ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company	:	Case No. 2013-0228
	:	Case No. 2012-2098
	:	
	:	On Appeal from the Public Utilities Commission of Ohio
	:	PUCO Case No. 10-2929-EL-UNC

APPENDIX OF APPELLANT/CROSS-APPELLEE INDUSTRIAL ENERGY USERS-OHIO (VOLUME 2 OF 2)

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INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE OCTOBER 17, 2012 ENTRY ON REHEARING AND MEMORANDUM IN SUPPORT

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BEFORE
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INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE OCTOBER 17, 2012 ENTRY ON REHEARING

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Entry on Rehearing ("Entry on Rehearing") issued by the Public Utilities Commission of Ohio ("Commission") on October 17, 2012, which granted rehearing and then asserted an additional jurisdictional basis, Section 4905.26, Revised Code, to support the Commission's July 2, 2012 Opinion and Order ("Capacity Order") in this proceeding.[1] The Entry on Rehearing is unlawful and unreasonable in the following respects:

1. The Entry on Rehearing is unlawful and unreasonable because the Commission cannot lawfully or reasonably rely upon Section 4905.26, Revised Code, to invent and apply a cost-based ratemaking methodology and uniquely and substantially increase AEP-Ohio's compensation for generation-related capacity service.

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[1] This Application for Rehearing is focused on the Commission's newly asserted claim that Section 4905.26, Revised Code, provides authority to invent and apply a cost-based ratemaking methodology to uniquely increase the compensation of Ohio Power Company ("AEP-Ohio") for generation-related capacity service supplied to a competitive retail electric service ("CRES") provider under Section 4905.26, Revised Code. Nothing herein alters IEU-Ohio's previous claims that the Commission's actions in this proceeding are unlawful and unreasonable.

2. The Entry on Rehearing is unlawful and unreasonable because any supervisory and regulatory authority that the Commission may possess under Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, extends to an electric light company only when it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state,"[2] and does not extend to the supervision or regulation of wholesale transactions such as the wholesale transactions between AEP-Ohio and CRES providers.

As discussed in the memorandum in support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

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[2] Section 4905.03(C), Revised Code.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

MEMORANDUM IN SUPPORT

I. BACKGROUND

On October 17, 2012, the Commission issued an Entry on Rehearing and generally denied the various Applications for Rehearing filed in this proceeding from: (1) its December 8, 2010 Entry; (2) its March 7, 2012 Entry; (3) its May 30, 2012 Entry; and (4) the Capacity Order. The Entry on Rehearing, however, granted rehearing and then asserted that an additional jurisdictional basis, Section 4905.26, Revised Code, supports the cost-based ratemaking methodology which the Commission invented and applied in this proceeding to uniquely increase the compensation AEP-Ohio receives for generation-related capacity service.[3] As discussed below, the Entry on Rehearing is unlawful and unreasonable because the Commission cannot regulate a retail electric service deemed competitive or a wholesale service under Chapter 4905, Revised Code, generally, or under Section 4905.26, Revised Code, in particular.

II. ARGUMENT

1. The Entry on Rehearing is unlawful and unreasonable because the Commission cannot lawfully or reasonably rely upon Section 4905.26, Revised Code, to invent and apply a cost-based ratemaking methodology and uniquely and substantially increase AEP-Ohio's compensation for generation-related capacity service.

[3] Entry on Rehearing at 9, 28-29, 54.

As IEU-Ohio's initial brief[4] and August 1, 2012 Application for Rehearing[5] demonstrate (among other pleadings before the Commission), Ohio law prohibits the Commission from regulating or supervising a competitive retail electric service under Chapter 4905, Revised Code.[6] Additionally, the Ohio Supreme Court has held that the Commission cannot, in any event, use its general supervisory powers to bypass the statutory ratemaking formulas the General Assembly has enacted.

The Entry on Rehearing, however, continued the unlawful assertion of authority under Sections 4905.04, 4905.05, and 4905.06, Revised Code, and without prompting from any party asserted that the investigation initiated by the Commission was also authorized under Section 4905.26, Revised Code. The Entry on Rehearing's belated and strained resort to Section 4905.26, Revised Code, does not make the Commission's Capacity Order lawful or reasonable; Section 4905.26, Revised Code, does not delegate authority to the Commission to invent and apply a cost-based ratemaking methodology for generation-related capacity service supplied to CRES providers for the purpose of substantially increasing AEP-Ohio's compensation for generation-related capacity service.

The Commission is a creature of statute and may exercise only that authority granted to the Commission by statute.[7] The definitions in Section 4928.01, Revised

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[4] IEU-Ohio's Post-Hearing Brief at 26-33, 40-41 (May 23, 2012).

[5] IEU-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 22-25 (Aug. 1, 2012).

[6] Section 4928.05(A)(1), Revised Code; *see, e.g., Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 20.

[7] *Lucas County Commissioners v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347 (1997) ("The commission may exercise only that jurisdiction conferred by statute.").

Code,[8] in combination with the declaration in Section 4928.03, Revised Code, make it clear that the Commission may not lawfully supervise or regulate any service involved in supplying or arranging for the supply of electricity to ultimate consumers in Ohio, from the point of generation to the point of consumption, once such service is declared competitive except in certain statutorily defined circumstances.[9] From these definitions, this conclusion holds regardless of whether the service is called wholesale or retail. The definition of "retail electric service" includes "*any service*" from the point of generation to the point of consumption.[10]

Section 4928.05(A)(1), Revised Code, makes it clear that the removal of the Commission's supervisory and regulatory powers extends to the service component or

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[8] "'Retail electric service' means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following 'service components': generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service." Section 4928.01(A)(27), Revised Code.

"'Competitive retail electric service' means a component of retail electric service that is competitive as provided under division (B) of this section." Section 4928.01(A)(4), Revised Code.

[9] Section 4928.05(A)(1), Revised Code, provides:

> On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90 ; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code. On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

[10] Section 4928.01(A)(27), Revised Code (emphasis added).

function (generation, transmission, distribution) if the service component is declared competitive. As provided in Section 4928.03, Revised Code, the General Assembly has declared that generation service is a competitive service:

> Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services[11] that the consumers may obtain subject to this chapter from any supplier or suppliers.

By operation of Section 4928.05, Revised Code, then, competitive retail electric service (which by definition includes any generation service from the point of generation to the point of consumption) is not subject to the Commission's regulation or supervision except as may be specifically allowed in Sections 4928.141 to 4928.144, Revised Code [which relate exclusively to the establishment of a standard service offer ("SSO") for *retail* electric customers]. The record in this proceeding makes it clear that capacity service is a generation service; and the so-called cost of this service is tied directly, albeit illegally, to AEP-Ohio's generating plants.[12] Section 4928.05(A)(1), Revised Code, also specifically precludes the Commission from regulating or supervising such a service under Chapter 4909, Revised Code.

Additionally, the Ohio Supreme Court has held that the Commission cannot use its general supervisory powers in contravention of the specific ratemaking processes that the General Assembly has developed and which are contained elsewhere in Title 49 of the Revised Code. In reviewing whether the seemingly broad grant of authority

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[11] The definition of "retail electric service" (in combination with the balance of Chapter 4928) also makes it clear that a service component or function is either competitive or non-competitive. Because non-competitive service components are defined to be everything except competitive service components or functions, a service component must either be competitive or non-competitive.

[12] IEU-Ohio's Reply Brief at 5 (May 30, 2012).

contained in Section 4901.02, Revised Code, provided the Commission with independent authority to establish rates outside the Commission's traditional ratemaking process, the Court held:

> [t]he comprehensive ratemaking formula provided by the General Assembly is meant to protect and balance the interests of the public utilities and their ratepayers alike. *Dayton Power & Light Co. v. Pub. Util. Comm., supra,* 4 Ohio St.3d 91, 4 OBR 341, 447 N.E.2d 733. We cannot conclude that it was the General Assembly's intent under the above enabling statute, R.C. 4901.02(A), to permit the PUCO to disregard *that very formula* in instances in which it simply did not agree with the result. Cf. *Consumers' Counsel, supra,* 67 Ohio St.2d at 165, 21 O.O.3d at 104, 423 N.E.2d at 828 ("the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the PUCO may effortlessly abrogate that very formula").[13]

Although in this instance the Commission suggests it has authority under Sections 4905.04, 4905.05, and 4909.06, Revised Code, and now Section 4905.26, Revised Code, instead of the Section analyzed by the Court above, the same legal principles apply. The General Assembly has established specific statutory requirements that the Commission must follow to authorize rates and charges for competitive retail electric services. Based on the Court's decision in the *Columbus Southern Power Company*[14] case quoted above, the Commission does not have the authority to bypass these specific requirements.

Additionally, Section 4905.26, Revised Code, by its terms is a procedural statute that does not delegate substantive authority to the Commission to increase a utility's compensation for a competitive or non-competitive service. It provides a process by which a complainant may seek a hearing or the Commission may initiate a hearing to determine whether a rate is unjust, unreasonable, unjustly discriminatory, unjustly

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[13] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d at 540 (emphasis in original).

[14] *Id.*

preferential, or in violation of law. If the Commission determines that there are reasonable grounds for hearing, the Commission shall fix a time for hearing and serve notice of the hearing. The Commission then shall conduct an evidentiary hearing.

The Commission's authority under Section 4905.26, Revised Code, to investigate rates that may be "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law," however, does not provide the Commission with the authority to invent and apply a ratemaking methodology to increase AEP-Ohio's compensation for generation-related capacity service. The determination as to whether a particular price or rate is unjust and unreasonable can be made only by reference to other provisions of Title 49, Revised Code, that describe the subject matter the Commission may address, the manner in which that subject matter may be addressed, and the criteria the Commission must apply to resolve the justness and reasonableness issues.

The Court addressed this issue in *Ohio Utilities Company v. Public Utilities Commission of Ohio*[15] and upheld the Commission's determination that the Ohio Utilities Company's existing rates were "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law" when measured against the statutory ratemaking formula contained in Section 4909.15, Revised Code. Despite the Commission's reliance on the *Ohio Utilities Case* in the Entry on Rehearing, the Court in that case did not find that Section 4905.26, Revised Code, provided the Commission any independent ratemaking authority. Rather, in that case, the Court held that the Commission could establish new rates in a complaint case context by joining its authority to investigate the reasonableness of existing rates under Section 4905.26,

[15] 58 Ohio St.2d 153 (1979) (hereinafter "*Ohio Utilities Case*").

Revised Code, with its ratemaking authority under Section 4905.15, Revised Code. In the *Ohio Utilities Case*, a complaint was initiated against the Ohio Utilities Company alleging that its existing rates (which were based upon the old statutory ratemaking formula referred to as reproduction cost new) were unjust and unreasonable when measured against the new statutory ratemaking formula (commonly referred to as rate-based, rate-of-return).[16] The Court upheld the Commission's investigation under Section 4905.26, Revised Code, and held that when its investigatory powers were coupled with substantive ratemaking authority the Commission could reduce a utility's rates that it found to be unjust and unreasonable.[17]

Similarly, in *Lucas County Commissioners v. Public Utilities Commission of Ohio,*[18] the Court upheld the Commission's determination that Section 4905.26, Revised Code, did not provide the Commission with independent authority to order a refund of previous rates that the complainant argued were unjust and unreasonable. Instead, the Court looked elsewhere in Title 49, Revised Code, to see if another grant of statutory authority could be coupled with the Commission's investigatory powers under Section 4905.26, Revised Code, to uphold the Commission-ordered refund.[19] Finding no grant of authority to order the refund, the Court affirmed the Commission's dismissal of the complaint.

Commission decisions have also recognized that Section 4905.26, Revised Code, is only procedural in nature and hold that a determination of whether a complaint

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[16] *Id.* at 157-159.

[17] *Id.*

[18] 80 Ohio St.3d 344 (1997).

[19] *See id.* at 347-348.

under that Section sets out grounds for relief is determined by reference to the substantive provisions of the law which the Commission must follow when engaged in ratemaking.

For example, in a complaint case brought by the Office of the Ohio Consumers' Counsel ("OCC") against West Ohio Gas Company ("West Ohio"), OCC alleged that West Ohio's approved rates were excessive and therefore unjust and unreasonable because West Ohio was earning a return on equity well in excess of the level authorized to set the company's rates.[20] West Ohio moved to dismiss on the ground that OCC had failed to allege grounds on which relief could be granted.[21] The Commission dismissed the complaint, holding: "the complaint must, at minimum, contain allegations that, if true, would support a finding that the rates exceed those which would be determined under [the statutory rate setting formula set out in Section 4909.15, Revised Code.]"[22]

The precedent established by cases dealing with the nature and scope of the Commission's authority under Section 4905.26, Revised Code, is consistent with the Court's holding that the Commission may not invent penalties under the emergency statute, Section 4909.16, Revised Code. Like Section 4905.26, Revised Code, the emergency statute provides the Commission with authority to alter or amend rates when it determines that an emergency exists. The range of relief the Commission may order under that Section, however, is controlled by the substantive requirements that the Commission must follow to measure the amount of rate relief that it may lawfully

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[20] *In the Matter of the Complaint of the Office of Consumers' Counsel, State of Ohio, on Behalf of the Residential Customers of West Ohio Gas Company v. West Ohio Gas Company*, Case No. 88-1743-GA-CSS, Entry at 1 (Jan. 31, 1988) (hereinafter "*West Ohio Case*").

[21] *Id.* at 3.

[22] *Id.* at 11.

entertain and grant. And, like Section 4905.26, Revised Code, Section 4909.16, Revised Code, does not permit the Commission to supervise or regulate in areas where it has not been given jurisdiction.

In *Ohio Manufacturers' Association v. Public Utilities Commission of Ohio,*[23] the Commission asserted authority under the emergency statute (Section 4909.16, Revised Code) to authorize a public utility to levy penalties against a consumer for natural gas consumption in excess of stated limitations. The Court reversed the Commission's order. Because Section 4905.04, Revised Code, limited the Commission's jurisdiction to the regulation of public utilities and railroads, the Court held, "[a]lthough the foregoing regulatory powers are broad, the General Assembly has granted no such power to the commission"[24] to enforce such penalties. Furthermore, the Commission could not justify its assertion of authority based on a federal order permitting the federally regulated pipeline providing natural gas to penalize the public utility if the public utility's consumers used more gas than the amount allocated. As the Court concluded, the Commission possessed no power or authority except that conferred and vested in it by statute, and no statute authorized the Commission to delegate to a public utility the power to penalize a consumer.[25]

Finally, the Commission itself has ruled that complaint cases initiated under Section 4905.26, Revised Code, are not the primary method for the Commission to modify or approve rates. Historically the Commission has only authorized rates pursuant to Section 4905.26, Revised Code, in very "limited circumstances" and has

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[23] 46 Ohio St.2d 214 (1976) (hereinafter "*OMA Case*").

[24] *Id.* at 217.

[25] *Id.*

only done so in accordance with grants of authority found elsewhere in Title 49, Revised Code, *e.g.*, Chapter 4909, Revised Code.[26] For instance, in an Opinion and Order issued earlier this year in Suburban Natural Gas Company's self-complaint case, the Commission stated that such "limited circumstances" exist:

> only when the impact of the rate change has been directed to particular customer classes, has occurred during a rate proceeding, has been temporary in duration, or occurred in the context of an emergency rate proceeding, pursuant to Section 4909.16, Revised Code. Further, the Commission has, in prior cases, found that, if the proposed charges are not a general, across-the-board, rate increase, which would affect all of the company's customers and, if the self-complaint mechanism will protect the company's customers' interests, it is appropriate to consider the reasonableness of charges proposed by the utility. See, *In the Matter of the Self-Complaint of Akron Thermal Limited Partnership* Case No. 04-1298-HT-SLF, Finding and Order (November 3, 2004), where the Commission approved a fuel cost surcharge rider, subject to refund, and only pending the determination of a base rate case of the company; *In the Matter of the Self-Complaint of Paramount Natural Gas Company Concerning its Existing Tariff Provisions Regarding Charges for Installing a Positive Shut Off Drip*, Case No. 98-1590-GA-SLF, Finding and Order (January 14,1999), where the Commission approved a charge applicable solely to those customers requiring installation of a positive shut-off drip device; *In the Matter of the Self-Complaint of Columbia Gas of Ohio, Inc. Concerning Certain of its Existing Tariff Provisions*, Case No. 93-1569-GA-SLF, Entry (December 7,1995), where the Commission approved the transfer and exchange of certain facilities between Suburban and Columbia, but without any cost to customers; and *In the Matter of the Application of Ohio Gas Company to Establish a Charge for Bad Checks and a Charge for Reconnection of Service After Regular Business Hours*, Case No. 87-2068-GA-SLF, Entry (January 10, 1989), where the Commission approved a $10.00 charge to be applied to customers who issue checks or other instruments backed by insufficient funds.[27]

Thus, contrary to the Commission's assertions in the Entry on Rehearing, the Commission has found that Section 4905.26, Revised Code does ***not*** "provide[] the

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[26] *In the Matter of the Self-Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Opinion and Order at 6 (Aug. 15, 2012). See also *Ohio Utilities Case*, 58 Ohio St.2d at 157-159.

[27] *In the Matter of the Self-Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Opinion and Order at 6 (Aug. 15, 2012).

Commission with considerable authority to initiate proceedings to investigate the reasonableness of any rate or charge rendered or proposed to be rendered by a public utility."[28] Instead, the Commission has held that "limited circumstances" exist that allow the Commission to alter rates based on Section 4905.26, Revised Code, and even then, the Commission's authority to do so was tied back to the substantive ratemaking criteria found elsewhere in Title 49, Revised Code.

Here, the Commission has not identified the criteria, *i.e.*, the ratemaking authority, by which to judge whether current rates are "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law."[29] Without reference to the statutory ratemaking authority, it is simply impossible for the Commission to conclude that an existing rate is unjust or unreasonable inasmuch as there is nothing to compare the current rates against. Thus, because there has never been an allegation that AEP-Ohio was not receiving what would otherwise be authorized by law, the Commission was required, based upon its own precedent, to dismiss the complaint.[30]

Of course, the Commission cannot point to any provision of Title 49, Revised Code, which authorizes the Commission to invent or apply a cost-based ratemaking methodology for the purpose of uniquely and significantly increasing the compensation of an electric distribution utility ("EDU") for the provision of generation-related capacity service because no such statute exists. Chapter 4909, Revised Code, is the only Chapter of Title 49, Revised Code, that provides for a cost-based methodology for increasing an EDU's compensation; however, that Chapter only applies to non-

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[28] Entry on Rehearing at 9.

[29] Section 4905.26, Revised Code.

[30] *West Ohio Gas*, Entry at 1 (Jan. 31, 1988).

competitive retail electric services. By operation of law, generation-related capacity service has been deemed competitive,[31] and the Commission has held that generation-related capacity service is a wholesale service rather than retail.[32] Further, even if that Chapter could be made applicable, the Commission excluded any ability it might otherwise have to rely on that Chapter to support the Capacity Order by completely failing to comply with the statutorily mandated requirements contained in that Chapter.[33] Likewise, the Federal Energy Regulatory Commission ("FERC")-approved Reliability Assurance Agreement ("RAA"), just like the federal gas curtailment order the Commission relied upon in the *OMA Case*, cannot be used to expand the Commission's subject matter jurisdiction into areas either not provided for or explicitly prohibited by the General Assembly.

Furthermore, throughout the nearly two-year history of this case, the Commission has never alleged that the existing rates, set in accordance with PJM Interconnection, L.L.C.'s ("PJM") Reliability Pricing Model ("RPM"), are unreasonable, unjust, unduly discriminatory or preferential, or otherwise in violation of law. In fact, the Commission approved the use of RPM-Based Pricing in its initial order opening the investigation in this case,[34] authorized the use of RPM-Based Pricing from January 1, 2012 through May 30, 2012,[35] and the Commission has determined that public policy requires that

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[31] Section 4928.03, Revised Code.

[32] Capacity Order at 13; Entry on Rehearing at 19-20.

[33] *See* Capacity Order at 13; IEU-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 25-30 (Aug. 1, 2012).

[34] Entry at 3 (Dec. 8, 2010).

[35] RPM-Based Pricing was the sole method of compensation for AEP-Ohio through December 31, 2012. Beginning January 1, 2012 and continuing through May 30, 2012, AEP-Ohio received compensation for generation-related capacity service based on two pricing tiers. The first tier, however, remained tied to RPM-Based Pricing. *See, e.g.*, Entry at 1-8 (May 30, 2012).

AEP-Ohio charge CRES providers the RPM-Based Price through the 2014-2015 PJM delivery year. Additionally, RPM-Based Pricing has been determined to be reasonable through FERC's approval of the RAA,[36] AEP-Ohio previously used RPM-Based Pricing to develop the capacity component of the competitive benchmark prices that AEP-Ohio used to compare the results under Section 4928.142, Revised Code, and all other EDUs in Ohio receive compensation for generation-related capacity service in accordance with RPM-Based Pricing. Thus, by all accounts, RPM-Based Pricing is just and reasonable and cannot be displaced by the Commission.

The Commission has concluded that RPM-Based Pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers.[37] However, at no time throughout this lengthy proceeding has the Commission identified how it is measuring just and reasonable compensation and this omission effectively bypasses the statutory obligations which the Commission must satisfy before it can increase utility bills. Also, since the source of RPM-Based Pricing is a contract binding on AEP-Ohio and approved by FERC, demonstrating that RPM-Based Pricing yields unjust and unreasonableness compensation requires AEP-Ohio to satisfy a *Mobile-Sierra* review standard that the pricing under the RAA is not in the public interest.[38] Neither AEP-Ohio nor the Commission demonstrated that continuation

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[36] *See PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006) (finding preexisting pricing model to be unjust and unreasonable); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006) (approving, with conditions, the RPM); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 (2007) (clarifying nature and extent of order approving the RPM).

[37] Opinion and Order at 23; Entry on Rehearing at 36.

[38] *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956).

of RPM-Based Pricing is contrary to the public interest. And as mentioned above, the Commission found that the continuation of RPM-Based Pricing is in the public interest.[39]

The Commission must proactively respect and follow the law. Yet, throughout this proceeding the Commission has repeatedly strained to evade this most fundamental obligation for the purpose of increasing utility bills and depriving consumers of the full opportunity to benefit from lower generation supply prices available from CRES providers. What the Commission has done here is not just, it is not lawful, and it is not right.

In summary, the Commission is specifically barred by Section 4928.05(A)(1), Revised Code, from using its supervisory and regulatory investigatory authority in Chapter 4905, Revised Code, including Section 4905.26, Revised Code, to address pricing for any generation service from the point of generation to the point of consumption.[40] Additionally, even if the Commission was not specifically barred under Section 4928.05(A)(1), Revised Code, from invoking Section 4905.26, Revised Code, that statute does not provide the Commission with independent or unconditional authority to grant rate relief. Finally, the Commission has held that rates can only be established under Section 4905.26, Revised Code, in "limited circumstances" and then, only in accordance with other ratemaking statutes. The Commission has violated its own holdings regarding the nature and scope of any authority that the Commission may possess under Section 4905.26, Revised Code. For these reasons, the Entry on Rehearing is unlawful and unreasonable.

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[39] Capacity Order at 23.

[40] Section 4928.05, Revised Code.

2. **The Entry on Rehearing is unlawful and unreasonable because any supervisory and regulatory authority that the Commission may possess under Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, extends to an electric light company only when it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state,"[41] and does not extend to the supervision or regulation of wholesale transactions such as the wholesale transactions between AEP-Ohio and CRES providers.**

In the Capacity Order, the Commission asserted that capacity service is not a retail service:

> [i]n this case, the electric service in question (*i.e.*, capacity service) is provided by AEP-Ohio for CRES providers, with CRES providers compensating the Company in return for its [Fixed Resource Requirement ("FRR")] capacity obligations. Such capacity service is not provided directly by AEP-Ohio to retail customers. Although the capacity service benefits shopping customers in due course, they are initially one step removed from the transaction, which is more appropriately characterized as an intrastate wholesale[42] matter between AEP-Ohio and each CRES provider operating in the Company's service territory.[43]

The Entry on Rehearing also confirms the Commission's assertion that "capacity service" is not a retail service:

> AEP-Ohio's provision of capacity to CRES providers ... is not a retail electric service ... . The capacity service in question is not provided directly by AEP-Ohio to retail customers, but is rather a whole transaction between the Company and CRES providers. Because AEP-Ohio's capacity costs are not directly assignable or allocable to retail electric generation service ... .[44]

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[41] Section 4905.03(C), Revised Code.

[42] It is unclear what the Commission means by the use of the words "intrastate wholesale". The United States Supreme Court has held that electricity is inherently in interstate commerce. *See New York et al. v. FERC et al.*, 535 U.S. 1 (2002); *FPC v. Florida Power & Light Co.*, 404 U.S. 453 at 454-455 (1972). And, the RAA itself specifies that the capacity responsibility discussed therein is a regional responsibility for the entire multistate footprint of PJM. IEU-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 45 (Aug. 1, 2012); FES Ex. 110A at 4, 21; Tr. Vol. VI. at 1346-1348. In plainer words, there is no such thing as "intrastate wholesale" electric service.

[43] Capacity Order at 13 (internal citations omitted).

[44] Entry on Rehearing at 19-20.

The Commission's determination that generation-related capacity service supplied to CRES providers is a wholesale service and not subject to Section 4928.05(A)(1), Revised Code, however, offers the Commission no advantage. The Commission's reliance on Chapter 4905, Revised Code, including Sections 4905.04, 4905.05, 4905.06, and now on rehearing Section 4905.26, Revised Code, to regulate capacity service is unlawful and unreasonable because those Sections apply to only retail services.

Sections 4905.04, 4905.05, 4905.06, and 4905.26, Revised Code, all apply to public utilities as that term is defined in Sections 4905.02[45] and 4905.03,[46] Revised Code. Those Sections specify that a public utility subject to the Commission's jurisdiction must be a company engaged in the business of supplying electricity *to consumers*, *i.e.*, it must be supplying a retail service. The definition of a public utility also specifically exempts regional transmission organizations ("RTOs"), such as PJM, the entity that actually bills CRES providers for wholesale capacity service. As mentioned above, the Commission held that it was not regulating a service provided to consumers; rather, it held it was regulating a wholesale service provided to CRES providers. Thus, if the Commission's definition of capacity service as a wholesale service is correct, the Commission has no authority under Chapter 4905, Revised Code,

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[45] "As used in this chapter, 'public utility' includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit ... ." Section 4905.02(A), Revised Code.

[46] Section 4905.03, Revised Code (Public utility company definitions) provides that the definition of a public utility includes "[a]n electric light company, *when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state*, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission." Section 4905.03(C), Revised Code (emphasis added).

to regulate the service or substantially increase the compensation available to AEP-Ohio for providing such service. Therefore, the Commission's assertion that it can regulate a wholesale rate under Chapter 4905, Revised Code, is unlawful and unreasonable.

III. CONCLUSION

As demonstrated herein, the Entry on Rehearing is unlawful and unreasonable because the Commissions lacks authority to regulate generation capacity service under Chapter 4905, Revised Code, regardless of whether that service is defined as retail or wholesale. Section 4905.26, Revised Code, does not expand the Commission's substantive authority to authorize rate relief beyond that which the General Assembly has granted and cannot, in any event, provide the Commission with authority the General Assembly has specifically denied the Commission. Because the Commission lacks the requisite authority to increase AEP-Ohio's compensation for generation capacity service supplied to CRES providers to $188.88/Megawatt-day ("MW-day"), the Commission must grant rehearing and terminate any authority AEP-Ohio has to collect (either currently or through deferral mechanisms) such increased compensation for generation-related capacity service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing of the October 17, 2012 Entry on Rehearing and Memorandum In Support* was served upon the following parties of record this 15th day of November 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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101

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE JULY 2, 2012 OPINION AND ORDER AND MEMORANDUM IN SUPPORT

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1. The July 2nd Order is unlawful and unreasonable since any authority the Commission may have to approve prices for generation capacity service does not permit the Commission to apply a cost-based methodology or resort to Chapters 4905 and 4909, Revised Code, to supervise and regulate pricing for generation capacity services. Similarly, the order is unreasonable and unlawful to the extent that it states or otherwise suggests that AEP-Ohio has a right to establish rates for generation-related services that are based on any cost-based ratemaking method including the ratemaking methodology identified or referenced in Chapters 4905 and 4909, Revised Code 22

2. Assuming for purposes of argument that the Commission has authority to authorize the billing and collection of a generation capacity service charge pursuant to Chapters 4905 and 4909, Revised Code, the July 2nd Order is nonetheless unreasonable and unlawful because AEP-Ohio failed to present the required evidence and the Commission failed to comply with the substantive and procedural requirements contained in such Chapters 25

3. The July 2nd Order is unreasonable and unlawful because it unreasonably impairs the value of contracts entered into with CRES providers by retroactively altering the capacity pricing method that was in place when such contracts were executed. The unlawful and unreasonable impairment arises, in the particular circumstances presented by this case, because the RPM-Based Pricing method establishes generation service capacity prices three years in advance and the July 2nd Order alters the capacity prices that had been fixed and were known and certain at the time such contracts were executed. To the extent the Commission has any authority to approve prices for generation capacity services by altering the ratemaking methodology, that authority may not be lawfully exercised to affect the prices established by the capacity pricing method previously approved by the Commission, in force by operation of law and known and certain for contracts entered into prior to the effective date of the new capacity pricing method 30

4. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to restore RPM-Based Pricing as

required by Section 4928.143(C)(2)(b), Revised Code, when it rejected AEP-Ohio's ESP in February 2012. 33

5. The July 2nd Order is unlawful and unreasonable inasmuch as it authorized AEP-Ohio to collect an above-market rate for generation capacity service, which will allow AEP-Ohio to collect transition revenue or its equivalent in violation of Ohio law and AEP-Ohio's Commission-approved commitment to not impose lost generation-related revenue charges on shopping customers. 34

6. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to adopt the uncontested recommendation of IEU-Ohio witness Kevin Murray contained at pages 33-34 of IEU-Ohio Exhibit 102A, which, if adopted, would provide much needed transparency to the process AEP-Ohio used to derive the billing determinants for generation capacity service. 36

7. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission authorized AEP-Ohio to collect above-market prices for generation capacity service, which will provide AEP-Ohio's generation business with an unlawful subsidy in violation of Section 4928.02(H), Revised Code. 38

8. The July 2nd Order is unlawful and unreasonable inasmuch as it violates the comparability requirements in Chapter 4928, Revised Code, which requires the generation capacity service rate applicable to CRES providers or otherwise to shopping customers to be comparable to the generation capacity service rate embedded in AEP-Ohio's SSO rates. 40

9. The July 2nd Order setting a generation capacity rate under PJM's RAA is unlawful and unreasonable inasmuch as the order violates the plain language of the RAA, which must be interpreted under Delaware law (the controlling law under the RAA). 42

   a. The administratively-determined "cost-based" rates for AEP-Ohio's certified electric distribution service area contained in the July 2nd Order violate the plain language of Article 2 of the RAA that states the RAA has a region-wide focus and pro-competitive purpose. 45

   b. Even if cost-based rates were established pursuant to the RAA, the Commission unlawfully and unreasonably based its determination of "cost" upon the embedded cost of AEP-Ohio's owned and controlled generating assets based on a defective assumption that such generating assets are the source of capacity available to

CRES providers serving customers in AEP-Ohio's certified electric distribution service area. The RAA requires that any change to the default pricing, RPM-Based Pricing, must be just and reasonable and looks to the FRR Entity, and the FRR Entity's Service Area and the Capacity Resources in the FRR Entity's Capacity Plan to establish any pricing other than RPM-Based Pricing. Based on the plain meaning of the word "cost", the July 2nd Order's sanctioning of the use of embedded cost to establish generation capacity services is arbitrary and capricious. In addition, the uncontested evidence demonstrates that AEP-Ohio is not an FRR Entity, AEP-Ohio's owned and controlled generating assets are not dedicated to serve Ohio load and also demonstrates that AEP-Ohio's owned and controlled generating assets are not the Capacity Resources in the FRR Entity's Capacity Plan. In such circumstances, the Commission's reliance upon embedded cost data for AEP-Ohio's owned and controlled generating assets to establish the cost incurred to provide generating capacity services to CRES providers is arbitrary and capricious. 48

10. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission violated Section 4903.09, Revised Code, by failing to properly address all material issues raised by the parties; the Ohio Supreme Court has held that the failure to address all material matters brought to the Commission's attention is a reversible error. 59

11. The July 2nd Order, which offers AEP-Ohio the opportunity to obtain above-market compensation for generation capacity service through a deferred revenue supplement [computed based upon the difference between RPM-Based Pricing and $188.88/megawatt-day ("MW-day"), including interest charges] is unlawful and unreasonable for the reasons detailed below..... 61

    a. The above-market supplement conflicts with the policies contained in Section 4928.02, Revised Code, which relies upon market forces, customer choice and prices disciplined by market forces to regulate prices for competitive electric services..... 62

    b. The Commission is prohibited under Section 4928.05(A), Revised Code, from regulating or otherwise creating a deferral associated with a competitive retail electric service under Section 4905.13, Revised Code. The Commission may only authorize deferred collection of a generation service-related price under Section 4928.144,

Revised Code, and any such deferral must be related to a rate established under Sections 4928.141 to 4928.143, Revised Code. 64

c. The Commission unlawfully and unreasonably authorized AEP-Ohio to defer the collection of generation capacity service revenue. Under generally accepted accounting principles, only an incurred cost can be deferred for future collection. To the extent that the July 2nd Order implies the Commission's intended use of Section 4928.144, Revised Code, that Section also requires the Commission to identify the incurred cost that is associated with any deferral, a requirement unreasonably and unlawfully neglected by the July 2nd Order. 66

d. The Commission unlawfully and unreasonably determined that allowing AEP-Ohio to impose above-market prices for generation capacity service was appropriate to address AEP-Ohio's claims regarding the financial performance of its generation business, the competitive business segment under Ohio law. 66

e. The Commission unlawfully and unreasonably authorized AEP-Ohio to increase the above-market revenue supplement by adding carrying charges to the deferred supplement without any evidence that carrying charges, or any specific level of carrying charges, are lawful or reasonable. To the extent that the carrying charge allowance is computed based on a weighted average cost of capital ("WACC") method or AEP-Ohio's embedded cost of long-term debt, it is also unreasonable and unlawful because it is excessive, arbitrary, capricious, and contrary to Commission precedent. 67

f. The July 2nd Order is unlawful and unreasonable because it fails to recognize that the rates and charges applicable to non-shopping customers also are providing AEP-Ohio with compensation for generation capacity service, it ignores or disregards the fact that AEP-Ohio has maintained that non-shopping customers are, on average, paying nearly twice the $188.88/MW-day price, and it fails to establish a mechanism to credit such excess compensation obtained from non-shopping customers against any deferred balance the July 2nd Order works to create by comparing RPM-Based Pricing to the $188.88/MW-day price. The non-symmetrical and arbitrary bias embedded in the July 2nd Order's

description of how the deferred revenue supplement shall be computed guarantees that AEP-Ohio shall collect, in the aggregate, total revenue for generation capacity service substantially in excess of the revenue produced by using the $188.88/MW-day price to determine generating capacity service compensation for shopping and non-shopping customers. 68

12. In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the July 2nd Order, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935). 69

13. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to direct AEP-Ohio to refund the above-market portion of capacity charges in place since January 2012 or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges..... 89

III. CONCLUSION 90

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE JULY 2, 2012 OPINION AND ORDER

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") on July 2, 2012 authorizing Ohio Power Company ("OP") (now merged with Columbus Southern Power Company or "CSP" as "AEP-Ohio") to increase the price competitive retail electric service ("CRES") providers pay for generation capacity service. The July 2, 2012 Opinion and Order ("July 2nd Order") significantly increased AEP-Ohio's capacity price from the market-based price established by PJM Interconnection, LLC's ("PJM") Reliability Pricing Model ("RPM") ("RPM-Based Pricing"). RPM-Based Pricing is the default pricing mechanism under PJM's Reliability Assurance Agreement or "RAA" (which, by its terms, is governed by Delaware law) and the pricing mechanism adopted by the Commission as part of AEP-Ohio's current standard service offer ("SSO") rates.

The July 2nd Order also authorized AEP-Ohio to charge above-market and arbitrary prices for capacity through the extension of AEP-Ohio's two-tiered generation

capacity service pricing scheme (as altered by the Commission to move prices further away from the market-based price), and authorized AEP-Ohio to defer for future collection an amount in excess of RPM-Based Pricing ("Delayed Recognition Pricing Scheme"). The July 2nd Order is unlawful and unreasonable in the following respects:

1. **The July 2nd Order is unlawful and unreasonable since any authority the Commission may have to approve prices for generation capacity service does not permit the Commission to apply a cost-based methodology or resort to Chapters 4905 and 4909, Revised Code, to supervise and regulate pricing for generation capacity services. Similarly, the order is unreasonable and unlawful to the extent that it states or otherwise suggests that AEP-Ohio has a right to establish rates for generation-related services that are based on any cost-based ratemaking method including the ratemaking methodology identified or referenced in Chapters 4905 and 4909, Revised Code.**

2. **Assuming for purposes of argument that the Commission has authority to authorize the billing and collection of a generation capacity service charge pursuant to Chapters 4905 and 4909, Revised Code, the July 2nd Order is nonetheless unreasonable and unlawful because AEP-Ohio failed to present the required evidence and the Commission failed to comply with the substantive and procedural requirements contained in such Chapters.**

3. **The July 2nd Order is unreasonable and unlawful because it unreasonably impairs the value of contracts entered into with CRES providers by retroactively altering the capacity pricing method that was in place when such contracts were executed. The unlawful and unreasonable impairment arises, in the particular circumstances presented by this case, because the RPM-Based Pricing method establishes generation service capacity prices three years in advance and the July 2nd Order alters the capacity prices that had been fixed and were known and certain at the time such contracts were executed. To the extent the Commission has any authority to approve prices for generation capacity services by altering the ratemaking methodology, that authority may not be lawfully exercised to affect the prices established by the capacity pricing method previously approved by the Commission, in force by operation of law and known and certain for contracts entered into prior to the effective date of the new capacity pricing method.**

4. **The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to restore RPM-Based Pricing as required by Section 4928.143(C)(2)(b), Revised Code, when it rejected AEP-Ohio's ESP in February 2012.**

5. The July 2nd Order is unlawful and unreasonable inasmuch as it authorized AEP-Ohio to collect an above-market rate for generation capacity service, which will allow AEP-Ohio to collect transition revenue or its equivalent in violation of Ohio law and AEP-Ohio's Commission-approved commitment to not impose lost generation-related revenue charges on shopping customers.

6. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to adopt the uncontested recommendation of IEU-Ohio witness Kevin Murray contained at pages 33-34 of IEU-Ohio Exhibit 102A, which, if adopted, would provide much needed transparency to the process AEP-Ohio used to derive the billing determinants for generation capacity service.

7. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission authorized AEP-Ohio to collect above-market prices for generation capacity service, which will provide AEP-Ohio's generation business with an unlawful subsidy in violation of Section 4928.02(H), Revised Code.

8. The July 2nd Order is unlawful and unreasonable inasmuch as it violates the comparability requirements in Chapter 4928, Revised Code, which requires the generation capacity service rate applicable to CRES providers or otherwise to shopping customers to be comparable to the generation capacity service rate embedded in AEP-Ohio's SSO rates.

