects, he can incur a lot of costs."[71] FirstEnergy Witness Ridmann,

[69] FirstEnergy ESP Ex. 4 at 3 (Ridmann).

[70] Stipulation at 2 and 34.

[71] MRO Tr. Vol. 6 at 820 (December 22, 2009) (James Wilson).

the Company's only witness in the ESP Case, did not know whether the selection of a summer month such as July would affect the results of the CBP compare to a May auction that was conducted in 2009.[72] The untested and unsupported CBP proposed by FirstEnergy should be rejected, and the recommendations stated below should be adopted.

B. The CBP Should be Modified and the PUCO Should Maintain Oversight Over the CBP.

1. The criteria for movement to a MRO in R.C. 4928.142 are satisfied.

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. Under such circumstances, utilities are authorized to rely on a CBP to obtain generation service to provide SSO service to non-shopping customers. The record in the MRO Case supported the determination that the minimum requirements for approval of a MRO are met. These requirements are addressed in the Company's MRO Application[73] and associated testimony. Section I of the PUCO Staff's Comments, adopted by PUCO Staff Witness Strom, also reached this conclusion.[74]

[72] ESP Tr. Vol. 1 at 90-91 (April 20, 2010) (Ridmann).

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

[74] Staff MRO Ex. 1 (Staff Comments, Section I) and Staff MRO Ex. 2 (Strom). While the Staff Comments state that "Staff cannot recommend approval of the Companies' MRO" "[g]iven the present RTO issues" (Staff MRO Ex. 1 at 6), the legal basis for approval of a MRO framework depends upon meeting the statutory criteria.

Meeting the minimum criteria stated in R.C. 4928.142 does not end the Commission's review of an MRO application filed under that section.[75] R.C. 4928.142 contains a rulemaking requirement to govern MRO applications, and under the Commission's rules FirstEnergy must generally ensure the satisfaction of Ohio's policy stated in R.C. 4928.01.[76] In addition to the Commission's general oversight authority over distribution utilities,[77] R.C. 4928.142 provides that retail rates shall be "as prescribed by the commission." The Commission's inquiry and review extends well beyond evaluation of the minimum requirements set forth in R.C. 4928.142.

2. The immediate term and long-term CBP should be modified.

a. The immediate-term CBP must recognize contingencies related to the switch of ATSI operations to the PJM footprint.

OCC Witness Wallach addressed the proposed RTO switch regarding its effect on the CBP. Mr. Wallach testified that uncertainty regarding whether the ATSI switch to PJM would take place and the timing of any completed switch would force potential

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[75] Important matters related to the criteria stated in R.C. 4928.142 require Commission attention, and meeting the minimum criteria under the statute does not mean that FirstEnergy's treatment of a subject matter is optimal or even satisfactory. For instance, the instant pleading addresses means by which improvements can be made to inspire greater confidence that the CBP is "[o]pen, fair, and transparent" so that bidders are encouraged to participate. R.C. 4928.142(A)(1). The role of the "independent third party that shall design the solicitation [and] administer the bidding" should be strengthened and clarified, as stated herein. R.C. 4928.142(A)(d). The issue for this case is whether the "electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization," a matter that is not in dispute even though the CBP design should recognize the uncertainties involved in FirstEnergy's plans to switch from one RTO to another.

[76] 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 MRO Ex. 1 at 20 (Staff Comments, Section I).

[77] R.C. 4905.06.

bidders to "face[ ] . . . cost risk due to uncertainty around the expected integration date [that] would likely increase offer prices to hedge such risk."[78] Further, he testified that for "the first two CBP auctions [proposed by FirstEnergy] in June and October of 2010, bidders may also bear risks associated with uncertainties regarding the impact of the migration on PJM system performance or market prices."[79] The CBP approved for generation service that begins on June 1, 2011 should recognize these risks, and power supply acquisition should be adapted accordingly.

Mr. Wallach recommended changes to the CBP that should be made to deal with obtaining generation service beginning on June 1, 2011:

> For the first two CBP auctions conducted prior to the integration of FirstEnergy Ohio with PJM, I recommend that the Companies solicit only 12-month full-requirements contracts, rather than a mix of 12-, 24- , and 36-month contracts.
>
> While it may be appropriate to buy three years forward in subsequent auction cycles, this is probably not the case for the first two auctions prior to integration with PJM. If offer prices in the first two auctions reflect premiums for pre-integration risk, then, under the Companies proposal, these premiums would be locked in for up to three years. Instead, the Companies could simply procure 12-month supply to serve SSO load in the 2011 planning year in these first two auctions, and then solicit longer-term contracts to serve load starting in the 2012 planning year in subsequent auctions. Under this alternative approach, ratepayers might still be exposed to a pre-integration risk premium for one year, since the 12-month contracts for the 2011 planning year would have been acquired prior to integration. However, unlike under the Company's approach, supply for subsequent planning years would

[78] OCC MRO Ex. 2 at 13 (Wallach).

[79] Id.

> be acquired after integration, at which point pre-integration risk and thus risk premiums would likely have diminished.[80]

Procurement for twelve months of generation service for delivery beginning on June 1, 2011, with subsequent procurements subject to later Commission approval, would also effectively deal with any failure of the integration to take place on June 1, 2011.[81]

In the alternative, in the event that the Commission determines that more than twelve months of generation service should be obtained, OCC Witness Wallach's recommendation should be followed such that multiple years' generation service is obtained in twelve month contracts in order to minimize the pre-integration risk premium, improve price transparency, and provide economic benefits to SSO customers.

Delay in the timing of the auctions for the 2011 delivery year should also be ordered to deal with the uncertainties over the proposed switch in RTOs. OCC Witness Wilson addressed the excessive period between the auctions and the period of delivery that is contained in FirstEnergy's proposal:

> The risk that the [proposed] auctions will lead to excessive prices can be reduced by rescheduling the auctions in early 2011, closer to the start of the first delivery year on June 1, 2011, reducing the unnecessary lead time and resulting in auction circumstances under which ATSI's RTO membership should be resolved or less uncertain.[82]

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[80] OCC MRO Ex. 2 at 15-16 (Wallach) (footnote omitted), accord OCC MRO Ex. 4 at 24 (Wilson) ("offers for one-year contracts in the CBP auctions, as proposed by Mr. Wallach"). OCC Witness Wilson also supports offers of "one-year contracts in the CBP auctions," along with reducing the lead time between auction and delivery to reduce the "uncertainty about ATSI integration into PJM." OCC MRO Ex. 4 at 24 (Wilson).

[81] Rates for service at the time of delivery are not the same as current rates, and rates for future delivery reflect today's expectations regarding economic conditions in the future. OCC MRO Ex. 4 at 6 (Wilson) ("actual prices in the future delivery years may be higher or lower"); FirstEnergy MRO Ex. 13 at 38 (Schnitzer) ("forward market prices . . . already reflect the market's judgment . . . which Mr. Frye identifies").

[82] OCC MRO Ex. 4 at 27 (Wilson).

This timing balances the desire by bidders for a reasonable amount of time between the auction and the delivery period for learning about the bidding process and planning while not increasing uncertainty related to long lead times before delivery.

Delaying when the first CBP auctions would take place in Ohio would also best accommodate a delay in the special auctions proposed by ATSI for fulfilling zonal capacity obligations in PJM, a matter discussed by OCC Witness Wilson.[83] While the treatment of ATSI's request for integration into PJM is a matter before FERC, many issues remain in controversy following FERC's Order Addressing RTO Realignment Request and Complaint that was issued on December 17, 2009.[84] While FirstEnergy has not addressed contingency planning in the wake of its realignment application at FERC, the Commission must deal with such important contingencies to protect the public interest in Ohio.

The testimony of Constellation Witness Fein helps solidify the Wallach-Wilson recommendations. Mr. Fein testified that potential bidders would like "sufficient advance knowledge of [whether the switch to PJM will occur] prior to the conduct of that

[83] OCC MRO Ex. 4 at 24 (Wilson) ("The FRR auction could also be re-scheduled to a time closer to the first delivery year. . . .").

[84] *American Transmission Systems, Inc.*, FERC Docket Nos. ER09-1589-000, et al., Order Addressing RTO Realignment Request and Complaint (December 17, 2009). While the Order is another step in the possible realignment of ATSI with PJM, it states (id. at ¶29):

[W]e cannot make any final determinations regarding ATSI's right to withdraw from the Midwest ISO. Nor can determine at this time, whether, or to what extent, applicant's anticipated replacement arrangements comply, or will comply, with the Commission's *pro forma* OATT or the standard of review applicable to deviations from the *pro forma* OATT. However, with the preliminary guidance we provide below, ATSI should have the information it will need to decide its future plans.

auction,"[85] "[c]ertainly . . . prior to . . . submitting that Part II application,"[86] and that "two- to three-month time frame would be ideal."[87] While the planning period provided for the May 2009 may have been too short -- referred to by Mr. Fein as a "compressed time frame" and "jammed up in time frame"[88] -- the auctions proposed in June and October of 2010 for delivery beginning on June 1, 2011[89] result in periods much longer than the two to three-month time period needed for planning purposes.