9. The July 2nd Order setting a generation capacity rate under PJM's RAA is unlawful and unreasonable inasmuch as the order violates the plain language of the RAA, which must be interpreted under Delaware law (the controlling law under the RAA).

   a. The administratively-determined "cost-based" rates for AEP-Ohio's certified electric distribution service area contained in the July 2nd Order violate the plain language of Article 2 of the RAA that states the RAA has a region-wide focus and pro-competitive purpose.

   b. Even if cost-based rates were established pursuant to the RAA, the Commission unlawfully and unreasonably based its determination of "cost" upon the embedded cost of AEP-Ohio's owned and controlled generating assets based on a defective assumption that such generating assets are the source of capacity available to CRES providers serving customers in AEP-Ohio's certified electric distribution service area. The RAA requires that any change to the default pricing, RPM-Based Pricing, must be just and reasonable and looks to the FRR Entity, and the FRR Entity's Service Area and the

Capacity Resources in the FRR Entity's Capacity Plan to establish any pricing other than RPM-Based Pricing. Based on the plain meaning of the word "cost", the July 2nd Order's sanctioning of the use of embedded cost to establish generation capacity services is arbitrary and capricious. In addition, the uncontested evidence demonstrates that AEP-Ohio is not an FRR Entity, AEP-Ohio's owned and controlled generating assets are not dedicated to serve Ohio load and also demonstrates that AEP-Ohio's owned and controlled generating assets are not the Capacity Resources in the FRR Entity's Capacity Plan. In such circumstances, the Commission's reliance upon embedded cost data for AEP-Ohio's owned and controlled generating assets to establish the cost incurred to provide generating capacity services to CRES providers is arbitrary and capricious.

10. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission violated Section 4903.09, Revised Code, by failing to properly address all material issues raised by the parties; the Ohio Supreme Court has held that the failure to address all material matters brought to the Commission's attention is a reversible error.

11. The July 2nd Order, which offers AEP-Ohio the opportunity to obtain above-market compensation for generation capacity service through a deferred revenue supplement [computed based upon the difference between RPM-Based Pricing and $188.88/megawatt-day ("MW-day"), including interest charges] is unlawful and unreasonable for the reasons detailed below.

    a. The above-market supplement conflicts with the policies contained in Section 4928.02, Revised Code, which relies upon market forces, customer choice and prices disciplined by market forces to regulate prices for competitive electric services.

    b. The Commission is prohibited under Section 4928.05(A), Revised Code, from regulating or otherwise creating a deferral associated with a competitive retail electric service under Section 4905.13, Revised Code. The Commission may only authorize deferred collection of a generation service-related price under Section 4928.144, Revised Code, and any such deferral must be related to a rate established under Sections 4928.141 to 4928.143, Revised Code.

    c. The Commission unlawfully and unreasonably authorized AEP-Ohio to defer the collection of generation capacity service revenue. Under generally accepted accounting principles, only an incurred cost can be deferred for future collection. To the extent that the July 2nd Order implies the Commission's intended use of Section 4928.144, Revised Code, that Section

also requires the Commission to identify the incurred cost that is associated with any deferral, a requirement unreasonably and unlawfully neglected by the July 2nd Order.

d. The Commission unlawfully and unreasonably determined that allowing AEP-Ohio to impose above-market prices for generation capacity service was appropriate to address AEP-Ohio's claims regarding the financial performance of its generation business, the competitive business segment under Ohio law.

e. The Commission unlawfully and unreasonably authorized AEP-Ohio to increase the above-market revenue supplement by adding carrying charges to the deferred supplement without any evidence that carrying charges, or any specific level of carrying charges, are lawful or reasonable. To the extent that the carrying charge allowance is computed based on a weighted average cost of capital ("WACC") method or AEP-Ohio's embedded cost of long-term debt, it is also unreasonable and unlawful because it is excessive, arbitrary, capricious, and contrary to Commission precedent.

f. The July 2nd Order is unlawful and unreasonable because it fails to recognize that the rates and charges applicable to non-shopping customers also are providing AEP-Ohio with compensation for generation capacity service, it ignores or disregards the fact that AEP-Ohio has maintained that non-shopping customers are, on average, paying nearly twice the $188.88/MW-day price, and it fails to establish a mechanism to credit such excess compensation obtained from non-shopping customers against any deferred balance the July 2nd Order works to create by comparing RPM-Based Pricing to the $188.88/MW-day price. The non-symmetrical and arbitrary bias embedded in the July 2nd Order's description of how the deferred revenue supplement shall be computed guarantees that AEP-Ohio shall collect, in the aggregate, total revenue for generation capacity service substantially in excess of the revenue produced by using the $188.88/MW-day price to determine generating capacity service compensation for shopping and non-shopping customers.

12. In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the July 2nd Order, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).

13. **The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to direct AEP-Ohio to refund the above-market portion of capacity charges in place since January 2012 or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.**

On July 20, 2012, American Electric Power Service Corporation ("AEPSC"), acting as agent for AEP-Ohio, filed a renewed motion and request for expedited rulings with the Federal Energy Regulatory Commission ("FERC") in Docket Nos. ER11-2183-001 and EL11-32-000. In this renewed motion, AEP-Ohio has once again asked FERC to use its authority to bypass the Commission so that AEP-Ohio can obtain higher compensation for generation capacity service than the compensation specified in the July 2nd Order. Thus, in AEP-Ohio's view, the Commission only has jurisdiction to address generation capacity service pricing so long as the Commission sets the price high enough and in a way that feeds AEP-Ohio's ambitions to block shopping. In other words, the unreasonable and unlawful actions by the Commission discussed herein are now being used by AEP-Ohio as a platform to launch further initiatives to insulate its generation business from the discipline of market forces and bring injury to Ohio and its citizens. AEP-Ohio's conduct shows that AEP-Ohio sees the July 2nd Order's disregard for the law and policy of Ohio as a Commission invitation to escalate its anti-consumer and anticompetitive campaign. If the Commission persists in its illegal and unreasonable tolerance of AEP-Ohio's bad legal theory and behavior, it will further position AEP-Ohio and its affiliates to plunder the public interest.

The focus here is mostly on the anticompetitive and excessive compensation consequences of the July 2nd Order. Yet, these unreasonable and unlawful consequences lead to other major problems. The confusion created by the flip-flopping, the multi-venue-multi-case process that has transformed adjudication at the

Commission into an endurance contest, the litigation churning and forum shopping has left customers and, to a lesser extent, CRES providers without the ability to make informed decisions about how and when customer choice rights can be exercised in furtherance of Ohio's stated policies. What AEP-Ohio has been unable to thwart through its anticompetitive and excessive pricing, AEP-Ohio is freezing out through the creation and maintenance of perpetual mysteries that defy "apples to apples" comparisons.

As discussed in the memorandum in support attached hereto, IEU-Ohio respectfully requests that the Commission grant this application for rehearing; forthwith terminate any authority that may permit AEP-Ohio to bill or collect compensation based on its two-tiered capacity charges or based upon the Delayed Recognition Pricing Scheme; "issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer..."[1] which, in this case, includes the establishment of generation service capacity prices by means of RPM-Based Pricing, and to refund to customers the above-market capacity revenues AEP-Ohio has collected since January 2012.

Even if the Commission's good intentions are behind the July 2nd Order, the Commission must now surely see that the Commission's good intentions only work to enable and inspire behavior by AEP-Ohio that cannot be reconciled with the public interest.

[1] Section 4928.143(C)(2)(b), Revised Code.

Respectfully submitted,

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

MEMORANDUM IN SUPPORT

I. BACKGROUND

At issue in this proceeding is the level of compensation AEP-Ohio receives from CRES providers for the capacity AEP-Ohio has dedicated to its regional transmission operator ("RTO"), PJM, which directs the operation of AEP-Ohio's high voltage transmission facilities. PJM is tasked with ensuring the high voltage transmission facilities under its supervisory control operate safely and reliably.[2] Unlike most commodities, electricity cannot be readily or economically stored in sufficient quantities to meet day-to-day demand. Therefore, to meet the needs of electricity consumers, PJM has established market-based mechanisms to compensate resources ("Capacity Resources" as defined by PJM) required to maintain a proper balance between supply and demand.

To obtain the Capacity Resources[3] PJM determines are necessary to maintain reliability, PJM operates markets to solicit and obtain sufficient resources.[4] These markets are governed by rules embodied in PJM's RAA,[5] a FERC-approved contract

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[2] IEU-Ohio Ex. 102A at 6.

[3] As capitalized herein, "Capacity Resources" carries the definition supplied under the RAA. FirstEnergy Solutions Corp. ("FES") Ex. 110A at 6.

[4] IEU-Ohio Ex. 102 at 5-6.

[5] *Id.* at 10. The RAA is FES Ex. 110A.

that all load serving entities ("LSEs") within PJM must execute. The RAA provides two options for LSEs to demonstrate that they have adequate Capacity Resources,[6] which as defined under the RAA include both supply-side and demand-side resources.[7]

RPM is the primary approach relied upon by the majority of LSEs to meet their capacity obligation within the PJM region. Under RPM, PJM conducts periodic capacity auctions to obtain a level of Capacity Resources necessary to meet forecasted load levels plus a sufficient reserve amount.[8] Capacity Resources are offered into the auctions at a specific price at which the bidder is willing to commit its capabilities to PJM for an upcoming delivery year.[9] PJM stacks the Capacity Resources by their offer prices and the auction clears the required level of Capacity Resources based upon the lowest offer prices to meet the specified target level.[10] The last and highest price offer that is needed to satisfy PJM's target capacity level determines the clearing price paid to all resources. Capacity Resources receive this clearing price for the quantity of capacity that clears in the auction for the entire delivery year. All LSEs pay RPM-Based Pricing for the capacity obligation associated with the load they serve; this payment is mitigated to the extent the LSE cleared a Capacity Resource in the RPM auctions.

As an alternative to RPM, an LSE can elect the FRR Alternative option under the RAA; LSEs that select this option are defined as an FRR Entity.[11] FRR Entities do not participate in PJM's periodic capacity auctions. Instead, PJM determines a required

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[6] IEU-Ohio Ex. 110A at 9.

[7] FES Ex. 110A at 6; Tr. Vol. XI at 2531.

[8] IEU-Ohio Ex. 102A at 7-8.

[9] *Id.*

[10] Although PJM conducts a single system-wide capacity auction, transmission constraints may cause pricing separation between zones within PJM. *Id.* Additionally, because of limitations on availability, there can be price separation between generation and demand response resource clearing prices.

[11] IEU-Ohio Ex. 102A at 9. "FRR Entity" is defined at page 10 of FES Ex. 110A.

quantity of Capacity Resources that the FRR Entity must have ownership or contractual rights to.[12] The FRR Entity is required to submit an FRR Capacity Plan[13] to PJM that demonstrates it holds adequate levels of Capacity Resources.[14]

In states that allow retail competition, such as Ohio, alternative LSEs (under Ohio law, an alternative LSE is called a CRES provider) pay RPM-Based Pricing for capacity for all load acquired from an LSE who participated in the RPM auctions.[15] If the alternative LSE acquired load from an FRR Entity, the default price that the alternative LSE pays to PJM, which is then remitted to the FRR Entity, is based on the RPM-Based Pricing methodology.[16] This description of the role of the RAA and RPM-Based Pricing has not been contested.

The default RPM-Based Pricing that the alternative LSE is required to pay to the FRR Entity can be displaced if a state lawfully adopts a "state compensation mechanism," in which case the state compensation mechanism controls.[17] If a state that allows retail competition has not lawfully adopted a state compensation mechanism, the FRR Entity can file an application with FERC under Section 205 of the Federal Power Act ("FPA"), seeking to change the compensation from RPM-Based Pricing "to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable."[18]

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[12] IEU-Ohio Ex. 102A at 9.

[13] FES Ex. 110A at 109-111. "FRR Capacity Plan" is defined at page 10 of FES Ex. 110A.

[14] *Id.* at 109.

[15] *Id.* at 33.

[16] *Id.* at 111.

[17] FES Ex. 110A at 111.

[18] *Id.*

By its terms, the RAA applies to the FRR Entity, and as the record demonstrates AEPSC made an FRR election on behalf of the pool of AEP operating companies (including AEP-Ohio) known as AEP East. With the inception of PJM's capacity market in 2007, AEP-Ohio has charged and advocated for RPM-Based Pricing to establish the compensation it receives from CRES providers pursuant to the RAA and from SSO customers.[19] Indeed, AEP-Ohio relied upon RPM-Based Pricing to develop the capacity component of the competitive benchmark prices that AEP-Ohio used to compare the results under Section 4928.142, Revised Code (the market rate offer or "MRO" option), and Section 4928.143, Revised Code (the ESP option), in the ESP proceeding ("ESP I")[20] that produced the current SSO rates.[21] The Commission has also held that AEP-Ohio's ESP I rates were based upon the assumption that RPM-Based Pricing would continue.[22]

On November 1, 2010, AEPSC acting in the agent role it frequently plays within American Electric Power Co. Inc. ("AEP") (AEP-Ohio's parent company), filed an application with FERC requesting authorization to establish a "cost-based" ratemaking methodology to determine compensation for generation capacity service relying upon Section D.8 of Schedule 8.1 of PJM's RAA and to make the compensation methodology uniquely applicable to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area. AEPSC claimed that there was no state

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[19] Tr. Vol. II at 401.

[20] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.* (hereinafter "*ESP I*").

[21] IEU-Ohio Ex. 103 at 11, 13-14.

[22] Entry at 2 (Dec. 8, 2010).

compensation mechanism in place and that it was entitled to prosecute its claim based on Section 205 of the FPA (hereinafter referred to as "the Section 205 Filing").[23]

In recognition of the clear and present danger presented by the Section 205 Filing, the Commission issued an Entry in this proceeding on December 8, 2010. Among other things and in case the Commission's prior determinations had left any doubt, the December 8, 2010 Entry adopted, pursuant to Section D.8 of Schedule 8.1 of the RAA, RPM-Based Pricing as the state compensation mechanism for AEP-Ohio. The December 8, 2010 Entry also opened this proceeding and solicited comments from interested parties. AEP-Ohio challenged the December 8, 2010 Entry. In an application for rehearing filed with the Commission on January 7, 2011, AEP-Ohio alleged the Commission erred in adopting a state compensation mechanism because the Commission lacked the authority to do so.[24] AEP-Ohio also claimed that RPM-Based Pricing would not allow it to recover its "cost."[25]

On August 11, 2011, the Commission issued an entry establishing a procedural schedule to conduct an evidentiary hearing in this proceeding. On August 31, 2011, AEP-Ohio filed testimony in the proceeding seeking to increase its capacity charges from RPM-Based Pricing to $355.55/MW-day, based on high level summaries of unaudited FERC Form 1 data for the year 2010.[26]

While the RAA allows, with FERC's approval, deviation from the default RPM-Based Pricing for entities that have elected the FRR Alternative, the deviation

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[23] *American Electric Power Service Corporation*, FERC Docket No. ER-11-2183, Application at 3 (Nov. 24, 2010) (hereinafter "*the Section 205 Filing*").

[24] Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 3, 18-31 (Jan. 7, 2011).

[25] *Id.* at 3, 5-18.

[26] AEP-Ohio Ex. 102 at 21.

provided for by the RAA is not the deviation that AEP-Ohio asked the Commission to authorize in this proceeding. It is undisputed that AEP-Ohio is not the FRR Entity; rather, AEPSC made the FRR Alternative election on behalf of AEP East.[27] Thus, to the extent the Commission has authority to apply the RAA, it is not applicable to AEP-Ohio directly, or to AEP-Ohio's owned or controlled generating assets.

Shortly after AEP-Ohio filed its testimony seeking Commission approval of a $355/MW-day charge, on September 7, 2011, AEP-Ohio, along with a number of other parties, submitted a stipulation and recommendation ("Stipulation") to resolve AEP-Ohio's pending ESP proceeding and several other pending cases, including this proceeding.[28]

Relevant to this proceeding, the Stipulation recommended that the Commission approve a two-tiered pricing scheme for generation capacity service available to CRES providers to be adopted prospectively as the state compensation mechanism. The first tier of the Stipulation's recommended CRES capacity price was tied to RPM-Based Pricing. The second tier, applicable to all capacity available to CRES providers not subject to RPM-Based Pricing, was set at $255/MW-day, a substantial increase to the otherwise applicable RPM-Based Price. The $255/MW-day price was arbitrary and based neither on a market-based pricing method nor a cost-based pricing method. In other words, the Stipulation recommended that the Commission approve a wholesale capacity price, even though AEP-Ohio[29] and AEPSC[30] had repeatedly claimed the Commission was without subject matter jurisdiction to do so.

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[27] *See* Assignment of Error No. 9, *infra* at 42-59.

[28] Stipulation and Recommendation (Sept. 7, 2011) (hereinafter "*Stipulation*").

[29] Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 8, 18-21 (Jan. 7, 2011).

During a September 7, 2011 conference call with the investment community held shortly after the Stipulation was filed with the Commission, AEP-Ohio acknowledged that the above-market second tier charge was designed to block the ability of retail customers to enjoy the full benefits of the "customer choice" rights provided by Ohio law.[31] Based on AEP-Ohio's own public representations of the purpose of the Stipulation's recommended two-tiered capacity pricing scheme, it was thus beyond doubt as of September 7, 2011 that the Stipulation was fundamentally and purposefully dedicated to a mission in conflict with Ohio law and the policy set forth in Section 4928.02, Revised Code.

After hearings on the Stipulation, on December 14, 2011, the Commission issued its order ("Stipulation Order")[32] approving the Stipulation with modifications, including modifications to expand the availability of the tier-one RPM-Based Pricing. Following the Stipulation Order, applications for rehearing were submitted on January 13, 2012 by various parties including IEU-Ohio. Among other things, the applications for rehearing claimed that the Commission had erred in concluding that the package presented by the Stipulation was just and reasonable and in the public interest. By entry dated February 1, 2012, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing of the Stipulation Order.

By the time the applications for rehearing were submitted to the Commission, the rate shock and shopping-blocking consequences of the Stipulation (which AEP-Ohio had masked in its on-average mumbo jumbo and untimely reporting of shopping data)

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[30] *The Section 205 Filing*, Request for Rehearing of American Electric Power Service Corporation at 8, 12-13 (Feb. 22, 2011).

[31] FES Ex. 102 at Ex. TCB-4.

[32] Opinion and Order (Dec. 14, 2011) (hereinafter "*Stipulation Order*").

began to arrive in relentless proportions. As AEP-Ohio's customers opened the electric bills that arrived after the Stipulation Order, customers' outrage overtook AEP-Ohio's managed message. Also, the results of the bill-reducing competitive bidding process ("CBP") used to set the generation supply price for SSO customers of Duke Energy Ohio ("Duke") sharpened the contrast between the arbitrary and excessive administratively-determined prices authorized by the Stipulation Order and the SSO prices established through a CBP.[33] Additionally, the Commission had access to filings that AEP-Ohio, or its agent AEPSC, made at FERC to implement the unlawful corporate separation provisions of the Stipulation and observed glaring inconsistencies between the content of such filings and the expectations created by the Stipulation.

On February 23, 2012, the Commission granted, in part, IEU-Ohio's and FES' applications for rehearing and rejected the Stipulation, ultimately finding, for multiple reasons, that the Stipulation was not in the public interest.

> As discussed below, upon review of the applications for rehearing, the Commission has determined that the Stipulation, as a package, does not benefit ratepayers and the public interest and, thus, does not satisfy our three-part test for the consideration of stipulations. Accordingly, the Commission will reject the Stipulation.[34]

Because the Commission's Stipulation Rehearing Entry rejected the proposed ESP contained in the Stipulation and in accordance with the requirements of Section 4928.143(C)(2)(b), Revised Code,[35] the Stipulation Rehearing Entry directed AEP-Ohio to file tariffs to provide its SSO pursuant to its previously authorized ESP:

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[33] PUCO Press Release, *Duke Energy auction leads to lower electric prices in 2012* (Dec. 15, 2011) (accessible *via* the internet at: http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/duke-energy-auction-leads-to-lower-electric-prices-in-2012/?border=off; last visited July 31, 2012).

[34] Entry on Rehearing at 4 (Feb. 23, 2012) (hereinafter "*Stipulation Rehearing Entry*").

[35] Section 4928.143(C)(2)(b), Revised Code, states (emphasis added):

> Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and **an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.**[36]

On February 27, 2012 and for the benefit of its sole shareholder, AEP, AEP-Ohio filed a motion for relief seeking to reintroduce AEP-Ohio's interpretation of the Stipulation's scheme to block customer choice. In other words, AEP-Ohio once again asked the Commission to approve a capacity price applicable to CRES providers while AEP-Ohio was contemporaneously asserting that the Commission does not have subject matter jurisdiction to do so.

While numerous parties (including many that previously supported the Stipulation) opposed AEP-Ohio's unlawful and unjust motion for relief, the Commission granted the requested temporary relief. Thus, what was contrary to the public interest when presented in the Stipulation as a package was extracted from the package and made available to AEP-Ohio so that AEP-Ohio could temporarily continue its shopping-blocking scheme. The Commission made the above-market shopping tax temporary and held that it would terminate on May 31, 2012.[37]

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission **shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.**

[36] *Stipulation Rehearing Entry* at 12 (emphasis added).

[37] Entry at 17 (Mar. 7, 2012) (hereinafter "*March 7, 2012 Entry*").

Subsequent to the Stipulation Rehearing Entry, on March 23, 2012, AEP-Ohio filed revised testimony in this proceeding again seeking an increase in its capacity rates based on its so-called cost-based formula rate method, which produced a rate of about $355/MW-day. A capacity price of $355/MW-day would have sharply increased capacity prices and produced a price about five times higher than the average fixed, known and measurable RPM-Based Pricing during the three delivery years commencing June 1, 2012 (a three-year average of $70/MW-day).[38]

AEP-Ohio claimed that its significantly above-market charge was necessary to allow AEP-Ohio to recover its cost and to promote investment in generation.[39] However, as this case progressed, the justification switched from recovering cost and promoting investment in generation to protecting AEP-Ohio's financial integrity[40] by providing AEP-Ohio with a transition to a fully competitive market.[41] Ohio law, however, provided a temporary opportunity to collect above-market, generation transition revenue as Ohio deregulated and moved towards competition for retail electric generation service. The timeframe to collect such transition revenue has long since passed. AEP-Ohio has admitted as much, stating electric distribution utilities ("EDUs") "were given a temporary opportunity to recover stranded generation investments during a transition period. That transition period is over."[42] The evidence in this case demonstrates AEP-Ohio is not entitled to transition revenue, even if the Commission

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[38] *See* IEU-Ohio Ex. 102A at 23.

[39] AEP-Ohio Ex. 101 at 8-9 (RPM-Based Pricing "provides little or no incentive to invest in Ohio asset generation.").

[40] Ohio Power Company's Initial Post-Hearing Brief at 1 (May 23, 2012) (the Commission's "task here is to ... preserve the financial integrity of the affected utility.").

[41] *Id.* at 2 ("The scope of this proceeding [is] establishing a three-year transitional (rather than permanent) capacity charge").

[42] IEU-Ohio Ex. 101 at 13.

had authority to adopt a cost-based ratemaking methodology to establish the compensation available to AEP-Ohio for generation service capacity available to CRES providers serving customers in AEP-Ohio's certified electric distribution service area.

While the evidentiary hearing was still ongoing, AEP-Ohio filed a motion requesting that the Commission extend and increase the two-tiered capacity charges beyond May 31, 2012. Despite its prior holding on the temporary nature of the two-tiered capacity charges, on May 30, 2012, the Commission authorized AEP-Ohio to extend use of the two-tiered charges through July 2, 2012.[43] The May 30, 2012 Entry also authorized AEP-Ohio to increase the price in the first tier from RPM-Based Pricing (roughly $20/MW-day beginning June 1, 2012) to $146/MW-day.[44]

On July 2, 2012, the Commission issued its decision in this proceeding (the July 2nd Order) and held it had jurisdiction under its general supervisory powers to adopt a cost-based ratemaking method to establish prices for wholesale capacity service available to CRES providers.[45] The July 2nd Order rejected AEP-Ohio's conclusion that its "cost" was $355/MW-day; however the Commission adopted AEP-Ohio's cost-based ratemaking methodology as the starting point and found AEP-Ohio's "cost" of capacity was $188.88/MW-day.[46] Although the Commission held AEP-Ohio's "cost" was $188.88/MW-day, it also held that, no later than August 8, 2012, AEP-Ohio must restore RPM-Based Pricing as the price for generation capacity service paid by CRES providers serving customers in AEP-Ohio's certified electric distribution service area.[47] The

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[43] Entry at 7-8 (May 30, 2012) (hereinafter "*May 30, 2012 Entry*").

[44] *Id.*

[45] *July 2nd Order* at 12-13.

[46] *Id.* at 33.

[47] *Id.* at 23.

Commission further held that AEP-Ohio could defer the difference between RPM-Based Pricing and $188.88/MW-day (the "Delayed Recognition Pricing Scheme").[48] The Commission stated that it would disclose, in AEP-Ohio's pending ESP proceeding,[49] how, when and who will pick up the tab for the Delayed Recognition Pricing Scheme (including interest).[50] The Commission stated that AEP-Ohio could add a carrying charge to the amount deferred computed at AEP-Ohio's WACC until such time as recovery was authorized in the ESP II proceeding.[51] Thereafter, AEP-Ohio could carry the deferral balance at a long-term debt rate.[52]

The Commission held that AEP-Ohio must restore RPM-Based Pricing to establish the compensation available from CRES providers for generation capacity service because "RPM-based capacity pricing will promote retail electric competition."[53] The Commission found that "RPM-based capacity pricing will stimulate true competition among suppliers in AEP-Ohio's service territory" and will "incent shopping."[54] The Commission also found that RPM-Based Pricing has "been successfully used throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field."[55] Thus, the Commission found that RPM-Based Pricing promoted State policy and competition in line with Ohio law and policy and the Commission's duty to effectuate that policy. Implicitly, the July 2nd Order stands for the

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[48] *Id.*

[49] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.* (hereinafter "*ESP II*").

[50] *July 2nd Order* at 23.

[51] *Id.* at 23-24.

[52] *Id.* at 24.

[53] *Id.* at 23.

[54] *Id.*

[55] *Id.*

proposition that capacity pricing other than RPM-Based Pricing does not promote retail electric competition, incent shopping or create a level playing field. In any event, the Commission made no finding, for it could not, that a capacity price of $188.88/MW-day has any of these virtues.

The Commission, however, failed to include in its July 2nd Order the specific details necessary for customers and CRES providers to understand the true impact of the Commission's order. Who will have to pay for the deferral? How long will the deferral last? When will customers/CRES providers have to begin payment for the deferral? How will a deferral based upon a difference in rates, instead of a deferred expense, be estimated, calculated, implemented, or even audited? The only information given by the Commission on these very important questions amounted to notice that they were being kicked down the road and somehow into AEP-Ohio's ESP II proceeding.[56] The Commission did not explain how it would or could address a deferral of the capacity price in the ESP II proceeding after the record in that case had closed.

The July 2nd Order also recognized IEU-Ohio had presented the Commission with uncontested evidence that AEP-Ohio's proposed compensation methodology for generation capacity service would allow for recovery of additional transition revenue, in contravention of the Ohio Revised Code, and commitments AEP-Ohio made to resolve issues in its electric transition plan ("ETP") proceeding.[57] The July 2nd Order, however, was devoid of any analysis or resolution of this issue. The July 2nd Order also failed to address several other issues raised by IEU-Ohio through testimony and on brief. These issues concern comparability requirements, the prohibition on anticompetitive subsidies,

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[56] *Id.*

[57] *Id.* at 30-31.

and an uncontested information disclosure recommendation presented by IEU-Ohio witness Murray.

As demonstrated below, the Commission must grant rehearing for the reasons discussed in this application for rehearing and others which have been granted by the Commission in this proceeding. The relief that IEU-Ohio seeks through its application for rehearing is prompt and full restoration of RPM-Based Pricing as required by the Ohio Revised Code and the express terms of the RAA.

II. ASSIGNMENTS OF ERROR

1. The July 2nd Order is unlawful and unreasonable since any authority the Commission may have to approve prices for generation capacity service does not permit the Commission to apply a cost-based methodology or resort to Chapters 4905 and 4909, Revised Code, to supervise and regulate pricing for generation capacity services. Similarly, the order is unreasonable and unlawful to the extent that it states or otherwise suggests that AEP-Ohio has a right to establish rates for generation-related services that are based on any cost-based ratemaking method including the ratemaking methodology identified or referenced in Chapters 4905 and 4909, Revised Code.

The Commission's July 2nd Order is unlawful and unreasonable because the Commission is prohibited from applying cost-based ratemaking principles or resorting to Chapters 4905 and 4909, Revised Code, to supervise and regulate generation capacity services.[58] The Commission is a creature of statute and may exercise only that authority granted to the Commission by statute.[59]

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[58] Section 4928.05(A)(1), Revised Code; *see, e.g., Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 20.

[59] *Lucas County Commissioners v. Pub. Util. Comm'n of Ohio*, 80 Ohio St.3d 344, 347 (1997) ("The commission may exercise only that jurisdiction conferred by statute.").

The definitions in Section 4928.01, Revised Code,[60] in combination with the declaration in Section 4928.03, Revised Code, make it clear that the Commission may not lawfully supervise or regulate any service involved in supplying or arranging for the supply of electricity to ultimate consumers in Ohio, from the point of generation to the point of consumption, once such service is declared competitive except in certain statutorily defined circumstances.[61] From these definitions, this conclusion holds regardless of whether the service is called wholesale or retail. The definition of "retail electric service" includes "*any service*" from the point of generation to the point of consumption.[62]

Section 4928.05, Revised Code, makes it clear that the removal of the Commission's supervisory and regulatory powers extends to the service component or

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[60] "'Retail electric service' means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following service components: generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service." Section 4928.01(A)(27), Revised Code.

"Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of Section 4928.01, Revised Code.

[61] Section 4928.05(A)(1), Revised Code, provides:

> On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90 ; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code. On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

[62] Section 4928.01(A)(27), Revised Code (emphasis added).

function (generation, transmission, distribution) where the service component is declared competitive. Section 4928.03, Revised Code, states:

> Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services[63] that the consumers may obtain subject to this chapter from any supplier or suppliers.

Section 4928.05, Revised Code, states that competitive retail electric service (which by definition includes any generation service from the point of generation to the point of consumption) is not subject to the Commission's regulation except as may be specifically allowed in Sections 4928.141 to 4928.144, Revised Code (which relate exclusively to the establishment of an SSO for *retail* electric customers). No party disputes that capacity service is a generation service. Section 4928.05(A), Revised Code, also specifically precludes the Commission from regulating such a service under Chapter 4909, Revised Code.

While Section 4928.05(A)(1), Revised Code, allows the Commission to supervise a competitive retail electric service under Section 4905.06, Revised Code, that authority is limited to supervising "the adequacy or accommodation afforded by [the] service, the safety and security of the public and [the utility's] employees, and [the utility's] compliance with all laws, orders of the commission, franchises, and charter requirements." Section 4905.06, Revised Code, does not allow the Commission to establish a rate for a competitive retail electric service. As mentioned above, the Commission's ability to regulate competitive retail electric rates is limited to the Commission's authority under Sections 4928.141 to 4928.144, Revised Code. As the

[63] The definition of "retail electric service" (in combination with the balance of Chapter 4928) also makes it clear that a service component or function is either competitive or non-competitive. Because non-competitive service components are defined to be everything except competitive service components or functions, a service component must either be competitive or non-competitive.

Ohio Supreme Court has held, when the General Assembly enacts ratemaking statutes, the Commission cannot usurp those statutes by relying on its general supervisory authority.[64] Because Sections 4928.141 to 4928.144, Revised Code, detail with specificity the means by which the Commission may regulate and establish rates for competitive retail electric services, the Commission cannot bypass those requirements by relying on its general supervisory powers contained in Sections 4905.04, 4905.05, and 4909.06, Revised Code.

Notwithstanding the Commission's July 2nd Order, the Commission is specifically barred from using its supervisory powers or the regulatory authority in Chapters 4905 and 4909, Revised Code, to address pricing for any generation service from the point of generation to the point of consumption.[65] Whatever authority the Commission has with regard to generation service, it is limited to the authorization of retail prices that the Commission must establish in conformance with the requirements of Sections 4928.141 to 4928.144, Revised Code. Because the Commission's authority to regulate generation service is limited to retail SSO rates, the July 2nd Order is unlawful and unreasonable.

2. Assuming for purposes of argument that the Commission has authority to authorize the billing and collection of a generation capacity service charge pursuant to Chapters 4905 and 4909, Revised Code, the July 2nd Order is nonetheless unreasonable and unlawful because AEP-Ohio failed to present the required evidence and the Commission failed to comply with the substantive and procedural requirements contained in such Chapters.

In the Commission's discussion on whether it had jurisdiction to approve AEP-Ohio's capacity proposal, the Commission held that it did not need to determine if

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[64] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d, 535, 620 N.E.2d 835, 840 (1993).

[65] Section 4928.05, Revised Code.

the generation capacity service is a competitive service (subject to limited regulation under Chapter 4928, Revised Code) or a noncompetitive service (subject to regulation under Chapter 4909, Revised Code).[66] Rather than determining that the Commission could regulate generation capacity service under Chapter 4909, Revised Code, the Commission held it could do so under its general supervisory powers in combination with the RAA.[67] However, the Commission ended up referencing Chapter 4909, Revised Code:

> We further find, pursuant to our regulatory authority under Chapter 4905, Revised Code, ***as well as Chapter 4909, Revised Code***, that it is necessary and appropriate to establish a cost-based state compensation mechanism for AEP-Ohio.[68]

The Commission's modifications to AEP-Ohio's implementation of a so-called "cost-based" ratemaking methodology also made it abundantly clear that it was applying Chapter 4909, Revised Code, when it established a "cost-based" rate under the Delayed Recognition Pricing Scheme.

As part of the July 2nd Order, the Commission adopted in part Staff's recommended adjustments to AEP-Ohio's "cost-based" ratemaking methodology. While Staff urged the Commission to adopt RPM-Based Pricing and simply illustrated adjustments required to AEP-Ohio's cost-based ratemaking methodology, Staff claimed that its adjustments were required based upon Chapter 4909, Revised Code.[69] The Commission also rejected several of Staff's adjustments, finding that the adjustments were not consistent with AEP-Ohio's recent distribution service (a non-competitive

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[66] *July 2nd Order* at 13.

[67] *Id.* at 12-13.

[68] *Id.* at 22 (emphasis added).

[69] *See* Staff Ex. 103 at 14-15 (removing CWIP from AEP-Ohio's "cost" calculation based upon Section 4909.15, Revised Code).

service) rate case.[70] That case, of course, was governed by Chapter 4909, Revised Code.[71] Although the Commission invoked Chapter 4909, Revised Code, neither the Commission nor AEP-Ohio complied with the statutory requirements in Chapter 4909, Revised Code, which, once satisfied, would permit the Commission to consider and potentially approve an application to increase rates and charges.

The first mandatory step in securing an increase in rates under Chapter 4909, Revised Code, is for the EDU to file a notice of its intention to seek an increase in rates.[72] The notice of intent must be sent to the mayor and legislative authority of each municipality served by the EDU.[73] At least thirty days later, the EDU may then file its application to increase rates.[74] The president or vice-president and the secretary or treasurer of the public utility must also verify the accuracy of the application.[75] The application itself must also contain extensive details.[76]

An application to increase rates must include a description of its property used and useful in rendering service to the public as laid out in Section 4909.05, Revised Code. An application to increase rates must also include a list of current rate schedules and the proposed rate schedules.[77] Further, the application must contain: a "complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any

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[70] *July 2nd Order* at 34 (Staff's adjustment was "inconsistent with Staff's recommendation in [AEP-Ohio's] recent distribution rate case.").

[71] Tr. Vol. IX at 1944.

[72] Section 4909.43, Revised Code; Rule 4901-7-1, O.A.C., Appendix at 7.

[73] Section 4909.43, Revised Code.

[74] *Id.*

[75] Section 4909.18, Revised Code.

[76] *See* Section 4909.18, Revised Code; Section 4909.19, Revised Code; Section 4909.05, Revised Code.

[77] Section 4909.18, Revised Code.

analysis such public utility deems applicable to the matter referred to in said application;" "a statement of the income and expense anticipated under the application filed;" and "a statement of financial condition summarizing assets, liabilities, and net worth."[78]

Once the proper application and all the appropriate information have been filed with the Commission, the Staff at the Commission is required by statute to investigate the facts contained in the rate increase application and issue a report (commonly referred to as the Staff Report of Investigation).[79]

Once complete, the Staff Report of Investigation must be docketed with the Commission and served on the mayors of all municipalities within the public utility's service territory.[80]

Parties that have intervened in the proceeding are then afforded a statutory right to object to the Staff Report of Investigation and thereby frame issues that must be addressed and resolved by the Commission.[81]

These above elements in Ohio's law regarding how and when the Commission may authorize an increase in rates pursuant to the authority delegated to the Commission by Chapter 4909, Revised Code, are only some of the statutory requirements that must be satisfied. Notably, AEP-Ohio and the Commission did not satisfy any of the requirements contained in Chapter 4909, Revised Code. AEP-Ohio did not file a notice of intent to file an application for a rate increase. AEP-Ohio did not present any evidence that it served a notice on the mayor and legislative authority of

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[78] *Id.*

[79] Section 4909.19(C), Revised Code.

[80] *Id.*

[81] *Id.*

each municipality served by the EDU. AEP-Ohio did not present any evidence as to what property was used and useful in rendering generating capacity service to the public, nor did AEP-Ohio have its information verified by the proper personnel.

Indeed, AEP-Ohio's witnesses claimed to not have a clue as to what "Capacity Resources" were being relied upon to satisfy the PJM resource adequacy obligation and the Commission's Staff knew no more about this subject.[82] And while AEP-Ohio's so-called cost-based methodology explained by AEP-Ohio witness Dr. Pearce explicitly assumes that AEP-Ohio's generation assets are the source of capacity that is available to CRES providers,[83] this assumption is contrary to the testimony of the AEP-Ohio witnesses that AEP-Ohio offered as "experts" on the subject. Even the AEP-Ohio witnesses who had not fully read the RAA were aware that the Capacity Resources that were associated with satisfying the capacity obligation of an FRR Entity are **not** composed of the generating assets owned or controlled by AEP-Ohio. More directly, Dr. Pearce's explicit assumption that AEP-Ohio's generation assets are the source of capacity available to CRES providers and thereby must be used to identify a cost-based price is, as Mr. Murray testified, fiction.[84]

The admissions by AEP-Ohio's witnesses render AEP-Ohio's so-called cost-based methodology "used and useless" even if law and reality are suspended to indulge consideration of AEP-Ohio's proposal to increase capacity prices by resorting to a so-called cost-based methodology.

The Commission's Staff also did not conduct the statutorily required investigation. In fact, during cross-examination of a Staff witness, Staff's counsel

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[82] Tr. Vol. XI at 2529-2534; Tr. Vol. XI at 1795-1799.

[83] *See* AEP-Ohio Ex. 102 at 3-24.

[84] Tr. Vol. VI at 1346-47.

objected on grounds of relevance stating "[t]he record is clear that [Staff witness Smith's testimony] is not a staff report of investigation pursuant to 4909.18."[85] Because the Commission Staff's adjustments to AEP-Ohio's cost-based methodology nonetheless rely on AEP-Ohio's approach to justify a huge increase in the lawful capacity price, the Staff's reworked cost-based method (one that the Staff ultimately did not recommend be adopted by the Commission) suffers from the same fundamental legal defects that are embedded in AEP-Ohio's proposal. There has not been any review of the property used and useful in rendering service to the public, as required by statute.[86] Thus, the very foundation for the creation of a cost-based rate under Ohio law was ignored.

In this proceeding, AEP-Ohio did not satisfy the statutory requirements that would allow the Commission to approve an application to increase rates pursuant to Chapter 4909, Revised Code. The Commission did not follow the procedural requirements associated with ratemaking under Chapter 4909, Revised Code. The Commission did not make the determinations required to authorize an increase in rates under Chapter 4909. Therefore, the Commission's reliance upon Chapter 4909, Revised Code, as the ratemaking means by which the Commission authorized an increase in the price for generation capacity service is unlawful and unreasonable.

3. **The July 2nd Order is unreasonable and unlawful because it unreasonably impairs the value of contracts entered into with CRES providers by retroactively altering the capacity pricing method that was in place when such contracts were executed. The unlawful and unreasonable impairment arises, in the particular circumstances presented by this case, because the RPM-Based Pricing method**

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[85] Tr. Vol. IX at 1948.