Finally, FirstEnergy should be required to document the procedures for responsibly dealing with the possibility that the proposed switch to PJM does not unfold exactly as desired in the Company's FERC filings. Mr. Warvell testified under cross-examination that bidding would take place under the framework used for the CBP in May 2009 in the event that bidding takes place under a MISO framework. Such contingencies should be spelled out, and should be subject to PUCO oversight and adjustment.[90]

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[85] MRO Tr. Vol. 3 at 403 (Fein).

[86] Id. at 404 (December 17, 2009) (Fein). Mr. Fein summarized: "[I]f you can reduce that uncertainty to a greatest extent possible, obviously it's going to give you more comfort and . . . that's what suppliers do, they sort of assess those risks and try to balance that and fashion a bid accordingly." Id at 405 (Fein). Bidders would fashion higher bids that recognize the uncertainty interjected by FirstEnergy as the result of the switch to PJM, and the Commission should order changes to the bidding timing proposed by the Company in order to reduce uncertainty and reduce prices for customers.

[87] Id.

[88] Id. at 413-414.

[89] MRO Application, Attachment B.

[90] Constellation Witness Fein testified that the "reservation price * * * appeared in the bidding rules which were not put before the Commission for approval" and that it was "developed . . . with FirstEnergy." MRO Tr. Vol. 3 at 411-412 (December 17, 2009). The CBP should be under the supervision of the Commission, and a loose framework diminishes confidence in the fairness of the process that may discourage participation in the bidding.

b. The long-term CBP should be reformed to undertake a portfolio approach to reduce overall costs for customers, and a PUCO-directed process should be established to determine the optimal approach.

The generation procurement process considered by FirstEnergy is very simple, focusing on a sequence of auctions where each auction would determine generation prices for a short period. OCC Witness Steinhurst recommends a more sophisticated process to serve customer interests:

> I recommend that the Commission require the Companies' put in place processes (to be approved by the Commission) to procure a more diverse and broad based portfolio of resources. The Commission could require this in the current proceeding. Alternatively, it could open a "Commission Ordered Investigation" to consider, generically, how to obtain needed products for all companies. The "COI" results could then be considered in future proceedings. I also note that the Companies seek approval for a perpetual CBP process. I urge the Commission not to approve the "perpetual" portion of the proposal, but to require the Companies to return before it so that stakeholder concerns (including those of the PUCO Staff) may be addressed.[91]

Upon approval of an immediate-term process for the procurement of generation service that would begin on June 1, 2011, the Commission should convene a process to consider a procurement process designed to best serve retail customers for the longer-term. The Commission should not -- faced with both the uncertainty presented by the ATSI switch to PJM and the lack of diverse products contained in FirstEnergy's proposed procurement process -- approve a process that continues perpetually without Commission supervision.

The advantage of more diverse product procurement is that price benefits and stability would be served, which is a sound approach to protect the interest of customers

[91] OCC MRO Ex. 3 at 6 (Steinhurst).

who are less capable of switching to alternative providers of generation service. OCC Witness Steinhurst recommended:

> [T]he PUCO [should] require the Companies to conduct portfolio management and/or long-term power contracting. A portfolio management approach would allow for alternative contracting options to complement the existing CBP procurement auction mechanism if those options were found to be economically attractive for customers. Under the Companies' proposal, no such option for consideration of alternative contracts for SSO power supply, such as longer-term contracts, even exists, even though some resources may be more competitively priced if secured over time frames greater than three years.[92]

Dr. Steinhurst described that such a portfolio approach has been the direction taken by other states that have restructured their regulation to utilize the competitive provision of generation service.[93]

Alternative approaches could be used for pursuing the portfolio approach for the benefit of FirstEnergy's SSO customers -- utility-directed planning or a process directed by an independent third party. The direction that should be taken does not need to be determined in this case, but should be the subject of further Commission review in a process to determine least-cost power supply options. Dr. Steinhurst favored a utility directed process, and continued regulatory oversight to help ensure a process that serves customer rather than utility interests.[94] Dr. Steinhurst recognized that circumstances might favor more reliance upon an independent third party to direct a portfolio procedure.[95] In the case of a utility such as the Company whose affiliate (i.e. FES) holds

[92] Id. at 10 (Steinhurst).

[93] Id.

[94] MRO Tr. Vol. 6 (December 22, 2009) (Steinhurst) (response to Attorney Examiner questioning).

[95] Id.

substantial generation resources, independent third party involvement in the planning process should be seriously considered to prevent the Company from favoring its affiliate in the determination of the choice of power supply options.

OCC Witness Steinhurst recommended a formal PUCO-directed process to address the question of the least-cost power supply portfolio, and the legacy of the collaborative established after the May 2009 auction reinforces that recommendation.[96] The Commission-approved stipulation approved in March 2009 included a collaborative process to assist in resolving issues without needless litigation.[97] That process resulted in only two meetings,[98] and those meetings did not involve (and were not even discussed with) the CBP Manager -- the third party assigned to design and administer the CBP process.[99] Significant matters -- such as the treatment of renewables, the acquisition of capacity, and any discussion of a potential switch in the RTO under which a CBP would take place -- were not discussed as part of a FirstEnergy-directed collaborative.[100]

The Commission should order and administer a process (e.g. schedule meetings, setting deadlines) organized to guide the next Commission process to consider FirstEnergy's SSO under R.C. 4928.142. As Constellation Witness Fein stated, a successful collaborative requires that "there is confidence in the process that those

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[96] Constellation Witness Fein testified that "other states have an annual docket that's open that says give us your comments on the last [auction] and suggest changes." MRO Tr. Vol. 3 at 408 (December 17, 2009) (Fein). Mr. Fein testified that Constellation "support[s] . . . future review." Id. at 409.

[97] *In re FirstEnergy ESP Application*, Case Nos. 08-935-EL-SSO, et. al., Second Opinion and Order at 17 (March 25, 2009) ("collaborative before the filing of any future MRO").

[98] MRO Tr. Vol. 3 at 359 (December 17, 2009) (Fein).

[99] MRO Tr. Vol. 1 at 147-148 (December 15, 2009) (Miller). R.C. 4928.142(A) requires "oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that . . . criteria . . . are met."

[100] MRO Tr. Vol. 2 at 246-248 (December 16, 2009) (Warvell).

[auction] issues are being considered . . . ."[101] The collaborative process that resulted from the stipulation in the last FirstEnergy SSO case did not inspire such confidence, and a more formal process should be ordered by the Commission.

3. The bidding rules contained in "Attachment A" to the MRO Application should be adjusted to agree with FirstEnergy's statements regarding contingencies.

FirstEnergy's Application addresses two contingencies: "(a) insufficient bidder participation . . . ; or (b) one or more SSO Suppliers default before or during the delivery period,"[102] but the Company's bidding rules (located in Attachment A to the Application) are inadequate to deal with these contingencies and are inconsistent with FirstEnergy's testimony. The Commission should specify what FirstEnergy must do to obtain replacement tranches in case one or both of these contingencies occur in order to ensure that generation is obtained at the lowest possible price. The treatment of the default contingency should be determined based upon the testimony of FirstEnergy Witness Warvell upon cross-examination at the hearing.

The prefiled testimony of FirstEnergy Witness Warvell provides a three-part treatment of both contingency situations. According to Mr. Warvell:

> [T]he Companies: (1) will first roll tranches to the next solicitation; (2) if the tranches remain unsubscribed, the Companies will offer the tranches to any of the other remaining SSO suppliers/winning bidders; and/or (3) and {sic} if the tranches are still not unsubscribed the Companies will fill the tranches by purchasing the necessary supply through PJM administered markets.[103]

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[101] MRO Tr. Vol. 3 at 410 (December 17, 2009) (Fein).

[102] MRO Application at 19, ¶53.

[103] FirstEnergy MRO Ex. 1 at 17-18 (Warvell). Mr. Warvell's description of the treatment for the two contingencies is the same, with the exception of an additional "and" that was not intended to distinguish the two cases. FirstEnergy MRO Ex. 1 at 18, (Warvell) (supplier default) and MRO Tr. Vol. 2 at 254, lines 8-10 (December 16, 2009) (Warvell) ("intended to be the same").

Mr. Warvell clarified on cross-examination, as the result of the confusing combination of "and/or" in the quote above, that FirstEnergy proposes these three treatments would occur in sequential order without discretion on the part of FirstEnergy.[104]

FirstEnergy's proposed bidding rules do not reflect the results of Mr. Warvell's testimony. The proposed bidding rules state the first two treatments for both the (a) "insufficient bidder" and the (b) "supplier default" situations, but do not contain the third treatment.[105] The bidding rules should contain the third plan for covering these contingencies, requiring the Company to purchase necessary supplies on PJM markets in the event that the first two treatments fail to provide the generation required to serve retail customers. Any such purchases should be subject to a Commission prudence review afterwards.

C. The Commission Should Modify FirstEnergy's Proposed Retail Rate Design to Serve the Public Interest.

1. Service to the Company's customers should encourage demand responsiveness by including demand components in large customer rates.