[86] Section 4909.05, Revised Code. Although IEU-Ohio's witness Hess and Staff identified a non-exhaustive list of the flaws that AEP-Ohio's formula rate suffered from under traditional cost-based ratemaking, neither of their recommendations concluded what property was used and useful in rendering service to the public , and neither claimed that their review or recommendations were comprehensive. IEU-Ohio Ex. 101 at 17-18; *see* Staff Ex. 103 at 8 (Mr. Smith testified that he did not comprehensively address all the issues that might exist with regard to AEP-Ohio's proposal).

establishes generation service capacity prices three years in advance and the July 2nd Order alters the capacity prices that had been fixed and were known and certain at the time such contracts were executed. To the extent the Commission has any authority to approve prices for generation capacity services by altering the ratemaking methodology, that authority may not be lawfully exercised to affect the prices established by the capacity pricing method previously approved by the Commission, in force by operation of law and known and certain for contracts entered into prior to the effective date of the new capacity pricing method.

The July 2nd Order is unreasonable and unlawful inasmuch as it unreasonably impairs the value of contracts entered into between customers and CRES providers. Due to the nature of PJM's capacity market, capacity prices are established three years in advance of the delivery period for that capacity. RPM values are generally known through May 31, 2015.[87] These known capacity prices serve as a basis for establishing CRES providers' offers to customers.[88] From the inception of PJM's capacity market in 2007 to January 1, 2012, the only capacity pricing method that had been lawfully approved by the Commission or FERC and applicable to CRES providers in AEP-Ohio's territory was the RPM-Based Pricing method. Beginning January 1, 2012, AEP-Ohio's two-tiered charges temporarily went into effect, but still provided customers an opportunity to secure RPM-Based Pricing. And the temporary displacement of RPM-Based Pricing came with Commission representations that RPM-Based Pricing would be fully restored in compliance with Ohio law. Thus, up until May 30, 2012, customers and CRES providers were entering into contracts on the warranted assumption that RPM-Based Pricing controlled.[89]

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[87] The subsequent incremental auctions are for relatively small amounts of capacity and therefore have minimal effect on the prices established through the initial auction, the base residual auction ("BRA"). The BRAs for the delivery periods through May 31, 2015 have been conducted, and the results are known.

[88] Tr. Vol. VIII at 1572-1575, 1691-1697.

[89] *May 30 Entry at 7-8.*

Because CRES providers and customers entered into contracts based upon the warranted expectations that RPM-Based Pricing would set the compensation for generation capacity service or was setting such compensation, the July 2nd Order retroactively works to arbitrarily and unreasonably impair the value of contracts by displacing the previously-approved RPM-Based Pricing in favor of a method producing a much higher price. As explained by FES witness Banks:

> The [RPM-Based Pricing] could swing. For example, the current capacity charge is about $145 a megawatt day. On June 1 it goes to about $16 a megawatt-day. That's a swing. On June 1st of the following year it goes to about $27 a megawatt-day. That's a swing.
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> Those things are okay because those things were known. It was known by the entire market that the capacity cost of a shopping customer that would be charged to a CRES provider was going to be those numbers, absent the adjustment to get to AEP's zone, but everyone knew that.
>
> All of a sudden now the capacity charge is asked to be different midstream based on the [Stipulation] that was filed in September, and then asked to be different again in this capacity case, then asked to be different again in the modified ESP. So that's the problem.[90]

To the extent that the Commission asserts jurisdiction over capacity pricing, it must also assure that the value of contracts already entered into at a time when either RPM-Based Pricing controlled or at a time when the Commission had held that RPM-Based Pricing would be restored as required by Ohio law is not impaired.[91]

Most customers that moved to a CRES provider have contracted with the CRES provider on the assumption that the CRES provider would be billed based on the RPM-Based Price.[92] Allowing AEP-Ohio to bill CRES providers at rates above RPM-Based Pricing or effectively doing the same thing by making such customers responsible for

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[90] Tr. Vol. VIII at 1703.

[91] *Utility Serv. Partners, Inc. v. Pub. Util. Comm'n of Ohio,* 124 Ohio St.3d 284 (2009).

[92] Tr. Vol. VIII at 1696-97 (cross-examination of FES witness Banks).

paying all or part of the difference between the RPM-Based Price and $188.88/MW-day for contracts that have already been executed when RPM-Based Pricing was in place or the Commission held that it would be in place, will cause losses that could not be anticipated or may trigger "regulatory out" clauses that could result in the termination of the contract.[93] Thus, the Commission should grant rehearing, and to the extent it allows the deferred revenue supplement portion of the Delayed Recognition Pricing Scheme to remain in place, the Commission must hold that the above-market capacity charges or any equivalent charge shall not apply to contracts that have already been entered into at a time when RPM-Based Pricing applied or the Commission had caused customers to believe that it would be fully restored as required by Ohio law.

4. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to restore RPM-Based Pricing as required by Section 4928.143(C)(2)(b), Revised Code, when it rejected AEP-Ohio's ESP in February 2012.

As discussed above, AEP-Ohio's ESP I rates were benchmarked to and were based on AEP-Ohio charging RPM-Based Pricing for generation capacity service.[94] After AEP-Ohio attempted to bypass this reality through the Section 205 Filing, the Commission eliminated any doubt, and held it had adopted the RPM-Based Pricing methodology as the state compensation mechanism.[95] Thus, AEP-Ohio's SSO rates, as established in the ESP I proceeding, included RPM-Based Pricing for generation capacity service and that pricing controlled until the Commission authorized new SSO rates for AEP-Ohio.

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[93] Tr. Vol. VIII at 1688-89 & 1694.

[94] IEU-Ohio Ex. 103 at 11, 13-14.

[95] Entry at 2 (Dec. 8, 2010).

On December 14, 2011, the Commission issued the Stipulation Order and adopted the Stipulation's recommended prices for generation capacity service. As discussed above, those rates were separated into two tiers with the first tied to RPM-Based Pricing and the second tier set at $255/MW-day, an entirely arbitrary number.[96] Ultimately, the Commission determined the Stipulation was not in the public interest and rejected the Stipulation. Upon rejecting the Stipulation, the Commission was required, in accordance with Section 4928.143(C)(2)(b), Revised Code, to restore the "the provisions, terms, and conditions of the utility's most recent standard service offer."

Although the Commission recognized that it was bound by Section 4928.143(C)(2)(b), Revised Code, upon rejecting the Stipulation, the Commission has nonetheless sustained AEP-Ohio's lawless demands. Specifically, as it relates to the July 2nd Order, the Commission authorized AEP-Ohio to increase its generation capacity service revenue by charging prices substantially in excess of RPM-Based Pricing. The Commission, however, is required to issue such orders as necessary to continue "the provisions, terms, and conditions" of AEP-Ohio's ESP I rates until the Commission authorizes a subsequent SSO under either Sections 4928.142 or 4928.143, Revised Code. The Commission ignored this mandate, and therefore the July 2nd Order is unlawful and unreasonable.

5. The July 2nd Order is unlawful and unreasonable inasmuch as it authorized AEP-Ohio to collect an above-market rate for generation capacity service, which will allow AEP-Ohio to collect transition revenue or its equivalent in violation of Ohio law and AEP-Ohio's Commission-approved commitment to not impose lost generation-related revenue charges on shopping customers.

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[96] *Stipulation* at 20-22.

As demonstrated by IEU-Ohio through the testimony of its witnesses[97] and its initial brief,[98] among other pleadings before the Commission,[99] the authorization of an above-market price for generation capacity service will allow AEP-Ohio to collect transition revenue (also referred to as "stranded costs") in violation of Ohio law and commitments AEP-Ohio it made as part of a Commission-approved settlement in AEP-Ohio's ETP proceedings.[100] In lieu of repeating all of the transition revenue/stranded costs discussion in IEU-Ohio's initial brief, IEU-Ohio hereby incorporates it by reference.[101]

Under Ohio law, AEP-Ohio was given an opportunity to collect generation-related transition revenue while it prepared for competition.[102] The "transition" period is over, and Ohio law now prohibits the collection of transition revenue.[103] Additionally, AEP-Ohio agreed to forgo collecting above-market transition revenue associated with its generation assets promising it would not "impose any lost revenue charges (generation transition charges (GTC)) on any switching customer."[104] That commitment was

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[97] IEU-Ohio Ex. 101, *in passim*; IEU-Ohio Ex. 102A at 15-20.

[98] IEU-Ohio Post-Hearing Brief at 16-25, 47-50 (May 23, 2012).

[99] IEU-Ohio Reply Brief at 5-7 (Nov. 18, 2011); Application for Rehearing and Memorandum in Support of IEU-Ohio at 36-39 (Jan. 13, 2012); IEU-Ohio Memorandum Contra Ohio Power Company's February 27, 2012 Motion for Relief and Request for Expedited Ruling at 15-16 (March 2, 2012); IEU-Ohio Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 18-20 (March 27, 2012); IEU-Ohio Application for Rehearing of the May 30, 2012 Entry and Memorandum in Support at 12 (June 19, 2012).

[100] Additionally, the briefs of FES, Ohio Manufacturers' Association ("OMA"), Ohio Hospital Association ("OHA"), The Kroger Company ("Kroger"), Dominion Retail, Inc. ("Dominion"), and Interstate Gas Supply ("IGS") support IEU-Ohio's arguments that AEP-Ohio is barred from collecting stranded costs. *See* July 2nd Order at 30-31.

[101] IEU-Ohio Post-Hearing Brief at 16-25, 47-50 (May 23, 2012); IEU-Ohio Reply Brief at 6-7 (May 30, 2012).

[102] Sections 4928.37 to 4928.40, Revised Code.

[103] Section 4928.40, Revised Code.

[104] IEU-Ohio Ex. 101 at 10-11; FES Ex. 106.

reaffirmed and incorporated into AEP-Ohio's Rate Stabilization Plan ("RSP") proceeding.[105]

The above-market generation capacity service charges sought by AEP-Ohio and approved by the Commission through the Delayed Recognition Pricing Scheme are based on the same assumptions as the transition revenue claim AEP-Ohio previously made and agreed to forgo in its ETP proceeding.[106] Both were based on AEP-Ohio's total net book value of its generation assets, and both included assumptions on the generation-related revenue that AEP-Ohio would be able to receive in the electric market (wholesale and retail).[107]

Because the July 2nd Order will allow AEP-Ohio to collect above-market generation-related revenue, the Commission has unlawfully approved transition revenue for AEP-Ohio. Therefore, the Commission must grant rehearing, and vacate any portion of the July 2nd Order that may permit AEP-Ohio to increase or collect rates that provide AEP-Ohio with transition revenue or the equivalent.

6. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to adopt the uncontested recommendation of IEU-Ohio witness Kevin Murray contained at pages 33-34 of IEU-Ohio Exhibit 102A, which, if adopted, would provide much needed transparency to the process AEP-Ohio used to derive the billing determinants for generation capacity service.

The Commission unlawfully and unreasonably failed to ensure that AEP-Ohio's generation capacity service charge will be billed in accordance with a customer's Peak Load Contribution ("PLC") factor that is the controlling billing determinant under the

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[105] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 9, (Jan. 26, 2005) (hereinafter "*RSP Proceeding*").

[106] *Id.* at 8-9, 11.

[107] IEU-Ohio Ex. 101 at 8-9, 11-13, 18.

RAA. IEU-Ohio witness Murray testified that "[t]he Commission should require AEP-Ohio to document to customers and CRES providers that the PLC factor it is assigning to customers corresponds with the customers' PLC value recognized by PJM."[108] No party cross-examined Mr. Murray on this issue, or challenged Mr. Murray's recommendations in their briefs. IEU-Ohio again requested the Commission to require AEP-Ohio to bring such much needed transparency to the billing determinant specification in its briefs.[109] The July 2nd Order, however, failed to address the recommendation.

As explained by Mr. Murray:

> For settlement purposes, each PJM electric distribution company ("EDC") is responsible for allocating its normalized previous summer's peak to each customer in the zone (both wholesale and retail). According to PJM's business practice manuals, the process used by an EDC to allocate peak load contributions to its customers is supposed to be based upon rules negotiated with the EDC's regulators. To assist in performing these allocations, PJM publishes information known as the five coincident peaks or 5CP for each summer, typically by mid-October. The 5CP reflects the five highest non-holiday weekday RTO unrestricted daily peaks from the summer. An individual customer's usage during those five hours is known as the peak load contribution or PLC. PJM calculates the capacity obligation for the FRR Entity based upon its load forecast. From the FRR Entity's capacity obligation the FRR Entity is required to allocate its obligation between wholesale and retail customers based upon the customer's PLC. PJM publishes its 5 coincident peak ("CP") data for each year to assist each electric distribution company in PJM to make an appropriate allocation of the entity's capacity obligation to customers. The CPs correspond to the five hours with the highest demand on the PJM system for a given PJM delivery year.[110]

The means by which AEP-Ohio is specifying each customer's PLC has never been identified by AEP-Ohio. And, as mentioned above, AEP-Ohio did not challenge IEU-Ohio's recommendation that the Commission direct AEP-Ohio to make the capacity

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[108] IEU-Ohio Ex. 102A at 34.

[109] IEU-Ohio Reply Brief at 10, 35 (May 30, 2012).

[110] IEU-Ohio Ex. 102A at 9.

charge billing determinant specification transparent. However, the Commission's July 2nd Order failed to require this much needed transparency. The issue is material to the ultimate outcome of this case because, without disclosure of the means by which the PLC is disaggregated from AEP East down to AEP-Ohio and then down to each AEP-Ohio customer, it is not possible to test AEP-Ohio's specification of PLCs, determine whether Ohio customers are disproportionately covering the AEP East FRR capacity obligation, or whether certain customers or customer classes within AEP-Ohio's territory are unfairly being assigned their PLCs.

The Commission must grant rehearing and require AEP-Ohio to publicly disclose the means by which the PLC is disaggregated from AEP East down to AEP-Ohio and then down to each AEP-Ohio customer. This action is required regardless of the pricing method used to identify capacity charges because any capacity charge must be applied to the proper billing determinant. IEU-Ohio would also note that this PLC specification transparency requirement is also a critically important determination of how much revenue AEP-Ohio may eventually be able to collect for generation capacity service through the Delayed Recognition Pricing Scheme since RPM-Based Pricing applies to the PLC. Calculating the difference between RPM-Based Pricing and $188.88/MW-day requires a transparent and proper identification of PLCs.

7. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission authorized AEP-Ohio to collect above-market prices for generation capacity service, which will provide AEP-Ohio's generation business with an unlawful subsidy in violation of Section 4928.02(H), Revised Code.

As demonstrated through IEU-Ohio's testimony,[111] and its initial brief,[112] the approval of an above-market generation capacity service charge (collected

[111] *Id.* at 14, 20-26.

contemporaneously and in the future) would unlawfully subsidize AEP-Ohio's competitive "deregulated" generation business.

Among the many other fundamental defects in the July 2nd Order, the establishment of an above-market price for capacity is contrary to the State's policies proscribing subsidies from flowing between competitive and noncompetitive services, to the detriment of generation function competitors and shopping and non-shopping customers alike.[113] Section 4928.02(H), Revised Code, states that it is the policy of the State of Ohio to:

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

In AEP-Ohio's *Sporn* proceeding, the Commission held that Section 4928.02(H), Revised Code:

> requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. OP seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR. Approval of such a charge would effectively allow the Company to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of the statute.[114]

Despite the plain meaning of Section 4928.02(H), Revised Code, and the Commission's recent refusal to authorize the recovery of the unamortized Sporn 5 plant investment through a nonbypassable charge, the July 2nd Order authorized AEP-Ohio to charge

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[112] IEU-Ohio Post-Hearing Brief at 56-59 (May 23, 2012).

[113] *See* Section 4928.02(H), Revised Code; *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) (hereinafter "*Sporn Decision*").

[114] *Id.*

arbitrary above-market generation prices prior to August 8, 2012 and above-market charges (computed as the difference between RPM-Based Pricing and $188.88/MW-day), thereafter thereby providing AEP-Ohio's competitive generation business with a unique and anticompetitive subsidy in violation of Ohio law.

8. The July 2nd Order is unlawful and unreasonable inasmuch as it violates the comparability requirements in Chapter 4928, Revised Code, which requires the generation capacity service rate applicable to CRES providers or otherwise to shopping customers to be comparable to the generation capacity service rate embedded in AEP-Ohio's SSO rates.

As demonstrated through IEU-Ohio's testimony,[115] and its initial brief,[116] the Ohio Revised Code[117] and the Commission's rules require generation capacity service prices in AEP-Ohio's SSO to be comparable and non-discriminatory relative to the prices applicable to CRES providers/shopping customers. Section 4928.02(B), Revised Code, provides that it is policy of the State of Ohio to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs."

The July 2nd Order adopts RPM-Based Pricing to establish the wholesale generation capacity service compensation available from CRES providers. The July 2nd Order indicates (and does so unlawfully and unreasonably in IEU-Ohio's view) that the Commission may yet permit AEP-Ohio to collect revenue to supplement the RPM-Based Pricing compensation available from CRES providers and that such revenue supplement will be addressed in future Commission decisions. The revenue supplement aspect of the Commission order does not alter the fact that, as between

[115] IEU-Ohio Ex. 102A at 14, 29-32.

[116] IEU-Ohio Post-Hearing Brief at 59-61 (May 23, 2012).

[117] See Sections 4928.02(B), 4928.15 and 4928.35(C), Revised Code; Rule 4901:1-35-01(L), O.A.C.

AEP-Ohio and CRES providers and for the wholesale transaction, the PUCO has again adopted RPM-Based Pricing as the price CRES providers are required to pay for generation capacity service.

There is no explicit generation service capacity charge in AEP-Ohio's SSO rates[118] to compare to the generation capacity service rates applicable to CRES providers. The SSO charge for generation capacity service is not unbundled, separately stated or driven by the PLC billing determinant. Although there is not an unbundled or explicit capacity charge in AEP-Ohio's SSO, AEP-Ohio witness Allen testified that the AEP-Ohio SSO provides AEP-Ohio with, on average, compensation for generation capacity service at a rate of $355/MW-day.[119] The total compensation available from the July 2nd Order for generation capacity service (a total of $188.88/MW-day plus interest on the deferred revenue supplement) is substantially less than the amount of compensation for generation capacity service that AEP-Ohio has admitted it is obtaining from its SSO. Thus, the SSO is not comparable, it is discriminatory and it is providing AEP-Ohio, according to AEP-Ohio, with excessive compensation for generation capacity service.

To ensure comparability, non-discrimination and to implement the Commission's July 2nd Order, the Commission must unbundle the generation capacity service embedded in the SSO, establish a comparable and non-discriminatory price and rate design for such unbundled component (with a proper and transparent recognition of the PLC) and use the generation capacity service compensation that AEP-Ohio has obtained through the SSO that is above the $188.88/MW-day price as an offset to any

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[118] AEP-Ohio Ex. 101 at 10; FES Ex. 108 at 3; Tr. Vol. I at 67-70.

[119] Tr. Vol. III at 635-637.

opportunity that the Commission may provide AEP-Ohio to obtain supplemental revenue under the Delayed Recognition Pricing Scheme. Otherwise, the Commission's July 2nd Order produces a non-comparable and discriminatory result that is unreasonable and unlawful.

9. The July 2nd Order setting a generation capacity rate under PJM's RAA is unlawful and unreasonable inasmuch as the order violates the plain language of the RAA, which must be interpreted under Delaware law (the controlling law under the RAA).

Despite the legal barriers discussed above, the Commission adopted a cost-based ratemaking methodology in part based on its views about the language in Section D.8 of Schedule 8.1 of the RAA. Even if the General Assembly had delegated authority to the Commission to use a cost-based ratemaking method to establish prices for generation capacity service or it was possible (and it is not) for the RAA to be a source of the Commission subject matter jurisdiction, the Commission's July 2nd Order violates the plain meaning of the RAA.

The RAA states the RAA has a region-wide focus and a pro-competitive purpose; the July 2nd Order ignores both. Additionally, to the extent the RAA allows an FRR Entity to request a change in compensation for its load that switches to an alternative LSE such as a CRES provider, the RAA looks to the FRR Entity, its FRR Capacity Plan, the Capacity Resources that make up that plan, and the FRR Service Area to determine an appropriate alternative compensation method. Any alternative compensation method must be just and reasonable and comply with tariff filing and approval requirements established by federal law. And, there is nothing in the RAA that supports the view that the word "cost" as it appears in Section D.8 of Schedule 8.1 of the RAA means "embedded cost" or the type of cost that the Commission may consider for purposes of ratemaking under Chapter 4909, Revised Code.

The RAA states that it is governed by Delaware law. AEP-Ohio has not made any claims related to the meaning of Delaware law and the Commission has thus far failed to consider Delaware law (something that IEU-Ohio has previously suggested).[120]

Based on the rules of construction formed by Delaware law (discussed below), it is patently unreasonable for the Commission to extract the word "cost" from the RAA and transform the word into a meaning that embraces the embedded cost-based ratemaking method that appears to be the foundation of the July 2nd Order.

The United States Supreme Court ("Court"), when confronted with an analogous situation of a competitive supplier required to compensate an incumbent owner of network resources for the use of those resources, addressed the issue of what "cost" should form the basis for the payments by the competitive supplier to the incumbent utility. In *Verizon Communications Inc. v. Federal Communications Commission*,[121] the Court sustained the Federal Communications Commission's ("FCC") application of the word "cost" without reference to or use of "rate-of-return or other rate-based proceeding."[122] The Court found that the FCC's approach to establish compensation for the use of monopoly service, without reference to the actual or historical "cost" of a facility, was both supported by the Telecommunications Act of 1996 and sufficient under the U.S. Constitution.[123] Beginning at page 498 of the decision, the Court stated:

> At the most basic level of common usage, "cost" has no such clear implication. A merchant who is asked about "the cost of providing the goods" he sells may reasonably quote their current wholesale market price, not the cost of the particular items he happens to have on his shelves, which may have been bought at higher or lower prices.

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[120] IEU-Ohio Reply Brief at 11-12 (May 30, 2012).

[121] 535 U.S. 467 (2002) (hereinafter "*Verizon*").

[122] *Verizon* at 498-501.

[123] *Verizon* at 497-501.

> When the reference shifts from common speech into the technical realm, the incumbents still have to attack uphill. To begin with, even when we have dealt with historical costs as a ratesetting basis, the cases have never assumed a sense of "cost" as generous as the incumbents seem to claim. "Cost" as used in calculating the rate base under the traditional cost-of-service method did not stand for all past capital expenditures, but at most for those that were prudent, while prudent investment itself could be denied recovery when unexpected events rendered investment useless, *Duquesne Light Co.* v. *Barasch,* 488 U.S., at 312. And even when investment was wholly includable in the rate base, ratemakers often rejected the utilities' "embedded costs," their own book-value estimates, which typically were geared to maximize the rate base with high statements of past expenditures and working capital, combined with unduly low rates of depreciation. See, *e. g., Hope Natural Gas,* 320 U.S., at 597— 598. It would also be a mistake to forget that "cost" was a term in value-based rate making and has figured in contemporary state and federal ratemaking untethered to historical valuation.[18]

AEP-Ohio's proposed formula-derived "cost" calculation (which the July 2nd Order adopted as a starting point to reach the conclusion that AEP-Ohio's cost of capacity is $188.88/MW-day) is not based upon any of the defined terms in the RAA. The July 2nd Order's reliance on an embedded cost ratemaking methodology is (as discussed previously) precluded by Ohio law and conflicts with the procompetitive purpose of the RAA (as specified in the RAA's Article 2), is incompatible with the controlling provisions of Delaware law, and conflicts with the U.S. Supreme Court's holding about the meaning of the word "cost" in an analogous situation. Thus, to the extent the Commission could establish a cost-based state compensation mechanism for generation capacity service pursuant to Ohio law, the Commission's determination violates the express terms of or is otherwise incompatible with the RAA which the Commission has no authority to modify or ignore and is therefore unlawful and unreasonable.

a. **The administratively-determined "cost-based" rates for AEP-Ohio's certified electric distribution service area contained in the July 2nd Order violate the plain language of Article 2 of the RAA that states the RAA has a region-wide focus and pro-competitive purpose.**

The RAA is an agreement or contract among parties that was approved by FERC with the support of AEP-Ohio and its affiliates. The RAA was initially executed as of June 1, 2007 and the current parties to the RAA are set forth in Schedule 17. The express terms of the RAA make it clear that it is a PJM region-wide mutual assistance agreement.[124] Article 2 of the RAA sets forth the purpose of the RAA and states:

> This Agreement is intended to ensure that adequate Capacity Resources, including planned and Existing Generation Capacity Resources, planned and existing Demand Resources, Energy Efficiency Resources, and ILR will be planned and made available to provide reliable service to loads **within the PJM Region**, to assist other Parties during Emergencies and to coordinate planning of such resources consistent with the Reliability Principles and Standards. **Further, it is the intention and objective of the Parties to implement this Agreement in a manner consistent with the development of a robust competitive marketplace.** ...[125]

PJM has also described the RAA as a mutual assistance agreement:

> The RAA, with its roots in PJM's prior existence as a power pool, is an agreement among load serving entities to share a common capacity obligation across a broad region, and through that sharing to reduce the capacity burden that each would face on its own.[126]

Additionally, the RAA is governed by Delaware law;[127] however, the July 2nd Order failed to address this legal fact. Under Delaware law, when interpreting a

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[124] FES Ex. 110A at 4, 21; Tr. Vol. VI. at 1346-1348.

[125] FES Ex. 110A at 21.

[126] IEU-Ohio Ex. 110 at 9.

[127] AEP-Ohio has not made any claims related to the meaning of Delaware law. In *Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303 at *1, 6 (Del. Ch., March 1, 2007), the Delaware Chancery Court addressed fundamental contract interpretation principles under Delaware law.

> In construing contracts, the function of the Court is to ascertain the shared intentions of the contracting parties when they entered into their agreement. The first level of analysis is deceptively simple: give the words chosen by the parties their ordinary meaning.

contract, the reviewing authority should "attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted."[128] As discussed above the RAA states that it is the expectation of the parties to the RAA "to implement [the RAA] in a manner consistent with the development of a robust competitive marketplace."[129] The authorization of an above-market anti-competitive capacity price is incompatible with the stated objectives regarding the implementation of the RAA.

> Disputes over a contract negotiated by sophisticated parties typically fall into three broad categories. First, the parties did not anticipate and provide for future events. Thus, the contract fails to address (or to address fully) the responsibilities of the parties in a particular factual setting. Second, the parties (or their lawyers) understand that there are drafting imperfections, perhaps because the parties cannot devise a mutually acceptable resolution to certain issues. The parties do not want what (at that time) are viewed as minor impediments to derail the transaction. They hope that the identified risks will not materialize and trust that, if the unlikely events occur, some judge will fill in the gaps in a way that substantially preserves the benefits of the bargain for each side. Finally, there are disputes like the one now pending. The words, when fairly read and given their ordinary meaning, lead to a result that the Court cannot believe is what reasonable parties would have intended. In a sense, one party's argument boils down to a plea of: "We couldn't have been that obtuse (or worse)." The result reached here is, in large part, unpalatable; it is the product, however, of words chosen by sophisticated parties who drafted a complex and comprehensive agreement. More importantly, it is not for some judge to substitute his subjective view of what makes sense for the terms accepted by the parties.
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> When interpreting a contract, the Court's function is to "attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted." The Court does this by initially looking to the contract's express terms. If the terms are clear on their face and reasonably susceptible to only one meaning, then the Court gives those terms the meaning that would be ascribed to them by a reasonable third party. If, however, a contract's language is ambiguous, then the Court will look beyond the "four corners" of the agreement to extrinsic evidence. A contract is not ambiguous merely because the parties disagree as to its proper construction. Instead, ambiguity exists when the terms of a contract are reasonably susceptible to different interpretations or have two or more different meanings. Also, when possible, the Court should attempt to give effect to each term of the agreement and to avoid rendering a provision redundant or illusory. (internal citations omitted).

[128] *Id.*

[129] FES Ex. 110A at 21.

The RAA is a multi-party agreement and any attempt to adjudicate the rights of any party to the agreement may affect the rights of other parties to the agreement.[130] Article 6 of the RAA states:

> Except as otherwise provided herein, this Agreement shall be managed and administered by the Parties, Members, and State Consumer Advocates through the Members Committee and the Markets and Reliability Committee as a Standing Committee thereof, except as delegated to the Office of the Interconnection and except that only the PJM Board shall have the authority to approve and authorize the filing of amendments to this Agreement with the FERC.[131]

Thus, to the extent the Commission had any authority to establish a cost-based price for generation capacity service in accordance with the RAA, the Commission's July 2nd Order missed the mark. While the Commission recognized that RPM-Based Pricing supports competition, it nonetheless authorized AEP-Ohio to collect significantly above-market anti-competitive rates through a deferral mechanism that only looks to the capacity compensation AEP-Ohio obtains when customers are served by a CRES provider. And the Commission limited its focus to AEP-Ohio's certified electric distribution service area without addressing the region-wide focus of the RAA. The Commission also completely ignored Delaware law in interpreting the RAA. For these reasons, the Commission's attempt to establish a cost-based rate for generation capacity service under the RAA is unlawful and unreasonable as the Commission's decision violates the plain meaning and stated objective of the RAA.

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[130] Ohio R. Civ. P. 19.

[131] FES Ex. 110A at 30.

b. **Even if cost-based rates were established pursuant to the RAA, the Commission unlawfully and unreasonably based its determination of "cost" upon the embedded cost of AEP-Ohio's owned and controlled generating assets based on a defective assumption that such generating assets are the source of capacity available to CRES providers serving customers in AEP-Ohio's certified electric distribution service area. The RAA requires that any change to the default pricing, RPM-Based Pricing, must be just and reasonable and looks to the FRR Entity, and the FRR Entity's Service Area and the Capacity Resources in the FRR Entity's Capacity Plan to establish any pricing other than RPM-Based Pricing. Based on the plain meaning of the word "cost", the July 2nd Order's sanctioning of the use of embedded cost to establish generation capacity services is arbitrary and capricious. In addition, the uncontested evidence demonstrates that AEP-Ohio is not an FRR Entity, AEP-Ohio's owned and controlled generating assets are not dedicated to serve Ohio load and also demonstrates that AEP-Ohio's owned and controlled generating assets are not the Capacity Resources in the FRR Entity's Capacity Plan. In such circumstances, the Commission's reliance upon embedded cost data for AEP-Ohio's owned and controlled generating assets to establish the cost incurred to provide generating capacity services to CRES providers is arbitrary and capricious.**

The Commission unreasonably and unlawfully adopted AEP-Ohio's starting point for its "cost-based" ratemaking calculation, which starting point was based upon the "embedded cost" of AEP-Ohio's generating assets (including year-end plant balances). AEP-Ohio claimed that "[t]he plain language of Schedule 8.1, Section D.8 of the RAA establishes AEP-Ohio's right to elect to charge a cost-based rate to CRES providers."[132] The RAA, however, allows an FRR Entity to request deviation from the default RPM-Based Pricing, and the RAA defines the information necessary to deviate from the default compensation methodology. Because the Commission's determination was based upon a flawed starting point, its "cost" calculation violates the plain language of the RAA.

[132] AEP-Ohio Initial Brief at 13 (May 23, 2012).

Schedule 8.1, Section D.8 of the RAA states:

> In a state regulatory jurisdiction that has implemented retail choice, the **FRR Entity** must include in its **FRR Capacity Plan** all load, including expected load growth, in the **FRR Service Area**, notwithstanding the loss of any such load to or among alternative retail **LSEs**. In the case of load reflected in the **FRR Capacity Plan** that switches to an alternative retail **LSE**, where the state regulatory jurisdiction requires switching customers or the **LSE** to compensate the **FRR Entity** for its **FRR capacity obligations**, such state compensation mechanism will prevail. In the absence of a state compensation mechanism, the applicable alternative retail **LSE** shall compensate the **FRR Entity** at the capacity price in the unconstrained portions of the **PJM Region**, as determined in accordance with Attachment DD to the PJM Tariff [RPM-Based Pricing], provided that the **FRR Entity** may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the **FRR Entity's cost** or such other basis shown to be just and reasonable, and a retail **LSE** may at any time exercise its rights under Section 206 of the FPA.[133]

Like most contracts having regulatory significance, the RAA contains a definition section where "Agreement," "Capacity Resources," "Fixed Resource Requirement Alternative or FRR Alternative," "FRR Capacity Plan," "FRR Entity," "FRR Service Area," "IOU," "Load Serving Entity or LSE," "Party," "PJM Region," "Planning Period," "Self-Supply,"[134] "State Regulatory Change" and other terms having significance for purposes of the RAA are defined.

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[133] FES Ex. 110A at 111 (emphasis added).

[134] The RAA definition of Self-Supply incorporates the definition of Self-Supply that appears in Attachment DD (Section 2.65, page 2305) to PJM's FERC-approved tariff (emphasis added):

> "Self-Supply" shall mean Capacity Resources secured by a Load-Serving Entity, **by ownership or contract**, outside a Reliability Pricing Model Auction, and used to meet obligations under this Attachment or the Reliability Assurance Agreement through submission in a Base Residual Auction or an Incremental Auction of a Sell Offer indicating such Market Seller's intent that such Capacity Resource be Self-Supply. **Self-Supply may be either committed regardless of clearing price or submitted as a Sell Offer with a price bid. A Load Serving Entity's Sell Offer with a price bid for an owned or contracted Capacity Resource shall not be deemed "Self-Supply," unless it is designated as Self-Supply and used by the LSE to meet obligations under this Attachment or the Reliability Assurance Agreement.**

FES Ex. 110C at 2305.

Assuming, *arguendo*, that the Commission could make determinations regarding the rights and obligations of parties to the RAA, the plain meaning of the above language makes it applicable, if at all, only to an FRR Entity and then only to the FRR Entity's Capacity Plan.

As the evidence in this proceeding demonstrates, and as admitted by AEP-Ohio, AEP-Ohio is not an FRR Entity. Rather, AEPSC is the FRR Entity as agent for the aggregated load of the combined AEP operating companies (including AEP-Ohio) known as AEP East.[135]

AEP-Ohio also failed to identify or introduce the FRR Capacity Plan to which the above-quoted plain language refers. Section 1.29 of the RAA defines "FRR Capacity Plan" as follows:

> FRR Capacity Plan shall mean a long-term plan for the commitment of Capacity Resources to satisfy the capacity obligations of a Party that has elected the FRR Alternative, as more fully set forth in Schedule 8.1 to this Agreement.[136]

AEP-Ohio further failed to identify the FRR Service Area that must be identified according to the above-quoted language. Section 1.31 of the RAA defines "FRR Service Area" as follows:

> FRR Service Area shall mean (a) the service territory of an IOU as recognized by state law, rule or order; (b) the service area of a Public Power Entity or Electric Cooperative as recognized by franchise or other state law, rule, or order; or (c) a separately identifiable geographic area that is: (i) bounded by wholesale metering, or similar appropriate multi-site aggregate metering, that is visible to, and regularly reported to, the Office of the Interconnection, or that is visible to, and regularly reported to an Electric Distributor and such Electric Distributor agrees to aggregate the load data from such meters for such FRR Service Area and regularly report such aggregated information, by FRR Service Area, to the Office of

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[135] *Id.* at 475-476; *see also* Tr. Vol. II at 436-437; Tr. Vol. XI at 2533-2534.

[136] FES Ex. 110A at 10.

> the Interconnection; and (ii) for which the FRR Entity has or assumes the obligation to provide capacity for all load (including load growth) within such area. In the event that the service obligations of an Electric Cooperative or Public Power Entity are not defined by geographic boundaries but by physical connections to a defined set of customers, the FRR Service Area in such circumstances shall be defined as all customers physically connected to transmission or distribution facilities of such Electric Cooperative or Public Power Entity within an area bounded by appropriate wholesale aggregate metering as described above.[137]

And on this subject, AEP-Ohio's witnesses agreed that PJM does not look to AEP-Ohio for purposes of the FRR election but to AEPSC as agent for the aggregated group of the AEP East operating companies including AEP-Ohio.[138] So whatever the FRR Service Area is, it is clear from the record evidence that the FRR Service Area is not coextensive with AEP-Ohio's certified electric distribution service area. AEP-Ohio also failed to identify the FRR capacity obligation that is referenced in the above-quoted language.

Further, the word cost is not used in conjunction with the "state compensation mechanism" (regardless of whether it is defined as "embedded cost" or defined as "avoided cost," which would be more in keeping with the content of the RAA and other governing PJM documents). Schedule 8.1, Section D.8 (quoted above) does not provide AEP-Ohio with the unilateral right to compensation for capacity that is based on AEP-Ohio's embedded cost. Schedule 8.1, Section D.8 permits an FRR Entity to seek a change in the method of compensation to a method that is based "... on the FRR Entity's cost or such other basis shown to be just and reasonable."[139]

The plain language of the RAA destroys the foundation of AEP-Ohio's claim that "... Schedule 8.1, Section D.8 of the RAA establishes AEP Ohio's right to elect to

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[137] *Id.* at 10-11.

[138] Tr. Vol. XI at 2533-2534.

[139] FES Ex. 110A at 111.

charge a cost-based rate to CRES providers."[140] Since AEP-Ohio did not advance any other legal theory to support its claimed unilateral right to use a so-called embedded cost method to set the CRES capacity price, the Commission's inquiry should have ended with a rejection of AEP-Ohio's claim. Instead, the Commission attempted to take AEP-Ohio's formula derived "cost" calculation and make certain adjustments to the calculation.[141] Assuming the Commission had authority to approve cost-based ratemaking methodology to establish compensation for generation capacity service under the RAA, the Commission's starting point fundamentally missed the mark.

The above-quoted language from the RAA requires specific information to evaluate an FRR Entity's proposal to change the method of compensation for the FRR Entity's capacity obligation. That information was never introduced into the record and therefore the Commission's "cost" determination does not comply with the RAA.

Instead of applying the framework set out by the RAA (as discussed above), AEP-Ohio tied its "cost" calculation to AEP-Ohio witness Dr. Pearce's opinions. He claimed that "because [AEP-Ohio] is self-supplying its own generation resources to satisfy these load obligations, the cost to provide this capacity is the *actual embedded capacity cost* of CSP's and OPCO's generation."[142] But Dr. Pearce made clear at page 5 of his direct testimony that he relied upon AEP-Ohio witnesses Munczinski and Horton for his statement that AEP-Ohio elected to utilize the FRR option as a predicate for his embedded-cost driven formula rate proposal. And the record evidence – including the admissions by AEP-Ohio witnesses Horton and Nelson – shows that: (1) AEP-Ohio did

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[140] AEP-Ohio Initial Brief at 15 (May 23, 2012).

[141] *See July 2nd Order* at 33-35.

[142] *Id.* at 36 (emphasis in original).

not make an FRR election for its certified electric distribution service area;[143] (2) no FRR election is associated uniquely with AEP-Ohio's certified electric distribution service area;[144] and, (3) AEP-Ohio's owned and controlled generating assets are not the source of capacity available to a CRES provider serving retail customers in AEP-Ohio's certified electric distribution service area.[145]

Thus, Dr. Pearce's embedded-cost formula rate math has no relationship to reality even if: (1) AEP-Ohio had demonstrated that a change from RPM-Based Pricing is warranted based on the facts and law; and (2) the Commission has authority to adopt a cost-based pricing method for generation capacity service.

As already discussed, the RAA itself dispels the notion that capacity anywhere in PJM, regardless of FRR or RPM status, is dedicated to specific customers or load. The RAA is a mutual assistance agreement through which Capacity Resources are shared on a region-wide basis within PJM. Schedule 8.1.A dealing with the FRR Alternative makes this clear (emphasis added):

> The Fixed Resource Requirement ("FRR") Alternative provides an alternative means, under the terms and conditions of this Schedule, for an eligible Load-Serving Entity to satisfy its obligation hereunder to commit Unforced Capacity **to ensure reliable service to loads in the PJM Region.**[146]

Schedule 8.1.B.2 of the RAA does permit a party to elect the FRR Alternative for a portion of its load within the PJM Region, but a partial FRR Alternative election triggers specific requirements:

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[143] Tr. Vol. II at 429, 475; Tr. Vol. XI at 2530-2534.

[144] *Id.*

[145] *Id.* at 2530-2531, 2533; *see also* Tr. Vol. XI at 2543-2547.

[146] FES Ex. 110A at 106 (emphasis added).