An important objective of the Company's rate design should be to send the correct economic signal to customers concerning the varying costs of electricity. Demand charges are an effective way to do just that. Demand components are charges that take into consideration the large load for generation or heavy burden large customers place upon a generation system at a single point or points in time.[106] Demand

[104] MRO Tr. Vol. 2 at 256 (December 16, 2009) (Warvell).

[105] MRO Application, Attachment A at Section 10 (10.1 insufficient bidder contingency and 10.2 supplier default contingency).

[106] OCC MRO Ex. 1 at 6 (Gonzalez).

components existed in the rates for large customers prior to a settlement in the Company's SSO proceeding that concluded in 2009.[107] As stated by OCC Witness Gonzalez:

> The Company's proposal eliminates the principal source of responsiveness to differences in demands that has historically been in place for large customers, and that is needed going forward to reduce the bid price.[108]

Such demand components should be reintroduced before any bidding takes place in order to properly reflect the cost of generation in rates and to reduce the price likely to be bid in the proposed auctions.

The Company's retail rate design does propose some limited measures to help control the growth in electricity demand -- but none of the measures go far enough. While the Company's proposed interruptible program and the time differentiated rate designs are important to help control the growth in demand, they do not suffice to overcome that lack of a more granular demand signal which is highlighted by the voluntary nature of both programs.[109] In addition, the Company's proposal to curtail the growth in electricity demand in the summer through a 16 percent seasonality factor embedded in the rate design is again not sufficient to counteract the impact of removing a mandatory demand charge.

The Commission and the Ohio Supreme Court have recognized that demand charges are an important way to reflect the costs to provide generation services to large

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[107] Id., referring to *In re FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, Stipulation and Recommendation at 11 (February 19, 2009).

[108] Id.

[109] Id. at 10. (Gonzalez).

customers.[110] FirstEnergy's approach fails to recognize the important cost differences between large customers. The elimination of required demand charges from all generation tariffs will encourage an inefficient demand for, and use of, generation resources.[111] This weakness in the generation tariffs will be recognized by bidders, and will result in higher bids.[112]

FirstEnergy's retail rate design focuses on the Company's procurement of power, and fails to recognize the impact that the retail rates will have on customers.[113] FirstEnergy proposes a generation rate design based entirely on kilowatt-hour charges.[114] FirstEnergy's proposal to design retail rates around kilowatt-hour charges only takes into consideration the Company's proposed manner of procuring power.[115] The proposed rated design does not send the appropriate price signal to customers that that electricity should be used in an economically efficient manner.[116] FirstEnergy Witness Fanelli agreed that demand charges, as a general concept, could provide an appropriate price signal to large customers.[117] However, FirstEnergy's retail rate design will encourage the inefficient demand for, and use of, generation resources by large consumers.[118]

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[110] Id.; see also *Smith v. Public Util. Comm. of Ohio* (1935), 130 Ohio St. 328.

[111] OCC MRO Ex. 1 at 6 (Gonzalez).

[112] Id.

[113] Id. at 6-7 (Gonzalez).

[114] MRO Application at 3.

[115] OCC MRO Ex. 1 at 7 (Gonzalez).

[116] Id. at 8 (Gonzalez).

[117] MRO Tr. Vol. 4 at 642 (December 18, 2009) (Fanelli).

[118] OCC MRO Ex. 1 at 7 (Gonzalez).

The Commission ordered FirstEnergy to incorporate additional demand components in its generation rate design in the Commission's first order regarding the Company's SSO service following the amendment of R.C. Chapter 4928 in 2008. The Commission stated "that the issues raised by various intervenors regarding the inclusion of demand components in the generation rate design must be addressed."[119] The Company's inclusion of voluntary interruptible load and time-differentiated rate design programs and a four-month seasonality factor does not go far enough. Demand charges should be reintroduced into the proposed retail generation rate design, similar to generation tariffs that existed before changes were introduced by a stipulation in 2009 in Case No. 08-935-EL-SSO.

Including demand charges in rates is likely to reduce the bid price in the proposed auctions.[120] FirstEnergy's retail rate design, which encourages the inefficient demand for, and use of, generation resources by large consumers, would result in an increasingly undesirable load shape (i.e. over time) for generation supply and result in higher auction prices. The Commission should consider directing the Company to move towards mandatory real time pricing for large customers as an alternative to demand charges. Unfortunately, FirstEnergy does not have the infrastructure in place to facilitate real time pricing for all large customers at this time. This is one aspect of retail rate design that the Commission should continue to review as part of the development of the Company's electric infrastructure.

[119] *In re FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, Order at 23 (December, 19, 2008).

[120] OCC MRO Ex. 1 at 10 (Gonzalez).

2. The Commission should modify the rate design for the residential customers by removing the proposed inclining block structure.

The proposed rate design for residential customers should be adjusted from those stated in the Application and FirstEnergy's testimony in the MRO Case.[121] The Commission should modify the Company's proposal to reflect a flat rate structure for RS customers (i.e. constant per kilowatt-hour rates over usage levels).[122] This recommendation is consistent with the rate design for the seven other rate schedules proposed by FirstEnergy in Rider GEN[123] and the Commission's ruling in FirstEnergy's 2008 request to increase rates for distribution service, where the Commission adopted the flat rate structure.[124]

While the rate design recommended in this Post-Hearing Brief is a feature of the Stipulation,[125] it can and should be ordered by the Commission along with other needed modifications to FirstEnergy's proposals in the MRO Case.

3. The Commission should modify FirstEnergy's proposal in the MRO Case and extend legacy type rate structures for certain residential customers.

FirstEnergy proposed in the MRO Case to extend rate discounts for street light customers (Rate STL) and traffic light customers (Rate TRF), in the words of the

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[121] NRDC does not support FirstEnergy's proposed rate design for residential customers because the Company's MRO Application and its testimony lack detail and a careful analysis of the proposed rate design.

[122] Id. 11-12 (Gonzalez).

[123] See, e.g., MRO Application, Schedule 2 at 12 (Rider Gen – The Ohio Edison Company).

[124] *In re FirstEnergy Distribution Rate Case,* Case Nos. 07-551-EL-AIR, et al., Order at 30 (January 21, 2009).

[125] Stipulation at 11.

Application, "in order to mitigate the rate impact of the proposed MRO."[126] OCC Witness Gonzalez testified that the Company's proposal to discontinue the existing Residential Non-Standard Credit Provision in Rider EDR is not supported by any facts nor is it consistent with its decision to continue the Rate STL and Rate TRF legacy rate discounts.[127] The Company's proposal in the MRO Case to eliminate the Residential Non-Standard Credit Provision in Rider EDR that was applied to residential service on a grandfathered basis at the time of the MRO application should be rejected.[128]

While the Stipulation accepts changes that have occurred in the residential rate design,[129] the residential rate design recommended in this Post-Hearing Brief can and should be ordered by the Commission along with other needed modifications to FirstEnergy's proposals in the MRO Case.

4. The Commission should modify FirstEnergy's proposed retail rate design in the MRO Case to establish a recovery mechanism for the Company's Peak Demand Reduction Rider that is reasonable and consistent with all aspects of the proposed rate design.

FirstEnergy proposed that its Peak Demand Reduction ("PDR") Rider collect from all customers the costs incurred with the Interruptible Generation Service Opportunity ("IGSO") offering.[130] Yet, the IGSO offering is designed for participation by only large commercial and industrial customers.[131] In addition, those large

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[126] MRO Application at 26, ¶76.

[127] OCC MRO Ex. 1 at 13 (Gonzalez).

[128] Residential rate design is the subject of Case No. 10-176-EL-ATA.

[129] Stipulation at 9.

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

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

commercial and industrial customers who participate in the program would receive additional benefits that other customers will not receive.[132] 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.[133] 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 Company's proposals should be modified.[134]

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 PDR programs.[135] 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.[136]

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

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

[133] Id.

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

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

[136] 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.").

counted upon by the Company to meet the Company's PDR requirements.[137] 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.[138] Yet, FirstEnergy's Application proposes 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 Company's proposal for all customers to pay 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.[139] In addition, Mr. Gonzalez testified that the Commission should accept the rate design principle that DSM program costs should be recovered from the customer class the program targets.[140]

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 . . . ."[141] Mr. Gonzalez also

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

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

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

[140] Id.

[141] 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) (emphasis added).

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.[142] The Commission should modify the Company's proposal to ensure that any program costs recovered for implementation of DSM programs be recovered from the customer class the program targets.

V. ARGUMENTS REGARDING THE FLAWED STIPULATION

A. The Circumstances Presented by the FirstEnergy SSO Cases Reveal that the Commission's Criteria for the Evaluation of Stipulations Should be Augmented.

1. Three criteria are usually reviewed regarding the submission of a partial stipulation.

The standard of review for consideration of a partial stipulation has been discussed in a number of Commission cases.[143] Among other places, the Ohio Supreme Court has addressed its review of stipulations in *Consumers Counsel v. Public Util. Comm.*, (1992), 64 Ohio St. 3d 123, 125. Citing *Akron v. Public Util. Comm.* (1978), 55 Ohio St.2d 155, 157, the Ohio Supreme Court stated in *Consumers' Counsel* that:

> The Commission, of course, is not bound to the terms of any stipulation; however, such terms are properly accorded substantial weight. Likewise, the commission is not bound by the findings of its staff. Nevertheless, those findings are the result of detailed investigations and are entitled to careful consideration.
>
> In *Duff v. Pub. Util. Comm.* (1978), ...in which several of the appellants challenged the correctness of a stipulation, we stated:

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

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

> A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.[144]

The instant ESP proceeding involved negotiations between FirstEnergy and some parties that provided benefits to narrow interests represented by these parties.