> A Party eligible under B.1 above may select the FRR Alternative only as to all of its load in the PJM Region; provided however, that a Party may select the FRR Alternative for only part of its load in the PJM Region if (a) the Party elects the FRR Alternative for all load (including all expected load growth) in one or more FRR Service Areas; (b) the Party complies with the rules and procedures of the Office of the Interconnection and all relevant Electric Distributors related to the metering and reporting of load data and settlement of accounts for separate FRR Service Areas; and (c) the Party separately allocates its Capacity Resources to and among FRR Service Areas in accordance with rules specified in the PJM Manuals.[147]

Section 1.67 of the RAA defines PJM Region as follows:

> PJM Region shall have the same meaning as provided in the Operating Agreement.[148]

Section 1.35A of the PJM Operating Agreement[149] defines PJM Region as follows (emphasis added):

> "PJM Region" shall mean **the aggregate of** the MAAC Control Zone, the PJM West Region, and VACAR Control Zone.

AEP-Ohio has not claimed that a partial FRR Alternative election was made, nor has AEP-Ohio offered any evidence showing that the FRR Alternative was uniquely elected for the AEP-Ohio certified electric distribution service area.[150]

The fact that PJM treats Capacity Resources as a PJM Region resource was also acknowledged by several AEP-Ohio witnesses.[151] On a day-to-day basis, the output of all the generating assets of the AEP East operating companies (including AEP-Ohio) are bid into PJM's market by AEPSC with an offer price.[152] On a region-wide basis, PJM

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[147] *Id.* at 107.

[148] *Id.* at 15.

[149] PJM Operating Agreement at 22. The PJM Operating Agreement is available *via* the internet at: http://www.pjm.com/documents/~/media/documents/agreements/oa.ashx (last visited July 31, 2012).

[150] Tr. Vol. II at 476.

[151] *Id.* at 484-485.

[152] Tr. Vol. XI at 2544-2545.

then determines which resources are actually dispatched to serve load in the PJM Region.[153]

On any given day, AEP-Ohio's actual load requirements are not required to be satisfied from AEP-Ohio's owned and controlled generating assets.[154] The operation of AEP-Ohio's "deregulated"[155] generating assets cannot be separated from the operation of the combined generation fleet of the AEP East operating companies.[156] On an after-the-fact basis, allocations are performed to attribute AEP generation output to off-system sales.[157] It is impossible to simulate a dispatch of the AEP-Ohio owned or controlled generating assets without performing a dispatch for the entire AEP system.[158]

Additionally, AEP-Ohio witness Nelson, as well as other AEP-Ohio and intervenor witnesses, testified that the demand response capability of AEP-Ohio's retail customers can be used as Capacity Resources to satisfy the capacity obligation of the FRR Entity in addition to the undisclosed generation assets included in the FRR Capacity Plan.[159] Again, AEP-Ohio did not introduce the FRR Capacity Plan so the specific Capacity Resources relied upon are not known. So, Dr. Pearce's exclusive reliance on embedded costs he attributed to AEP-Ohio's generating plants is not consistent with reality or the definition of Capacity Resources in the RAA. Even if Dr. Pearce would have offered a formula rate proposal that looked to the entire fleet of the AEP East operating companies' generating assets, it would still be out of touch with

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[153] *Id.*

[154] *Id.* at 2546-2547.

[155] *Id.* at 2536-2537.

[156] *Id.* at 2545-2547.

[157] *Id.* at 2547-2550.

[158] *Id.* at 2545-2547.

[159] *See e.g.*, Tr. Vol. XI at 2531.

reality because PJM relies upon Capacity Resources for the entire PJM Region and Capacity Resources includes both demand and supply-side Capacity Resources, not just generating plants.

As already discussed, the RAA calls for an FRR Entity to submit an FRR Capacity Plan. The RAA defines the FRR Capacity Plan as follows:

> FRR Capacity Plan shall mean a long-term plan for the commitment of Capacity Resources to satisfy the capacity obligations of a Party that has elected the FRR Alternative, as more fully set forth in Schedule 8.1 to this Agreement.[160]

If AEP-Ohio was actually engaged in the kind of "Self-Supply" of Capacity Resources as is permitted under the RAA, Schedule 7 of the RAA would apply. Schedule 7 of the RAA states as follows (emphasis added):

SCHEDULE 7

PLANS TO MEET OBLIGATIONS

A. Each Party that elects to meet its estimated obligations for a Delivery Year by Self-Supply of Capacity Resources shall notify the Office of the Interconnection via the Internet site designated by the Office of the Interconnection, prior to the start of the Base Residual Auction for such Delivery Year.

B. A Party that Self-Supplies Capacity Resources to satisfy its obligations for a Delivery Year **must submit a Sell Offer as to such resource in the Base Residual Auction for such Delivery Year, in accordance with Attachment DD to the PJM Tariff.**

C. If, at any time after the close of the Third Incremental Auction for a Delivery Year, including at any time during such Delivery Year, a Capacity Resource that a Party has committed as a Self-Supplied Capacity Resource becomes physically incapable of delivering capacity or reducing load, the Party may submit a replacement Capacity Resource to the Office of the Interconnection. Such replacement Capacity Resource (1) may not be previously committed for such Delivery Year, (2) shall be capable of providing the same quantity of megawatts of capacity or load reduction as the originally committed Capacity Resource, and (3) shall meet the

[160] FES Ex. 110A at 10.

> same locational requirements, if applicable, as the originally committed resource. In accordance with Attachment DD to the PJM Tariff, the Office of the Interconnection shall determine the acceptability of the replacement Capacity Resource.[161]

Accordingly, satisfaction of the Capacity Resource obligation established by the RAA through Self-Supply calls for the submission of a sell offer in the BRA. In other words, the Self-Supply option is only available to LSEs participating in the RPM BRA, and as AEP-Ohio has repeatedly stated, its legal theory relates only to the FRR Alternative. The Self-Supply RPM market option defined in the RAA is mutually exclusive from the Capacity Resources that are designated as part of the FRR Entity's FRR Capacity Plan. AEP-Ohio cannot be an FRR Entity and "Self-Supply" Capacity Resources.

Thus, Dr. Pearce's threshold assumptions – that AEP-Ohio is an FRR Entity and that AEP-Ohio's owned and controlled generating assets are the source of capacity provided to a CRES provider serving retail customers in AEP-Ohio's certified electric distribution service area – are wrong. Because these threshold assumptions are wrong, the mathematical computations embedded in Dr. Pearce's proposed formula rate therefore cannot identify any type of cost of capacity provided to a CRES provider serving retail customers in AEP-Ohio's certified electric distribution service area. Because of the fundamental errors made by Dr. Pearce, the Staff's recommended adjustments that the Commission accepted, in part, are victims of the defects in Dr. Pearce's assumptions and his assumption-driven math. And the Commission's statement at page 33 of the July 2nd Order indicating that no party seriously challenged the Staff's cost-based methodology ignores the serious challenge that IEU-Ohio made

[161] *Id.* at 101 (emphasis added).

and repeats here. After all was said and done during the evidentiary phase of this proceeding, even the Staff urged the Commission to adopt RPM-Based Pricing.

Had AEP-Ohio actually been Self-Supplying Capacity Resources or had it actually been a stand-alone FRR Entity, it would have been a simple matter for AEP-Ohio to have identified the FRR Capacity Plan or the Self-Supply resources that it is relying on to meet the RAA obligations. AEP-Ohio did not do so. Instead, it resorted to false assumptions and then embedded the false assumptions in the math associated with a proposed mathematical formula that pulls garbage in and pushes garbage out.

Despite these fundamental flaws, Staff used AEP-Ohio's "cost" methodology and then made certain adjustments to AEP-Ohio's calculation. These adjustments included changes to: return on equity; rate of return; construction work in progress, plant held for future use; cash working capital; certain prepayments; accumulated deferred income taxes; payroll and benefits for eliminated positions; 2010 severance program cost; capacity equalization revenue; ancillary services revenue; and energy sales margins.[162] Staff's adjustments resulted in a "cost" of capacity of $146.41/MW-day.[163] The Commission accepted some of Staff's adjustments, modified one adjustment, and rejected others.[164] The result of the Commission's modification to Staff's calculation was a computed "cost" of capacity of $188.88/MW-day detached from any determination of such things as a test year, a date certain used and useful rate base valuation, test year expenses, test year revenue at current rates and the total authorized revenue that AEP-Ohio should have an opportunity to collect in the future. Because the Staff's calculation relied upon AEP-Ohio's methodology, and the Commission's

[162] *July 2nd Order* at 25.

[163] *Id.*

[164] *Id.* at 33-35.

adjustments relied upon Staff's calculation, the Staff and the Commission's calculation suffer from the same fundamental flaws discussed above. Neither the methodology nor its application has been connected to an FRR Entity, the relevant FRR Capacity Plan, and the actual Capacity Resources relied upon by the FRR Entity to satisfy its capacity obligation to PJM.

Thus, even if the Commission had authority to permit AEP-Ohio to change from RPM-Based Pricing to a cost-based ratemaking method to determine the compensation for generation capacity service available to CRES providers serving retail customers in AEP-Ohio's certified electric distribution service area, the so-called embedded cost-based methodology used as the starting point for the Commission's determination was based on bankrupt assumptions and numerical inputs that are wrong. For this reason, the Commission's July 2nd Order is unlawful and unreasonable.

10. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission violated Section 4903.09, Revised Code, by failing to properly address all material issues raised by the parties; the Ohio Supreme Court has held that the failure to address all material matters brought to the Commission's attention is a reversible error.

Section 4903.09, Revised Code, requires the Commission to sufficiently detail "the reasons prompting the decisions arrived at."[165] It is reversible error if the Commission "initially failed to explain a material matter," that matter was again brought "to the commission's attention through an application for rehearing ... [and] the commission still failed to explain itself" on rehearing.[166]

IEU-Ohio raised material issues through its testimony and briefs that the Commission failed to address in the July 2nd Order. Specifically, IEU-Ohio presented

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[165] *See also In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶¶ 70-71.

[166] *Id.* at ¶ 71.

the Commission with evidence that any above-market rate for generation capacity service would allow AEP-Ohio to collect transition revenue ("stranded cost") in violation of Ohio law and AEP-Ohio's commitments made in its ETP proceeding.[167] The July 2nd Order recognized that parties had raised this issue, summarizing the stranded cost arguments raised by IEU-Ohio and other intervening parties.[168] However, the order failed to address the issue. This issue is material to the resolution of this case, because if the Commission determines an above-market generation capacity service would provide AEP-Ohio with transition revenue as IEU-Ohio believes the Commission must, Ohio law requires the Commission to reject the proposed above-market charge.

IEU-Ohio also presented unchallenged recommendations to bring much needed transparency to the billing determinant specification and billing process behind generation capacity service, which the Commission failed to address. Additionally, IEU-Ohio contested the cost-based ratemaking proposals because they produced non-comparable and discriminatory results.[169] IEU-Ohio contested the Commission's ability to approve the proposed above-market generation charge because the Commission lacks jurisdiction to use cost-based ratemaking to increase rates for generation service or through the exercise of general supervisory authority. Further, IEU-Ohio contested the use of a cost-based methodology as presented by AEP-Ohio (and illustrated by the Commission's Staff) because the resulting above-market generation capacity service price applicable to CRES providers provides AEP-Ohio an anticompetitive subsidy in violation of Section 4928.02(H), Revised Code. IEU-Ohio also contested the cost-

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[167] IEU-Ohio Ex. 101, *in passim*; IEU-Ohio Ex. 102A at 15-20.

[168] *Id.*

[169] *Id.* at 9, 29-32.

based ratemaking proposal because they conflicted with the plain language of the RAA (as discussed above).[170]

These contested issues – all material issues – are presented herein to the Commission again. The Ohio Revised Code requires the Commission to address these issues and the failure to do so on rehearing is grounds for reversal.

11. The July 2nd Order, which offers AEP-Ohio the opportunity to obtain above-market compensation for generation capacity service through a deferred revenue supplement [computed based upon the difference between RPM-Based Pricing and $188.88/megawatt-day ("MW-day"), including interest charges] is unlawful and unreasonable for the reasons detailed below.

The Commission's July 2nd Order is unlawful and unreasonable inasmuch as the deferral that was created is riddled with legal and factual errors and omissions. Legally, there has not been a finding that a rate in excess of RPM-Based Pricing would promote the pro-competitive State policies contained in Section 4928.02, Revised Code, or that AEP-Ohio is entitled to increase rates based on the ratemaking method set forth in Chapter 4909, Revised Code. Additionally, the Commission does not have authority to authorize the recovery of a generation-related deferral unless the deferral is a result of a phase-in of a lawfully approved rate under Sections 4928.141 to 4928.143, Revised Code.[171] Further, any justification for approving an above-market price for generation capacity service based upon financial harm that might occur to AEP-Ohio is, based on prior Commission rulings, irrelevant.

From an accounting perspective, it is impossible to defer and create a regulatory asset measured by the difference in two revenue streams (in this case, a revenue stream tied to RPM-Based Pricing and a revenue stream tied to a 188.88/MW-day

[170] See Assignment of Error No. 8, *supra*, at 40-42; IEU-Ohio Post-Hearing Brief at 52-55 (May 23, 2012); IEU-Ohio Reply Brief at 18-25 (May 30, 2012).

[171] Section 4928.144, Revised Code.

price); only an incurred expense can be deferred through the creation of a regulatory asset. To the extent a deferral could be created, there is no evidence that a carrying cost on the deferral is appropriate, let alone one established at AEP-Ohio's WACC or embedded (historic) cost of long-term debt. Finally, the July 2nd Order failed to recognize that SSO customers are, according to AEP-Ohio, providing AEP-Ohio with compensation for generation capacity service that is nearly double the $188.88/MW-day charge. In this circumstance, the July 2nd Order is unreasonable and unlawful because it failed to establish a mechanism to credit such excess compensation against any deferred balance the July 2nd Order works to create by comparing RPM-Based Pricing to the $188.88/MW-day price associated with shopping customers.

a. The above-market supplement conflicts with the policies contained in Section 4928.02, Revised Code, which relies upon market forces, customer choice and prices disciplined by market forces to regulate prices for competitive electric services.

Section 4928.02, Revised Code, contains State policies which the Commission is obligated to effectuate pursuant to Section 4928.06, Revised Code. These policies generally support reliance on market-based approaches to set prices for competitive services such as generation service and strongly favor competition to discipline prices of competitive services. In the Stipulation Order, the Commission espoused on the pro-competitive State policies in the context of AEP-Ohio's requested generation resource rider:

> We will first look to the market to build needed capacity. ... [Any cost-based generation facility] must be based upon a demonstration of need under the integrated resource planning process and be narrowly tailored to advance the policy provision contained in Section 4928.02, Revised Code ... .[172]

[172] *Stipulation Order* at 39-40.

In this proceeding, the Commission reaffirmed Section 4928.02, Revised Code, favors market-based approaches to set prices and compensation for competitive services. The Commission rejected imposing the significantly above-market $188.88/MW-day charge on CRES providers. Instead, the Commission held that AEP-Ohio would have to begin, shortly, charging the market-based RPM-Based Pricing so as to "promote retail competition."[173]

The Commission found that "RPM-based capacity pricing will stimulate true competition among suppliers in AEP-Ohio's service territory" and will "incent shopping."[174] The Commission also found that RPM-Based Pricing has "successfully been used throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field."[175] Thus, the Commission found that RPM-Based Pricing promoted State policy and competition in line with Ohio law and policy and the Commission's duty to effectuate that policy.

The July 2nd Order did not find that an above-market capacity charge could comply with Section 4928.02, Revised Code, and the Commission's reasoning implicitly rejects such a finding. Because the above-market deferred revenue supplement contained in the Delayed Recognition Pricing Scheme does not comply with Section 4928.02, Revised Code, the Commission's authorization of this component of the pricing scheme was unlawful and unreasonable.

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[173] *July 2nd Order* at 23.

[174] *Id.*

[175] *Id.*

b. **The Commission is prohibited under Section 4928.05(A), Revised Code, from regulating or otherwise creating a deferral associated with a competitive retail electric service under Section 4905.13, Revised Code. The Commission may only authorize deferred collection of a generation service-related price under Section 4928.144, Revised Code, and any such deferral must be related to a rate established under Sections 4928.141 to 4928.143, Revised Code.**

As part of the July 2nd Order, the Commission held it was authorizing AEP-Ohio to defer for future collection the difference between RPM-Based Pricing and $188.88/MW-day under Section 4905.13, Revised Code.[176] As discussed above, the Commission's ability to regulate competitive retail electric services is generally limited to Sections 4928.141 to 4928.144, Revised Code.[177] As part of that authority, the Commission has authority to authorize a phase-in of generation rates thereby creating a regulatory asset, *i.e.* a deferral, ***only if*** it is the result of a phase-in of an SSO rate. Section 4928.144, Revised Code, states that the Commission:

> may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

Outside of this authority, the Commission is otherwise without authority to authorize an EDU to defer for future collection any generation-related costs.[178] In the July 2nd Order, however, the Commission held that it was not authorizing the generation

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[176] *July 2nd Order* at 23.

[177] Section 4928.05, Revised Code.

[178] *See* Section 4928.05, Revised Code (generally limiting the Commission's jurisdiction to regulate generation service to Section 4928.141 to 4928.144, Revised Code).

capacity service rate as part of an SSO under Sections 4928.141 to Section 4928.143, Revised Code, but rather under its general supervisory jurisdiction contained in Sections 4905.04, 4905.05, and 4905.06, Revised Code.[179] Because the Commission did not (and it could not) authorize the Delayed Recognition Pricing Scheme under Sections 4928.141 to 4928.143, Revised Code, the Commission is without authority to authorize a phase-in, and the resulting deferral.

Additionally, any use of phase-in authority under Section 4928.144, Revised Code, requires the Commission to identify, as part of the phase-in accounting, the "incurred costs" that are deferred for future collection. Neither AEP-Ohio nor the Commission has identified the "incurred cost" that the Commission must specify to lawfully proceed with the phase-in authority in Section 4928.144, Revised Code, even if such authority could be used in the case of generation capacity service rates. Absent the required identification of "incurred costs", there is no means proposed by AEP-Ohio or identified by the Commission to ensure that the deferral is necessary to compensate AEP-Ohio for "incurred costs." This point takes on added significance since the "cost" calculation, which is the foundation for the Delayed Recognition Pricing Scheme, was based on a "formula rate" methodology that bears no relationship to AEP-Ohio's cost to meet its FRR obligation. For these reasons, the July 2nd Order was unlawful and unreasonable.

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[179] *July 2nd Order* at 12-13.

c. **The Commission unlawfully and unreasonably authorized AEP-Ohio to defer the collection of generation capacity service revenue. Under generally accepted accounting principles, only an incurred cost can be deferred for future collection. To the extent that the July 2nd Order implies the Commission's intended use of Section 4928.144, Revised Code, that Section also requires the Commission to identify the incurred cost that is associated with any deferral, a requirement unreasonably and unlawfully neglected by the July 2nd Order.**

The Commission's July 2nd Order was unlawful and unreasonable because the Commission authorized AEP-Ohio to defer the difference between an RPM-Based Pricing rate and a rate set at $188.88/MW-day. Under generally accepted accounting principles, only an expense, *i.e.*, a "cost", can be deferred. Because the issue of a deferral was not created until the Commission issued its July 2nd Order, there is no evidence in the record on this issue. Thus, the Commission must grant rehearing and remove the deferred revenue component of the July 2nd Order.

d. **The Commission unlawfully and unreasonably determined that allowing AEP-Ohio to impose above-market prices for generation capacity service was appropriate to address AEP-Ohio's claims regarding the financial performance of its generation business, the competitive business segment under Ohio law.**

The Commission unreasonably and unlawfully determined that AEP-Ohio could suffer financial harm if it charged RPM-Based Pricing and by establishing compensation for generation capacity service designed to address the financial performance of AEP-Ohio's competitive generation business.[180]

Following each EDU's market development period ("MDP"), which could end no later than December 31, 2005,[181] the generation function of the EDU was "fully on its

[180] *See July 2nd Order* at 23.

[181] Section 4928.40, Revised Code.

own in the competitive market."[182] As AEP-Ohio has argued before, and the Commission has confirmed, AEP-Ohio's earnings do not matter for purposes of establishing generation rates.[183] Thus, the Commission's reliance upon consideration of the financial implications for AEP-Ohio's generation business resulting from maintaining RPM-Based Pricing was unreasonable and unlawful.[184]

If AEP-Ohio, in its operation as an EDU, is facing financial harm, it can avail itself of the Commission's emergency ratemaking authority under Section 4909.16, Revised Code, as applied by the Commission's long standing criteria.[185] Because AEP-Ohio's generation business is on its own in the competitive market by operation of law, the Commission's holding that above-market compensation for generation capacity service is warranted to prevent financial harm to AEP-Ohio's generation business is unlawful and unreasonable.

e. **The Commission unlawfully and unreasonably authorized AEP-Ohio to increase the above-market revenue supplement by adding carrying charges to the deferred supplement without any evidence that carrying charges, or any specific level of carrying charges, are lawful or reasonable. To the extent that the carrying charge allowance is computed based on a weighted average cost of capital ("WACC") method or AEP-Ohio's embedded cost of long-term debt, it is also unreasonable and unlawful because it is excessive, arbitrary, capricious, and contrary to Commission precedent.**

The Commission's July 2nd Order is unlawful and unreasonable because there was no evidence introduced to support any level of carrying charges. Despite the lack

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[182] Section 4928.38, Revised Code.

[183] *RSP Proceeding*, Opinion and Order at 18 (Jan. 26, 2005).

[184] *July 2nd Order* at 23 (*citing* AEP-Ohio Ex. 104 at 3-5, Ex. WAA-1).

[185] *See also In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case Nos. 09-453-HT-AEM, *et al.*, Opinion and Order at 6 (Sept. 2, 2009).

of record support, the Commission held AEP-Ohio could defer the difference in rates with a carrying charge on the deferral based on AEP-Ohio's "weighted average cost of capital [WACC], until such time as a recovery mechanism is approved" in the ESP II proceeding.[186] Thereafter, the Commission held AEP-Ohio could collect carrying charges at its long-term cost of debt.[187] The Ohio Supreme Court has held it is reversible error when the Commission acts without any evidentiary record.[188] Because there was no evidence introduced to support any level of carrying charges the Commission's July 2nd Order adopting the same is unlawful and unreasonable. If the Commission deems it necessary to authorize carrying charges on the deferred revenue supplement, the Commission must grant rehearing and allow for the introduction of additional evidence.

The Commission's unilateral decision to act without evidentiary support by creating a deferral with carrying charges has deprived parties of their due process rights. Accordingly, the July 2nd Order is unlawful and unreasonable.

f. **The July 2nd Order is unlawful and unreasonable because it fails to recognize that the rates and charges applicable to non-shopping customers also are providing AEP-Ohio with compensation for generation capacity service, it ignores or disregards the fact that AEP-Ohio has maintained that non-shopping customers are, on average, paying nearly twice the $188.88/MW-day price, and it fails to establish a mechanism to credit such excess compensation obtained from non-shopping customers against any deferred balance the July 2nd Order works to create by comparing RPM-Based Pricing to the $188.88/MW-day price. The non-symmetrical and arbitrary bias embedded in the July 2nd Order's description of how the deferred revenue supplement shall be computed guarantees that AEP-Ohio shall collect, in the aggregate, total revenue for**

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[186] *July 2nd Order* at 23-24.

[187] *Id.* at 24.

[188] *Tongren v. Pub. Util. Comm.* 85 Ohio St. 3d 87 (1999), quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163 (1996).

generation capacity service substantially in excess of the revenue produced by using the $188.88/MW-day price to determine generating capacity service compensation for shopping and non-shopping customers.

If the Commission proceeds in AEP-Ohio's ESP II proceeding to create the deferral and recovery mechanism for the difference between RPM-Based Pricing and $188.88/MW-day that is vaguely described in the July 2nd Order, the Commission must recognize the fact that AEP-Ohio has maintained that non-shopping customers are, on average, paying nearly twice the $188.88/MW-day price for generation capacity service. According to AEP-Ohio, the current SSO provides AEP-Ohio with compensation for capacity on par with a $355/MW-Day charge.[189] Thus, SSO customers are paying excessive amounts for capacity that are not based upon either market (RPM-Based Pricing) or cost ($188.88/MW-day as determined by the Commission). As further explained in Assignment of Error No. 8 of this application for rehearing, the Commission must grant rehearing and remedy the non-symmetrical and arbitrary treatment between the capacity compensation embedded in the SSO and eliminate the excessive compensation embedded in the SSO or credit the amount of such compensation above $188.88/MW-day against any amount deferred based on the difference between RPM-Based Pricing and $188.88/MW-day.

12. In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the July 2nd Order, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).

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[189] Tr. Vol. III at 635-637.

The totality of the Commission's actions during the course of this proceeding combine to violate IEU-Ohio's due process rights under the Fourteenth Amendment. Throughout this proceeding, the Commission has repeatedly granted applications for rehearing indefinitely tolling them, preventing parties from taking an unobstructed appeal to the Ohio Supreme Court. In fact, AEP-Ohio's application for rehearing challenging the Commission's jurisdiction to set a generation capacity service compensation from CRES providers has been tolled and pending since February 2, 2011.[190] Additionally, the Commission has repeatedly granted AEP-Ohio authority to temporarily impose various forms of its two-tiered and shopping-blocking capacity charges without any record support for the charges. Those charges continue today. Further, and despite finally issuing a decision on the merits, the Commission ignored addressing major issues raised by parties in violation of Section 4903.09, Revised Code. The Commission also violated parties' due process rights by creating an incomplete deferral component of the Delayed Recognition Pricing Scheme without any evidence in the record to support a deferral, and then moving the completion of the deferral component to a separate proceeding where the evidentiary record has already closed. Finally, the Commission violated parties' due process rights by authorizing carrying charges on the deferral component at a WACC rate without record support. The totality of the Commission's actions is a violation of IEU-Ohio's due process rights.

As the Commission is aware, AEP-Ohio and AEPSC on behalf of AEP-Ohio have both challenged the Commission's authority to regulate generation capacity service applicable to CRES providers serving retail customers in AEP-Ohio's certified electric distribution service area. Specifically, on January 7, 2011, AEP-Ohio filed an

[190] Entry on Rehearing at 2 (Feb. 2, 2011).

application for rehearing contesting the December 8, 2010 Entry on several grounds. Among other things, AEP-Ohio asserted that the Commission lacked subject matter jurisdiction to address the level of compensation that may be obtained for generation capacity service provided to a CRES provider and that the Entry "... was issued in a manner that denied AEP Ohio due process and violated statutes within Title 49 of the Revised Code, including Sections 4903.09, 4905.26, and 4909.16, Revised Code."[191] On February 2, 2011, the Commission granted AEP-Ohio's application for rehearing saying (emphasis added):

> The Commission grants AEP-Ohio's application for rehearing. We believe that sufficient reason has been set forth by AEP-Ohio to warrant further consideration of the matters specified in the application for rehearing. **However, the Commission notes that the state compensation mechanism adopted in our December 8, 2010, Finding and Order will remain in effect during the pendency of our review.**[192]

Since granting AEP-Ohio's application for rehearing on February 2, 2011, the Commission has not taken up or addressed the substantive and procedural issues which the Commission found, based on AEP-Ohio's rehearing request, were worthy of further consideration. The Commission has not identified, as required by Section 4903.10, Revised Code, the scope of any additional evidence which will be taken.

Beginning in early January 2011, parties filed comments requested by the Commission in the December 8, 2010 Entry. The written comments highlighted the contested issues that have since churned confusingly in various Commission proceedings and at FERC. In its written comments at page 3, AEP-Ohio acknowledged that: "... the PJM capacity auction price in section 8.1 of the RAA is ... a backstop

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[191] Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 2 (Jan. 7, 2011).

[192] Entry on Rehearing at 2 (Feb. 2, 2011).

mechanism ... if no others exist."[193] Of course, on December 8, 2010, the Commission made it clearer that it had adopted and was adopting RPM-Based Pricing. In any event and in 19 plus months since this proceeding was initiated, the Commission has not responded to the comments it received beginning in early January 2011.

As AEP-Ohio has acknowledged, the RAA specifies that absent a lawful state compensation mechanism, RPM-Based Pricing controls unless and until FERC approves an alternative. Thus, if the Commission was without authority to regulate generation capacity service applicable to CRES providers in AEP-Ohio's certified electric distribution service area, as AEP-Ohio has repeatedly claimed, the RAA obligated AEP-Ohio to apply RPM-Based Pricing unless and until FERC approved otherwise. AEP-Ohio and AEPSC say as much at pages 9 to 12 of the July 20, 2012 Renewed Motion filed with FERC: "any wholesale FRR capacity charges must be approved or accepted by the Commission [FERC] before they may go into effect."[194]

On January 27, 2011, AEP-Ohio filed an application to replace its current ESP (ESP I) with a new ESP (ESP II).[195] Under Ohio law, ESP I remains in effect until the Commission lawfully approves ESP II under Sections 4928.141 and 4928.143, Revised Code, or an MRO under Sections 4928.141 and 4928.142, Revised Code.

On August 11, 2011, more than nine months after this proceeding was initiated, the Commission issued an entry establishing a procedural schedule to conduct an evidentiary hearing.[196] In accordance with the procedural schedule and on August 31,

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[193] Ohio Power Company's and Columbus Southern Power Company's Initial Comments at 3 (Jan. 7, 2011).

[194] *The Section 205 Filing*, Renewed Motion of American Electric Power Service Corporation for Expedited Rulings at 10 (July 20, 2012.

[195] *ESP II*, Application (Jan. 27, 2011).

[196] Among other things, the Attorney Examiner's Entry (Finding No. 6) stated:

2011, AEP-Ohio filed direct testimony of five witnesses. The pre-filed direct testimony of Richard E. Munczinski repeated (at page 3) AEP-Ohio's assertion that FERC, not the Commission, had jurisdiction over generation capacity service applicable to CRES providers. AEP-Ohio's pre-filed testimony did ***not*** contain detailed information on the financial impact of maintaining RPM-Based Pricing. Rather, the AEP-Ohio direct testimony asserted that displacing RPM-Based Pricing with AEP-Ohio's proposed formula rate method of compensation would facilitate generation-related investment.

On September 7, 2011, AEP-Ohio, along with number of other parties, submitted the Stipulation to resolve issues in AEP-Ohio's pending ESP proceeding and several other pending cases, including this proceeding.

On September 8, 2011, a number of parties that had signed the Stipulation filed a joint motion to consolidate ***for purposes of considering the adoption of the Stipulation***. At page 6 of the joint motion's memorandum in support, the movants stated (emphasis added):

> This motion for consolidation for hearing purposes differs from the February 18, 2011 motion filed by the Industrial Energy Users-Ohio in three important ways. First, consolidation here is needed because the Stipulation, as opposed to the respective Applications are broader in its impact on the merger, energy curtailment, capacity charge and fuel deferral. ***Second, the request is only to consolidate the matter for hearing of the Stipulation.*** That is of smaller scope than the motion filed by the Industrial Energy Users-Ohio for consolidation of the cases in their entirety and ***should the Attorney Examiners reject the Stipulation, the cases would return for individual process on their own with no further consolidation***. Finally, the consolidation request here involves

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> Having fully reviewed the comments and reply comments, the attorney examiner now determines that a procedural schedule for hearing should be adopted in order to establish an evidentiary record on a state compensation mechanism. Interested parties should develop an evidentiary record on the appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism.

Entry at 2 (Aug. 11, 2011).

> less cases than the IEU request and is fully warranted as described herein.[197]

On September 14, 2011, IEU-Ohio filed a memorandum in support of the proposed consolidation ***for the purpose of considering the Stipulation***. On September 16, 2011, an Attorney Examiner issued an Entry granting the September 8, 2011 motion to consolidate ***for the purpose of considering the Stipulation*** and staying the procedural schedule in this proceeding. The Attorney Examiner's September 16, 2011 Entry was ***not*** issued or filed in this proceeding.

The Stipulation recommended that the Commission approve prospectively a two-tiered pricing scheme for generation capacity service available to CRES providers as the state compensation mechanism. In other words, the Stipulation recommended that the Commission approve a wholesale capacity compensation mechanism that AEPSC and AEP-Ohio were (and are) claiming the Commission is powerless to approve.

On the afternoon of September 7, 2011, AEP-Ohio hosted a conference call with the investment community to discuss the Stipulation filed with the Commission earlier in the day. During the call, AEP-Ohio acknowledged that the Stipulation was designed to block the ability of retail customers to enjoy the full benefits of the "customer choice" rights provided by Ohio law.[198] Based on AEP-Ohio's own public descriptions of the purpose of the Stipulation's recommended capacity pricing proposal and irrespective of whatever authority the Commission may have to authorize a capacity charge applicable

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[197] Joint Motion to Consolidate at 6 (Sept. 8, 2011).

[198] FES Ex. 102 at Ex. TCB-4:

> What happens is those customers that get the discount as Brian mention are allowed - are priced out at the RPM prices. So the $100, the $16, and I think the $26 going forward. Over those percentages, if you want to shop, you pay the full cost of $255 per megawatt day. So the thought and the theory is that the shopping will be constrained to the discounted RPM price.

to CRES providers, the Commission has known for many months that the generation capacity service charge provision in the Stipulation violated Ohio law and the policy set forth in Section 4928.02, Revised Code.

After hearings on the Stipulation, on December 14, 2011, the Commission issued the Stipulation Order approving the Stipulation with modifications including modifications to expand the availability of RPM-Based Pricing.

Following the Stipulation Order, applications for rehearing were submitted on January 13, 2012 by various parties including IEU-Ohio. Among other things, the applications for rehearing claimed that the Commission had erred in concluding that the package presented by the Stipulation was just and reasonable and in the public interest. By Entry dated February 1, 2012, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing of the Stipulation Order.

On February 23, 2012, the Commission granted, in part, IEU-Ohio's and FES' applications for rehearing, and rejected the Stipulation, ultimately finding, for multiple reasons, that the package contained in the Stipulation was not in the public interest.

> As discussed below, upon review of the applications for rehearing, the Commission has determined that the Stipulation, ***as a package***, does not benefit ratepayers and the public interest and, thus, does not satisfy our three-part test for the consideration of stipulations. Accordingly, the Commission will reject the Stipulation.[199]

The rejection of the Stipulation on rehearing occurred because the Commission eventually agreed that the signatory parties to the Stipulation had not met their burden of demonstrating that the Stipulation, as a package, benefited ratepayers and the public

[199] *Stipulation Rehearing Entry* at 4 (emphasis added).

interest as required by the Commission's three-part test for the consideration of settlements.

Because the Commission's Stipulation Rehearing Entry rejected the proposed ESP contained in the Stipulation and in accordance with the requirements of Section 4928.143(C)(2)(b), Revised Code,[200] the Stipulation Rehearing Entry directed AEP-Ohio to file tariffs to provide SSO pursuant to its previously-authorized ESP:

> Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and ***an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.***[201]

The Stipulation Rehearing Entry also directed the Attorney Examiners assigned to this case to establish a new procedural schedule.

On February 27, 2012 and for the benefit of its sole shareholder, AEP, AEP-Ohio filed a motion seeking to delete RPM-Based Pricing and insert AEP-Ohio's interpretation of the Stipulation's two-tiered charges. In other words, AEP-Ohio extracted the capacity pricing provision from the Stipulation's package and once again asked the Commission to approve a wholesale capacity price applicable to CRES

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[200] Section 4928.143(C)(2)(b), Revised Code, states (emphasis added):

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission ***shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.***

[201] *Stipulation Rehearing Entry* at 12 (emphasis added).

providers while AEP-Ohio was simultaneously asserting that the Commission lacked subject matter jurisdiction to do so.

In its memorandum in support attached to the February 27, 2012 motion, AEP-Ohio alleged that:

(1) "If the Commission implements full RPM pricing pending the outcome in this proceeding, AEP Ohio will suffer immediate and irreparable harm. ... Using the same two-tiered capacity pricing proposed in the Stipulation offers the most stability and represents a reasonable middle ground;"[202]

(2) "As an FRR entity, AEP Ohio reasonably relied upon its expected ability to establish cost-based rates should the RPM-based rates become unjust and unreasonable;"[203] and

(3) "The reasonableness of the interim capacity pricing is demonstrated by comparing it to the pricing that AEP Ohio is advocating and that Dr. Pearce's prefiled testimony supports in Case No. 10-2929-EL-UNC'"[204]

(4) "A ***perfect compromise*** in this situation where a temporary solution is needed until a more permanent decision is made is to 'split the baby' by (i) allowing RPM pricing for customers being served by CRES providers or having provided a switch request as of the February 23 Entry on Rehearing, and (ii) charging $255/MW-Day for all other customers (including additional aggregation load) for customers who shop before the case is decided."[205]

For the first time, AEP-Ohio's February 27, 2012 motion alleged that following the law and restoring RPM-Based Pricing to its rightful position as the Commission had directed would cause financial harm to AEP-Ohio's generation business, the business that is supposed to be on its own in the competitive market.[206]

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[202] AEP-Ohio's Motion for Relief and Request for Expedited Ruling at 4 (Feb. 27, 2012).

[203] *Id.* at 5.

[204] *Id.* at 10.

[205] *Id.* at 15 (citation omitted).

[206] AEP-Ohio's Motion for Relief and Request for Expedited Ruling at 1, 3-5 (Feb. 27, 2012). Also, Section 4928.39, Revised Code, states:

> With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition

While numerous parties (including many that previously supported the Stipulation's package) opposed AEP-Ohio's unlawful and unjust request to bypass RPM-Based Pricing, the Commission granted the requested relief in its March 7, 2012 Entry.[207] At page 15 of the March 7, 2012 Entry, the Commission stated:

> We reject claims that the interim relief is not based upon record evidence. The instant proceeding was consolidated with 11-346 and the cases enumerated in footnote three of this entry for purposes of considering the ESP 2 Stipulation. All of the testimony and exhibits admitted into the record for purposes of considering the ESP 2 Stipulation are part of the record in this proceeding. Our subsequent rejection of the ESP 2 Stipulation did not remove such evidence from the record, and we may, and do, rely upon such evidence in our decision granting interim relief.[208]

The above Commission statement is irreconcilable with the purpose of the consolidation as approved by the Commission on September 16, 2011. That consolidation specifically limited the consolidation to consideration of the Stipulation ***as a package***. Once the Commission rejected the Stipulation, no evidence from the consolidated proceeding was available to the Commission to address contested issues in this proceeding.

Nonetheless, the Commission's approval came before parties had an opportunity to test the merit of AEP-Ohio's claims and the Commission ignored requests that the Commission only grant AEP-Ohio's motion subject to reconciliation and refund.

The Commission imported evidence from other proceedings into this proceeding even though the imported evidence was presented ***only*** to determine if the signatory parties to the Stipulation had met their burden of demonstrating that the Stipulation, as a package, benefited ratepayers and the public interest as required by the Commission's

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revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

[207] *March 7, 2012 Entry* at 17.

[208] *Id.* at 15.

three-part test for the consideration of settlements. Thus, the capacity charge provision the Commission ultimately concluded was contrary to the public interest when presented in the Stipulation, as a package, was extracted from the package submitted in different cases and made available in this proceeding to AEP-Ohio so that AEP-Ohio could continue the shopping-blocking two-tiered capacity charges that became void when the Commission rejected the Stipulation. Nothing effectuating compensation other than RPM-Based Pricing was filed at FERC. As if lawless acts are less lawless when their tenure is limited, the Commission made AEP-Ohio's "shopping tax" temporary and held that it would end on May 31, 2012 with the restoration of RPM-Based Pricing effective June 1, 2012.[209]

In response to the Commission's unlawful and unreasonable flip-flop, various applications for rehearing were filed contesting the March 7, 2012 Entry on procedural and substantive grounds. No application for rehearing was filed by AEP-Ohio (AEP-Ohio did not contest the Commission's determination that RPM-Based Pricing be restored effective June 1, 2012).

On April 11, 2012, some 16 months after this proceeding was initiated, the Commission again granted rehearing for the purpose of giving itself more time to consider the rehearing requests filed in response to the March 7, 2012 Entry. Like the written comments submitted by interested parties beginning in early January 2011 and AEP-Ohio's granted application for rehearing filed on January 7, 2011, the granted applications for rehearing related to the Commission's March 7, 2012 Entry have not been further acted upon by the Commission.