While the Staff executed the Stipulation, the testimony of the Staff witness responsible for supporting the approval of the Stipulation revealed a narrow focus: Questioning about the favoritism shown to members of the AICUO in the Stipulation revealed the following:

> Q [OCC counsel]. Okay. So I go back to my question which is do you consider it good regulatory practice to favor members of the AICUO over other colleges and universities that might otherwise ... , other things being equal, would want to be covered as a mercantile customer [as provided for AICUO members in the Stipulation]?
>
> A [Staff Witness Turkenson]. Yes, I think in the context of this [S]tipulation if those other colleges or universities wanted the same treatment, they should have intervened in the case and got the same treatment. So yes, I think it is sound regulatory policy, it's in the context of an overall stipulation where the parties agreed.[145]

According to this testimony, the interests of customers who were not specifically represented in this ESP proceeding (and perhaps only those who became stipulating parties) were not considered in Staff's evaluation of the package presented by the

[144] *Consumers' Counsel v. Public Util. Comm.* (1992), 64 Ohio St. 3d 123, 125.

[145] ESP Tr. Vol. 1 at 242-243 (April 20, 2010) (Turkenton).

Stipulation. The interests of non-signatories and the public at large should be considered, not just the interests of signatories to the Stipulation.

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?[146]

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.[147]

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

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

[147] Stipulation at 5.

> 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.
>
> 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.*[148]

Commissioners Centolella and Lemmie stated similar concerns.[149] 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.

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[148] *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).

[149] 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.").

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:

> 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.[150]

FirstEnergy proposed an ESP proceeding, and negotiated its terms, under circumstances where all the evidence presented in the MRO Case stated that the statutory requirements for approval of an MRO were met.[151] Thereafter, the 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?

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

[151] 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.

2. *Is the settlement a product of negotiations among parties occupying asymmetric bargaining positions that affected the settlement result?*

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?

In the event the answer to the new, second criterion stated above is affirmative, "all terms and conditions of this stipulation" should be carefully reviewed as recommended by Commissioner Roberto and that review would impact the Commission's consideration of the settlement as a "package" in the PUCO's last two criteria. This Post-Hearing Brief reviews each of these criteria, and observes that a careful review of the Stipulation's terms does not support its adoption as a totality.

B. The Settlement is Not the Product of Serious Bargaining Among Capable, Knowledgeable Parties.

1. The negotiations were rushed and took place outside the context of an existing case, a circumstance that questions the ability of parties to negotiate seriously.

"Serious bargaining" is not simply evaluated by the examination of credentials for counsel representing the stipulating parties or the regulatory knowledge gained by a party in prior cases. OCC Witness Gonzalez observed:

> The evaluation of the first criteria is muddled in FirstEnergy Witness Ridmann's testimony. He claims the Stipulation is supported on the first criteria because the signatories to the Stipulation "ha[ve] a history of participation and experience in matters before the Commission and [are] represented by experienced and competent counsel." In this characterization Mr. Ridmann addresses the parties' generalized knowledge of the regulatory process, but not the capability or knowledge of the *parties* to this particular case regarding the *facts presented in this case*. Even the proposed auction process -- about which some parties to the MRO Case (i.e. Case No. 09-906-EL-SSO) have knowledge -- has been altered from that proposed in the MRO

> Case. And this case involves a wide range of matters outside the auction process that were not explored by any party to the MRO Case.[152]

The ESP Case involves new distribution and transmission service components, and also a changed CBP proposal as noted by OCC Witness Gonzalez.

As an example of the confusion surrounding the negotiations and the submission of the ESP Case, FirstEnergy's testimony regarding the need for a near-term auction noticeably changed from the MRO Case to the ESP Case. The Application states that an expedited process for this ESP Case is required to "permit the Companies to immediately proceed with implementing the competitive bidding process to take advantage of historically low market prices for wholesale electric generation."[153] FirstEnergy Witness Ridmann supports the "aggressive timeline" based upon the benefits provided by an immediate auction, "given current market conditions."[154] However, *FirstEnergy's specialist rebuttal witness in the MRO Case testified otherwise.*

FirstEnergy Witness Schnitzer testified in the MRO Case that "forward market prices for power to be delivered in future years already reflect the market's judgment about . . . economic trends," and that "[t]here is no basis for believing . . . that market prices for any given future delivery year will be lower now or in the first half of 2010 than they will be at a later date."[155] That is, prices for electricity delivered in the future reflect today's expectations regarding economic conditions in the future. The timing of

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[152] OCC ESP Ex. 2 at 9-10 (Gonzalez) (emphasis sic), quoting FirstEnergy ESP Ex. 4 at 11 (Ridmann).

[153] Application at 1.

[154] FirstEnergy ESP Ex. 4 at 27 (Ridmann).

[155] FirstEnergy MRO Ex. 13 at 38 (Schnitzer); accord, OCC MRO Ex. 4 at 6 (Wilson) ("actual prices in the future delivery years may be higher or lower").

the SSO auctions should not be based upon FirstEnergy's *complete reversal of its position* on the subject, a reversal apparently dictated by the Company's desire to rush approval of the Stipulation.

Other signs of danger are present in the circumstances of this case. The settlement was arrived at outside the context of a litigated case so that means to compel FirstEnergy to provide information regarding proposals in the Stipulation as well as alternatives that parties may have wanted to explore was absent.[156] The PUCO Staff (alone) may have accessed information during negotiations by applying statutes such as R.C. 4905.06 ("General Supervision") and R.C. 4905.13 ("System of Accounts for Public Utilities"). This route is more problematic in the instant case where the negotiations in Ohio took place over matters at issue before FERC and at PJM.[157] The Commission itself ordered FirstEnergy to file additional information -- information not provided until after the negotiations concluded and the Stipulation was executed -- that the PUCO concluded was "essential to . . . consideration of the application and stipulation."[158]

Diversity of interests is an important component to assure that a stipulation is reasonable. The Commission has found that the presence of a diversity of interests provides strong support for the reasonableness of a settlement package.[159]
As observed by OCC Witness Gonzalez, the "broad range of interests" claimed for the

[156] OCC ESP Ex. 4 at 10 (Gonzalez).

[157] See, e.g., Stipulation at 18-19 ("Transmission").

[158] PUCO Entry at 4, ¶(10) (April 6, 2010).

[159] *In re Restatement of Accounts and Records of CG&E, DP&L, and CSOE*, Case No. 84-1187-EL-UNC, Order at 7 (November 26, 1985).

Stipulation by FirstEnergy Witness Ridmann[160] does not include a representative of residential customers.[161] Also, the negotiations took place, at the maximum, among parties to the MRO Case.[162] The matters addressed in the Stipulation, however, are broader in scope than the matters raised in the MRO Case. For example, many of the parties who intervened in this case who were not involved in the MRO Case are concerned with environmental issues or other issues that were first raised in the Stipulation.[163] Curtailable service provider parties are not signatories to the Stipulation, a status shared by some of the competitive suppliers who are parties to the ESP Case.

One of the new issues presented in the ESP Case was "lost revenue" associated with energy efficiency and peak demand programs. The parties who represent those most affected by lost revenue recovery -- residential consumer and environmental advocates -- did not sign the Stipulation. Members of the residential "RS" rate class will pay more than 4.5 times the lost revenues in 2009-2011 than of members of the GS rate class, and more than 98 times the combined lost revenues of members of the "large enterprise" rate classes GP, GSU, and GT.[164] This, the lost revenue provision of the Stipulation cannot

[160] FirstEnergy ESP Ex. 4 at 11 (March 31, 2010) (Ridmann).

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

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

[163] Parties added to this case (i.e. not intervenors in the MRO Case) include the Environmental Law & Policy Center, EnerNOC, CPower, Viridity Energy, Energy Connect, Comverge, Enerwise Global Technologies, Energy Curtailment Specialists, and the Council of Smaller Enterprises.

[164] *In re FirstEnergy Portfolio Plan Proceeding*, Case Nos. 09-1947-EL-POR, et al., EE & PDR Program Plan at 140. Ohio Partners for Affordable Energy represents community action agencies and no residential customers. To the extent these agencies have contacts with low-income customers, those customers on a Percentage of Income Payment Plan ("PIPP") do not directly pay the costs of the rider that collects lost revenues. NRDC ESP Ex. 1 at 6 (Sullivan).

be considered the product of "lengthy, serious bargaining," and is instead the product of the Company's heavy influence over the settlement terms.

The length of the negotiations was not as testified by FirstEnergy Witness Ridmann. Mr. Ridmann testified that the negotiation process "began several months ago."[165] Outside his prefiled testimony, FirstEnergy Witness Ridmann could not even identify the month in which negotiations reconvened after they were initiated by the PUCO Staff on December 1, 2009. OCC Witness Gonzalez testified as follows:

> The PUCO Staff made some initial efforts to convene parties to the MRO Case to gain perspectives on the Staff Comments that FirstEnergy should consider an ESP filing.[166] Those nascent efforts resulted in a meeting on December 1, 2009, but were abandoned as the hearing in the MRO on December 15, 2009 approached. No further meetings were held with all the parties to the MRO Case regarding an alternative approach until February 25, 2010.[167]

A key benefit claimed for the Stipulation is connected with the treatment of RTEP charges, which was the subject of a FERC statement order on December 17, 2009 during the course of hearings in the MRO Case. The totality of these circumstances suggests a rushed process undertaken in less than one month before the ESP Application was filed on March 23, 2010.

Flaws in the Stipulation document should give pause during the Commission's evaluation. For example, the inclusion of "[n]et capital additions for Plant in Service for General Plan" is permitted in the Stipulation only "so long as there are no net job losses a the Companies as a result of involuntary attrition as a result of the merger between

[165] FirstEnergy ESP Ex. 4 at 11 (March 31, 2010) (Ridmann).

[166] Staff Comments, Staff MRO Ex. 2 at 22 (November 24, 2009).

[167] OCC ESP Ex. 2 at 12 and Attachment 1 (e-mail string proposing the resumption of discussions from December 1, 2009 on February 25, 2010).

FirstEnergy Corp. and Allegheny Energy, Inc."[168] This settlement term is meaningless, referring to jobs at the three electric distribution utilities that do not include the profession staff at the FirstEnergy Service Company (i.e. the professional staff such as FirstEnergy Witness Ridmann), employees at any power plant, contract workers, or even employees who accept "buy-out" packages to leave their employment with the distribution utilities.[169] This and other flaws stated below raise questions regarding

The above-mentioned factors were evaluated by OCC Witness Gonzalez. He concluded that "the Stipulation is not a result of serious bargaining among capable, knowledgeable parties."[170]

2. 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 an ESP case -- expanded upon by OCC Witness Gonzalez under circumstances where FirstEnergy was not required to file an ESP at all -- should concern the PUCO in this ESP Case. The statutory framework set by S.B. 221 is, of course, the most critical factor that "creates a dynamic that is impossible to ignore."[171]

The imprint of the asymmetric positions of the signatories is evident from the face of the 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*

[168] Stipulation at 15.

[169] ESP Tr. Vol. 1 at 85-87 (Ridmann).

[170] OCC ESP Ex. 2 at 13 (Gonzalez).

[171] *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).

ESP null and void and the Application filed with this Stipulation shall be considered withdrawn upon filing of a written notice with the Commission."[172] 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 competent jurisdiction, rejects all or any part of the ESP."[173] The Stipulation concludes by stating 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."[174] These provisions are all unique to FirstEnergy as a stipulating party. The asymmetry in the negotiating process is embedded and documented in the 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.[175]

The other conclusion follows from Commissioner Roberto's analysis: the Commission, to the extent that it entertains the Stipulation under the flawed procedure in the ESP Case, must carefully review every term and condition in the Stipulation and must be willing to make changes in keeping with sound regulatory policy. The SSO proceedings that

[172] Stipulation at 2 (emphasis added).

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

[174] Id. (emphasis added).

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

concluded during 2009 (that resulted in an auction on May 14, 2009) were concluded after FirstEnergy's rate plan expired. The Commission has the advantage, in the instant circumstances, of deciding matters concerning the provision of electric generation service more than one year away (June 1, 2011).

C. The Settlement, as a Package, Does Not Benefit Ratepayers and the Public.

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.[176] 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]."[177] Mr. Gonzalez' summary tables presented three such scenarios[178] using different assumptions than those used in FirstEnergy Witness Ridmann's present value analysis.[179] 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 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

[176] 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.

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

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

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

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.[180] 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.[181]

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.[182] 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.[183]

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

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

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

[182] Stipulation at 14.

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

Ridmann's testimony.[184] 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.[185] 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.[186]

A key value in the present value analysis of both OCC Witness Gonzalez and FirstEnergy Witness Ridmann is whether charges for legacy RTEP projects will be charged to FirstEnergy by ATSI and thereafter flowed through to Ohio retail customers by FirstEnergy. The Stipulation states that "[t]he Companies agree to not seek recovery through retail rates for the costs billed by PJM during the period June 1, 2011 through May 31, 2016 for [legacy] RTEP projects which are approved by the PJM Board prior to June 1, 2011."[187] OCC Witness Gonzalez testified:

> The savings attributed to MISO exit fees, the PJM Integration fees, and RTEP charges misstate their consequences for FirstEnergy's retail customers, and therefore grossly inflate the benefits claimed for the ESP.[188]

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

[185] 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).

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

[187] Stipulation, page 18.

[188] OCC ESP Ex. 2 at 28 (Gonzalez).

While OCC Witness Gonzalez made other adjustments to FirstEnergy's assessment of Stipulation benefits and costs (discussed below), the likelihood that retail customers will be required to pay the legacy RTEP charges is key to the present value results. Where FirstEnergy Witness Ridmann assumes the pass through of legacy RTEP charges is certain, OCC Witness Gonzalez' tables display a present value analysis based on the absence of pass through to retail customers.

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."[189]

Although the policy stated in the FERC order addressed the assignment of legacy RTEP charges to ATSI as the transmission owner, OCC Witness Gonzalez applied that same policy to the MISO exit fees and PJM integration fees associated with the switch to PJM.[190]

As discussed above, OCC Witness Gonzalez prepared three tables showing scenarios, each based upon FERC's above-quoted assignment of transition costs to ATSI

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

[190] OCC ESP Ex. 2 at 34 (Gonzalez). FirstEnergy Witness Ridmann assigns values of $37.5 million to the MISO exit fee and $5 million to the PJM integration fee. FirstEnergy ESP Ex. 4, WRR Attachment 1, lines (12) and (13).

(the decision-maker regarding the selection of RTOs). That present value analysis states that the MRO is more favorable in the aggregate than an ESP in Corrected Schedule WG-1 (DCR as stated by FirstEnergy Witness Ridmann) if the probability that FERC will change its policy is zero, but the MRO is also favored if that probability is less than 0.64. Corrected Schedule WG-1A (DCR collects the maximum set in the Stipulation) would favor the MRO if the probability that FERC will change its policy is less than 0.90. Corrected Schedule WG-1B (distribution rate increase unproven) would favor the MRO even if the probability that FERC will change its policy is 1.00 (i.e. the FirstEnergy assumption).[191] The present value analysis favors the MRO, and rejection of the Stipulation-based ESP.

The comparison of scenarios with that presented by FirstEnergy Witness Ridmann assumes the values for legacy RTEP charges alleged by FirstEnergy in the instant case. The record, however, provides a view of FirstEnergy's statements in the docket initiated by the Commission to examine FirstEnergy's RTO switch (Case No. 09-778-EL-UNC) to assure the Commission that legacy RTEP charges will be lower. The record includes transcribed statements by FirstEnergy representatives to the PUCO Commissioners on January 7, 2010 in which progress on the PATH and MAPP transmission projects in PJM were questioned.[192] FirstEnergy's responses to the OCC's discovery reveal that these two projects are listed as requiring $40 million in annual revenue requirements in 2016

[191] ESP Tr. Vol. 4 at 964-966 (Gonzalez).

[192] OCC ESP Ex. 5 (excerpt, pages 20-22, from transcript of the FirstEnergy presentation to the PUCO Commissioners in Case No. 09-778-EL-UNC on January 7, 2010).

out of a total of $98 million (i.e. forty-one percent).[193] A delay in these projects would mean that the present value analysis favors the MRO even more.[194]

The table in FirstEnergy Witness Ridmann's testimony that displays the Company's net present value comparison of the proposed ESP with a MRO also omits differences between the two situations related to "distribution lost revenues." Distribution lost revenues is described by OCC Witness Gonzalez as follows: "[L]ost distribution revenues are those revenues the Company does collect because of the implementation of energy efficiency programs."[195] The Stipulation permits more than quarterly increases in distribution rates, but would also opens a means by which FirstEnergy would create additional deferrals for lost distribution revenues that would not exist in the absence of the Stipulation.[196]

The Stipulation does not resolve the amount of energy efficiency program induced lost revenues the Company will be allowed to recover from energy efficiency programs *approved during* the ESP term. It allows the Company to fully collect lost revenues for the term of the ESP, but states that 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 [S]tipulation."[197] OCC Witness Gonzalez evaluated amounts for distribution lost revenues under an MRO as consistent with the

[193] OCC ESP Ex. 2, Attachment 4.

[194] OCC Witness Gonzalez testified that a more definitive review of projects whose timing has been questioned will be available in PJM's RTEP report that is expected in June. ESP Tr. Vol. 4 at 938-939 (Gonzalez). The information is not available due to the greatly condensed timeline for this case.

[195] OCC ESP Ex. 2 at 35 (Gonzalez).

[196] Stipulation at 24, ¶3 ("lost distribution revenue"); FE Ex. 1, Attached Tariffs, Sheet 115 (each company) ("RIDER DSE," including "lost distribution revenues" in the "PROVISIONS").