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[209] *March 7, 2012 Entry* at 17.

The evidentiary hearing phase of this proceeding subsequently commenced on April 17, 2012 and concluded on May 15, 2012. At the conclusion of the evidentiary hearing, parties were given a very short amount of time to submit initial and reply briefs addressing many of the same issues that have been before the Commission since the December 8, 2010 Entry. Initial briefs were due and filed on May 23, 2012 (one week after the close of the evidentiary hearing) and reply briefs were due a week later on May 30, 2012.

Based on the evidence that is before the Commission in this proceeding, it is repetitively clear that the allegations in AEP-Ohio's February 27, 2012 motion for relief were and are false. For example, the evidence shows that AEP-Ohio is not an FRR Entity[210] and that there was never any analysis done to identify if the FRR Alternative was the best option for AEP-Ohio.[211]

Unlike when the two-tiered capacity pricing proposal was presented as part of the Stipulation's package of terms and conditions, no other party supports AEP-Ohio's above-market charges. Indeed, all parties except AEP-Ohio urged the Commission to issue a merit-based decision restoring RPM-Based Pricing.

The evidence shows that AEP-Ohio previously committed to not impose any lost generation-related revenue charges on shopping customers as part of a Commission-approved settlement agreement which is final and binding.[212] The July 2nd Order failed

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[210] Tr. Vol. II at 455-476, 436; Tr. Vol. XI at 2533-2534; *see also* IEU-Ohio Post-Hearing Brief at 52-55 (May 23, 2012) and IEU-Ohio Reply Brief at 18-29 (May 30, 2012). FRR Entity is a defined term under the RAA. FES Ex. 110A at 10.

[211] Tr. Vol. II at 493-494.

[212] FES Ex. 106 at 3; *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Opinion and Order at 16 (Sept. 28, 2000); *see also* Tr. Vol. I at 49-56, 146-147; Tr. Vol. V. at 883.

to address this, despite the Commission summarizing the transition revenue/stranded cost arguments raised by various parties including IEU-Ohio.

Additionally, the so-called cost-based methodology advanced by AEP-Ohio witness Dr. Pearce was shown to be fundamentally defective because it relied on the false assumption that the generation assets owned or controlled by AEP-Ohio are the source of capacity available to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area.[213] Likewise, AEP-Ohio's claim (a threshold assumption by Dr. Pearce) that AEP-Ohio's owned and controlled generation assets are dedicated to its Ohio load is, as AEP-Ohio's witnesses agreed, untrue.

On April 30, 2012, while the evidentiary hearings were in progress, and after AEP-Ohio had concluded its case-in-chief, AEP-Ohio filed a motion seeking to undo the "***perfect compromise***" it previously advanced to displace the RPM-Based Pricing method previously adopted by the Commission and required by the RAA. More specifically, AEP-Ohio asked the Commission to: (1) extend the Commission-specified life of its two-tiered charges; and, (2) increase the revenue collected by AEP-Ohio by means of such charges. In other words, AEP-Ohio once again asked the Commission to engage in ratemaking that AEP-Ohio has repeatedly asserted was beyond the Commission's subject matter jurisdiction. AEP-Ohio's motion was essentially an untimely application for rehearing regarding the Commission's March 7, 2012 Entry, which specifically held that the unlawful shopping-blocking two-tiered charges that AEP-Ohio proposed in its February 27, 2012 motion for interim relief would end on May 31, 2012.

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[213] Tr. Vol. II at 429; Tr. Vol. XI at 2530-2534.

AEP-Ohio's April 30, 2012 motion was strongly opposed by numerous parties who have actively participated in this proceeding..

Without citing evidence or addressing dispositive motions or the pending applications for rehearing that had previously been granted by the Commission, the Commission granted AEP-Ohio's April 30, 2012 motion to extend the life of its two-tiered charges and increase the revenue collected by AEP-Ohio by means of such charges. By this action on the day reply briefs were filed, the Commission flip-flopped again for the benefit of AEP-Ohio and modified the March 7, 2012 Entry.[214] Again, nothing was filed at FERC to effectuate the new and higher-priced version of the shopping-blocking two-tiered capacity compensation mechanism.

The Commission's action on May 30, 2012, coming more than 17 months after this proceeding was initiated, extended the life of the two-tiered charges and increased the revenue that AEP-Ohio collects through those charges. In doing so, the Commission set AEP-Ohio free to collect more revenue than permitted under the "***perfect compromise***" that AEP-Ohio identified in the February 27, 2012 motion seeking interim relief. Again disregarding the requests by parties, the Commission's May 30, 2012 Entry made no provision for reconciliation and refund.

When this proceeding began in late 2010, RPM-Based Pricing controlled for all shopping in AEP-Ohio's service area either as a result of the Commission's adoption of a state compensation mechanism or as a result of the RAA which requires RPM-Based Pricing when there is no state compensation mechanism. RPM-Based Pricing was the *status quo.*

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[214] *May 30, 2012 Entry* at 7-8.

Yet, beginning with bills rendered in January 2012, AEP-Ohio has not used RPM-Based Pricing to set all capacity prices for CRES providers. Instead and over persistent objections, the Commission has permitted AEP-Ohio to implement its anticompetitive two-tiered charges through a Commission-approved-then-rejected Stipulation. When the Stipulation fell under its own weight, the Commission then allowed AEP-Ohio to ignore the required restoration of RPM-Based Pricing without making any provision for reconciliation and refund. Just as the Commission-ordered restoration of RPM-Based Pricing was about to occur on June 1, 2012, the Commission intervened again to allow AEP-Ohio to continue to stiff-arm the market discipline of RPM-Based Pricing and, adding insult to injury, give AEP-Ohio the opportunity to increase its capacity-related revenue.[215]

On June 19, 2012, IEU-Ohio filed an application for rehearing from the Commission's May 30, 2012 Entry, again repeating the claims the Commission has continued to dodge: its jurisdictional authority, stranded cost recovery, and comparability, among others. Other parties also filed applications for rehearing focused on the May 30, 2012 Entry. On July 11, 2012, the Commission granted the applications for rehearing filed by IEU-Ohio, the OMA and FES. These granted applications for rehearing, like many others that came before them, have not been further addressed by the Commission.

On July 2, 2012, the Commission issued a decision in this case; however, the Commission again ignored the law and the facts and the opposing arguments raised continuously by the parties. Despite the limitations placed upon the Commission by the General Assembly, the Commission found that it could use its cost-based ratemaking

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[215] *Id.*

authority to regulate a competitive service. And in using its cost-based ratemaking authority, the Commission entirely failed to comply with the statutorily imposed requirements for running the cost-based ratemaking methodology that is specified in Ohio law. Instead, the Commission applied the "principles" of its cost-based ratemaking while asserting general supervisory jurisdiction. The Ohio Supreme Court has held, however, that the Commission cannot use general supervisory authority to evade the specific ratemaking methods contained in the Ohio Revised Code.[216]

Despite the Commission's previous holding that the financial consequences of prices authorized by the Commission for competitive services are irrelevant, the Commission's July 2nd Order adopting the $188.88/MW-day price nonetheless attempts to justify this result based on the effects of generating capacity service compensation on the financial performance of AEP-Ohio's competitive generation business.[217]

Further, and despite IEU-Ohio's and other parties' repeated protests, the Commission did not discuss whether or not the Delayed Recognition Pricing Scheme would unlawfully allow AEP-Ohio to collect transition revenue, whether or not the scheme would result in comparable rates, or whether the scheme would unlawfully subsidize AEP-Ohio's generation business. These issues were not new or novel (not that that would somehow excuse the Commission from addressing the issues). IEU-Ohio has continuously brought these issues before the Commission.[218]

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[216] *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835, 840 (1993); *see also* IEU-Ohio Initial Brief at 40-41 (May 23, 2012).

[217] *July 2nd Order* at 23.

[218] IEU-Ohio Reply Brief at 5-7 (Nov. 18, 2011); Application for Rehearing and Memorandum in Support of IEU-Ohio at 36-39 (Jan. 13, 2012); IEU-Ohio Memorandum Contra Ohio Power Company's February 27, 2012 Motion for Relief and Request for Expedited Ruling at 15-16 (March 2, 2012); IEU-Ohio Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 18-20 (March 27, 2012); IEU-Ohio Post-Hearing Brief at 16-25, 47-50 (May 23, 2012); IEU-Ohio Reply Brief at 6 (May 30, 2012); IEU-Ohio Application for Rehearing of the May 30, 2012 Entry and Memorandum in Support at 12 (June 19, 2012).

In the July 2nd Order, the Commission also extended the May 30, 2012 version of AEP-Ohio's two-tiered capacity charges. The Commission held the two-tiered charges could continue until the earlier of a Commission decision in AEP-Ohio's pending ESP proceeding or August 8, 2012. The Commission made this determination even though it held RPM-Based Pricing was necessary to promote the State policy contained in Section 4928.02, Revised Code, and despite the Commission finding AEP-Ohio's "cost" was $188.88/MW-day. Following its order, there is absolutely no basis for an "interim" pricing scheme, as it is neither cost-based nor market-based, nor does it support State policy. Finally, the Commission stated that it would address the above-market deferral portion of the Delayed Recognition Pricing Scheme in AEP-Ohio's ESP II proceeding (although the record in that case had already closed).

When parties injured by the Commission's stunning indulgence of AEP-Ohio's illegal demands have objected, the Commission has turned a deaf ear and not addressed the merits of the objections. Instead, the Commission has repeatedly maneuvered the can down the road while granting rehearing to give itself and AEP-Ohio more time to operate outside the law. The effect of the Commission grants of rehearing is to block the ability of the injured parties to pursue an unobstructed appeal to the Ohio Supreme Court.

When the Commission has engaged in ratemaking based on evidence not in the record or failed to allow parties to refute evidence, the United States Supreme Court has held that the Commission violated the due process rights of parties: "[t]his is not the fair hearing essential to due process. It is condemnation without trial."[219] The United States Supreme Court has also held that regulation by a public utilities

[219] *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937).

commission in accordance with the jurisdiction's applicable law "meets the requirements both of substantive and procedural due process ***when it is not arbitrarily and capriciously exercised.***"[220]

Similarly, the Ohio Supreme Court has held due process in a Commission proceeding occurs ***when*** parties are given: (1) "ample notice;" (2) "permitted to present evidence through the calling of its own witnesses;" (3) permitted to "cross-examin[e] the other parties' witnesses;" (4) introduce exhibits; (5) "argue its position through the filing of posthearing briefs;" and (6) "challenge the PUCO's findings through an application for rehearing."[221] Further, the Ohio Supreme Court has held that the Commission must, in order to comply with the law, provide "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion."[222]

> The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom. Its decision must be based on a record containing "sufficient probative evidence to show that the commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty."[223]

The Commission abuses its discretion if it renders an opinion without record support.[224] Ruling on an issue without record support is an abuse of discretion and reversible error.[225]

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[220] *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 465 (1952) (emphasis added).

[221] *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599; 2006-Ohio-1386 at ¶ 53.

[222] *Tongren v. Pub. Util. Comm.* 85 Ohio St.3d 87, 89 (1999).

[223] *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 406 (1991) *dissenting opinion of Justice Herbert Brown* (*quoting Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 104).

[224] *Tongren v. Pub. Util. Comm.* 85 Ohio St. 3d 87 (1999), quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163 (1996).

The capacity service available to CRES providers is undisputedly a generation service. This service is undisputedly a wholesale service. Yet, the Commission has indulged AEP-Ohio's claim that it is entitled to use cost-based ratemaking to establish compensation for a competitive service even while AEP-Ohio has been simultaneously claiming the Commission lacks subject matter jurisdiction to address the question of capacity compensation.

This proceeding is not an ESP or MRO proceeding and it is not a traditional rate case proceeding.

The Ohio Supreme Court has held on several occasions that the generation component of retail electric service is not subject to Commission regulation:

> It is well settled that the generation component of electric service is not subject to commission regulation. In *Constellation NewEnergy, Inc.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 2, we stated that S.B. 3 'provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service.' R.C. 4928.03 specifies that retail electric-generation service is competitive and therefore not subject to commission regulation, and R.C. 4928.05 expressly removes competitive retail electric services from commission regulation.[226]

The Ohio Supreme Court has held that concerns about the future do not empower the Commission to create remedies beyond those permitted by the law.[227]

When the Commission issues a lawful order, it must provide acceptable justification and follow the required statutory process before the Commission can modify such order.[228]

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[225] *See, e.g., Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 30.

[226] *Id.* at ¶ 20.

[227] *Id.*

[228] *See Cleveland Elec. Illum. Co. v Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975).

The law and evidence did not permit the Commission to approve the Stipulation and the Commission eventually relented. Once the Stipulation was rejected, the Commission was obligated to restore RPM-Based Pricing. This is a duty placed on the Commission (not AEP-Ohio) by Section 4928.143, Revised Code, as the Commission held in its Stipulation Rehearing Entry rejecting the Stipulation. The record shows that the Commission did not comply with its obligation to restore RPM-Based Pricing.

Soon after the Stipulation was rejected, AEP-Ohio inspired the Commission to embrace a stand-alone version of the shopping-blocking, two-tiered capacity charges that had been previously considered and addressed only as part of the Stipulation's larger package. No evidence had been taken in this proceeding when the Commission granted the temporary and illegal relief requested by AEP-Ohio. The Commission also ignored requests to set up a refund and reconciliation mechanism. The Commission held that its lawless fling with the stand-alone version of the two-tiered charges would end on May 31, 2012 and that RPM-Based Pricing would be restored on June 1, 2012. Rehearing applications were filed by parties other than AEP-Ohio and the Commission granted rehearing thereby delaying its accountability for addressing the merits of the granted rehearing applications.

A day before the lawless fling with the stand-alone version of the shopping-blocking, two-tiered charges was scheduled to end by the force of the Commission's prior holding, the Commission extended the fling and authorized AEP-Ohio to move even further away from RPM-Based Pricing. The Commission also permitted AEP-Ohio to increase generation-related rates for shopping customers and elevate the hurdle that non-shopping customers must clear to reduce their electric bills by shopping. Again, in the July 2nd Order, the Commission authorized a continuation of the May 30, 2012

version of the two-tiered capacity charges that have no basis in this record, or in the Commission's order.

The Commission's conduct throughout this proceeding has subjected parties objecting to AEP-Ohio's demands to condemnation without trial. Throughout this proceeding, the Commission has taken it upon itself to rewrite the law and claim authority it does not have. Repeatedly, the Commission has acceded to AEP-Ohio's demands, granting rehearing and then doing nothing to put things right. The Commission has repeatedly refused to make its AEP-Ohio friendly decisions subject to reconciliation and refund so as to protect the interests of parties injured by the Commission's AEP-Ohio-inspired rush to judgment. The totality of the Commission's conduct throughout this proceeding is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U.S. 168) long known to our law". "The Fourteenth Amendment condemns such methods and defeats them."[229]

13. The July 2nd Order is unlawful and unreasonable inasmuch as the Commission failed to direct AEP-Ohio to refund the above-market portion of capacity charges in place since January 2012 or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.

For the reasons expressed above, the Commission must immediately grant rehearing and permanently restore RPM-Based Pricing, eliminating the deferral component of the Delayed Recognition Pricing Scheme. Because the Commission was obligated to restore RPM-Based Pricing upon rejection of the Stipulation ESP, the Commission must require AEP-Ohio to refund all revenue collected above RPM-Based Pricing. If the Commission is unwilling to require AEP-Ohio to refund the compensation

[229] *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).

billed and collected in excess of RPM-Based Pricing, it should direct AEP-Ohio to apply such excess as a credit to regulatory asset balances otherwise eligible for amortization through retail rates in order to provide consumers with some "rough justice" for the Commission's violation of its statutory duty.

III. CONCLUSION

As discussed herein, the July 2nd Order creating the Deferred Recognition Pricing Scheme is unlawful and unreasonable. As a matter of State law, and because it is the default option under the RAA, the Commission must fully restore RPM-Based Pricing as the exclusive means by which AEP-Ohio may obtain compensation for generation capacity service available to CRES providers serving retail customers in AEP-Ohio's certified electric distribution service area.

The purpose of economic regulation is to simulate the forces of a competitive market.[230] The regulatory structure in Ohio is designed to let competition do directly what prior forms of economic regulation did poorly or not at all. Instead of serving the fundamental purposes of economic regulation and following the law, the Commission has acted to provide AEP-Ohio with above-market compensation and impose Ohio's monopoly rent on consumers.

This is not right. It is not lawful. Enough is enough.

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[230] Principles of Utility Corporate Finance, Leonardo R. Giacchino, Ph.D. & Jonathan A. Lesser, Ph.D., Public Utility Report, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support* was served upon the following parties of record this 1st day of August 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE MAY 30, 2012 ENTRY AND MEMORANDUM IN SUPPORT

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1. As identified in IEU-Ohio's March 27, 2012 Application for Rehearing, IEU-Ohio's May 23, 2012 Initial Brief, and IEU-Ohio's May 30, 2012 Reply Brief, the Commission failed to comply with the law by not returning customers to the rates under AEP-Ohio's prior ESP; the Commission is without jurisdiction to approve the Pricing Scheme; AEP-Ohio failed to meet its applicable burden of proof; the Pricing Scheme is discriminatory and is not comparable; the Pricing Scheme allows AEP-Ohio to collect transition revenue in violation of the law; the Pricing Scheme is not supported by the evidence; and the Commission authorized AEP-Ohio to extend the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing Scheme in response to an untimely application for rehearing. 10

2. In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission,* 294 U.S. 63 (1935). 12

3. The Commission must restore the customer protections that have been ignored and eroded through the unlawful and unreasonable Pricing Scheme and, to this end, must direct AEP-Ohio to refund the above-market portion of the Pricing Scheme or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges 37

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE MAY 30, 2012 ENTRY

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Entry issued by the Public Utilities Commission of Ohio ("Commission") on May 30, 2012 authorizing Ohio Power Company ("OP") (now merged with Columbus Southern Power Company or "CSP" as "AEP-Ohio") to continue and increase its two-tiered generation capacity service pricing scheme ("Pricing Scheme") until July 2, 2012 ("May 30, 2012 Entry"). The Commission's May 30, 2012 Entry is unlawful and unreasonable in the following respects:

1. **As identified in IEU-Ohio's March 27, 2012 Application for Rehearing, IEU-Ohio's May 23, 2012 Initial Brief, and IEU-Ohio's May 30, 2012 Reply Brief, the Commission failed to comply with the law by not returning customers to the rates under AEP-Ohio's prior electric security plan ("ESP"); the Commission is without jurisdiction to approve the Pricing Scheme; AEP-Ohio failed to meet its applicable burden of proof; the Pricing Scheme is discriminatory and is not comparable; the Pricing Scheme allows AEP-Ohio to collect transition revenue in violation of the law; the Pricing Scheme is not supported by the evidence; and the Commission authorized AEP-Ohio to extend the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing Scheme in response to an untimely application for rehearing.**

2. **In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).**

3. **The Commission must restore the customer protections that have been ignored and eroded through the unlawful and unreasonable Pricing Scheme and, to this end, must direct AEP-Ohio to refund the above-market portion of the Pricing Scheme or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.**

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing; forthwith terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the Pricing Scheme; and, "issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer..."[1]

[1] Section 4928.143(C)(2)(b), Revised Code.

which, in this case, includes the establishment of generation service capacity prices by means of RPM-Based Pricing.[2]

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[2] The wholesale generation capacity service pricing method that is the default method under PJM Interconnection, L.L.C.'s ("PJM") Reliability Pricing Model ("RPM") is referred to as "RPM-Based Pricing".

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)))	Case No. 10-2929-EL-UNC

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's May 30, 2012 Entry permitted AEP-Ohio to extend the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing Scheme. This Pricing Scheme illegally displaced RPM-Based Pricing, the capacity pricing mechanism in place since 2007. The Pricing Scheme was designed by AEP-Ohio to illegally abridge the ability of customers to reduce their electric bills by obtaining generation supply service from a Competitive Retail Electric Service ("CRES") provider.[3] As with prior actions by the Commission in this proceeding, the May 30, 2012 Entry is unlawful and unreasonable for several fundamental reasons that have been previously identified by IEU-Ohio in its prior Application for Rehearing, Initial Brief and Reply Brief which are incorporated herein by reference.

Among other things, the Commission's authorization of the extension of the anticompetitive, discriminatory and non-comparable Pricing Scheme and an increase in the revenue collected by AEP-Ohio by means of such Pricing Scheme exceeded the

[3] FES Ex. 102 at Ex. TCB-4.

Commission's statutory authority which is confined to retail ratemaking and is differentiated based on whether the service is a competitive or non-competitive service.

Even if the Commission had authority to establish a compensation mechanism for the provision of generation capacity service to a CRES provider (a wholesale rather than a retail transaction), the Pricing Scheme which was extended and expanded in the May 30, 2012 Entry violates state law because it results in unduly discriminatory and non-comparable rates and the collection of illegal transition costs.

Assuming that the Commission has subject matter jurisdiction over the establishment of a compensation mechanism for the provision of generation capacity service to a CRES provider, the Commission's May 30, 2012 Entry authorized an increase in the level of such compensation without a proper record and in violation of the statutory requirements that must be satisfied before the Commission may lawfully authorize an increase or change in compensation for utility service.

The Commission initiated this proceeding on December 7, 2010. In the course of this proceeding, the Commission has issued orders and entries that increase rates and charges paid by shopping customers and has allowed AEP-Ohio to erect economic barriers to "customer choice," all in contravention of the Commission's affirmative obligations to encourage and advance the policy set forth in Section 4928.02, Revised Code.

Because the Commission's May 30, 2012 Entry is unlawful and unreasonable, the Commission should grant rehearing, immediately terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the Pricing Scheme and "issue such order as is necessary to continue the provisions, terms, and conditions of

the utility's most recent standard service offer..."[4] which, in this case, includes the establishment of generation service capacity prices by means of RPM-Based Pricing. By granting rehearing and providing the relief requested herein, the Commission will return customers to the *status quo* required when the Commission rejected the Stipulation and Recommendation ("Stipulation")[5] on February 23, 2012.

II. BACKGROUND

Beginning in June of 2007, OP and CSP (now merged as "AEP-Ohio") began using RPM-Based Pricing as authorized by the Federal Energy Regulatory Commission ("FERC").[6] AEP-Ohio used RPM-Based Pricing to secure "just and reasonable" compensation for all generation capacity service available from AEP-Ohio for CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area. The applicability of RPM-Based Pricing to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area is dictated as the default pricing method under PJM's controlling Reliability Assurance Agreement ("RAA"). This view of the role of the RAA and RPM-Based Pricing is not contested.

AEP-Ohio has also continuously supported the use of RPM-Based Pricing for ratemaking purposes in Ohio. Indeed, AEP-Ohio relied upon RPM-Based Pricing to develop the capacity component of the competitive benchmark prices that AEP-Ohio used to compare the results under Section 4928.142, Revised Code (the market rate offer or "MRO" option), and Section 4928.143, Revised Code (the electric security plan

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[4] Section 4928.143(C)(2)(b), Revised Code.

[5] Stipulation and Recommendation (Sept. 7, 2011) (hereinafter "*Stipulation*").

[6] Tr. Vol. II at 401.

or "ESP" option), in the ESP proceeding that produced the standard service offer ("SSO") that is presently in effect.[7]

The RPM-Based Pricing capacity compensation method remained in effect until the Commission approved, over objections, the ESP recommended by the Stipulation.[8] RPM-Based Pricing or competitive bid-based pricing also controls for purposes of establishing compensation available to electric distribution utilities ("EDU") in other areas of Ohio, including areas where AEP-Ohio's affiliated CRES provider is actively seeking and presently serving retail customers.[9]

On November 1, 2010, American Electric Power Service Corporation ("AEPSC"), acting in the agent role it frequently plays within American Electric Power Company ("AEP", AEP-Ohio's parent), filed an application with FERC in Docket No. ER11-1995-000.[10] The application claimed that there was no state compensation mechanism in place and was filed under Section 205 of the Federal Power Act ("FPA"). The application requested that FERC approve certain formula rates as the basis for capacity charges that AEP-Ohio would uniquely levy upon CRES providers serving retail customers in AEP-Ohio's certified electric distribution service area. This formula

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[7] IEU-Ohio Ex. 103 at 11, 13-14.

[8] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 54-55 (Dec. 14, 2011) (hereinafter "*Stipulation Order*").

[9] IEU-Ohio Ex. 102A at 23-24. Although FirstEnergy Corporation's ("FirstEnergy") EDUs (The Cleveland Electric Illuminating Company, the Ohio Edison Company, and The Toledo Edison Company) are not compensated for capacity at RPM-Based Pricing, the FirstEnergy EDUs conducted an auction to procure capacity until it could sync up with PJM's base residual action ("BRA"). *Id.* at 22-23. The price that resulted from these auctions was very close to the capacity prices that resulted from PJM's BRA for the same delivery years. *Id.* at 23.

[10] As a result of a deficient filing and a related directive from FERC, AEPSC refiled its application in FERC Docket No. ER11-2183 on November 24, 2010. See *American Electric Power Service Corporation*, FERC Docket No. ER11-2183, Application (Nov. 24, 2010) (hereinafter "*the Section 205 Filing*").

rate approach would have significantly increased capacity charges to CRES providers – on the order of 49% to 98% as compared to RPM-Based Prices that were in effect at the time.

On December 10, 2010, the Commission filed comments in FERC Docket No. ER11-2183-000 dealing with AEPSC's Section 205 application. In the comments, the Commission stated:

> On December 8, 2010, the Ohio Commission issued an entry (attached) in Case No. 10-2929-EL-UNC inviting comments from interested persons concerning the AEP Ohio Companies' capacity charges to Ohio's CRES providers. The Ohio Commission's entry notes that currently the PUCO-approved rates for the AEP Ohio Companies include recovery of capacity costs through provider-of-last-resort charges to certain retail shopping customers. These rates are based on the continuation of the current FRR mechanism and the continued use of PJM's reliability pricing model's three-year auction results. The AEP Ohio Companies' filing for formula rates could impact this current mechanism. Consequently, the Ohio Commission's investigation invites comments from interested persons concerning the following issues: (1) what changes to the current Ohio Commission mechanism are appropriate to determine the AEP Ohio Companies' Fixed Resource Requirement (FRR) capacity charges to the State of Ohio's CRES providers; (2) the degree to which the AEP Ohio Companies' capacity charges are currently being recovered through retail rates approved by the Ohio Commission or other capacity charges; and (3) the impact the AEP Ohio Companies' capacity charges will have on CRES providers and retail competition in the State of Ohio. **Although the state compensation mechanism has implicitly been in place since the inception of AEP-Ohio's current Standard Service Offer, the Ohio Commission expressly adopted as its state compensation mechanism the AEP Ohio Companies' charges established by the reliability pricing model's three-year capacity auction conducted by PJM. Currently, the 2010/2011 clearing price is equal to $174.29 per MW-day.**
>
> Consistent with Section D.8 of Schedule 8.1 of the RAA, which dictates that state imposed compensation mechanisms prevail in those instances where the state jurisdiction requires the load serving entity (LSE) (or switching customers) to compensate the FRR entity, the Ohio Commission maintains that there is no current need for FERC to advance its proceeding regarding this matter because the Ohio Commission has a rate for capacity charges to CRES providers. Consequently, the Ohio

> Commission respectfully requests that FERC dismiss the application and close this investigation, or, in the alternative, suspend its final decision in this proceeding until the Ohio Commission has concluded its state proceeding. If FERC elects to hold the case in abeyance, the Ohio Commission will inform FERC, in the above-captioned proceeding, as to the outcome of its investigation.[11]

On January 20, 2011, FERC issued an order interpreting Section D.8. of the RAA to find that an FRR Entity's Section 205 rights to request an alternative FRR capacity charge apply only in the absence of a "state compensation mechanism." Because of the Commission's December 8, 2010 Entry in this proceeding, FERC rejected AEPSC's request to adopt a rate formula for calculating its capacity charge.

On February 22, 2011, AEP requested rehearing of FERC's January 20, 2011 Order in Docket No. ER11-2183-001. AEP's request for rehearing is still pending before the Commission.[12]

In response to AEPSC's application the Commission initiated this docket "in order to determine the impact of the proposed change to AEP-Ohio's capacity charges" and sought comments on:

> (1) what changes to the current state mechanism are appropriate to determine the Companies' FRR capacity charges to Ohio competitive retail electric service (CRES) providers; (2) the degree to which AEP-Ohio's capacity charges are currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charges upon CRES providers and retail competition in Ohio.[13]

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[11] *American Electric Power Service Corporation*, FERC Docket No. ER11-2183, Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 2 of 5 thru 4 of 5 (Dec. 10, 2010) (internal citations omitted) (emphasis added).

[12] *American Electric Power Service Corporation*, FERC Docket No. ER11-2183, Request for Rehearing of American Electric Power Service Corporation (Feb. 22, 2011).

[13] Entry at 2 (Dec. 8, 2010).

The Commission also granted AEP-Ohio's request to take evidence in addition to comments and stated it would hold an evidentiary hearing to receive additional evidence beyond the comments.[14] The evidentiary hearing is now over and the record evidence demonstrates that AEP-Ohio's proposed formula rate capacity pricing proposal has no basis in law or fact. There is no legal basis for the Commission to set any capacity charge to assess against CRES providers of shopping customers and there is no factual basis to approve anything but RPM-Based Pricing if the Commission did have jurisdiction. The Commission must grant rehearing and put an end to the unlawful Pricing Scheme, restore RPM-Based Pricing, and refund to or credit to the benefit of retail customers all amounts charged above RPM-Based Pricing.

III. ARGUMENT

1. As identified in IEU-Ohio's March 27, 2012 Application for Rehearing, IEU-Ohio's May 23, 2012 Initial Brief, and IEU-Ohio's May 30, 2012 Reply Brief, the Commission failed to comply with the law by not returning customers to the rates under AEP-Ohio's prior ESP; the Commission is without jurisdiction to approve the Pricing Scheme; AEP-Ohio failed to meet its applicable burden of proof; the Pricing Scheme is discriminatory and is not comparable; the Pricing Scheme allows AEP-Ohio to collect transition revenue in violation of the law; the Pricing Scheme is not supported by the evidence; and the Commission authorized AEP-Ohio to extend the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing Scheme in response to an untimely application for rehearing.

Without rehashing all of IEU-Ohio's arguments made in IEU-Ohio's March 27, 2012 Application for Rehearing, May 23, 2012 Initial Brief, and May 30, 2012 Reply Brief filed in this proceeding, IEU-Ohio hereby incorporates them by reference. As the Commission itself recognized, at least temporarily, once it rejected the Stipulation it was

[14] Entry at 2 (Jan. 21, 2011); Entry on Rehearing at 13 (Feb. 23, 2012).

bound by Section 4928.143(C)(2)(b), Revised Code, to issue such orders as necessary to return customers to the rates charged under AEP-Ohio's previous ESP. The Commission has failed to return customers and CRES providers to RPM-Based Pricing that the Commission and AEP-Ohio have both acknowledged[15] controlled and should continue to control during AEP-Ohio's current ESP (commonly referred to as "*ESP I*").[16]

Also, as IEU-Ohio has previously demonstrated,[17] and AEP-Ohio has also argued,[18] the Commission is without jurisdiction in this proceeding to approve either AEP-Ohio's proposed formula rate proposal or the Pricing Scheme. Because the Commission is without jurisdiction to change the price at which CRES providers compensate AEP-Ohio for capacity, the Commission must reject the Pricing Scheme.

Additionally, even if the Commission had jurisdiction to modify the rate at which CRES providers compensate AEP-Ohio for capacity, AEP-Ohio has failed to meet its burden of proof demonstrating that RPM-Based Pricing is unreasonable and that the Pricing Scheme is just and reasonable.[19] AEP-Ohio must show that RPM-Based Pricing is unreasonable before it can replace RPM-Based Pricing with another method of compensation. Further, the capacity rates under the Pricing Scheme are not

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[15] *March 7, 2012 Entry* at 16; Entry at 2 (Dec. 8, 2010); *American Electric Power Service Corporation*, Docket No. ER11-2183-001, Motion of American Electric Power Service Corporation for Expedited Rulings at 7 (Feb. 29, 2012) (available at: http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20120229-5250).

[16] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.* (hereinafter "*ESP I*").

[17] Industrial Energy Users-Ohio's Post-Hearing Brief at 26-41 (May 23, 2012); Industrial Energy Users-Ohio's Reply Brief at 30-33 (May 30, 2012); IEU-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 10-15 (Mar. 27, 2012).

[18] AEP-Ohio's Application for Rehearing at 18-21 (Jan. 7, 2011) ("Thus, even if FERC had delegated authority to establish wholesale capacity charges (which it has not), the Commission lacks subject matter jurisdiction under Ohio law to do so.").

[19] Industrial Energy Users-Ohio's Post-Hearing Brief at 41-45 (May 23, 2012).

comparable to the capacity charged under AEP-Ohio's ESP and the Pricing Scheme unlawfully discriminates between customers receiving the same service under similar circumstances depending on whether they are in tier one or tier two.[20] The Pricing Scheme, an above-market charge for capacity, also violates state law prohibiting the collection of transition revenue following the end of AEP-Ohio's Market Development Period ("MDP")",[21] and violates the commitment made by AEP-Ohio in its Electric Transition Plan ("ETP") Commission-approved settlement agreement (in which AEP-Ohio agreed not to impose lost generation revenue charges on shopping customers.[22]

Finally, as the record demonstrates, there is no factual basis to approve AEP-Ohio's formula rate proposal and therefore no legitimate reason to find that the Pricing Scheme is lawful, just or reasonable.[23] As IEU-Ohio's March 27, 2012 Application for Rehearing, May 23, 2012 Initial Brief, and May 30, 2012 Reply Brief demonstrate, and as briefly described above, the Commission must grant rehearing and strike down the Pricing Scheme.

2. **In addition to the individual errors committed by the Commission which are referenced or identified herein, the totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U. S. 168) long known to our law." "The Fourteenth Amendment**

[20] Industrial Energy Users-Ohio's Post-Hearing Brief at 59-61 (May 23, 2012); Industrial Energy Users-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 15-18 (Mar. 27, 2012).

[21] Industrial Energy Users-Ohio's Post-Hearing Brief at 47-50 (May 23, 2012); IEU-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 18-20 (Mar. 27, 2012).

[22] Industrial Energy Users-Ohio's Post-Hearing Brief at 49-50 (May 23, 2012); *see also* Tr. Vol. I at 49-56, 146-147; Tr. Vol. V at 883.

[23] Industrial Energy Users-Ohio's Reply Brief at 10-25 (May 30, 2012); *see* Industrial Energy Users-Ohio's Post-Hearing Brief at 45-47 (May 23, 2012).

condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission,* 294 U.S. 63 (1935).

In recognition of the shopping-blocking implications of the Section 205 Filing, the Commission issued an Entry in this proceeding on December 8, 2010. In case the Commission's prior ESP determinations left room for doubt, the Commission issued the December 8, 2010 Entry explicitly adopting, pursuant to Schedule 8.1, Section D.8 of the RAA, RPM-Based Pricing as the state compensation mechanism for AEP-Ohio. The December 8, 2010 Entry also opened this proceeding and solicited comments from interested parties.

Subsequent to the December 8, 2010 Entry, the Commission notified FERC of its action and urged FERC to dismiss the Section 205 Filing. In response to the Commission's request that FERC dismiss the Section 205 Filing, AEPSC again argued that the Commission did not have subject matter jurisdiction to establish a capacity price applicable to CRES providers.

On January 20, 2011, FERC issued an order rejecting the Section 205 Filing, finding that the Commission had adopted a state compensation mechanism pursuant to Schedule 8.1, Section D.8 of the RAA. More specifically, FERC found that AEPSC had waived any right to make a Section 205 Filing to establish a price for generation capacity service and did so as part of the settlement agreement which was associated with FERC's approval of the RAA to which AEPSC was bound.[24]

AEPSC sought rehearing of FERC's January 20, 2011 order, again asserting that the Commission lacked subject matter jurisdiction to establish the method of

[24] *The Section 205 Filing,* FERC Order at 4-5 (Jan. 20, 2011).

compensation for capacity available to a CRES provider.[25] Thereafter, AEPSC also filed a complaint[26] at FERC pursuant to Section 206 of the FPA generally seeking to amend Section 8.1, Section D.8 of the RAA to displace and subordinate the role of any state compensation mechanism and RPM-Based Pricing.[27] In its complaint, AEPSC alleged, among other things, that the state compensation mechanism contained in Section 8.1, Section D.8 of the RAA was not just and reasonable because it would allow the Commission to establish a wholesale rate for capacity and circumvent AEPSC's ability to flip-flop between capacity compensation methodologies as and when AEPSC may elect to do so. This flip-flop is a common element of all of AEP-Ohio's SSO rate and capacity charge-related proposals. Its implementation depends on the Commission's lawful approval and it is designed to decouple AEP-Ohio's excessively profitable, above-market SSO generation revenue from the discipline of competition.[28] FERC has not addressed AEPSC's Section 206 Filing.

On January 7, 2011, AEP-Ohio filed an Application for Rehearing contesting the December 8, 2010 Entry on several grounds. Among other things, AEP-Ohio asserted that the Commission lacked subject matter jurisdiction to address the level of compensation that may be obtained for generation capacity service provided to a CRES provider and that the Entry "... was issued in a manner that denied AEP Ohio due process and violated statutes within Title 49 of the Revised Code, including Sections

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[25] AEPSC's request for rehearing is still pending. On March 24, 2011, FERC tolled AEPSC's request for rehearing to allow itself additional time to consider the merits of AEPSC's rehearing request.

[26] *American Electric Power Service Corporation v. PJM Interconnection, L.L.C.*, FERC Docket No. EL11-32-000, Complaint (April 4, 2011) (hereinafter "*the Section 206 Filing*").

[27] Section 16.4 of the RAA states that only the PJM Board may amend the RAA. Thus, AEPSC's effort to amend the RAA through its Section 206 Filing is barred by the RAA.

[28] *The Section 206 Filing* at 2-4.

4903.09, 4905.26, and 4909.16, Revised Code."[29] On February 2, 2011, the Commission granted AEP-Ohio's Application for Rehearing saying (emphasis added):

> The Commission grants AEP-Ohio's application for rehearing. We believe that sufficient reason has been set forth by AEP-Ohio to warrant further consideration of the matters specified in the application for rehearing. **However, the Commission notes that the state compensation mechanism adopted in our December 8, 2010, Finding and Order will remain in effect during the pendency of our review.**[30]

Since granting AEP-Ohio's Application for Rehearing on February 2, 2011, the Commission has not taken up or addressed the substantive and procedural issues which the Commission found, based on AEP-Ohio's rehearing request, were worthy of further consideration. The Commission has not identified, as required by Section 4903.10, Revised Code, the scope of any additional evidence which will be taken.

Beginning in early January 2011, parties filed comments requested by the Commission in the December 8, 2010 Entry. The written comments highlighted the contested issues that have since churned confusingly in various Commission proceedings and remain unresolved except to the extent that the Commission has granted "temporary" relief. In its written comments at page 3, AEP-Ohio acknowledged that: "... the PJM capacity auction price in section 8.1 of the RAA is ... a backstop mechanism ... if no others exist."[31] Of course, on December 8, 2010, the Commission made it clearer that it had adopted RPM-Based Pricing.

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[29] Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing at 2 (Jan. 7, 2012).

[30] Entry on Rehearing at 2 (Feb. 2, 2011).

[31] Ohio Power Company's and Columbus Southern Power Company's Initial Comments at 3 (Jan. 7, 2011).

On January 20, 2011, AEP-Ohio filed a motion seeking a stay in the reply comment period, a procedural schedule for a hearing and an expedited ruling. In the January 20, 2011 pleading supporting memorandum at page 2,[32] AEP-Ohio stated:

> In the absence of a pending FERC process to establish a just and reasonable mechanism for AEP Ohio to recover its actual costs, the Commission will need to commence an evidentiary hearing process in order to adjudicate a more permanent rate. Without an evidentiary hearing on this matter the Commission will not have the requisite evidentiary record to make its ultimate decision in this case. The evidentiary hearing process will allow interested parties the opportunity to develop the issues and provide the Commission with evidentiary support.

The next day (January 21, 2011), an Entry was issued to extend the reply comment period. The Entry stated:

> The attorney examiner finds that AEP-Ohio's motion to extend the deadline to file reply comments is reasonable and should be granted. Accordingly, the January 24, 2011 deadline to file reply comments shall be extended to February 7, 2011. The extension of the deadline applies to all interested stakeholders. In addition, AEP-Ohio's motion for the Commission to establish a procedural schedule for hearing shall be considered after the reply comment period has concluded.[33]

In its February 7, 2011 reply comments at pages 1 and 2, AEP-Ohio stated:

> Review of the Initial Comments shows that there are material differences in how the parties view the facts underlying this case. The Companies do not believe that Initial Comments and Reply Comments alone will provide an adequate evidential record in this case for the Commission to make a fully informed decision to establish an ongoing state compensation mechanism for the cost of capacity. The outcome of this case will have significant ramifications for the Companies, our customers, competitive retail electric service ("CRES") providers and investment in the State of Ohio. As such, the Companies believe that it would be more appropriate for the Commission to move forward with an evidentiary hearing process.[34]

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[32] Columbus Southern Power Company's and Ohio Power Company's Motion to Stay the Reply Comment Period and Establish a Procedural Schedule for Hearing and Expedited Ruling at 2 (Jan. 20, 2011).

[33] Entry at 2 (Jan. 21, 2011).

[34] Ohio Power Company's and Columbus Southern Power Company's Reply Comments at 1-2 (Feb. 7, 2011) (citation omitted).

In any event and in 18 plus months since this proceeding was initiated, the Commission has not responded to the comments it received beginning in early January 2011.

As AEP-Ohio has acknowledged, the RAA specifies that absent a lawful state compensation mechanism, RPM-Based Pricing controls unless and until FERC approves an alternative. Thus, if the Commission acted outside its authority by issuing the December 8, 2010 Entry as AEP-Ohio has repeatedly claimed, the RAA obligated AEP-Ohio to apply RPM-Based Pricing unless and until FERC approved otherwise. AEP-Ohio first began using RPM-Based Pricing in 2007 and only discontinued the use of RPM-Based Pricing when the Commission paved the way for AEP-Ohio to implement its shopping-blocking Pricing Scheme.

On February 29, 2012, AEPSC, acting in its capacity as agent for Indiana Michigan Power ("I&M") and relative to I&M's Michigan service area, filed an application with FERC in Docket No. ER12-1173-000.[35] In its application, AEPSC requested authorization to establish a "cost-based" capacity compensation mechanism pursuant to Schedule 8.1, Section D.8 of PJM's RAA. As in the Section 205 Filing related to Ohio, AEPSC claimed that there was no state compensation mechanism in place in Michigan and that AEPSC was entitled to prosecute its claim based on Section 205 of the FPA (hereinafter referred to as the "Michigan Filing"). On April 30, 2012, FERC suspended the Michigan Filing for the maximum period allowed under the FPA, finding that the Michigan Filing may be ***unjust and unlawful.***[36] If the AEPSC formula rate proposal

[35] *American Electric Power Service Corporation,* FERC Docket No. ER12-1173-000, Application (Feb. 29, 2012) (hereinafter "*I&M Case*").

[36] *I&M Case*, FERC Order at 7-8 (April 30, 2012).

goes into effect for I&M, it will only become effective after the suspension period and then subject to refund once FERC addresses the contested issues set for hearing.

On January 27, 2011, AEP-Ohio filed an application to replace its current ESP ("ESP I") with a new ESP ("ESP II").[37] Under Ohio law, ESP I remains in effect until the Commission lawfully approves ESP II under Sections 4928.141 and 4928.143, Revised Code, or an MRO under Sections 4928.141 and 4928.142, Revised Code.

On August 11, 2011, more than nine months after this proceeding was initiated, the Commission issued an entry establishing a procedural schedule to conduct an evidentiary hearing.[38] In accordance with the procedural schedule and on August 31, 2011, AEP-Ohio filed direct testimony of five witnesses. The pre-filed direct testimony of Richard E. Munczinski repeated (at page 3) AEP-Ohio's assertion that FERC, not the Commission, had jurisdiction over the wholesale capacity charge applicable to CRES providers. AEP-Ohio's pre-filed testimony did ***not*** contain detailed information on the financial impact of maintaining RPM-Based Pricing. Rather, the AEP-Ohio direct testimony asserted that displacing RPM-Based Pricing with AEP-Ohio's proposed formula rate method of compensation would facilitate generation-related investment.

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[37] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Application (Jan. 27, 2011).

[38] Among other things, the Attorney Examiner's entry (Finding No. 6) stated:

> Having fully reviewed the comments and reply comments, the attorney examiner now determines that a procedural schedule for hearing should be adopted in order to establish an evidentiary record on a state compensation mechanism. Interested parties should develop an evidentiary record on the appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism.

Entry at 2 (Aug. 11, 2011).

On September 7, 2011, AEP-Ohio, along with number of other parties, submitted the Stipulation to resolve issues in AEP-Ohio's pending ESP proceeding and several other pending cases, including this proceeding.

On September 8, 2011, a number of parties that had signed the Stipulation filed a Joint Motion to Consolidate ***for purposes of considering the adoption of the Stipulation***. At page 6 of the Joint Motion's Memorandum in Support, the movants stated (emphasis added):

> This motion for consolidation for hearing purposes differs from the February 18, 2011 motion filed by the Industrial Energy Users-Ohio in three important ways. First, consolidation here is needed because the Stipulation, as opposed to the respective Applications are broader in its impact on the merger, energy curtailment, capacity charge and fuel deferral. ***Second, the request is only to consolidate the matter for hearing of the Stipulation.*** That is of smaller scope than the motion filed by the Industrial Energy Users-Ohio for consolidation of the cases in their entirety and ***should the Attorney Examiners reject the Stipulation, the cases would return for individual process on their own with no further consolidation***. Finally, the consolidation request here involves less cases than the IEU request and is fully warranted as described herein.[39]

On September 14, 2011, IEU-Ohio filed a memorandum in support of the proposed consolidation ***for the purpose of considering the Stipulation***. On September 16, 2011, an Attorney Examiner issued an Entry granting the September 8, 2011 Motion to Consolidate ***for the purpose of considering the Stipulation*** and staying the procedural schedule in this proceeding. The Attorney Examiner's September 16, 2011 Entry was ***not*** issued or filed in this proceeding.

[39] Joint Motion to Consolidate at 6 (Sept. 8, 2011).

The Stipulation recommended that the Commission approve prospectively a two-tiered Pricing Scheme for generation capacity service available to CRES providers as the state compensation mechanism. In other words, the Stipulation recommended that the Commission approve a wholesale capacity compensation mechanism that AEPSC and AEP-Ohio were (and are) claiming the Commission is powerless to approve.

The first tier of the Stipulation's recommended CRES capacity price was tied to RPM-Based Pricing and was available for the first 21% of AEP-Ohio's shopping load by customer class. The second tier, applicable to all capacity available to CRES providers not subject to RPM-Based Pricing, was set at $255/megawatt-day ("MW-day"); an arbitrary amount and a substantial increase to the RPM-Based Price. The $255/MW-day price was simultaneously disconnected from RPM-Based Pricing or market-based pricing and cost-based pricing.[40]

On the afternoon of September 7, 2011, AEP-Ohio hosted a conference call with the investment community to discuss the Stipulation filed with the Commission earlier in the day. During the call, AEP-Ohio acknowledged that the Stipulation was designed to block the ability of retail customers to enjoy the full benefits of the "customer choice" rights provided by Ohio law.[41] Based on AEP-Ohio's own public descriptions of the purpose of the Stipulation's recommended capacity pricing proposal and irrespective of

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[40] Market prices, as established under RPM, were $116/MW-day for the 2011/2012 delivery year ($16.73/MW-day for 2012/2013). FES Ex. 103 at 35. Cost-based prices have been recommended by AEP-Ohio at $355/MW-day (AEP-Ohio Ex. 102 at 21), by Staff at $146/MW-day (Staff Ex. 105 at Ex. ESM-4) and by FES at $78.53/MW-day (FES Ex. 103 at 35).

[41] FES Ex. 102 at Ex. TCB-4:

> What happens is those customers that get the discount as Brian mention are allowed - are priced out at the RPM prices. So the $100, the $16, and I think the $26 going forward. Over those percentages, if you want to shop, you pay the full cost of $255 per megawatt day. So the thought and the theory is that the shopping will be constrained to the discounted RPM price,

whatever authority the Commission may have to authorize a capacity charge applicable to CRES providers, the Commission has known for many months that the capacity charge provision in the Stipulation violated Ohio law and the policy set forth in Section 4928.02, Revised Code.

After hearings on the Stipulation, on December 14, 2011, the Commission issued the Stipulation Order approving the Stipulation with modifications including modifications to expand the availability of RPM-Based Pricing.[42] The Commission rejected most of the objections to the capacity pricing provision in the Stipulation saying:

> Thus, the evidence presented at hearing demonstrates that the $255/MW-day interim capacity charge is within the range of reasonableness, ***particularly in light of the fact that it is one component of an extensive settlement package that includes components which benefit the public and could not otherwise be achieved in a fully litigated proceeding.***[43]

Following the Stipulation Order, applications for rehearing were submitted on January 13, 2012 by various parties including IEU-Ohio. Among other things, the applications for rehearing claimed that the Commission had erred in concluding that the package presented by the Stipulation was just and reasonable and in the public interest. By Entry dated February 1, 2012, the Commission granted rehearing for further

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[42] On January 23, 2012, the Commission issued an entry ("Clarification Entry") that provided a number of clarifications regarding its Stipulation Order. On February 10, 2012, AEP-Ohio filed an Application for Rehearing of the Commission's Clarification Entry arguing, among other things, that the Clarification Entry exceeds the Commission's jurisdiction and violates the statutory rehearing process by expanding the Opinion and Order outside the statutory rehearing process. Further, AEP-Ohio argued that the Clarification Entry was not supported by the record, forced AEP-Ohio to ***involuntarily*** provide a below-cost subsidy, and unreasonably retreated from the RPM-priced capacity set-aside limitations without an explanation. In addition, AEP-Ohio asserted that the Clarification Entry unreasonably imposed long-term obligations on AEP-Ohio while preserving the option to further modify the RPM set-aside levels in the future. On February 17, 2012, IEU-Ohio filed an Application for Rehearing of the Clarification Entry, arguing the entry was unreasonable because it did not allow all governmental aggregation programs that complete the necessary process by December 31, 2012, to have access to RPM-priced capacity. IEU-Ohio also asserted that the December 31, 2012 deadline to complete the governmental aggregation process was unreasonable.

[43] Stipulation Order at 55 (Dec. 14, 2011) (emphasis added).

consideration of the matters specified in the applications for rehearing of the Stipulation Order.

By the time the applications for rehearing were submitted in response to the Stipulation Order, the rate shock and shopping-blocking consequences of the Stipulation (which AEP-Ohio had masked in its on-average mumbo jumbo and untimely reporting of shopping data) began to materialize in relentless proportions. As AEP-Ohio's customers opened the electric bills that arrived after the Stipulation Order, customers' outrage overtook AEP-Ohio's managed message. Also, the results of the bill-reducing competitive bidding process ("CBP") used to set the generation supply price for SSO customers of Duke Energy Ohio ("Duke") sharpened the contrast between the arbitrary and excessive SSO prices authorized by the Stipulation Order and the lower prices established through the CBP used for Duke's SSO.[44] Additionally, the Commission had access to filings that AEP-Ohio, or its agent AEPSC, made at FERC to implement the unlawful corporate separation provisions of the Stipulation and the glaring inconsistencies between the content of such filings and the expectations created by the Stipulation.

On February 23, 2012, the Commission granted, in part, IEU-Ohio's and FirstEnergy Solutions Corp.'s ("FES") applications for rehearing, and rejected the Stipulation, ultimately finding, for multiple reasons, that the package contained in the Stipulation was not in the public interest.

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[44] PUCO Press Release, *Duke Energy auction leads to lower electric prices in 2012* (Dec. 15, 2011) (accessible *via* the internet at: http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/duke-energy-auction-leads-to-lower-electric-prices-in-2012/?border=off; last visited June 18, 2012).

> As discussed below, upon review of the applications for rehearing, the Commission has determined that the Stipulation, ***as a package***, does not benefit ratepayers and the public interest and, thus, does not satisfy our three-part test for the consideration of stipulations. Accordingly, the Commission will reject the Stipulation.[45]

The rejection of the Stipulation on rehearing occurred because the Commission eventually agreed that the signatory parties to the Stipulation had not met their burden of demonstrating that the Stipulation, as a package, benefited ratepayers and the public interest as required by the Commission's three-part test for the consideration of settlements.

Because the Commission's Stipulation Rehearing Entry rejected the proposed ESP contained in the Stipulation and in accordance with the requirements of Section 4928.143(C)(2)(b), Revised Code,[46] the Stipulation Rehearing Entry directed AEP-Ohio to file tariffs to provide SSO pursuant to its previously-authorized ESP:

> Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and ***an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.***[47]

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[45] Entry on Rehearing at 4 (Feb. 23, 2012) (hereinafter "*Stipulation Rehearing Entry*") (emphasis added).

[46] Section 4928.143(C)(2)(b), Revised Code, states (emphasis added):

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission ***shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.***

[47] *Stipulation Rehearing Entry* at 12 (emphasis added).

The Stipulation Rehearing Entry also directed the Attorney Examiners assigned to this case to establish a new procedural schedule.

On February 27, 2012 and for the benefit of its sole shareholder, AEP, AEP-Ohio filed a motion seeking to delete RPM-Based Pricing and insert AEP-Ohio's interpretation of the Stipulation's capacity Pricing Scheme. In other words, AEP-Ohio extracted the capacity pricing provision from the Stipulation's package and once again asked the Commission to approve a wholesale capacity price applicable to CRES providers while AEP-Ohio was simultaneously asserting that the Commission lacked subject matter jurisdiction to do so.

In its memorandum in support attached to the February 27, 2012 motion, AEP-Ohio alleged that:

(1) "If the Commission implements full RPM pricing pending the outcome in this proceeding, AEP Ohio will suffer immediate and irreparable harm. ... Using the same two-tiered capacity pricing proposed in the Stipulation offers the most stability and represents a reasonable middle ground;"[48]

(2) "As an FRR entity, AEP Ohio reasonably relied upon its expected ability to establish cost-based rates should the RPM-based rates become unjust and unreasonable;"[49] and

(3) "The reasonableness of the interim capacity pricing is demonstrated by comparing it to the pricing that AEP Ohio is advocating and that Dr. Pearce's prefiled testimony supports in Case No. 10-2929-EL-UNC"[50]

(4) "A ***perfect compromise*** in this situation where a temporary solution is needed until a more permanent decision is made is to 'split the baby' by (i) allowing RPM pricing for customers being served by CRES providers or having provided a switch request as of the February 23 Entry on Rehearing, and (ii)

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[48] Motion for Relief and Request for Expedited Ruling at 4 (Feb. 27, 2011)

[49] *Id.* at 5.

[50] *Id.* at 10.

> charging $255/MW-Day for all other customers (including additional aggregation load) for customers who shop before the case is decided."[51]

For the first time, AEP-Ohio's February 27, 2011 motion alleged that following the law and restoring RPM-Based Pricing to its rightful position as the Commission had directed would cause financial harm to AEP-Ohio's generation business, the business that is supposed to be on its own in the competitive market.[52]

While numerous parties (including many that previously supported the Stipulation's package) opposed AEP-Ohio's unlawful and unjust request to bypass RPM-Based Pricing, the Commission granted the requested relief in its March 7, 2012 Entry.[53] At page 15 of the March 7, 2012 Entry, the Commission stated:

> We reject claims that the interim relief is not based upon record evidence. The instant proceeding was consolidated with 11-346 and the cases enumerated in footnote three of this entry for purposes of considering the ESP 2 Stipulation. All of the testimony and exhibits admitted into the record for purposes of considering the ESP 2 Stipulation are part of the record in this proceeding. Our subsequent rejection of the ESP 2 Stipulation did not remove such evidence from the record, and we may, and do, rely upon such evidence in our decision granting interim relief.[54]

The above Commission statement is irreconcilable with the purpose of the consolidation as approved by the Commission on September 16, 2011. That consolidation specifically limited the consolidation to consideration of the Stipulation ***as a package***. Once the Commission rejected the Stipulation, no evidence from the consolidated

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[51] *Id.* at 15 (citation omitted).

[52] AEP-Ohio's Motion for Relief and Request for Expedited Treatment at 1, 3-5 (Feb. 27, 2012). Also, Section 4928.39, Revised Code states:

> With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

[53] Entry at 17 (March 7, 2012) (hereinafter "*March 7, 2012 Entry*").

[54] *Id.* at 15.

proceeding was available to the Commission to address contested issues in this proceeding.

Nonetheless, the Commission's approval came before parties had an opportunity to test the merit of AEP-Ohio's claims and the Commission ignored requests that the Commission only grant AEP-Ohio's motion subject to reconciliation and refund.

The Commission imported evidence from other proceedings into this proceeding even though the imported evidence was presented ***only*** to determine if the signatory parties to the Stipulation had met their burden of demonstrating that the Stipulation, as a package, benefited ratepayers and the public interest as required by the Commission's three-part test for the consideration of settlements. Thus, the capacity charge provision the Commission ultimately concluded was contrary to the public interest when presented in the Stipulation, as a package, was extracted from the package submitted in different cases and made available in this proceeding to AEP-Ohio so that AEP-Ohio could continue the shopping-blocking Pricing Scheme that became void when the Commission rejected the Stipulation. As if lawless acts are less lawless when their tenure is limited, the Commission made AEP-Ohio's "shopping tax" temporary and held that it would end on May 31, 2012 with the restoration of RPM-Based Pricing effective June 1, 2012.[55]

In response to the Commission's unlawful and unreasonable flip-flop, various applications for rehearing were filed contesting the March 7, 2012 Entry on procedural and substantive grounds. No application for rehearing was filed by AEP-Ohio

[55] *March 7, 2012 Entry* at 17.

(AEP-Ohio did not contest the Commission's determination that RPM-Based Pricing be restored effective June 1, 2012).

On April 11, 2012, some 16 months after this proceeding was initiated, the Commission again granted rehearing for the purpose of giving itself more time to consider the rehearing requests filed in response to the March 7, 2012 Entry. Like the written comments submitted by interested parties beginning in early January 2011 and AEP-Ohio's granted Application for Rehearing filed on January 7, 2011, the granted applications for rehearing related to the Commission's March 7, 2012 Entry have not been further acted upon by the Commission.

The evidentiary hearing phase of this proceeding subsequently commenced on April 17, 2012 and concluded on May 15, 2012. At the conclusion of the evidentiary hearing, parties were given a very short amount of time to submit initial and reply briefs addressing many of the same issues that have been before the Commission since the December 8, 2010 Entry. Initial briefs were due and filed on May 23, 2012 and reply briefs were filed on May 30, 2012.

Based on the evidence that is before the Commission in this proceeding, it is repetitively clear that the allegations in AEP-Ohio's February 27, 2012 motion for relief were and are false.

For example, the evidence shows that AEP-Ohio is not an FRR Entity[56] and that there was never any analysis done to identify if the FRR Alternative was the best option for AEP-Ohio.[57]

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[56] Tr. Vol. II at 455-476, 436; Tr. Vol. XI at 2533-2534; *see also* Industrial Energy Users-Ohio's Post-Hearing Brief at 52-55 and Industrial Energy Users-Ohio's Reply Brief at 18-29. FRR Entity is a defined term under the RAA. FES Ex. 110A at 10.

[57] Tr. Vol. II at 493-494.

Unlike when the two-tiered capacity pricing proposal was presented as part of the Stipulation's package, no other party supports AEP-Ohio's Pricing Scheme. Indeed, all parties except AEP-Ohio have urged the Commission to issue a merit-based decision restoring RPM-Based Pricing.

The evidence shows that AEP-Ohio previously committed to not impose any lost generation-related revenue charges on shopping customers as part of a Commission-approved settlement agreement which is final and binding.[58]

Additionally, the methodology advanced by AEP-Ohio witness Dr. Pearce has now been shown to be defective because it is based on the false assumption that the generation assets owned or controlled by AEP-Ohio are the source of capacity available to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area.[59] Likewise, AEP-Ohio's claim (a threshold assumption by Dr. Pearce) that AEP-Ohio's owned and controlled generation assets are dedicated to its Ohio load is, as AEP-Ohio's witnesses agreed, untrue. And even if the core defects in Dr. Pearce's methodology are ignored, his application of the methodology has now been shown to produce significantly excessive capacity prices because it fails to take into account generation-related revenue that must be offset against his capacity-related revenue requirement.[60]

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[58] FES Ex. 106 at 3; *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Opinion and Order at 16 (Sept. 28, 2000); *see also* Tr. Vol. I at 49-56, 146-147; Tr. Vol. V. at 883.

[59] Tr. Vol. II at 429; Tr. Vol. XI at 2530-2534.

[60] FES Ex. 101 at 405; *see e.g.* Staff Ex. 101 at 4.

On April 30, 2012, while the evidentiary hearings[61] were in progress, and after AEP-Ohio had concluded its case-in-chief, AEP-Ohio filed a motion seeking to undo the "***perfect compromise***" it previously advanced to displace the RPM-Based Pricing method previously adopted by the Commission. More specifically, AEP-Ohio asked the Commission to: (1) extend the Commission-specified life of the Pricing Scheme; and, (2) increase the revenue collected by AEP-Ohio by means of such Pricing Scheme. In other words, AEP-Ohio once again asked the Commission to engage in ratemaking that AEP-Ohio has repeatedly asserted was beyond the Commission's subject matter jurisdiction. AEP-Ohio's motion was essentially an untimely application for rehearing regarding the Commission's March 7, 2012 Entry, which specifically held that the unlawful shopping-blocking Pricing Scheme that AEP-Ohio proposed in its February 27, 2012 motion for interim relief would end on May 31, 2012.

AEP-Ohio's April 30, 2012 motion was strongly opposed by numerous parties who have actively participated in this proceeding.

Without citing evidence or addressing dispositive motions or the pending applications for rehearing that had previously been granted by the Commission, the Commission granted AEP-Ohio's April 30, 2012 motion to extend the life of the Pricing Scheme and increase the revenue collected by AEP-Ohio by means of such Pricing

[61] Prior to the commencement of the evidentiary hearing in this proceeding, IEU-Ohio filed a motion to dismiss, asserting that the Commission lacked the statutory authority to authorize a cost-based or formula-based charge applicable to generation capacity service available to CRES providers serving retail customers located in AEP-Ohio's certified electric distribution service area. At the close of AEP-Ohio's case-in-chief, IEU-Ohio again moved to dismiss the proceeding, this time orally. In its oral motion to dismiss, IEU-Ohio asserted that AEP-Ohio had failed to meet its burden of proof necessary for the Commission to authorize the proposed wholesale capacity compensation mechanism. The Attorney Examiners deferred ruling on both of IEU-Ohio's motions to dismiss, which are still pending. Tr. Vol. I at 21-22; Tr. Vol. V at 1056-1059. IEU-Ohio's motions to dismiss are also discussed in IEU-Ohio's briefs in this proceeding which are incorporated herein by reference.

Scheme. By this action on the day reply briefs were filed, the Commission flip-flopped again for the benefit of AEP-Ohio and modified the March 7, 2012 Entry.[62]

The Commission's action on May 30, 2012, coming more than 17 months after this proceeding was initiated, extended the life of the Pricing Scheme and increased the revenue that AEP-Ohio collects through the Pricing Scheme. In doing so, the Commission set AEP-Ohio free to collect more revenue than permitted under the "***perfect compromise***" that AEP-Ohio identified in the February 27, 2012 motion seeking interim relief.

The May 30, 2012 Entry shows that two Commissioners (Chairman Snitchler and Commissioner Lesser) signed the Entry without qualification, two Commissioners (Commissioners Roberto and Slaby) concurred in the result only and that Commissioner Porter, the lone Commissioner who attended the evidentiary hearings, dissented. In his dissent, Commissioner Porter stated:

> [The] Commission's March 7, 2012, entry and order made clear that the interim rate adopted in that order "will be in effect until May 31, 2012, at which point the rate for capacity under the state compensation mechanism shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year." If this Commission is to adopt anything else other than RPM based rates for 100% of shopping load, in which case I would have significant reservations, then a record of evidence must be cited in support of the decision. At most, I believe that a case record could be cited to support an extension of the interim capacity price to be "RPM-based" for tier-one customers, *i.e.* approximately $20/Mw day as of June 1, 2012, with tier-two customers remaining at the previously approved $255 Mw day.
>
> On December 8, 2010, the Commission approved a state compensation mechanism based upon PJM Inc.'s annual base residual auction. That auction establishes annual capacity rates, effective during the PJM delivery calendar year, *i.e.* from June 1 to May 31 of the following year, which competitive suppliers are to pay AEP-Ohio for their capacity. Thus,

[62] *May 30, 2012 Entry* at 7-8.

pursuant to this Commission's decision on December 8, 2010, and based upon the applicable base residual auctions, it is my understanding that AEP-Ohio charged $174.29/Mw day for capacity as of the date of that entry through May 31, 2011, and charged $110/Mw day as of June 1, 2011. No party, nor does the majority in its entry today, contends that the change in the state compensation mechanism as of June 1, 2011, was an unjustified interpretation of the Commission's adoption of the "capacity charges established by the three-year [base residual auction] conducted by PJM, Inc."

On December [14], 2011, this Commission modified and approved a Stipulation that was executed by AEP-Ohio and numerous other parties, many if not all of whom are currently participating in this proceeding. That Stipulation provided for a tiered capacity rate mechanism with 21% of AEP-Ohio load qualifying for tier-one rates — rates that would be based upon the clearing prices of PJM's base residual auction and would, therefore, change annually to match the published PJM capacity clearing price effective on June 1; those not coming under the percentage cap would receive tier-two rates of $255/Mw day. It should be noted here that, similar to the December 8, 2010, entry, no party, nor does the majority in its entry today, contends that the annual change to match the published PJM capacity clearing price is an unjustified interpretation of the Commission's December 7, 2011, entry. The Commission later rejected all components of the Stipulation, including the tiered capacity mechanism.

However, on March 7, 2012, *following a request from AEP-Ohio*, the Commission approved, as an interim state compensation mechanism that was to last only until May 31, 2012, a tiered approach that is virtually identical in terms of its RPM-based components to each the December 8, 2010; December 7, 2011; and March 7, 2012, entries. That is, this Commission left no doubt that 21% of shopping customers would qualify for tier-one capacity at RPM-based prices, with other shopping customers permitted to shop at the tier-two rate of $255/Mw day; after this interim mechanism expired on May 31, 2012, capacity rates for all competitive suppliers would be the RPM-based rate.

In sum, by approving the March 7, 2012, entry, which was itself based upon a review of the record that began with the December 8, 2010, entry, and developed to support the Stipulation as per AEP Ohio's request to maintain the *status quo*, the Commission made a decision to approve a two-tier mechanism, with tier-one pricing based upon RPM prices with the RPM prices changing to match current prices as of each new PJM delivery year. In light of the history and record of this case, I cannot support ... today's entry, and the request of AEP Ohio.[63]

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[63] *May 30, 2012 Entry*, Dissenting Opinion of Commissioner Andre T. Porter at 1-2 (internal citation omitted).

Again disregarding the requests by parties, the Commission's May 30, 2012 Entry made no provision for reconciliation and refund.

When this proceeding began in late 2010, RPM-Based Pricing controlled for all shopping in AEP-Ohio's service area either as a result of the Commission's adoption of a state compensation mechanism or as a result of the RAA which requires RPM-Based Pricing when there is no state compensation mechanism. RPM-Based Pricing was the *status quo*.

Yet, beginning with bills rendered in January 2012, AEP-Ohio has not used RPM-Based Pricing to set all capacity prices for CRES providers. Instead and over objections, the Commission has permitted AEP-Ohio to implement its anticompetitive Pricing Scheme through a Commission-approved-then-rejected Stipulation. When the Stipulation fell under its own weight, the Commission then allowed AEP-Ohio to ignore the required restoration of RPM-Based Pricing without making any provision for reconciliation and refund. Just as the Commission-ordered restoration of RPM-Based Pricing was about to occur on June 1, 2012, the Commission intervened again to allow AEP-Ohio to continue to stiff-arm the market discipline of RPM-Based Pricing and, adding insult to injury, gave AEP-Ohio the opportunity to increase its capacity-related revenue.

When parties injured by the Commission's stunning indulgence of AEP-Ohio's illegal demands have objected, the Commission has turned a deaf ear and not addressed the merits of the objections. Instead, the Commission has repeatedly maneuvered the can down the road while granting rehearing to give itself and AEP-Ohio more time to operate outside the law. The practical effect of the Commission grants of

rehearing is to block the ability of the injured parties to pursue an unobstructed appeal to the Ohio Supreme Court.

When the Commission has engaged in ratemaking based on evidence not in the record or failed to allow parties to refute evidence, the United States Supreme Court has held that the Commission violated the due process rights of parties: "[t]his is not the fair hearing essential to due process. It is condemnation without trial."[64] The United States Supreme Court has also held that regulation by a public utilities commission in accordance with the jurisdiction's applicable law "meets the requirements both of substantive and procedural due process ***when it is not arbitrarily and capriciously exercised.***"[65]

Similarly, the Ohio Supreme Court has held due process in a Commission proceeding occurs ***when*** parties are given: (1) "ample notice;" (2) "permitted to present evidence through the calling of its own witnesses;" (3) permitted to "cross-examin[e] the other parties' witnesses;" (4) introduce exhibits; (5) "argue its position through the filing of posthearing briefs;" and (6) "challenge the PUCO's findings through an application for rehearing."[66] Further, the Ohio Supreme Court has held that the Commission must, in order to comply with the law, provide "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion."[67]

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[64] *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937).

[65] *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 465 (1952) (emphasis added).

[66] *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599; 2006-Ohio-1386 at ¶ 53.

[67] *Tongren v. Pub. Util. Comm.* 85 Ohio St.3d 87, 89 (1999).

> The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom. Its decision must be based on a record containing "sufficient probative evidence to show that the commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty."[68]

The Commission abuses its discretion if it renders an opinion without record support.[69] Ruling on an issue without record support is an abuse of discretion and reversible error.[70]

The capacity service available to CRES providers is undisputedly a generation service. This service is undisputedly a wholesale service. Yet, the Commission has indulged AEP-Ohio's claim that it is entitled to use cost-based ratemaking to establish compensation for a competitive service even while AEP-Ohio has been simultaneously claiming the Commission lacks subject matter jurisdiction to address the question of capacity compensation.

This proceeding is not an ESP or MRO proceeding and it is not a traditional rate case proceeding.

Despite the fact that the Commission has been asked repeatedly to do so, the Commission has yet to identify the source of its authority to regulate generation-related services or to establish prices for wholesale services. Similarly, neither the Commission nor any other party has identified the source of the Commission's authority to simultaneously bypass both cost-based ratemaking requirements that apply to non-

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[68] *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 406 (1991) *dissenting opinion of Justice Herbert Brown* (*quoting Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 104).

[69] *Tongren v. Pub. Util. Comm.* 85 Ohio St. 3d 87 (1999), quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163 (1996).

[70] *See, e.g., Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486 (2008).

competitive services and the requirements that attach to establishing prices for the competitive services that are part of an SSO.

The Ohio Supreme Court has held on several occasions that the generation component of retail electric service is not subject to commission regulation:

> It is well settled that the generation component of electric service is not subject to commission regulation. In *Constellation NewEnergy, Inc.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 2, we stated that S.B. 3 'provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service.' R.C. 4928.03 specifies that retail electric-generation service is competitive and therefore not subject to commission regulation, and R.C. 4928.05 expressly removes competitive retail electric services from commission regulation.[71]

The Ohio Supreme Court has held that concerns about the future do not empower the Commission to create remedies beyond those permitted by the law.[72]

When the Commission issues a lawful order, it must provide acceptable justification and follow the required statutory process before the Commission can modify such order.[73]

The law and evidence did not permit the Commission to approve the Stipulation and the Commission eventually relented. Once the Stipulation was rejected, the Commission was obligated to restore RPM-Based Pricing. This is a duty placed on the Commission (not AEP-Ohio) by Section 4928.143, Revised Code, as the Commission held in its February 23, 2012 order rejecting the Stipulation. The record shows that the Commission did not comply with its obligation to restore RPM-Based Pricing.

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[71] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, ¶20, 2008-Ohio-990.

[72] *Id.*

[73] *See Cleveland Elec. Illum. Co. v Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975).

Soon after the Stipulation was rejected, AEP-Ohio inspired the Commission to embrace a stand-alone version of the shopping-blocking, two-tiered Pricing Scheme that had been previously considered and addressed only as part of the Stipulation's larger package. No evidence had been taken in this proceeding when the Commission granted the temporary and illegal relief requested by AEP-Ohio. The Commission also ignored requests to set up a refund and reconciliation mechanism. The Commission held that its lawless fling with the stand-alone version of the Pricing Scheme would end on May 31, 2012 and that RPM-Based Pricing would be restored on June 1, 2012. Rehearing applications were filed by parties other than AEP-Ohio and the Commission granted rehearing thereby delaying its accountability for addressing the merits of the granted rehearing applications.

A day before the lawless fling with the stand-alone version of the shopping-blocking, two-tiered Pricing Scheme was scheduled to end by the force of the Commission's prior holding, the Commission extended the fling and authorized AEP-Ohio to move even further away from the RPM-Based Pricing. The Commission permitted AEP-Ohio to increase generation-related rates for shopping customers and elevate the hurdle that non-shopping customers must clear to reduce their electric bills by shopping.

The Commission's conduct throughout this proceeding has subjected the positions of parties objecting to AEP-Ohio's demands to condemnation without trial. Throughout this proceeding, the Commission has taken it upon itself to rewrite the law and claim authority it does not have. Repeatedly the Commission has acceded to AEP-Ohio demands, granting rehearing and then doing nothing to put things right. The

Commission has repeatedly refused to make its AEP-Ohio friendly decisions subject to reconciliation and refund so as to protect the interests of parties injured by the Commission's AEP-Ohio-inspired rush to judgment. The totality of the Commission's conduct throughout this proceeding, including the May 30, 2012 Entry, is arbitrary and capricious, an abuse of discretion, otherwise outside the law and "... at variance with 'the rudiments of fair play' (*Chicago, Milwaukee & St. Paul Ry. Co. v. Polt*, 232 U.S. 165, 232 U.S. 168) long known to our law". "The Fourteenth Amendment condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63 (1935).

3. The Commission must restore the customer protections that have been ignored and eroded through the unlawful and unreasonable Pricing Scheme and, to this end, must direct AEP-Ohio to refund the above-market portion of the Pricing Scheme or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.

For the reasons expressed above, the Commission must immediately issue an order restoring RPM-Based Pricing and requiring AEP-Ohio to refund all revenue collected above RPM-Based Pricing. In the event the Commission refuses to put things fully right by means of a refund, it must nonetheless require AEP-Ohio to refund all revenue collected above RPM-Based Pricing for bills rendered on and after June 1, 2012. If the Commission is unwilling to require AEP-Ohio to refund the compensation billed and collected in excess of RPM-Based Pricing, it should direct AEP-Ohio to apply such excess as a credit to regulatory asset balances otherwise eligible for amortization through retail rates.

IV. CONCLUSION

As a result of the Commission's decision, customer choice has been and will be further frustrated, and customers will lose an effective means of reducing their electric bills. The Commission, however, can serve customer interests by reversing another of its unfortunate decisions to authorize the continuation of the unlawful and unreasonable Pricing Scheme. Granting IEU-Ohio's Application for Rehearing and eliminating the illegal Pricing Scheme will finally restore the customer choice options presented by Amended Substitute Senate Bill 3 and Amended Substitute Senate Bill 221 and will remove the unreasonable and unlawful Pricing Scheme AEP-Ohio has advanced to shield its generation business from competitive pressure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing of the May 30, 2012 Entry and Memorandum in Support* was served upon the following parties of record this 19th day of June 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company	))))	Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE MARCH 7, 2012 ENTRY AND MEMORANDUM IN SUPPORT

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company	))))	Case No. 10-2929-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE MARCH 7, 2012 ENTRY

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Entry issued by the Public Utilities Commission of Ohio ("Commission") on March 7, 2012 authorizing Ohio Power Company ("OP") to implement a two-tiered generation capacity service pricing scheme ("Pricing Scheme") until May 31, 2012 ("March 7, 2012 Entry"). The Commission's March 7, 2012 Entry is unlawful and unreasonable in the following respects:

1. The Commission's order authorizing OP to implement the Pricing Scheme is unlawful because the Commission is without subject matter jurisdiction to establish a formula or cost based capacity charge in this proceeding.

2. The Commission's order authorizing the Pricing Scheme is unlawful because the resulting rates are unduly discriminatory and not comparable.

3. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because it permits OP to recover transition costs in violation of state law.

4. The Commission's order authorizing implementation of the Pricing Scheme is unlawful and unreasonable because there is no record to support the Commission's finding that "the state compensation mechanism could risk an unjust and unreasonable result."

5. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the rate increase is not based on any economic justification as required by Commission precedent.

6. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the Commission failed to comply with Section 4909.16, Revised Code.

7. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because OP did not file an application for rehearing as provided by Section 4903.10, Revised Code, and the Commission abrogated its prior order without making the findings required by that Section.

Additionally, IEU-Ohio joins in the Application for Rehearing by FirstEnergy Solutions Corporation ("FES") filed on March 21, 2012 and incorporates the assignments of error and supporting memorandum as if fully stated herein.

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing and deny OP's Motion to implement the Pricing Scheme.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's March 7, 2012 Entry permitted OP to replace the legal capacity pricing mechanism on which retail customers and Competitive Retail Electric Service ("CRES") providers have relied with an illegal Pricing Scheme designed to shut down customer choice. That Entry is unlawful and unreasonable for several reasons. First, the Commission's attempt to authorize the Pricing Scheme exceeded the Commission's statutory authority governing electric service regulation. Second, even if the Commission had some authority to set a capacity rate, the Pricing Scheme approved in the March 7, 2012 Entry violates state law because it results in unduly discriminatory and non-comparable rates and the collection of illegal transition costs. Third, the Commission approved a rate increase without a proper record and in violation of the statutory procedures for seeking emergency relief or reversal of a Commission order. Additionally, IEU-Ohio joins in the Application for Rehearing filed by FES and adopts the assignments of error and supporting memorandum as if fully stated herein.

Because the Commission's order is unlawful and unreasonable, the Commission should grant rehearing and reverse its March 7, 2012 Entry authorizing the Pricing Scheme. By granting rehearing and reversing its prior decision permitting OP to stifle customer choice, it will return the parties to the status quo the law required when the Commission rejected the Stipulation and Recommendation ("Stipulation") on February 23, 2012.

II. BACKGROUND

Capacity transactions between OP and a CRES provider are sales for resale.[1] As a result, capacity charges that OP seeks to impose through the Pricing Scheme are governed by the rules of PJM Interconnection, LLC ("PJM") under the federally approved Reliability Assurance Agreement ("RAA"). The rules create an organized capacity market generally referred to as the Reliability Pricing Model ("RPM") and are embodied in PJM's open access transmission tariff. The RPM rules require a load-serving entity ("LSE") to obtain or arrange for adequate capacity (in the form of qualifying generation or demand response resources) to meet PJM's forecasted peak demand, including a reserve margin. To price capacity resources, the RPM also features a centralized capacity auction in which generation and demand response resources are cleared or matched to forecasted load based upon prices offered by qualifying resources three years prior to a June to May delivery year.