[197] Stipulation at 24.

end of such revenues upon the filing of a distribution rate case (as provided for under the existing ESP).[198] As demonstrated in both the testimony of OCC Witness Gonzalez and NRDC Witness Sullivan, the cost to residential customers is $6.78 million in 2012, $14.5 million in 2013, and $23 million in 2014 ($9.53 million if recovery ends May 31, 2014).[199] When combined with the lost revenue collection from the existing ESP, residential customers will pay $21 million in lost revenues in 2012, $28.7 million in 2013, and $37.2 million in 2014 ($23.7 million if recovery ends May 31, 2014).[200] 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.[201]

Residential customers may pay more in lost revenue collection that than they will in energy efficiency program costs[202] or from a distribution rate case.[203] The formulation of lost distribution revenue recovery in the Stipulation has the potential to incite negative customer reaction such as was experienced with the FirstEnergy compact fluorescent light bulb "give away" program.[204] A lost revenue collection approach is uncommon in states with aggressive energy efficiency targets, and Minnesota scrapped its lost revenue

[198] See, e.g., OCC ESP Ex. 2, Corrected Schedule WG-1, WG-1A, WG-1B (described below line (14)).

[199] NRDC ESP Ex. 1 at 3 (Sullivan); OCC ESP Ex. 2, Schedule WG-2 (Gonzalez).

[200] NRDC ESP Ex. 1 at 4 (Sullivan); OCC ESP Ex. 2, Schedule WG-2 (Gonzalez).

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

[202] NRDC ESP Ex. 1 at 4 (Sullivan).

[203] Id. at 5 (Sullivan).

[204] Id. at 4 (Sullivan).

collection mechanism in the mid-1990s when lost revenue collection exceeded program costs.[205]

OCC Witness Gonzalez also stated concerns stemming from the vagueness of the Stipulation language concerning energy efficiency savings. The Stipulation language "appears to allow the Company to count "*all*" EE/PDR lost distribution revenue.[206] The Stipulation does not limit the term "all" according to any constraint or recognize the Technical Reference Manual results from Case No. 09-512-GE-UNC. The Commission should clarify that lost revenue recovery, if it is permitted, is limited to net lost distribution revenues, which reduced revenue recover for the "free rider" effect.[207]

The Commission may choose to scrutinize the components of the Stipulation and make adjustments, as suggested by Commissioner Roberto's concerns regarding the three criteria for the evaluation of settlements. In that event, the Commission should modify the Stipulation and order the explicit development of a rate adjustment revenue decoupling mechanism that assures that the Company recovers no more and no less than its revenue requirement.[208]

Both OCC Witness Gonzalez and NRDC Witness Sullivan testified that a decoupling mechanism is a superior method to handle distribution lost revenues than the

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[205] Id. at 4 (Sullivan).

[206] Stipulation at 24 (emphasis added). OCC Witness Gonzalez testified: "After all the controversy over the Commission's promulgation of the 'Green Rules' (Case No. 08-888-EL-ORD, also as submitted to JCARR) concerning the 'count all savings' language of ORC 4928.66, it is disappointing that the term 'all' related to distribution lost revenue is not clearly defined in the Stipulation." OCC ESP Ex. 2 at 36, footnote 50 (Gonzales).

[207] OCC ESP Ex. 2 at 35-36 (Gonzalez).

[208] Citizen Power does not take a position at this time on the use of a revenue decoupling mechanism.

lost revenue approach contained in the Stipulation.[209] A revenue decoupling mechanism adjusts rates to provide that a utility accounts, as revenue for distribution fixed cost recovery, for no more and for no less than the revenue requirements authorized in the utility's last distribution rate case. However, "[a] lost revenue approach does not eliminate the throughput incentive for the Company."[210] A lost revenue mechanism does not net sales increases -- such as those that might occur as a result of the economic development deals embedded in the Stipulation -- against lost sales to arrive at a reasonable amount that the utility is entitled to recover. "A revenue decoupling mechanism would be more protective of consumers than the lost revenue recovery in the Stipulation that does not relate the lost revenues the Company is seeking recovery for with their authorized cost recovery."[211]

The table in FirstEnergy Witness Ridmann's testimony that displays the Company's net present value comparison of the proposed ESP with a MRO also omits differences between the two situations related to the treatment of FirstEnergy' Smart Grid initiative in the Cleveland Electric Illuminating service area. Section E.1.ii of the Stipulation states: "All costs approved in Case No. 09-1820-EL-ATA associated with the [Smart Grid] project will be considered incremental for recovery under Rider AMI." [212]

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[209] OCC ESP Ex. 2 at 39 (Gonzalez); NRDC ESP Ex. 1 at 5 (Sullivan).

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

[211] OCC ESP Ex. 2 at 39 (Gonzalez). The Stipulation contains a provision for revenue neutral distribution rate design changes, which might accommodate a revenue decoupling mechanism. Stipulation at 13, ¶1 ("changes in rate design that are designed to be revenue neutral"). However, the Stipulation states that the change must be made by the FirstEnergy (i.e. "[t]he *Companies* are not precluded"). Id. (emphasis added). Such action by FirstEnergy is unlikely given the financial disincentive to the Company. The provision in the Stipulation is yet another example of its asymmetric terms designed, among other matters, to limit later adjustments by the Commission.

[212] Stipulation at 23.

Section E.1.vi states: "All reasonably incurred incremental operating expenses associated with the project will also be recovered." [213] Therefore, the Stipulation does not contain any "net of benefits" concept regarding operational costs.

OCC Witness Gonzalez makes the following observations regarding the Stipulation and FirstEnergy's treatment of cost recovery for the Smart Grid project:

> One of the major benefits of smart grid to the utility and customers of the smart grid should be the utility operational cost saving benefits that accrue from its implementation. These range from reducing meter reader expenses, reduced call center expenses, reduced costs of responding to power outages, enhanced revenues from more accurate meter reads and additional benefits that can make up over 50 percent of the original investment. By not including the "net of benefits" language in the Stipulation, distribution customers of FirstEnergy would overpay for the Company's implementation of smart grid.[214]

The effect of recognizing an appropriate cost recovery treatment for the Smart Grid project was estimated by OCC Witness Gonzalez at $4 million.[215] This adjustment further favors the MRO, and also argues in favor of the PUCO separately treating cases that would be resolved if all the terms of the Stipulation were approved.

The discount for PIPP customers in another subject that is treated differently by OCC Witness Gonzalez than in FirstEnergy's assumptions. The Stipulation states that PIPP customers will be served based on a sole-source contact between FirstEnergy and its affiliated generation provider, FirstEnergy Solutions.[216] OCC Witness Gonzalez observed that FirstEnergy Solutions, a separate party to this case, desires this load at a six

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[213] Id. at 23.

[214] OCC ESP Ex. 2 at 40-41 (Gonzalez) (citations omitted).

[215] Id. at 41.

[216] Stipulation at 7-8.

percent discount.[217] A market solution should provide at least this amount of benefit to consumers.[218] OCC Witness Gonzalez therefore used "half of a percent more discount to the PIPP generation supply under a separate competitively bid supply. This would result in $1 million in additional savings, or an additional $1 million in cost to customers of the ESP over the MRO for this element."[219]

Other difficulties regarding the public interest are presented by the terms of the Stipulation but are not easily quantified. For example, the Company proposes in the Stipulation to meet its solar and non-solar renewable requirements for the period June 1, 2011 through May 31, 2014 by issuing a separate request for proposal ("RFP") for a three year term for renewable energy credits ("RECs"), a process that would be conducted by an independent bid manager.[220] If the RFP process does not yield the required number and type of RECs, the Company proposes to enter into bilateral contracts to obtain the required RECs.[221] The proposed RFP process is designed for failure, and alternative means should be provided so that renewable requirements are met.

OCC Witness Gonzalez and OEC Witness Hitt stated concerns that the short-term nature of the RFP, three years, will not garner a sufficient response from the renewable developer community.[222] The Company issued a short-term RFP for RECs last year that

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[217] ESP Tr. Vol. 4 at 938 (Gonzalez).

[218] Id.

[219] OCC ESP Ex. 2 at 27 (Gonzalez). As noted earlier, the sole-source contract with the Company's affiliate, FirstEnergy Solutions and statements by FirstEnergy counsel about the Stipulation has raised questions regarding corporate separation.

[220] Stipulation at 9.

[221] Id.

[222] OCC ESP Ex. 2 at 52 (Gonzalez); OEC ESP Ex. 1 at 3 (Hitt).

is similar to the proposal in the Stipulation and had little success.[223] As stated by OCC Witness Gonzalez, "[r]enewable energy developers need an upfront, guaranteed stream of REC revenue to obtain bank financing for new projects."[224] The Company's solar REC waiver application in Case No. 09-1922-EL-EEC recognized the need by developers for longer-term contracts. As quoted by OCC Witness Gonzalez: "'certain parties contacted by [the Company's solar RFP consultant Navigant Consulting Inc.] stated that the Commission should be interested in a long-term contract with the companies . . . .'"[225] Another Ohio utility, American Electric Power, has signed a 20-year contract with Wyandot Solar.[226] Most recently in Pennsylvania, PECO successfully procured super RECs from more than seven megawatts of solar capacity through a 10-year RFP.[227] The supply of RECs will increase, and the corresponding price of procuring RECs will decrease, only when long-term REC offerings become the norm for electric utilities.