An LSE that is a Fixed Resource Requirement Entity ("FRR Entity") may satisfy its capacity or resource adequacy obligation through a second method known as the Fixed Resource Requirement Alternative ("FRR Alternative"). An FRR Entity may be an investor owned utility, such as OP, that has the ability to satisfy the unforced capacity obligation for all load in its service territory. For an FRR Entity, the FRR Alternative allows it to submit an FRR capacity plan with a fixed capacity resource requirement in lieu of satisfying the capacity resource obligation through PJM's RPM capacity auction process. To establish the compensation paid by CRES providers to the FRR Entity, Section D.8 of Schedule 8.1 of the RAA provides, in relevant part:

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[1] Tr. Vol. XII at 2184 (Cross-examination of Philip Nelson).

> In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.[2]

OP and Columbus Southern Power Company ("CSP")[3] elected to operate as FRR Entities for the 2007-2008 delivery year and thereafter. As FRR Entities, they charged CRES providers the RPM auction price.[4] In late 2010, however, American Electric Power Service Corp. ("AEPSC"), on behalf of OP, requested that the Federal Energy Regulatory Commission ("FERC") approve formula rates as the basis for establishing the capacity charges that would be levied upon CRES providers in Ohio. The proposed move to a formula rate approach from an auction-based clearing price approach would have significantly increased capacity charges to CRES providers.[5]

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[2] PJM Open Access Transmission Tariff, Attachment D, Schedule 8.1 ("Fixed Resource Requirement Alternative") (emphasis added).

[3] Since the initiation of this proceeding, OP and CSP have merged. For purposes of this pleading, references are to the surviving legal entity, OP.

[4] Prefiled Testimony of Richard Munczinski at 5 (Aug.31, 2011).

[5] Comments of Industrial Energy Users-Ohio at 4 (Jan. 7, 2011).

In response to AEPSC's FERC filing, the Commission initiated this proceeding in December 2010.[6] In the initiating Entry, the Commission noted that it had approved retail rates including the recovery of capacity costs in the first electric security plan[7] based on the continuation of capacity charges established by the three-year capacity auction conducted by PJM ("RPM-priced capacity") under the current FRR mechanism.[8] The Commission then "expressly adopt[ed] as the state compensation mechanism for the Companies the current capacity charges established by the three-year capacity auction conducted by PJM, Inc. during the pendency of this review."[9]

As a result of the Commission's adoption of the PJM pricing mechanism for capacity as the state compensation mechanism, the FERC dismissed the case filed by AEPSC. In dismissing the case, the FERC determined that the Commission's adoption of the RPM auction as the state compensation mechanism precluded OP's right to proceed under Section 205 of the Federal Power Act because OP had contracted away that right when it signed the RAA.[10]

Thus, since the RPM auction was implemented, CRES providers serving customers in OP's service territory were charged for capacity based upon the prevailing RPM auction price for capacity in the unconstrained portion of the PJM region.[11] That

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[6] Entry at 1 (Dec. 8, 2010).

[7] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order (Mar. 18, 2009) ("*ESP I*").

[8] Entry at 1-2 (Dec. 8, 2010).

[9] *Id.* at 2.

[10] *American Electric Power Service Corporation*, 134 FERC ¶ 61,039 at 5 (Jan. 20, 2011).

[11] Entry at 2 (Dec. 8, 2010).

approach remained in effect until the Commission approved a Stipulation[12] filed on September 7, 2011 in this case and related cases that sought to establish a new electric security plan ("ESP") and implement the Pricing Scheme.[13]

As part of the Stipulation, OP proposed to replace the RPM pricing mechanism with the Pricing Scheme. As proposed, OP would have been permitted to charge CRES providers $255/megawatt-day ("MW-day") for all capacity provided for shopping customers that were outside pre-determined shopping caps.[14] CRES providers serving customers within the shopping caps would be charged the RPM price for capacity.[15] The $255/MW-day price was a negotiated rate; it had no relation to either a market-determined price or a cost or formula-based price.[16] Following an extended hearing, the Commission initially approved the Pricing Scheme with two modifications.[17] First, the Commission determined that governmental aggregation programs should have access to RPM-priced capacity outside the shopping caps.[18] Second, the Commission rejected

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[12] Stipulation (Sept. 7, 2011).

[13] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 54-55 (Dec. 14, 2011) ("Opinion and Order").

[14] Stipulation at 20-22 (Sept. 7, 2011).

[15] *Id.* at 21.

[16] Tr. Vol. II at 191 (Cross-examination of Kelly Pearce); Tr. Vol. V at 737 (Cross-examination of Philip Nelson); Tr. Vol. V at 810, 845 (Cross-examination of Joseph Hamrock).

[17] Opinion and Order at 54-55 (Dec. 14, 2011).

[18] *Id.* at 54.

a provision of the Stipulation that permitted a reallocation of a customer class's unused allotments to other customer classes.[19]

On February 23, 2012, however, the Commission rejected the Stipulation, finding in an Entry on Rehearing that the Stipulation did not benefit ratepayers and the public interest.[20] As a result of its decision to reject the Stipulation, the Commission ordered OP "to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan ... and an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case."[21]

OP, however, failed to bring its treatment of capacity pricing into compliance with the Entry on Rehearing. In response to the Commission's rejection of the Stipulation in the Entry on Rehearing, OP filed a Motion seeking Commission approval to continue the Pricing Scheme as implemented under the December 29, 2011 version of the DIP or some modification of it.[22] While the Motion was pending, moreover, OP stated that it would continue to operate as if the Commission had not rejected OP's attempts to restrict customer choice on several occasions.[23]

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[19] *Id.* at 55. The Stipulation established a priority list, or queue, that was based on when the customer shopped. Stipulation, Appendix C. The shopping caps limited access to RPM priced capacity based on a percentage of total megawatt hours sold. *Id.* Appendix C was further "operationalized" through a document filed with the Commission called the Detailed Implementation Plan ("DIP") which OP filed on October 5, 2011, one day after hearings on the Stipulation commenced.

[20] Entry on Rehearing at 12 (Feb. 23, 2012).

[21] *Id.*

[22] Motion for Relief and Request for Expedited Ruling (Feb. 27, 2012) ("OP Motion").

[23] In its cover letter accompanying the tariffs filed on February 28, 2012, OP continued to maintain that it needed "clarification" of the Commission's Entry on Rehearing and would "await further direction based

Concluding that a return to the RPM pricing mechanism for all capacity sold to CRES "could risk an unjust and unreasonable result," the Commission granted OP's Motion in the March 7, 2012 Entry and authorized OP to continue the Pricing Scheme subject to the clarifications in a January 23, 2012 Entry.[24] In support of its decision to permit OP to continue the Pricing Scheme, the Commission noted that OP was not receiving Provider of Last Resort ("POLR") Charges revenue as a result of the Commission's decision in the remand of the *ESP I* case. It also cited the conflicting evidence regarding the cost of capacity that parties had presented in the hearing on the Stipulation.[25] The Commission further stated that OP may have to share with affiliates any revenue it received as a result of off-system sales ("OSS") that would be available as a result of customer migration.[26] The Commission's approval of the Pricing Scheme is effective until May 31, 2012 "at which point the rate for capacity under the state compensation mechanism shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year."[27]

III. ARGUMENT

By permitting OP to charge CRES providers a capacity charge exceeding the RPM price, the Commission has exceeded its statutory authority. Even if the Commission had the legal authority to set a capacity charge, the Pricing Scheme

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on disposition of its Motion for Relief filed yesterday (February 27, 2012) in Case No. 10-2929-EL-UNC." Letter from Steven T. Nourse to Betty McCauley (Feb. 28, 2012).

[24] Entry at 16 (Mar. 7, 2012).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 17.

adopted by the Commission results in unduly discriminatory and non-comparable rates and permits OP to recover transition costs in violation of state law. Further, the process used by the Commission to approve the Pricing Scheme was legally defective. For these reasons, the Commission should grant rehearing and deny OP's motion requesting permission to implement the Pricing Scheme.

1. The Commission's order authorizing OP to implement the *Pricing Scheme is unlawful because the Commission is* without subject matter jurisdiction to establish a formula or cost based capacity charge in this proceeding.

The Commission's rate setting authority is governed by statute.[28] Although the Commission has recently asserted that it has authority to set capacity rates,[29] state law authorizes the Commission to set rates for two types of retail electric services: non-competitive ones and the standard service offer ("SSO"). Under the applicable law, this case is not properly before the Commission whether the capacity charge is treated as a noncompetitive or competitive service.

Chapter 4928, Revised Code, establishes that the provision of retail electric service is comprised of non-competitive and competitive services.[30] If the retail electric service is non-competitive, the Commission's authority is defined by Chapters 4901,

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[28] *Lucas County Commissioners v. Pub. Util. Comm'n of Ohio*, 80 Ohio St.3d 344, 347 (1997) ("The commission may exercise only that jurisdiction conferred by statute.").

[29] *American Electric Power Service Corporation*, Case No. ER11-2183-000, Motion for Leave to Answer and Limited Answer Submitted on Behalf of the Public Utilities Commission of Ohio to PJM Interconnection, L.L.C. Response to AEP Motion for Expedited Ruling at 3 (Mar. 22, 2012). A separate issue is raised regarding whether the Commission is preempted from setting a capacity rate. The Commission, however, need not address that issue if it determines that state law does not provide the necessary rate making authority to set the rate under the current legal and factual posture of this case.

[30] Section 4928.05(A), Revised Code.

4909, 4933, 4935, and 4963, Revised Code.[31] In addition, an electric distribution utility ("EDU") must provide non-competitive retail electric service on a comparable and non-discriminatory basis.[32]

Further, rate setting for noncompetitive services under Sections 4909.18 and 4909.19, Revised Code, entails extensive mandatory procedural requirements (*e.g.*, pre-filing notice, application, and staff report) and a Commission determination that the resulting rates are just and reasonable. Rates for any particular service would need to be addressed in the context of a total revenue requirement for non-competitive services that remain subject to the Commission's rate setting authority.

Other retail electric services are defined as competitive. Under Section 4928.03, Revised Code,[33] retail electric generation,[34] aggregation, power marketing, and power

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[31] Section 4928.05(A)(2), Revised Code. Under Chapter 4909, Revised Code, a utility can make a "first filing" for a new service to establish a rate and the Commission may approve the application without a hearing. Section 4909.18, Revised Code. If the PUCO determines that the application is an application to increase rates, the PUCO must follow the rate base rate of return method to evaluate the utility's revenue requirement (in total) and determine if additional compensation is warranted. Traditional ratemaking does not allow the PUCO to adopt transition-to-market or glide path pricing.

[32] Section 4928.03, Revised Code. To avoid the possibility that the ratemaking process will trap federally approved transmission rates, Section 4928.05(A)(2), Revised Code, further provides: "Notwithstanding Chapters 4905 and 4909 of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission."

[33] This section also requires that consumers and suppliers to consumers be provided comparable and non-discriminatory access to non-competitive services. So even if generation capacity service was a non-competitive service, it would have to be available on a comparable and non-discriminatory basis to all consumers and suppliers to such consumers.

[34] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16 (Jan. 11, 2012).

brokering are "competitive services."[35] For competitive services, the Commission is without authority to set the prices for these services by traditional economic regulation, and supervision of competitive retail electric services are not within the Commission's jurisdiction under Chapter 4909, Revised Code[36] and other specified Chapters except as specifically identified in Section 4928.05, Revised Code.

With regard to the provision of a generation service, the only exception that authorizes the Commission to set rates for a competitive service concerns the SSO. The only time an EDU can directly supply retail generation service is when it is the default supplier (the customer is not served by a CRES provider including a governmental aggregator).[37] The only source of the Commission's authority to price default generation supply is provided by Sections 4928.141, 4928.142, and 4928.143, Revised Code. Based on Section 4928.141 Revised Code, the SSO is defined to include "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service" and it must

[35] The PUCO has authority to declare more services, including ancillary services, competitive under Sections 4928.04 and 4928.06, Revised Code, and gives the Commission authority to make sure the services that it declares to be competitive are provided at just and reasonable rates once it determines that there has been a decline or loss of competition with regard to such services declared to be competitive by the Commission. The Commission has no such authority with regard to retail generation service, aggregation, power marketing or power brokering since these services are declared competitive by statute.

[36] Since the PUCO has no jurisdiction under Chapter 4909, Revised Code, it is logical to argue that it has no authority to entertain a "cost-based" rate. AEP has previously argued and the PUCO has previously held that Ohio's restructuring legislation made cost-based analysis irrelevant.

[37] Section 4928.05(A)(1), Revised Code, provides an exception to the finding that retail electric generation service is fully competitive.

be offered on a comparable and nondiscriminatory basis. Further, an EDU must comply with various procedural requirements for approval of an SSO.[38]

The division of competitive and non-competitive services under state law also dictates how and when an EDU can offer to provide a competitive service. Section 4928.17, Revised Code, states that:

> [N]o electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
> (1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.
>
> (Emphasis added.)

The statutory scheme provided by Ohio law leads to two possible treatments of capacity sold to CRES providers if the Commission is not preempted from setting capacity rates. If capacity service is a non-competitive service, then OP must initiate a rate case under Section 4909.18, Revised Code, and comply with the applicable filing requirements. The Commission, furthermore, cannot approve a rate increase for the service unless it finds that the rates are just and reasonable in relation to a total revenue

[38] Sections 4928.142 and 4928.143, Revised Code.

requirement. OP, however, has satisfied none of the substantive or administrative requirements of Chapter 4909, Revised Code, to initiate a ratemaking process, and the Commission has not proceeded on the application to increase the rate in the manner required by law (*e.g.*, issuance of a staff report, an opportunity to file objections, hearing). Thus, the March 7, 2012 Entry is unlawful if capacity service sold to CRES providers is a noncompetitive retail electric service.

If capacity service is competitive, it must be provided by an appropriate affiliate under a corporate separation plan, and market pricing must prevail unless such service qualifies as an SSO. Although capacity service is a component of retail generation service that may be a part of the SSO, it is not by definition the default service.[39] Moreover, if capacity service could be sold as an SSO, various procedural requirements would have to be satisfied before the Commission could approve the SSO, but OP and the Commission have not attempted to satisfy those requirements. Alternatively, if capacity service is not a default service subject to the provisions governing the SSO, then the March 7, 2012 Entry violates applicable law by setting the price for the second tier of capacity service at $255/MW-day and failing to require its sale through a separate subsidiary. Thus, the Entry is unlawful under state law, regardless of the starting point.

The Commission lacked subject matter jurisdiction to authorize the Pricing Scheme if it is characterized as either competitive or non-competitive electric service. Because the Commission's March 7, 2012 Entry is not authorized by state law, the

[39] The SSO is defined as "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Section 4928.141(A), Revised Code.

Commission should grant rehearing and reverse its decision granting OP authority to implement the Pricing Scheme.

2. The Commission's order authorizing the Pricing Scheme is unlawful because the resulting rates are unduly discriminatory and not comparable.

Even if the Commission had some authority to set a capacity charge, the Pricing Scheme authorized in this matter violates state legal provisions on price discrimination and comparability. Because the resulting rates of the Pricing Scheme are illegal, the Commission should grant rehearing and revoke its authorization permitting OP to price capacity at $255/MW-day.

Section 4928.02, Revised Code, various other sections in Chapter 4928, Revised Code, and Commission rules require the Commission to ensure that rates, services, and practices associated with competitive and non-competitive retail electric service rates are comparable and non-discriminatory. For example, Section 4928.02(A), Revised Code, provides that it is the State's policy to "[e]nsure the availability to consumers of ... nondiscriminatory ... retail electric service." Similarly, Section 4928.40(D), Revised Code, provides that "no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service." Likewise, the definition of "standard service offer" in Rule 4901:1-35-01(L), Ohio Administrative Code ("OAC"), highlights the importance of the role of the nondiscriminatory and comparable requirements that are imposed by Chapter 4928, Revised Code: "'Standard service offer' means an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services

necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." These statutory and administrative requirements for nondiscriminatory and comparable rates extend to both customers and suppliers.[40]

Differences in treatment of customers can be justified only "where such differential is based upon some actual and measurable differences in the furnishing of services to them."[41] Absent a finding that demonstrates that rate differences are reasonable, those rates violate the statutory requirements that prohibit undue discrimination and non-comparability.[42]

As approved by the Commission in the March 7, 2012 Entry, the Pricing Scheme permits OP to sell capacity to similarly situated customers, CRES providers, at two different prices, the price resulting from the RPM-pricing mechanism for retail customers representing 21% of OP's annual load and $255/MW-day for the balance of the load seeking service through a CRES provider.[43] There has never been a demonstration that the cost to serve those customers justifies any difference in the rates. Further, the Commission has not made any finding that would support the conclusion that the Pricing Scheme satisfies the requirement that rates be comparable to the cost of capacity used to serve OP's SSO load.

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[40] For example, Sections 4928.15 and 4928.35(C), Revised Code, require electric distribution service to be available to all consumers and suppliers on a non-discriminatory and comparable basis.

[41] *Townships of Mahoning County v. Pub. Util. Comm'n of Ohio*, 58 Ohio St. 2d 40, 44 (1979).

[42] *In the Matter of the Complaint of Westside Cellular, Inc. dba Cellnet*, Case No. 93-1758-RC-CSS, Opinion and Order at 50-51 (Jan. 18, 2001) (Section 4905.33, Revised Code, violated when Ameritech Mobile charged a non-affiliate more than it charged its own retail service provider for the same services).

[43] Entry at 17 (Mar. 7, 2012).

OP's only justification for the Pricing Scheme was that OP was facing a financial shortfall if it was required to continue to price all capacity through the RPM pricing mechanism.[44] In response to this "justification," the Commission concluded that the use of RPM pricing "could risk an unjust and unreasonable result" because OP is no longer receiving provider of last resort ("POLR") charges[45] and shares revenues associated with released capacity due to customer switching with other affiliates.[46] This justification, however, does not address any difference in the furnishing of the service to customers that would permit discrimination among customers.

In fact, the discrimination has only to do with maintaining OP's hold on customers by blocking the ability of CRES providers to offer alternatives to default service. As the Commission is well aware, the Companies pursued the Pricing Scheme as a means of preventing customers from shopping,[47] and the Commission in its December 14, 2011 Opinion and Order concluded that the Pricing Scheme would have that effect.[48] Blocking customer choice certainly cannot be a legal basis for the discrimination contained in the Pricing Scheme.[49] Because there is no legal basis for the Pricing Scheme under the applicable law regarding nondiscrimination and comparability, the

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[44] As noted in IEU-Ohio's memorandum contra the motion, the Companies have not provided any factual record that supports this claim. Industrial Energy User-Ohio's Memorandum Contra Ohio Power Company's February 27, 2012 Motion for Relief and Request for Expedited Ruling at 14 (Mar. 2, 2012).

[45] The reference to POLR charges is suspect in itself because OP failed to demonstrate that it had any cost basis associated with providing POLR service. See below.

[46] Entry at 16 (Mar. 7, 2012).

[47] FES Ex. 1, TCB ex. 7, 8, & 9.

[48] Opinion and Order at 54 (governmental aggregation programs would be foreclosed from accessing competitive retail generation services).

[49] Section 4928.02 (B), Revised Code, provides that it is state policy to provide customers with "options they elect to meet their respective needs."

Commission should grant rehearing and reverse its decision to allow OP to impose the Pricing Scheme.

3. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because it permits OP to recover transition costs in violation of state law.

Senate Bill 3 provided a statutory structure for the recovery of transition costs. These costs were defined in Section 4928.39, Revised Code. Generally the total allowable transition costs for which an electric utility could seek transition revenue were the prudently incurred and legitimate, net, verifiable generation costs that were not recoverable in a competitive market that the utility would otherwise have the opportunity to recover.[50] The electric utility was then offered a limited time period for the recovery of those generation-related transition costs. Transition costs recovery was to end by December 31, 2005.[51]

Through its higher capacity charge, OP is seeking to recover capacity charges in excess of the revenue available at market rates. The second tier rate is well above the RPM price for capacity. The difference between the current RPM capacity price of approximately $110/MW-day and the second tier price represents a potential recovery of transition costs if the other criteria were satisfied.[52]

OP itself has stated that the purpose of the higher capacity charge contained in the second tier is recovery of transition costs. As OP explained, it believed it relied

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[50] Section 4928.39, Revised Code.

[51] Section 4928.40, Revised Code.

[52] Transition cost recovery was limited to net, verifiable, and directly assignable costs of retail electric generation service that were prudently incurred and otherwise recoverable. For purposes of this proceeding those issues have not been addressed at this point.

upon its "expected ability to establish costs-based rates," but complained that it will be forced to move to RPM-priced capacity "without a reasonable transition mechanism" for "a transition period."[53] OP's claim that it has some expectation to additional transition revenues, however, flies in the face of Ohio's controlling statutory provisions governing the opportunity for a utility to seek and obtain transition revenue recovery.

OP's opportunity to recover transition costs has ended. As provided by Section 4928.38, Revised Code, "[t]he utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code." Section 4928.141, Revised Code, further prohibits the continued receipt of transition revenues: "A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan." In short, OP bases its "expectation" that it should receive a cost-based rate for capacity on an assumption

[53] OP Motion at 5. (Feb. 27, 2012). Throughout these proceedings, OP has argued that it has some entitlement to transition costs to support its move to an SSO based on a competitive bidding process ("CBP"). In a press release issued on February 27, 2012, the parent company of OP once again indicated that the purpose of OP's request for an arbitrarily priced capacity charge was to provide recovery of generation-related assets. "'AEP Ohio has committed significant capital investment in its Ohio generation fleet under what was a regulated environment to serve our customers' generation needs,' said Nicholas K. Akins, AEP president and chief executive officer. "'The settlement agreement allowed AEP Ohio a reasonable transition to market over a period of time. Without that transition, we will basically be giving the capacity we built to competitive suppliers for the taking.'" Press Release (Feb. 27, 2012) (viewed at https://www.aepohio.com/info/news/viewRelease.aspx?releaseID=1203).

that it is entitled to another opportunity to recover transition costs.[54] It is not. The March 7, 2012 Entry permitting recovery of transition revenues, therefore, is illegal and unreasonable and should be reversed.

4. The Commission's order authorizing implementation of the Pricing Scheme is unlawful and unreasonable because there is no record to support the Commission's finding that "the state compensation mechanism could risk an unjust and unreasonable result."

In support of its conclusion that continued use of the RPM pricing mechanism as the state compensation mechanism could result in an unjust and unreasonable result, the Commission noted that OP was no longer collecting POLR charges as a result of the *ESP I* remand and may have to share OSS revenues. Further, the Commission cited evidence from the Stipulation hearing that RPM prices did not permit OP to recover its capacity costs.[55] The Commission's reasoning and reliance on this "record" was unreasonable and unlawful.

The first factor noted by the Commission to support its Entry is that OP is no longer authorized to collect POLR charges. The Commission, however, previously determined that OP was not entitled to POLR charges because it had failed to demonstrate that it had any POLR-related costs.[56] The Commission's suggestion that OP should be permitted to raise its capacity rate to make up for a cost the Commission previously found had not been proven defies reason.

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[54] *See Dayton Power and Light Co. v. Pub. Util. Comm'n of Ohio*, 4 Ohio St. 3d 91 (1983).

[55] Entry at 16 (Mar. 7, 2012).

[56] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 33 (Oct. 3, 2011).

The Commission also relies improperly on testimony from the Stipulation hearing concerning capacity costs. When the Commission rejected the Stipulation on February 23, 2012, it further decided to restart proceedings in this case.[57] If this proceeding is truly "reset" to the point in time when the Stipulation was filed, then the evidence supporting the Stipulation on which the Commission relied[58] cannot justify continuing the Pricing Scheme.[59]

The Commission's reliance on the hearing record also violates the Signatory Parties' understanding of the use of that record in subsequent proceedings if the Stipulation was rejected. Although a provision of the Stipulation concerning the withdrawal of a party did not contemplate the exact circumstances that have occurred here, *i.e.*, the Commission's rejection of the Stipulation through an Entry on Rehearing, the Signatory Parties, including OP, agreed that "this proceeding shall go forward at the procedural point at which the Stipulation was filed, and the parties will be afforded the opportunity to present evidence through witnesses, to cross-examine all witnesses, to present rebuttal testimony, and to brief all issues which shall be decided based upon the record and briefs, as if the Stipulation had never been executed." The use of the this record is particularly unwarranted when the parties supporting the Stipulation did not challenge OP's evidence because they were trading other benefits of the Stipulation for the Pricing Scheme and other provisions that OP sought.[60]

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[57] Entry on Rehearing at 13.

[58] March 7, 2012 Entry at 15-16.

[59] Stipulation at 30.

[60] Entry at 15 (Mar. 7, 2012).

Moreover, the use of the Stipulation hearing evidence is prejudicial. Without this reference to the record of the Stipulation hearing, the Commission had no basis to suggest that RPM rates are below OP's cost to provide capacity or the Commission's conclusion that RPM prices could lead to an unjust and unreasonable result.[61]

Finally, there is no evidence to address what shortfall might occur because of OP's decision to agree to share OSS revenue with other affiliates.

Because the reasoning on which the Commission authorizes OP to implement the Pricing Scheme is nonsensical (loss of POLR charges), and "evidence" it relies upon violates the terms of the Stipulation hearing (capacity costs) or is nonexistent (OSS shortfall), the Commission's March 7, 2012 Entry is unlawful and unreasonable.

5. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the rate increase is not based on any economic justification as required by Commission precedent.

With the current RPM price at approximately $110/MW-day, the Commission's approval of the second-tier rate of $255/MW-day is more than double the level set by the RPM pricing mechanism. The only justification offered for the rate increase is that based on the improper reasoning and record discussed in the prior assignment of error.[62] Wholly absent from the Commission's decision is any finding that OP will actually suffer a shortfall that requires rate relief.

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[61] *Id.* at 16. As discussed below, the Commission's determination that OP was receiving capacity revenue under the POLR, likewise, is indefensible.

[62] March 7, 2012 Entry at 16.

In the *ESP I* case, the Commission stated that the Companies must demonstrate the economic basis for a rate increase in the context of a full review.[63] On the record before it, the Commission, however, did not and could not make any finding that OP was suffering an economic shortfall. In fact, the *ESP I* rates have become notorious because they have resulted in significantly excessive earnings.[64] Moreover, OP's own motion demonstrated that its "worst case" scenario still generated positive returns.[65] Because the Commission authorized a rate increase without a demonstration that there was an economic basis for it, the Commission violated its own precedent, and the decision should be reversed on rehearing.

6. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the Commission failed to comply with Section 4909.16, Revised Code.

The Commission has concluded that OP is entitled to some expedited rate relief by raising the capacity charge to $255/MW-day on the basis that OP could face an unjust and unreasonable result if the Commission did not act. If the Commission intended to provide some emergency relief, it did not comply with Section 4909.16, Revised Code.

If there were a real emergency, OP could seek relief under Section 4909.16, Revised Code. That Section provides the Commission with authority to address, on an

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[63] *ESP I*, Opinion and Order at 34 (Mar. 18, 2009).

[64] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011); *In the Matter of the 2010 Annual Filing of Columbus Southern Power Company and Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code*, Case Nos. 11-4571-EL-UNC, *et al.*, Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Jan. 31, 2012).

[65] OP Motion at 5 (Feb. 27, 2012).

interim basis and subject to refund, financial emergencies. In addressing such emergencies, however, the Commission has long-standing precedent and criteria that must be applied, after a hearing, to determine if emergency relief is appropriate and, if so, to what extent.[66] OP, however, has not invoked that authority, and thus it has no basis for claiming any interim relief based on its alleged financial distress.

Even if the Commission could properly consider OP's concern that it may incur harm if the Commission does not provide interim financial relief, OP's claim that it will suffer confiscation also is without merit. To support a claim of confiscation, OP must demonstrate that the rate is "so 'unjust' as to be confiscatory,"[67] but a review of a rate, standing alone, is not a basis for determining if a confiscation has occurred. Before the Commission may find that rates are confiscatory, it must assess "all relevant costs and expenditures made by [the electric distribution utility]."[68] "It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end."[69] Relying on this well-understood test for determining if rates are confiscatory, the Commission has held that it must "consider the total effect of the [EDU's] rates."[70] Applying this comprehensive review standard, the Commission has found that an 8% return based on net operating income

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[66] *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM, Opinion and Order at 3 (Jan. 25, 2001).

[67] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

[68] *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 924 (S.D. Ohio 2004).

[69] *Id.* at 921.

[70] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for Monongahela Power Company*, Case No. 04-880-EL-UNC, Opinion and Order at 16 (Dec. 8, 2004).

(along with other factors) was sufficient to support a determination that rates were not confiscatory.[71]

In light of this high hurdle to establish a constitutional claim, OP's assertion that requiring it to provide RPM-priced capacity for all customer load migrating to CRES providers will result in confiscation is unsupported. OP rests its argument on a lower return on equity that has no basis in the current record and would still return, by OP's own analysis, a positive return in both 2012 and 2013.[72] Its additional claim that the stock value has declined likewise is outside the record available to the Commission and does not demonstrate anything other than that OP's value was overstated on the assumption that it could continue to extract excessive returns from customers.[73] Moreover, OP ignores recent Commission and Staff findings that its first ESP is producing significantly excessive returns. The Commission determined that the CSP ESP resulted in significantly excessive earnings in 2009,[74] and the Staff of the Commission has raised a similar concern with CSP's total-EDU earned return on common equity for 2010.[75] Given that their returns occurred while OP was charging the

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[71] *Id.* at 20.

[72] OP Motion at 5.

[73] The current price of AEP's stock is well within the twelve-month range of prices. *See* http://finance.yahoo.com/echarts?s=AEP+Interactive#chart1:symbol=aep;range=20070305,20120229;indicator=volume;charttype=line;crosshair=on;ohlcvalues=0;logscale=on.

[74] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011).

[75] *In the matter of the 2010 Annual Filing of Columbus Southern Power Company and Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code*, Case Nos. 11-4571-EL-UNC, *et al.*, Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Jan. 31, 2012).

same SSO rates and under the same capacity mechanism the Commission required OP to implement on February 23, 2012, OP has failed to demonstrate any basis to believe the Commission's Entry on Rehearing will result in confiscation.

Having failed to properly invoke the Commission's emergency authority or to present a case supporting such relief, OP's motion should have been denied. The Commission should correct its March 7, 2012 Entry by granting rehearing.

7. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because OP did not file an application for rehearing as provided by Section 4903.10, Revised Code, and the Commission abrogated its prior order without making the findings required by that Section.

Because emergency relief was not available, the only other alternative for seeking a change to a Commission order is an application for rehearing. An application for rehearing is available "[a]fter any order has been made by the public utilities commission."[76] Only after granting rehearing may the Commission "abrogate or modify" its order and only if it finds that the original order is "unjust or unwarranted, or should be changed."[77]

OP, however, sought and received a reversal of the Commission's Entry on Rehearing without complying with the rehearing process. Instead of applying for rehearing, OP filed the February 27, 2012 Motion requesting that the Commission abrogate its prior order in the Entry on Rehearing directing OP to return capacity rates to the terms provided by the December 8, 2010 Entry. In the March 7, 2012 Entry, the Commission granted that request, but the Commission did not grant rehearing prior to

[76] Section 4903.10, Revised Code.

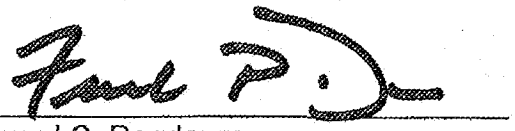
[77] *Id.*

changing its order and did not determine that its prior order was unjust or unwarranted. Absent a showing that there is an emergency, the Commission did not have the legal authority to reverse its prior order outside the rehearing process. Therefore, the Commission's March 7, 2012 Entry was illegal and should be reversed.

IV. CONCLUSION

As a result of the Commission's decision, customer choice will be frustrated, and customers will lose an effective means of reducing their electric bills. The Commission, however, can serve customer interests by reversing its unfortunate decision to authorize the Pricing Scheme. The Commission should do so because the March 7, 2012 Entry is both unlawful and unreasonable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support* was served upon the following parties of record this 27th day of March 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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4901:1-35-01 Definitions.

(A) "Application" means an application for standard service offer pursuant to this chapter.

(B) "Commission" means the public utilities commission of Ohio.

(C) "Competitive bidding process" means a bidding process established pursuant to section 4928.142 of the Revised Code.

(D) "Dynamic retail pricing" means a retail rate design which includes prices that can change based on changes in wholesale electricity prices, power system conditions, or the marginal cost of providing electric service.

(E) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(F) "Electric security plan" means an electric utility plan for the supply and pricing of electric generation service including other related matters pursuant to section 4928.143 of the Revised Code.

(G) "First application for a market rate offer" means the application filed under section 4928.142 of the Revised Code by an electric utility that has not previously implemented an approved market-rate offer.

(H) "Market development period" shall have the meaning set forth in division (A)(17) of section 4928.01 of the Revised Code.

(I) "Market-rate offer" means an electric utility plan for the supply and pricing of electric generation service pursuant to section 4928.142 of the Revised Code.

(J) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(K) "Rate plan" means an electric utility's standard service offer approved by the commission prior to January 1, 2009, that established rates for electric service at the expiration of an electric utility's market development period.

(L) "Standard service offer" means an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.

(M) "Staff" means the staff of the commission or its authorized representatives.

(N) "Time differentiated pricing" means a retail rate design which includes differing prices based upon the time that electricity is used in order to reflect differences in expected costs or wholesale electricity prices in different time periods.

Replaces: 4901:1-35-01

Effective: 05/07/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4928.06, 4928.141

Rule Amplifies: 4928.14, 4928.141, 4928.142, 4928.143

Prior Effective Dates: 5/27/04

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U.S.C.A. Const. Amend. XIV-Full Text

United States Code Annotated Currentness

Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4901.02 Public utilities commission of Ohio.

(A) There is hereby created the public utilities commission of Ohio, by which name the commission may sue and be sued. The commission shall consist of five public utilities commissioners appointed by the governor with the advice and consent of the senate. The governor shall designate one of such commissioners to be the chairperson of the commission. The chairperson of the commission shall serve as chairperson at the governor's pleasure. The commissioners shall be selected from the lists of qualified persons submitted to the governor by the public utilities commission nominating council pursuant to section 4901.021 of the Revised Code. Not more than three of said commissioners shall belong to or be affiliated with the same political party. The commission shall possess the powers and duties specified in, as well as all powers necessary and proper to carry out the purposes of Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code.

(B) A majority of the public utilities commissioners constitutes a quorum.

(C) The terms of office of public utilities commissioners shall be for five years, commencing on the eleventh day of April and ending on the tenth day of April, except that terms of the first commissioners shall be for one, two, three, four, and five years, respectively, as designated by the governor at the time of appointment. Each commissioner shall hold office from the date of appointment until the end of the term for which the commissioner was appointed. Any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which the commissioner was appointed shall hold office for the remainder of such term. Any commissioner shall continue in office subsequent to the expiration date of the term for which the commissioner was appointed until the commissioner's successor takes office, or until a period of sixty days has elapsed, whichever occurs first. Each vacancy shall be filled by appointment within sixty days after the vacancy occurs.

(D) Public utilities commissioners shall have at least three years of experience in one or more of the following fields: economics, law, finance, accounting, engineering, physical or natural sciences, natural resources, or environmental studies. At least one commissioner shall be an attorney admitted to the practice of law in any state or the District of Columbia.

(E) The chairperson of the commission shall be the head of the commission and its chief executive officer. The appointment or removal of employees of the commission or any division thereof, and all contracts for special service, are subject to the approval of the chairperson. The chairperson shall designate one of the commissioners to act as deputy chairperson, who shall possess during the absence or disability of the chairperson, all of the powers of the chairperson.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 01-11-1983

4905.02 Public utility defined.

(A) As used in this chapter, "public utility" includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit, except the following:

(1) An electric light company that operates its utility not for profit;

(2) A public utility, other than a telephone company, that is owned and operated exclusively by and solely for the utility's customers, including any consumer or group of consumers purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas exclusively by and solely for the consumer's or consumers' own intended use as the end user or end users and not for profit;

(3) A public utility that is owned or operated by any municipal corporation;

(4) A railroad as defined in sections 4907.02 and 4907.03 of the Revised Code;

(5) Any provider, including a telephone company, with respect to its provision of any of the following:

(a) Advanced services as defined in 47 C.F.R. 51.5;

(b) Broadband service, however defined or classified by the federal communications commission;

(c) Information service as defined in the "Telecommunications Act of 1996," 110 Stat. 59, 47 U.S.C. 153(20);

(d) Subject to division (A) of section 4927.03 of the Revised Code, internet protocol-enabled services as defined in section 4927.01 of the Revised Code;

(e) Subject to division (A) of section 4927.03 of the Revised Code, any telecommunications service as defined in section 4927.01 of the Revised Code to which both of the following apply:

(i) The service was not commercially available on September 13, 2010, the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.

(ii) The service employs technology that became available for commercial use only after September 13, 2010, the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.

(B)

(1) "Public utility" includes a for-hire motor carrier even if the carrier is operated in connection with an entity described in division (A)(1), (2), (4), or (5) of this section.

(2) Division (A) of this section shall not be construed to relieve a private motor carrier, operated in connection with an entity described in division (A)(1), (2), (4), or (5) of this section, from compliance with any of the following:

(a) Chapter 4923. of the Revised Code;

(b) Hazardous-material regulation under section 4921.15 of the Revised Code and division (H) of section 4921.19 of the Revised Code, or rules adopted thereunder;

(c) Rules governing unified carrier registration adopted under section 4921.11 of the Revised Code.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 6/11/2012.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 09-17-1996

4905.03 Public utility company definitions.

As used in this chapter

, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(A) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state;

(B) A for-hire motor carrier, when engaged in the business of transporting persons or property by motor vehicle for compensation, except when engaged in any of the operations in intrastate commerce described in divisions (B)(1) to (9) of section 4921.01 of the Revised Code, but including the carrier's agents, officers, and representatives, as well as employees responsible for hiring, supervising, training, assigning, or dispatching drivers and employees concerned with the installation, inspection, and maintenance of motor-vehicle equipment and accessories;

(C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

(D) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying artificial gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artificial gas as is manufactured by that producer as a by-product of some other process in which the producer is primarily engaged within this state is not thereby a gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between any gas company and any other gas company or any natural gas company providing for the supplying of artificial gas and for compensation for the same are subject to the jurisdiction of the public utilities commission.

(E) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state. Notwithstanding the above, neither the delivery nor sale of Ohio-produced natural gas or Ohio-produced raw natural gas liquids by a producer or gatherer under a public utilities commission-ordered exemption, adopted before, as to producers, or after, as to producers or gatherers, January 1, 1996, or the delivery or sale of Ohio-produced natural gas or Ohio-produced raw natural gas liquids by a producer or gatherer of Ohio-produced natural gas or Ohio-produced raw natural gas liquids, either to a lessor under an oil and gas lease of the land on which the producer's drilling unit is located, or the grantor incident to a right-of-way or easement to the producer or gatherer, shall cause the producer or gatherer to be a natural gas company for the purposes of this section.

All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same are subject to the jurisdiction of the public utilities commission. The commission, upon application made to it, may relieve any producer or gatherer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so

long as the producer or gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the producer or gatherer does not engage in the distribution of natural gas to consumers.

Nothing in division (E) of this section limits the authority of the commission to enforce sections 4905.90 to 4905.96 of the Revised Code.

(F) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state, but not when engaged in the business of the transport associated with gathering lines, raw natural gas liquids, or finished product natural gas liquids;

(G) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(H) A heating or cooling company, when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes;

(I) A messenger company, when engaged in the business of supplying messengers for any purpose;

(J) A street railway company, when engaged in the business of operating as a common carrier, a railway, wholly or partly within this state, with one or more tracks upon, along, above, or below any public road, street, alleyway, or ground, within any municipal corporation, operated by any motive power other than steam and not a part of an interurban railroad, whether the railway is termed street, inclined-plane, elevated, or underground railway;

(K) A suburban railroad company, when engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad;

(L) An interurban railroad company, when engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipal corporations, using electricity or other motive power than steam power for the transportation of passengers, packages, express matter, United States mail, baggage, and freight. Such an interurban railroad company is included in the term "railroad" as used in section 4907.02 of the Revised Code.

(M) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

(C) **[As added by 129th General Assembly File No. 127, HB 487, § 101.01]**As used in this section:

(1) "Gathering lines" has the same meaning as in section 4905.90 of the Revised Code.