Instead of repeating a failed experiment (i.e. a short-term RFP for RECs), and consequently having to respond to another FirstEnergy force majeure filing later in 2010, the Commission should recognize the recommendation contained in the testimonies of

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[223] OCC ESP Ex. 2 at 52 (Gonzalez). No Ohio solar RECs were bid, and only 49 solar RECs were bid from contiguous states in 2009. *In re FirstEnergy Force Majeure Solar Proceeding*, Case 09-1922-EL-ACP, Order at 2, ¶(6) (March 10, 2010). These RFP results left the Company with a 1,836 deficit related to FirstEnergy's 2009 Ohio solar benchmark. Id.

[224] OCC ESP Ex. 2 at 52 (Gonzalez); see also OEC ESP Ex. 1 at 3-4 (Hitt).

[225] OCC ESP Ex. 2 at 53 (Gonzalez), citing *In re FirstEnergy Force Majeure Solar Proceeding*, Case No. 09-1922-EL-EEC, Application at 4 (December 7, 2009).

[226] OEC ESP Ex. 1 at 6 (Hitt).

[227] Id. at 6-7 (Hitt).

OCC Witness Gonzalez and OEC Witness Hitt as failings of the Stipulation. The length of the REC contract should be at least ten years.[228]

In the likely event that the three-year short-term REC purchase RFP does not yield results, the Stipulation permits FirstEnergy to enter into bilateral contracts for its solar requirements.[229] These bilateral contracts may not be least cost, they would be for as yet undetermined periods of time, and they might involve transactions with FirstEnergy's affiliates. The longer-term REC contract is the better way to proceed.

D. The Settlement Violates Numerous Important Regulatory Principles and Practices.

1. Regulatory principles and practices stem from various sources.

The hearing in the ESP proceedings repeatedly required revisiting the issue of where the Commission's regulatory principles and practices are established. Important regulatory principles and practices are found in the statutes applicable to PUCO proceedings. Often quoted, the "Commission is a creature of statute, and lacks the authority to amend or ignore the requirements imposed by the General Assembly."[230]

The Commission's rules are also a source of the Commission's regulatory principles and practices. Typically shaped by PUCO Staff initial drafting, such rules are tested and retested before the Commission and then subjected to review by JCARR. OCC testimony was incorrectly stricken from the record based upon IEU's extreme argument that because an ESP permits adoption of matters on a wide range of subjects,

[228] OCC ESP Ex. 2 at 53 (Gonzalez); OEC ESP Ex. 1 at 7 (Hitt).

[229] Stipulation at 9.

[230] *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.

the Commission's rules on that same subject are irrelevant to an evaluation of Commission principles and practices.[231] The Commission's policy statements on a subject that are contained in approved rules on that subject should never be ignored as irrelevant.

Neither should the Commission's entries and orders be ignored as irrelevant.

Approval of the Stipulation, as demonstrated below, would result in ignoring the policy prescriptions embodied in statutes, rules, and the Commission's decisions.

2. Numerous important regulatory principles and practices are violated by the stipulation.

The terms of the Stipulation seek to change statutes that frame the Commission's decision-making. The Stipulation proposes an example of such a proposed change. FirstEnergy, recognizing the narrow interests of the AICUO, agreed that an "AICUO college or university member may elect to be treated as a mercantile customer . . . for the limited purposes of R.C. § 4928.66 so long as the aggregate load of facilities situated on a campus . . . qualifies such an entity as a mercantile customer. . . ."[232] "Mercantile customer" is defined in R.C. 4928.01(A)(19), and it does not refer to "AICUO college[s] or university[ies]."[233] To the extent such institutions qualify as a mercantile customer, no reason exists to limit that status to the energy efficiency purposes stated in R.C. 4928.66.

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[231] ESP Tr. Vol. 3 at 682-687.

[232] Stipulation at 25, ¶5.

[233] Aside from the "unprincipled manner in which the Stipulation would have the Commission treat a statute (OCC ESP Ex. 2 at 16 (Gonzalez)), the treatment in the Stipulation is discriminatory, basing rate treatment on the unimportant (from a utility regulatory standpoint) feature of membership in a trade association. R.C. 4928.02(A) states that it is Ohio policy to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, *nondiscriminatory*, and reasonably priced retail electric service." (Emphasis added.) The Commission waived the requirement that FirstEnergy explain how its ESP proposal serves the State's policies. PUCO Entry at 4 (April 6, 2010).

FirstEnergy proposes to increase distribution rates on a quarterly basis by an average annual $161 million during the proposed ESP period.[234] 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."[235] 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[236]). The Stipulation provision that proposes that quarterly increases in ordinary distribution rates do not fit the description of an increase in rates is absurd."[237]

Other problems exist with the proposal to create Rider DCR in the Stipulation. The annual audits mentioned in the Stipulation would be subject to FirstEnergy's "burden of proof to demonstrate the accuracy of the quarterly filings."[238] A FirstEnergy response to the OCC's discovery states that the audits provided for in the Stipulation "would be of a technical nature primarily involving reviews for accuracy, consistency with the Stipulation, mathematical errors, and correctness of supporting calculations."[239] FirstEnergy Witness Ridmann confirmed this interpretation on cross-examination.[240] Upon cross-examination, PUCO Staff Witness Turkenton believed the audit process should go further:

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

[235] Stipulation at 15.

[236] Increased distribution rates in connection with CEI's smart grid proposal is the subject of another section of the Stipulation. Stipulation at 22-23.

[237] OCC ESP Ex. 2 at 14 (Gonzalez).

[238] Stipulation at 16.

[239] OCC ESP Ex. 3 (FirstEnergy response to OCC Interrogatory 62, subpart c).

[240] ESP Tr. Vol. 1 at 105-106 (Ridmann).

> We [i.e. the PUCO Staff] would not just be looking at the accuracy, we would actually be out in the field looking as to whether investments were put into the distribution system. We would not just be ticking off numbers looking for the accuracy of the filing. There would be, you know, out in the field type review done on this capital infrastructure.[241]

The PUCO Staff's interpretation provides needed protection for consumers, but it would provide more comfort if these two signatories to a single settlement had similar expectations regarding the process described in the Stipulation. The review contemplated by the PUCO Staff is still less than would be possible in a distribution rate case.[242]

Other parties affected by Rider DCR -- such as representatives of customers required to pay hundreds of millions of dollars in additional rates -- may wish to participate in the process of reviewing FirstEnergy's increases in distribution rates. R.C. 4903.221 provides that persons who "may be adversely affected by a public utilities commission proceeding may intervene in such a proceeding." As observed by OCC Witness Gonzalez, participation in activities to check on FirstEnergy's physical adjustments to its distribution system and the accounting associated with those adjustments "is limited, according to the Stipulation, to *only* the PUCO Staff and to signatories to the Stipulation."[243] FirstEnergy's efforts to limit both the scope of reviews as well as the parties to such reviews should be rejected as an unprincipled approach to

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[241] ESP Tr. Vol. 1 at 226 (Turkenton).

[242] The public is attuned to the need for more vigilant oversight. For example, a member of the public commented: "The ESP provisions that I specifically oppose include the quarterly adjustments and delivery rates without having to get PUCO approval to see if the increases are reasonable or even necessary. The only thing the PUCO is going to do is do the accounting. They're not going to say: Wait a minute. That's not right. That's not fair. You shouldn't be charging the customers that. That on its own merit is enough to say: Don't approve this." North Ridgeville ESP Tr. at 76-77 (April 21, 2010) (Eileen Campo).

[243] OCC ESP Ex. 2 at 12 (Gonzalez) (emphasis sic), noting Stipulation at 16.

regulation that fails to conform to the practice of reviewing distribution rate increases in rate cases that must involve all adversely affected persons.[244]

The Stipulation contains economic development benefits for the Cleveland Clinic and rate discounts for "domestic automakers facilities."[245] An application for such arrangements would normally be accompanied by background information needed for the Commission to make a reasoned decision as set out in the Commission's rules. As confirmed by PUCO Staff Witness Turkenton, an applicant would be subject to discovery requests and possibly to a separate hearing.[246] The likely participants in such a proceeding would be the persons adversely affected by the request for others to pay for the proposed benefits. The background information and the process that has been developed by the Commission to deal with such situations are missing from this case. Testimony by Staff Witness Fortney confirms, in part, missing elements regarding the provisions for the Cleveland Clinic. Mr. Fortney testified that the Commission should require additional information about the Cleveland Clinic project.[247] The Stipulation proposes a shortcut on the PUCO's practice of dealing with special arrangement requests according to its rules. Approval of such special benefits as part of the Stipulation could

[244] 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 b 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.").

[245] Stipulation at 26-29. As argued above, OCC testimony on this portion of the Stipulation was incorrectly stricken, and thereby prevented from making arguments regarding the Commission's settlement criteria.

[246] ESP Tr. Vol. 1 at 235 (Turkenton).

[247] PUCO Staff ESP Ex. 3 at 3-4 (Fortney) ("I have some suggestions as to what information the Commission should be provided").

encourage the formation of a line of potential applicants whenever an ESP proposal has been filed (or, as in this case, whenever an ESP proposal is contemplated).

The Stipulation devotes only a few lines to the discount for "domestic automaker facilities." The word "domestic" seems connected with the concept of "buy American," according to PUCO Staff Witness Fortney, although the term is not defined in the Stipulation or elsewhere in the materials filed by FirstEnergy.[248] That ratemaking approach violates State policy to ensure "nondiscriminatory . . . retail electric service."[249] Large "GT" customers are not required to pay for the rate discounts. PUCO Staff Witness Fortney explained this exemption on the theory that a customer should not have to pay for their own discounts or the discounts provided to a direct competitor.[250] However, according to FirstEnergy Witness Ridmann, the domestic automaker facilities he was aware of were not all GT customers and other GT customers exist that are not domestic automaker facilities.[251] Mr. Fortney's rate theory does not apply to the circumstances, and GT customers should pay their fair share of any subsidy provided to the domestic automaker facilities.

Both the Cleveland Clinic and domestic automaker arrangements in the Stipulation should be dealt with through the Commission's approach to deal with applications under R.C. 4905.31. That approach is best able to deal with the verification of benefits, accountability for achieving the expectations for which other customers are

[248] ESP Tr. Vol. 3 at 580 (Fortney). PUCO Witness Fortney favored the statement of a definition for the classification. Id. at 585.

[249] R.C. 4928.02(A).

[250] PUCO Staff Ex. 3 at 5 (Fortney).

[251] ESP Tr. Vol. 1 at 131-132 (Ridmann).

asked to pay, and transparency (e.g. the provision of information). Such arrangements should not be approved in settlements to shortcut this process.

The Commission's rules and the tested application of those rules should be recognized in the evaluation of the Stipulation. Maybe it was haste, but the PUCO generally disapproves of broad waivers such as that contained in the Stipulation.[252] The Stipulation states that "the Companies request waivers of those rules to the extent that the Commission deems necessary to approve and implement this ESP."[253] OCC Witness Gonzalez explained:

> Stipulations should not result in later surprises to its signatory parties, other interested persons, the public, or the Commission itself. Moreover, without listing each waiver request and the reason for each request, it is impossible for the Commission to determine whether the matters sought to be waived are reasonable and in the public interest.[254]

The implications of approving the Stipulation should be known to all, but especially by the Commission that is expected to decide whether to approve the Stipulation terms.

FirstEnergy's ESP proposes to reverse PUCO decisions, a failure to observe the regulatory principles and practices embodied in such decisions. The new proposals 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

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[252] This Commission policy is stated, for example, in *In re FirstEnergy RSP Proposal*, Case No. 03-2144-EL-ATA, Opinion and Order at 40 (June 9, 2004):

> The breadth of this [FirstEnergy] waiver request and the lack of any specificity as to the areas of non-compliance make it impossible for the Commission to find good cause for granting the extension of the general waiver. The Commission cannot grant a waiver where the application has been unable to state the actual company process, program or function that requires the waiver.

[253] Stipulation at 32, ¶8.

[254] OCC ESP Ex. 2 at 17 (Gonzalez).

deemed 'incremental' for purposes of meeting the 2011 through 2013 benchmarks."[255] 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 Stipulation (i.e. the Stipulation conflicts with the order).[256]

The Commission's Order in the case on the interruptible programs was issued on March 10, 2010 (during the period for settlement discussions), 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.*"[257] The previously existing ELR and OLR loads must be considered in 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."[258] The Commission's policies and

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

[256] *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.

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

[258] OCC ESP Ex. 2 at 19 (Gonzalez), citing information provided at the technical conference conducted on April 5, 2010.

practices, embodied in its decisions, are violated by the provision in the Stipulation regarding "incremental" interruptible load.[259]

FirstEnergy and the Stipulation are inconsistent with other Commission decisions. The Commission stated in Case No. 07-551-EL-AIR, the Company's distribution rate case, that it "will not grant FirstEnergy authority to defer expenses related to storm damage indefinitely."[260] 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."[261] By stating that "all deferrals previously approved in . . . 07-551-EL-AIR et al. [FirstEnergy's distribution rate case]" will continue,[262] the Stipulation conflicts with the earlier order.

The Stipulation contains an additional provision that is vague on the subject of storm damage. OCC Witness Gonzalez observed:

> 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).[263]

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[259] 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").

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

[261] Id.

[262] Stipulation at 22.

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

Apparently the Commission, not only adversely affected parties, is eliminated from decision-making regarding these "deferral criteria." The vagueness of the Stipulation is bad and approval would be poor regulatory practice, and the PUCO Staff's agreement to additional deferrals is inexplicable considering the Commission's policy pronouncement against new storm damage deferrals.

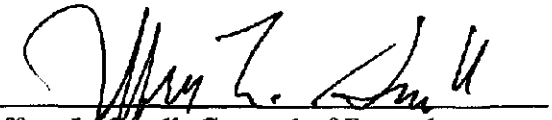
VI. CONCLUSION

The Commission should reject the proposed ESP 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 proposed ESP was hastily negotiated, and FirstEnergy wielded tremendous and unequal bargaining power in the negotiating process as the result of the interplay of statutory provisions related to SSO plans. The Stipulation that frames the ESP Application also violates numerous regulatory principles and practices.

The path to a SSO plan for service to customers beginning June 1, 2011 should go through the Company's pending MRO Case. The Commission decision in the MRO Case is long overdue, and should be issued to provide for generation service for the 2011 to 2014 period.

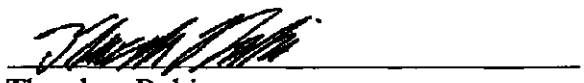
Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

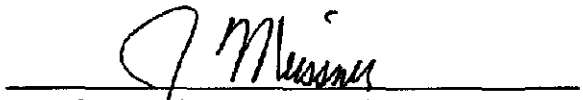


Jeffrey L. Small, Counsel of Record
Gregory J. Poulos
Assistant Consumers' Counsel

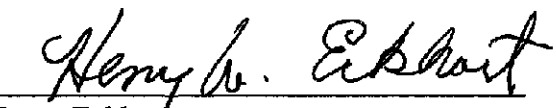
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
poulos@occ.state.oh.us



Theodore Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
(412) 421-7029 (Telephone)
robinson@citizenpower.com



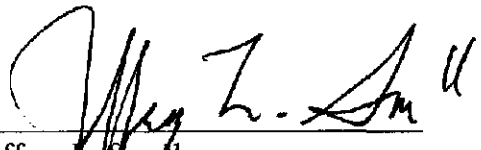
Joseph P. Meissner, Counsel of Record
Matthew D. Vincel
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
(216) 216-687-1900 (Telephone)
jpmeissn@lasclev.org
mvincel@lasclev.org
Citizens Coalition



Henry Eckhart
50 West Broad Street, #2117
Columbus, OH 43215
(614) 461-0984 (Telephone)
(614) 221-7401 (Facsimile)
henryeckhart@aol.com
Natural Resources Defense Council

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Post-Hearing Brief* was served on the persons stated below, electronically (as instructed by the Attorney Examiners), this 30th day of April, 2010.



Jeffrey L. Small
Counsel of Record

SERVICE LIST

burkj@firstenergycorp.com
korkosza@firstenergycorp.com
haydenm@firstenergycorp.com
elmiller@firstenergycorp.com
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com
david.fein@constellation.com
Cynthia.brady@constellation.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
RTriozzi@city.cleveland.oh.us
SBeeler@city.cleveland.oh.us
Cmooney2@columbus.rr.com
drinebolt@aol.com
Thomas.mcnamee@puc.state.oh.us
smhoward@vorys.com
mhpetricoff@vssp.com
mwarnock@bricker.com
wis29@yahoo.com
cmiller@szd.com
aporter@szd.com
gdunn@szd.com
robinson@citizenpower.com
mheintz@elpc.org
dsullivan@nrdc.org
swolfe@viridityenergy.com
Ccunningham@Akronohio.Gov
cfaruki@ficlaw.com
ricks@ohanet.org
tobrien@bricker.com
gkrassen@bricker.com
mwarnock@bricker.com
mkl@bbrslaw.com
gas@bbrslaw.com
jbentine@cwslaw.com
mwhite@cwslaw.com
myurick@cwslaw.com
dmancino@mwe.com
glawrence@mwe.com
lkeiffer@co.lucas.oh.us
nmoser@theOEC.org
will@theOEC.org
trent@theOEC.org
Williams.toddm@gmail.com
Amy.Spiller@duke-energy.com
mdortch@kravitzllc.com
mparke@firstenergycorp.com
beitingm@firstenergycorp.com
Dane.Stinson@BaileyCavalieri.com
henryeckhart@aol.com
jpmeissn@lasclev.org
mvincel@lasclev.org
jroberts@enernoc.com
eric.weldele@tuckerellis.com
afreifeld@viridityenergy.com
charles.dyas@btlaw.com
david.paragas@btlaw.com
Kim.Bojko@puc.state.oh.us
Gregory.Price@puc.state.oh.us