(2) "Raw natural gas liquids" and "finished product natural gas liquids" have the same meanings as in section 4906.01 of the Revised Code.

Amended by 129th General Assembly File No. 125, SB 315, § 101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 6/11/2012.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 01-01-2001

4905.04 Power to regulate public utilities and railroads.

The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 06-18-1996; 11-04-2005

4905.05 Scope of jurisdiction.

The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state; to the persons or companies owning, leasing, or operating such public utilities and railroads; to the records and accounts of the business thereof done within this state; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79c, and the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system.

Nothing in this section, or section 4905.06 or 4905.46 of the Revised Code pertaining to regulation of holding companies, grants the public utilities commission authority to regulate a holding company or its subsidiaries which are organized under the laws of another state, render no public utility service in the state of Ohio, and are regulated as a public utility by the public utilities commission of another state or primarily by a federal regulatory commission, nor do these grants of authority apply to public utilities that are excepted from the definition of "public utility" under divisions (A)(1) to (3) of section 4905.02 of the Revised Code.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 6/11/2012.

Effective Date: 03-29-1988

4905.06 General supervision.

The public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. The commission has general supervision over all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section, and may examine such companies and keep informed as to their general condition and capitalization, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies. The commission, through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety. In order to assist the commission in the performance of its duties under this chapter, authorized employees of the motor carrier enforcement unit, created under section 5503.34 of the Revised Code in the division of state highway patrol, of the department of public safety may enter in or upon, for inspection purposes, any motor vehicle of any motor carrier .

In order to inspect motor vehicles owned or operated by a motor carrier engaged in the transportation of persons, authorized employees of the motor carrier enforcement unit, division of state highway patrol, of the department of public safety may enter in or upon any property of any motor carrier engaged in the intrastate transportation of persons.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 6/11/2012.

Effective Date: 09-01-2000; 09-16-2004

4905.10 Assessment for expenses.

(A) For the sole purpose of maintaining and administering the public utilities commission and exercising its supervision and jurisdiction over the railroads and public utilities of this state, an amount equivalent to the appropriation from the public utilities fund created under division (B) of this section to the public utilities commission for railroad and public utilities regulation in each fiscal year shall be apportioned among and assessed against each railroad and public utility within this state by the commission by first computing an assessment as though it were to be made in proportion to the intrastate gross earnings or receipts, excluding earnings or receipts from sales to other public utilities for resale, of the railroad or public utility for the calendar year next preceding that in which the assessment is made. The commission may include in that first computation any amount of a railroad's or public utility's intrastate gross earnings or receipts that were underreported in a prior year. In addition to whatever penalties apply under the Revised Code to such underreporting, the commission shall assess the railroad or public utility interest at the rate stated in division (A) of section 1343.01 of the Revised Code. The commission shall deposit any interest so collected into the public utilities fund. The commission may exclude from that first computation any such amounts that were overreported in a prior year. The final computation of the assessment shall consist of imposing upon each railroad and public utility whose assessment under the first computation would have been one hundred dollars or less an assessment of one hundred dollars and recomputing the assessments of the remaining railroads and public utilities by apportioning an amount equal to the appropriation to the public utilities commission for administration of the utilities division in each fiscal year less the total amount to be recovered from those paying the minimum assessment, in proportion to the intrastate gross earnings or receipts of the remaining railroads and public utilities for the calendar year next preceding that in which the assessments are made. In the case of an assessment based on intrastate gross receipts under this section against a public utility that is an electric utility as defined in section 4928.01 of the Revised Code, or an electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, such receipts shall be those specified in the utility's, company's, cooperative's, or aggregator's most recent report of intrastate gross receipts and sales of kilowatt hours of electricity, filed with the commission pursuant to division (F) of section 4928.06 of the Revised Code, and verified by the commission. In the case of an assessment based on intrastate gross receipts under this section against a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, such receipts shall be those specified in the supplier's or aggregator's most recent report of intrastate gross receipts and sales of hundred cubic feet of natural gas, filed with the commission pursuant to division (B) of section 4929.23 of the Revised Code, and verified by the commission. However, no such retail natural gas supplier or such governmental aggregator serving or proposing to serve customers of a particular natural gas company, as defined in section 4929.01 of the Revised Code, shall be assessed under this section until after the commission, pursuant to section 4905.26 or 4909.18 of the Revised Code, has removed from the base rates of the natural gas company the amount of assessment under this section that is attributable to the value of commodity sales service, as defined in section 4929.01 of the Revised Code, in the base rates paid by those customers of the company that do not purchase that service from the natural gas company.

(B) Through calendar year 2005, on or before the first day of October in each year, the commission shall notify each such railroad and public utility of the sum assessed against it, whereupon payment shall be made to the commission, which shall deposit it into the state treasury to the credit of the public utilities fund, which is hereby created. Beginning in calendar year 2006, on or before the

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fifteenth day of May in each year, the commission shall notify each railroad and public utility that had a sum assessed against it for the current fiscal year of more than one thousand dollars that fifty per cent of that amount shall be paid to the commission by the twentieth day of June of that year as an initial payment of the assessment against the company for the next fiscal year. On or before the first day of October in each year, the commission shall make a final determination of the sum of the assessment against each railroad and public utility and shall notify each railroad and public utility of the sum assessed against it. The commission shall deduct from the assessment for each railroad or public utility any initial payment received. Payment of the assessment shall be made to the commission by the first day of November of that year. The commission shall deposit the payments received into the state treasury to the credit of the public utilities fund. Any such amounts paid into the fund but not expended by the commission shall be credited ratably, after first deducting any deficits accumulated from prior years, by the commission to railroads and public utilities that pay more than the minimum assessment, according to the respective portions of such sum assessable against them for the ensuing fiscal year. The assessments for such fiscal year shall be reduced correspondingly.

(C) Within five days after the beginning of each fiscal year through fiscal year 2006, the director of budget and management shall transfer from the general revenue fund to the public utilities fund an amount sufficient for maintaining and administering the public utilities commission and exercising its supervision and jurisdiction over the railroads and public utilities of the state during the first four months of the fiscal year. The director shall transfer the same amount back to the general revenue fund from the public utilities fund at such time as the director determines that the balance of the public utilities fund is sufficient to support the appropriations from the fund for the fiscal year. The director may transfer less than that amount if the director determines that the revenues of the public utilities fund during the fiscal year will be insufficient to support the appropriations from the fund for the fiscal year, in which case the amount not paid back to the general revenue fund shall be payable to the general revenue fund in future fiscal years.

(D) For the purpose of this section only, "public utility" includes:

(1) In addition to an electric utility as defined in section 4928.01 of the Revised Code, an electric services company, an electric cooperative, or a governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent of the company's, cooperative's, or aggregator's engagement in the business of supplying or arranging for the supply in this state of any retail electric service for which it must be so certified;

(2) In addition to a natural gas company as defined in section 4929.01 of the Revised Code, a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, to the extent of the supplier's or aggregator's engagement in the business of supplying or arranging for the supply in this state of any competitive retail natural gas service for which it must be certified.

(E) Each public utilities commissioner shall receive a salary fixed at the level set by pay range 49 under schedule E-2 of section 124.152 of the Revised Code.

Effective Date: 06-26-2001; 06-30-2005

The amendment to this section by 129th General AssemblyFile No.10,SB 5, §1 was rejected by voters in the November, 2011 election.

4905.13 System of accounts for public utilities.

The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. Such system shall, when practicable, conform to the system prescribed by the department of taxation. The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. The system of accounts established by the commission and the forms of accounts, records, and memorandums prescribed by it shall not be inconsistent, in the case of corporations subject to the act of congress entitled "An act to regulate commerce" approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the systems and forms established for such corporations by the interstate commerce commission. This section does not affect the power of the public utilities commission to prescribe forms of accounts, records, and memorandums covering information in addition to that required by the interstate commerce commission. The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, except such accounts, records, or memorandums as are explanatory of and supplemental to the accounts, records, or memorandums prescribed by the commission. The commission shall at all times have access to all accounts kept by such public utilities or railroads and may designate any of its officers or employees to inspect and examine any such accounts. The auditor or other chief accounting officer of any such public utility or railroad shall keep such accounts and make the reports provided for in sections 4905.14 and 4907.13 of the Revised Code. Any auditor or chief accounting officer who fails to comply with this section shall be subject to the penalty provided for in division (B) of section 4905.99 of the Revised Code. The attorney general shall enforce such section upon request of the public utilities commission by mandamus or other appropriate proceedings.

Effective Date: 07-01-1996

4905.15 Reports and accounts.

Each public utility shall furnish to the public utilities commission, in such form and at such times as the commission requires, such accounts, reports, and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.

Effective Date: 10-01-1953

4905.26 Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 09-29-1997

4905.31 Reasonable arrangements allowed - variable rate.

Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees, and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:

(A) The division or distribution of its surplus profits;

(B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement.

(C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;

(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;

(E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate. No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet. Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs. Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

Effective Date: 10-29-1993; 2008 SB221 07-31-2008

4905.33 Rebates, special rates, and free service prohibited.

(A) No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.

(B) No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

Effective Date: 01-01-2001

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4905.35 Prohibiting discrimination.

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(B)

(1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

(2) A natural gas company that is a public utility and that offers to a consumer a bundled service that includes both regulated and unregulated services or goods shall offer, on an unbundled basis, to that same consumer the regulated services or goods that would have been part of the bundled service. Those regulated services or goods shall be of the same quality as or better quality than, and shall be offered at the same price as or a better price than and under the same terms and conditions as or better terms and conditions than, they would have been had they been part of the company's bundled service.

(3) No natural gas company that is a public utility shall condition or limit the availability of any regulated services or goods, or condition the availability of a discounted rate or improved quality, price, term, or condition for any regulated services or goods, on the basis of the identity of the supplier of any other services or goods or on the purchase of any unregulated services or goods from the company.

Effective Date: 09-17-1996

4909.18 [Effective Until 3/27/2013] Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful, or, with respect to a natural gas company, projected to be used and useful as of the date certain, in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E)

Such other information as the commission may require in its discretion.

Amended by 129th General Assembly File No. 20, HB 95, § 1, eff. 9/9/2011.

Effective Date: 01-11-1983

4909.18 [Effective 3/27/2013] Application to establish or change rate

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) Such other information as the commission may require in its discretion.

Amended by 129th General Assembly File No. 199, HB 379, § 1, eff. 3/27/2013.

Amended by 129th General Assembly File No. 20, HB 95, § 1, eff. 9/9/2011.

Effective Date: 01-11-1983

4909.19 Publication of notice - investigation.

(A) Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish notice of such application, in a form approved by the public utilities commission, once a week for two consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and directly affected by the matters referred to in said application. The notice shall include instructions for direct electronic access to the application or other documents on file with the public utilities commission. The first publication of the notice shall be made in its entirety and may be made in a preprinted insert in the newspaper. The second publication may be abbreviated if all of the following apply:

(1) The abbreviated notice is at least one-fourth of the size of the notice in the first publication.

(2) At the same time the abbreviated notice is published, the notice in the first publication is posted in its entirety on the newspaper's web site, if the newspaper has a web site, and the commission's web site.

(3) The abbreviated notice contains a statement of the web site posting or postings, as applicable, and instructions for accessing the posting or postings.

(B) The commission shall determine a format for the content of all notices required under this section, and shall consider costs and technological efficiencies in making that determination. Defects in the publication of said notice shall not affect the legality or sufficiency of notices published under this section provided that the commission has substantially complied with this section, as described in section 4905.09 of the Revised Code.

(C) The commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The

commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

Amended by 129th General Assembly File No. 20, HB 95, § 1, eff. 9/9/2011.

Effective Date: 01-11-1983

4909.43 Filing rate increase application.

(A) No public utility shall file a rate increase application covering a municipal corporation pursuant to section 4909.18 or 4909.35 of the Revised Code at any time prior to six months before the expiration of an ordinance of that municipal corporation enacted for the purpose of establishing the rates of that public utility.

(B) Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code, a public utility shall notify, in writing, the mayor and legislative authority of each municipality included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein.

Effective Date: 01-11-1983

4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components" : generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM);

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

"Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy;

(ii) Wind energy;

(iii) Power produced by a hydroelectric facility;

(iv) Geothermal energy;

(v) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion;

(vi) Biomass energy;

(vii) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census;

(viii) Biologically derived methane gas;

(ix) Energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors.

"Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the better utilization of a renewable energy resource ; or distributed generation system used by a customer to generate electricity from any such energy.

"Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(38) "Waste energy recovery system" means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) "Smart grid" means capital improvements to an electric distribution utility's distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) "Combined heat and power system" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

Amended by 129th General Assembly File No. 125, SB 315, § 101.01, eff. 9/10/2012.

Amended by 128th General Assembly File No. 47, SB 181, § 1, eff. 9/13/2010.

Amended by 128th General Assembly File No. 48, SB 232, § 1, eff. 6/17/2010.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 10-05-1999; 01-04-2007; 2008 SB221 07-31-2008

4928.02 State policy.

It is the policy of this state to do the following throughout this state:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Amended by 129th General Assembly File No. 125, SB 315, § 101.01, eff. 9/10/2012.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.03 Identification of competitive services and noncompetitive services.

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

Effective Date: 10-05-1999

4928.04 Additional competitive services.

(A) The public utilities commission by order may declare that retail ancillary, metering, or billing and collection service supplied to consumers within the certified territory of an electric utility on or after the starting date of competitive retail electric service is a competitive retail electric service that the consumers may obtain from any supplier or suppliers subject to this chapter. The commission may issue such order, after investigation and public hearing, only if it first determines either of the following:

(1) There will be effective competition with respect to the service.

(2) The customers of the service have reasonably available alternatives. The commission shall initiate a proceeding on or before March 31, 2003, on the question of the desirability, feasibility, and timing of any such competition.

(B) In carrying out division (A) of this section, the commission may prescribe different classifications, procedures, terms, or conditions for different electric utilities and for the retail electric services they provide that are declared competitive pursuant to that division, provided the classifications, procedures, terms, or conditions are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any electric utility.

Effective Date: 10-05-1999

4928.05 Extent of exemptions.

(A)

(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90 ; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code. On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission. The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated. On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.06 Commission to ensure competitive retail electric service.

(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter. Initial rules necessary for the commencement of the competitive retail electric service under this chapter shall be adopted within one hundred eighty days after the effective date of this section. Except as otherwise provided in this chapter, the proceedings and orders of the commission under the chapter shall be subject to and governed by Chapter 4903. of the Revised Code.

(B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommendations for legislation to the standing committees of both houses of the general assembly that have primary jurisdiction regarding public utility legislation. Until 2008, the commission and the consumer's counsel also shall provide biennial reports to those standing committees, regarding the effectiveness of competition in the supply of competitive retail electric services in this state. In addition, until the end of all market development periods as determined by the commission under section 4928.40 of the Revised Code, those standing committees shall meet at least biennially to consider the effect on this state of electric service restructuring and to receive reports from the commission, consumers' counsel, and director of development.

(D) In determining, for purposes of division (B) or (C) of this section, whether there is effective competition in the provision of a retail electric service or reasonably available alternatives for that service, the commission shall consider factors including, but not limited to, all of the following:

(1) The number and size of alternative providers of that service;

(2) The extent to which the service is available from alternative suppliers in the relevant market;

(3) The ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services. The burden of proof shall be on any entity requesting, under division (B) or (C) of this section, a determination by the commission of the existence of or a lack of effective competition or reasonably available alternatives.

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(E)

(1) Beginning on the starting date of competitive retail electric service, the commission has authority under Chapters 4901. to 4909. of the Revised Code, and shall exercise that authority, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service.

(2) In addition to the commission's authority under division (E)(1) of this section, the commission, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The commission may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure shall be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the commission's authority is not preempted by federal law. The measure shall remain the commission, after reasonable notice and opportunity for hearing, determines that the particular abuse of market power has been mitigated.

(F) An electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall provide the commission with such information, regarding a competitive retail electric service for which it is subject to certification, as the commission considers necessary to carry out this chapter. An electric utility shall provide the commission with such information as the commission considers necessary to carry out divisions (B) to (E) of this section. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information. The commission shall require each electric utility to file with the commission on and after the starting date of competitive retail electric service an annual report of its intrastate gross receipts and sales of kilowatt hours of electricity, and shall require each electric services company, electric cooperative, and governmental aggregator subject to certification to file an annual report on and after that starting date of such receipts and sales from the provision of those retail electric services for which it is subject to certification. For the purpose of the reports, sales of kilowatt hours of electricity are deemed to occur at the meter of the retail customer.

Effective Date: 10-05-1999

4928.12 Qualifying transmission entities.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no entity shall own or control transmission facilities as defined under federal law and located in this state on or after the starting date of competitive retail electric service unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities, as described in division (B) of this section, that are operational.

(B) An entity that owns or controls transmission facilities located in this state complies with division (A) of this section if each transmission entity of which it is a member meets all of the following specifications:

(1) The transmission entity is approved by the federal energy regulatory commission.

(2) The transmission entity effects separate control of transmission facilities from control of generation facilities.

(3) The transmission entity implements, to the extent reasonably possible, policies and procedures designed to minimize pancaked transmission rates within this state.

(4) The transmission entity improves service reliability within this state.

(5) The transmission entity achieves the objectives of an open and competitive electric generation marketplace, elimination of barriers to market entry, and preclusion of control of bottleneck electric transmission facilities in the provision of retail electric service.

(6) The transmission entity is of sufficient scope or otherwise operates to substantially increase economical supply options for consumers.

(7) The governance structure or control of the transmission entity is independent of the users of the transmission facilities, and no member of its board of directors has an affiliation, with such a user or with an affiliate of a user during the member's tenure on the board, such as to unduly affect the transmission entity's performance. For the purpose of division (B)(7) of this section, a "user" is any entity or affiliate of that entity that buys or sells electric energy in the transmission entity's region or in a neighboring region.

(8) The transmission entity operates under policies that promote positive performance designed to satisfy the electricity requirements of customers.

(9) The transmission entity is capable of maintaining real-time reliability of the electric transmission system, ensuring comparable and nondiscriminatory transmission access and necessary services, minimizing system congestion, and further addressing real or potential transmission constraints.

(C) To the extent that a transmission entity under division (A) of this section is authorized to build transmission facilities, that transmission entity has the powers provided in and is subject to sections 1723.01 to 1723.08 of the Revised Code.

(D) For the purpose of forming or participating in a regional regulatory oversight body or mechanism developed for any transmission entity under division (A) of this section that is of regional scope and operates within this state:

(1) The commission shall make joint investigations, hold joint hearings, within or outside this state, and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States, whether in the holding of those investigations or hearings, or in the making of those orders, the commission is functioning under agreements or compacts between states, under the concurrent power of states to regulate interstate commerce, as an agency of the United States, or otherwise.

(2) The commission shall negotiate and enter into agreements or compacts with agencies of other states for cooperative regulatory efforts and for the enforcement of the respective state laws regarding the transmission entity.

(E) If a qualifying transmission entity is not operational as contemplated in division (A) of this section, division (A)(13) of section 4928.34 of the Revised Code, or division (G) of section 4928.35 of the Revised Code, the commission by rule or order shall take such measures or impose such requirements on all for-profit entities that own or control electric transmission facilities located in this state as the commission determines necessary and proper to achieve independent, nondiscriminatory operation of, and separate ownership and control of, such electric transmission facilities on or after the starting date of competitive retail electric service.

Effective Date: 10-05-1999

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

Effective Date: 2008 SB221 07-31-2008

4928.142 Standard generation service offer price - competitive bidding.

(A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following:

(a) Open, fair, and transparent competitive solicitation;

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

(d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. 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 requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

(1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;

(2) Its prudently incurred purchased power costs;

(3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

(F) An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.

Effective Date: 2008 SB221 07-31-2008; 2008 HB562 09-22-2008

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the

electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

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

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division 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 under this section, not later than two hundred seventy-five days after the application's filing date.

Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with

such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

Amended by 129th General Assembly File No. 61, HB 364, § 1, eff. 3/22/2012.

Effective Date: 2008 SB221 07-31-2008

4928.144 Phase-in of electric distribution utility rate or price.

The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

Effective Date: 2008 SB221 07-31-2008

4928.15 Schedules for provision of noncompetitive service.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code. The schedule shall provide that electric distribution service under the schedule is available to all consumers within the utility's certified territory and to any supplier to those consumers on a nondiscriminatory and comparable basis. Distribution service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code. The schedule shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(B) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and except as preempted by federal law, no electric utility shall supply the transmission service or ancillary service component of noncompetitive retail electric service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the commission under section 4909.18 of the Revised Code. The schedule shall provide that transmission or ancillary service under the schedule is available to all consumers and to any supplier to those consumers on a nondiscriminatory and comparable basis. Service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code.

(C) A self-generator shall have access to backup electricity supply from its competitive electric generation service provider at a rate to be determined by contract.

Effective Date: 10-05-1999

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4928.17 Corporate separation plans.

(A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for

ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.31 Transition plan.

(A) Not later than ninety days after the effective date of this section, an electric utility supplying retail electric service in this state on that date shall file with the public utilities commission a plan for the utility's provision of retail electric service in this state during the market development period. This transition plan shall be in such form as the commission shall prescribe by rule adopted under division (A) of section 4928.06 of the Revised Code and shall include all of the following:

(1) A rate unbundling plan that specifies, consistent with divisions (A)(1) to (7) of section 4928.34 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, the unbundles components for electric generation, transmission, and distribution service and such other unbundled service components as the commission requires, to be charged by the utility beginning on the starting date of competitive retail electric service and that includes information the commission requires to fix and determine those components;

(2) A corporate separation plan consistent with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(3) Such plan or plans as the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service consistent with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(4) An employee assistance plan for providing severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter;

(5) A consumer education plan consistent with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. A transition plan under this section may include tariff terms and conditions to address reasonable requirements for changing suppliers, length of commitment by a customer for service, and such other matters as are necessary to accommodate electric restructuring. Additionally, a transition plan under this section may include an application for the opportunity to receive transition revenues as authorized under sections 4928.31 to 4928.40 of the Revised Code, which application shall be consistent with those sections and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. The transition plan also may include a plan for the independent operation of the utility's transmission facilities consistent with section 4928.12 of the Revised Code, division (A)(13) of section 4928.34 of the Revised Code, and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. The commission may reject and require refiling, in whole or in part, of any substantially inadequate transition plan.

(B) The electric utility shall provide public notice of its filing under division (A) of this section, in a form and manner that the commission shall prescribe by rule adopted under division (A) of section 4928.06 of the Revised Code. However, the adoption of rules regarding the public notice under this division, regarding the form of the transition plan under division (A) of this section, and regarding procedures for expedited discovery under division (A) of section 4928.32 of the Revised Code are not subject to division (D) of section 111.15 of the Revised Code.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.35 Schedules containing unbundled rate components set in approved plan.

(A) Upon approval of its transition plan under sections 4928.31 to 4928.40 of the Revised Code, an electric utility shall file in accordance with section 4905.30 of the Revised Code schedules containing the unbundled rate components set in the approved plan in accordance with section 4928.34 of the Revised Code. The schedules shall be in effect for the duration of the utility's market development period, shall be subject to the cap specified in division (A)(6) of section 4928.34 of the Revised Code, and shall not be adjusted during that period by the public utilities commission except as otherwise authorized by division (B) of this section or as otherwise authorized by federal law or except to reflect any change in tax law or tax regulation that has a material effect on the electric utility.

(B) Efforts shall be made to reach agreements with electric utilities in matters of litigation regarding property valuation issues. Irrespective of those efforts, the unbundled components for an electric utility's retail electric generation service and distribution service, as provided in division (A) of this section, are not subject to adjustment for the utility's market development period, except that the commission shall order an equitable reduction in those components for all customer classes to reflect any refund a utility receives as a result of the resolution of utility personal property tax valuation litigation that is resolved on or after the effective date of this section and not later than December 31, 2005. Immediately upon the issuance of that order, the electric utility shall file revised rate schedules under section 4909.18 of the Revised Code to effect the order.

(C) The schedule under division (A) of this section containing the unbundled distribution components shall provide that electric distribution service under the schedule will be available to all retail electric service customers in the electric utility's certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service. The schedule also shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(D) During the market development period, an electric distribution utility shall provide consumers on a comparable and nondiscriminatory basis within its certified territory a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service priced in accordance with the schedule containing the utility's unbundled generation service component. Immediately upon approval of its transition plan, the utility shall file the standard service offer with the commission under section 4909.18 of the Revised Code, during the market development period. The failure of a supplier to deliver retail electric generation service shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under this division until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to deliver such service if any of the conditions specified in section 4928.14 of the Revised Code is met.

(E) An amendment of a corporate separation plan contained in a transition plan approved by the commission under section 4928.33 of the Revised Code shall be filed and approved as a corporate separation plan pursuant to section 4928.17 of the Revised Code.

(F) Any change to an electric utility's opportunity to receive transition revenues under a transition plan approved in accordance with section 4928.33 of the Revised Code shall be authorized only as provided in sections 4928.31 to 4928.40 of the Revised Code.

(G) The commission, by order, shall require each electric utility whose approved transition plan did not include an independent transmission plan as described in division (A)(13) of section 4928.34 of the Revised Code to be a member of, and transfer control of transmission facilities it owns or controls in this state to, one or more qualifying transmission entities, as described in division (B) of section 4928.12 of the Revised Code, that are planned to be operational on and after December 31, 2003. However, the commission may extend that date if, for reasons beyond the control of the utility, a qualifying transmission entity is not planned to be operational on that date. The commission's order may specify an earlier date on which the transmission entity or entities are planned to be operational if the commission considers it necessary to carry out the policy specified in section 4928.02 of the Revised Code or to encourage effective competition in retail electric service in this state. Upon the issuance of the order, each such utility shall file with the commission a plan for such independent operation of the utility's transmission facilities consistent with this division. The commission may reject and require refiling of any substantially inadequate plan submitted under this division. After reasonable notice and opportunity for hearing, the commission shall approve the plan upon a finding that the plan will result in the utility's compliance with the order, this division, and any rules adopted under division (A) of section 4928.06 of the Revised Code. The approved independent transmission plan shall be deemed a part of the utility's transition plan for purposes of sections 4928.31 to 4928.40 of the Revised Code.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4928.38 Commencing and terminating transition revenues.

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

Effective Date: 10-05-1999

4928.39 Determining total allowable transition costs.

Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:

(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs. Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section. Further, the commission's order under this section shall separately identify regulatory assets of the utility that are a part of the total allowable amount of transition costs determined under this section and separately identify that portion of a transition charge determined under section 4928.40 of the Revised Code that is allocable to those assets, which portion of a transition charge shall be subject to adjustment only prospectively and after December 31, 2004, unless the commission authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to division (B)(2) of section 4928.40 of the Revised Code. The electric utility shall have the burden of demonstrating allowable transition costs as authorized under this section. The commission may impose reasonable commitments upon the utility's collection of the transition revenues to ensure that those revenues are used to eliminate the allowable transition costs of the utility during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage, in the provision by the utility of regulated or unregulated products or services.

Effective Date: 10-05-1999

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4933.81 Certified territories for electric suppliers definitions.

As used in sections 4933.81 to 4933.90 of the Revised Code:

(A) "Electric supplier" means any electric light company as defined in section 4905.03 of the Revised Code, including electric light companies organized as nonprofit corporations, but not including municipal corporations or other units of local government that provide electric service.

(B) "Adequate facilities" means distribution lines or facilities having sufficient capacity to meet the maximum estimated electric service requirements of its existing customers and of any new customer occurring during the year following the commencement of permanent electric service, and to assure all such customers of reasonable continuity and quality of service. Distribution facilities and lines of an electric supplier shall be considered "adequate facilities" if such supplier offers to undertake to make its distribution facilities and lines meet such service requirements and, in the determination of the public utilities commission, can do so within a reasonable time.

(C) "Distribution line" means any electric line that is being or has been used primarily to provide electric service directly to electric load centers by the owner of such line.

(D) "Existing distribution line" means any distribution line of an electric supplier which was in existence on January 1, 1977, or under construction on that date.

(E) "Electric load center" means all the electric-consuming facilities of any type or character owned, occupied, controlled, or used by a person at a single location which facilities have been, are, or will be connected to and served at a metered point of delivery and to which electric service has been, is, or will be rendered.

(F) "Electric service" means retail electric service furnished to an electric load center for ultimate consumption, but excludes furnishing electric power or energy at wholesale for resale. In the case of a for-profit electric supplier and beginning on the starting date of competitive retail electric service as defined in section 4928.01 of the Revised Code, "electric service" also excludes a competitive retail electric service. In the case of a not-for-profit electric supplier and beginning on that starting date, "electric service" also excludes any service component of competitive retail electric service that is specified in an irrevocable filing the electric supplier makes with the public utilities commission for informational purposes only to eliminate permanently its certified territory under sections 4933.81 to 4933.90 of the Revised Code as to that service component. The filing shall specify the date on which such territory is so eliminated. Notwithstanding division (B) of section 4928.01 of the Revised Code, such a service component may include retail ancillary, metering, or billing and collection service irrespective of whether that service component has or has not been declared competitive under section 4928.04 of the Revised Code. Upon receipt of the filing by the commission, the not-for-profit electric supplier's certified territory shall be eliminated permanently as to the service component specified in the filing as of the date specified in the filing. As used in this division, "competitive retail electric service" and "retail electric service" have the same meanings as in section 4928.01 of the Revised Code.

(G) "Certified territory" means a geographical area the boundaries of which have been established pursuant to sections 4933.81 to 4933.90 of the Revised Code within which an electric supplier is authorized and required to provide electric service.

(H) "Other unit of local government" means any governmental unit or body that may come into existence after July 12, 1978, with powers and authority similar to those of a municipal corporation, or that is created to replace or exercise the relevant powers of any one or more municipal corporations.

Effective Date: 10-05-1999

4933.82 Boundaries of certified territory of electric suppliers.

(A) Except as otherwise provided in this section, the boundaries of the certified territory of each electric supplier shall be considered set as a line or lines substantially equidistant between its existing distribution lines and the nearest existing distribution lines of any other electric supplier in every direction, so that there is thereby certified to each electric supplier such land area as is located nearer to one of its existing distribution lines than to the nearest existing distribution line of any other electric supplier.

(B) On or before one year after the effective date of this section or, when requested in writing by an electric supplier and for good cause shown, such further time as the commission may fix by order, each electric supplier shall file with the public utilities commission a map or maps showing all of its existing distribution lines and the proposed boundaries of its certified territory. The commission shall prepare, or cause to be prepared, within six months after such filing a map of uniform scale to show, accurately and clearly, the boundaries of the certified territory of each electric supplier as proposed by such electric supplier, or as established under division (A) of this section, and shall issue a map of the certified territory of each electric supplier. Such map shall show the service areas of municipally owned electric systems as of the date the map is drawn. The service area of each municipally owned electric system shall include all of the incorporated area of said system and that territory within a line substantially equidistant between its existing distribution lines and the nearest existing distribution line of any electric supplier in every direction. Certification of territory pursuant to sections 4933.81 to 4933.90 of the Revised Code shall not in any manner prohibit or restrict the rights of municipalities under Article XVIII or any other article of the Ohio Constitution and the existence of a municipally owned electric system service area shall not in any respect restrict or limit the boundaries of the certified territory established for electric suppliers.

(C) Each electric supplier and any municipal corporation may examine the maps of electric suppliers filed with the commission pursuant to this section. Any electric supplier whose own certified territory is affected or any municipal corporation whose service area is affected by any such filing and that takes exception thereto, on the basis of an alleged error, may informally request the commission to arrange a conference of the affected parties to resolve the alleged error. The supplier making the request shall serve a copy of the request by certified mail on the electric supplier whose map is alleged to contain the error. The commission shall arrange a conference as promptly as practicable after receipt of the request and shall give notice thereof to all electric suppliers and municipal corporations affected by the alleged error. If an alleged error is not corrected to the satisfaction of any affected electric supplier or municipal corporation, such supplier or municipal corporation may formally petition the commission for a hearing and such hearing shall be granted by the commission as promptly as practicable.

(D) Upon completion by the commission of maps showing the boundaries of the certified territory of each electric supplier as established under division (A) of this section, each electric supplier shall have the right to examine all such maps, and any electric supplier whose own certified territory is affected thereby, on the basis of an alleged error, may informally request that the commission confer with it to resolve the issue of the alleged incorrect location of boundary. The procedure shall be as specified above for resolution of alleged errors in the maps supplied by any electric supplier, including the right of the supplier making the informal request to ultimately formally petition the commission for a hearing.

(E) In reaching its decision on any dispute formally or informally brought to the attention of the commission, under division (C) or (D) of this section, the commission shall follow the standards set forth in division (A) of this section and division (C) of section 4933.83 of the Revised Code.

(F) All portions of the state shall be included within certified territory established pursuant to this section.

Effective Date: 07-12-1978

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4933.83 Exclusive right to furnish electric service to electric load centers.

(A) Except as otherwise provided in this section and Article XVIII of the Ohio Constitution, each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier; provided that nothing in sections 4933.81 to 4933.90 of the Revised Code shall impair the power of municipal corporations to require franchises or contracts for the provision of electric service within their boundaries, and provided that any electric supplier may extend its facilities through the certified territory of another electric supplier to connect any of its facilities, to serve electric load centers within its own certified territory or to interconnect with other electric suppliers. In the event that a new electric load center should locate in an area that is composed of two or more adjacent certified territories, the electric supplier in whose certified territory the greater portion of the land area covered by the electric load center is located shall serve that electric load center. In the event that a municipal corporation refuses to grant a franchise or contract for electric service within its boundaries to an electric supplier whose certified territory is included within the municipality, any other electric supplier may serve the municipal corporation under a franchise or contract with the municipal corporation.

(B) Electric suppliers shall furnish adequate facilities to meet the reasonable needs of the consumers and inhabitants in the certified territories that they are authorized and required to serve pursuant to sections 4933.81 to 4933.90 of the Revised Code. The public utilities commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any electric supplier operating in a certified territory, or providing electric service pursuant to division (C) of this section, is rendering or proposes to render physically adequate service to an electric load center and in the event the commission finds that such electric supplier is not rendering and does not propose to render physically adequate service, the commission may enter an order specifying in what particulars such electric supplier has failed to render or propose to render physically adequate service and order that such failure be corrected within a reasonable time to be fixed in such order. If the electric supplier so ordered to correct such failure fails to comply with such order, the commission may authorize another electric supplier to furnish electric service to such electric load center and shall appropriately amend the maps of the certified territory of such electric suppliers.

(C) Except as provided in division (B) of this section and Article XVIII of the Ohio Constitution, each electric supplier has the obligation and exclusive right to furnish electric service to electric load centers, wherever located, which it was serving on January 1, 1977, or which it had agreed to serve under lawful contracts in effect on or resulting from written bids submitted under bond prior to January 1, 1977, and no other electric supplier shall furnish, make available, or extend electric service to any such electric load centers.

(D) Sections 4933.81 to 4933.90 of the Revised Code shall not prevent an electric supplier from extending its electric service after the effective date of this section to its own property or facilities.

(E) Notwithstanding the effectuation of certified territories established by or pursuant to sections 4933.81 to 4933.90 of the Revised Code, and the exclusive right of electric suppliers to serve within such territory, and notwithstanding any other provisions of such sections establishing rights of electric suppliers to furnish electric service, any two or more electric suppliers may jointly petition the

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commission for the reallocation of their own territories and electric load centers among them and designating which portions of such territories and electric load centers are to be served by each of the electric suppliers. The commission, if it finds that granting the petition will promote the purposes of sections 4933.81 to 4933.90 of the Revised Code and will provide adequate service to all territories and electric load centers affected thereby, shall approve such a petition, appropriately modify the territorial boundaries of the petitioning electric suppliers, and amend the maps of the certified territory of such electric suppliers accordingly.

Effective Date: 07-12-1978

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4933.84 Right of electric supplier to continue or extend electric service within certified territory following annexation or incorporation of territory.

Annexation or incorporation by a municipal corporation or other unit of local government does not affect the right of an electric supplier to continue or extend electric service within its certified territory except insofar as that right is affected or modified by Article XVIII or any other article of the Ohio Constitution. Notwithstanding this section or any other provision of law, the right of a municipal corporation to furnish service to such portion of the corporation as has been annexed to the corporation since the time maps have been drawn in accordance with section 4933.82 of the Revised Code shall not be abridged.

Effective Date: 07-12-1978

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4933.85 Assigning or transferring rights.

The rights and authority granted under sections 4933.81 to 4933.84 of the Revised Code may be assigned or transferred only with the approval of the public utilities commission and approval shall be granted if the commission finds that the assignment or transfer is not contrary to the public interest. Upon the merger or consolidation of electric suppliers, the surviving or new electric supplier shall, without further action, succeed to all rights and authority previously granted under sections 4933.81 to 4933.84 of the Revised Code to the merged or consolidated electric suppliers.

Effective Date: 07-12-1978

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4933.86 Violations.

Any electric supplier that renders electric service in violation of sections 4933.81 to 4933.90 of the Revised Code is subject to remedies and penalties provided by sections 4905.54, 4905.56, 4905.57, 4905.59, 4905.60, and 4905.61 and division (B) of section 4905.99 of the Revised Code.

Effective Date: 07-01-1996

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4933.87 Right of municipal corporations to generate, transmit, distribute, or sell electric energy.

Nothing contained in sections 4933.81 to 4933.90 of the Revised Code shall be construed to affect the right of municipal corporations to generate, transmit, distribute, or sell electric energy. The rights and powers of municipal corporations as they exist on or after the effective date of this section to acquire, construct, own, lease, or operate in any manner a public utility or to supply the service or product by means of a rate ordinance adopted under section 743.26 of the Revised Code or under Section 4, Article XVIII, Ohio Constitution in any portion of the state is not affected by sections 4933.81 to 4933.90 of the Revised Code. When an electric system owned by a municipal corporation is sold, the purchaser thereof shall be considered an electric supplier and the area served by the system shall become the certified territory of the purchaser. An electric supplier whose certified territory also includes any portion of such service area shall have the right and obligation to continue providing electric service within its previously established certified territory and the sale of a municipal corporation's electric system shall not in any respect restrict or limit such right and obligation. The purchaser shall, for the purposes of sections 4933.81 to 4933.90 of the Revised Code, be an electric supplier.

Effective Date: 07-12-1978

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4933.88 Assessing expenses of administration.

The expenses of the public utilities commission in administering sections 4933.81 to 4933.90 of the Revised Code shall be assessed by the commission against the affected electric suppliers on the following basis:

(A) Expenses that relate to the preparation or review of maps to establish the certified territory of a single electric supplier in any area where there is no other electric supplier shall be assessed solely to such electric supplier.

(B) Expenses that relate to the preparation or review of maps to establish the certified territories of two or more electric suppliers in any area where there are two or more electric suppliers shall be assessed in equal shares among such electric suppliers.

(C) Expenses that relate to the consideration and disposition of alleged errors pursuant to section 4933.82 of the Revised Code and the consideration and disposition of proposed adjustments pursuant to division (E) of section 4933.83 of the Revised Code shall be assessed in equal shares among the electric suppliers affected thereby.

(D) Expenses that relate to the enforcement by the commission of compliance with sections 4933.81 to 4933.90 of the Revised Code shall be assessed in equal shares against the electric supplier or suppliers to which an order of enforcement is directed. Where such enforcement proceedings are initiated by an electric supplier or suppliers and no order of enforcement is issued by the commission, such expenses shall be assessed in equal shares against the electric supplier or suppliers initiating such proceedings.

(E) Any other expenses of the commission shall be assessed by the commission in equal shares among the electric suppliers that are subject to sections 4933.81 to 4933.90 of the Revised Code.

(F) The commission may assess the expenses enumerated in this section on the basis of estimates made by it, with appropriate adjustment or credit after final determination of such expenses.

Effective Date: 07-12-1978

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4933.89 Public utilities territorial administration fund.

There is hereby created in the state treasury a fund to be known as the public utilities territorial administration fund. The funds collected under section 4933.88 of the Revised Code as assessments shall be credited to the public utilities territorial administration fund.

Effective Date: 07-12-1978

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4933.90 Review of public utilities commission actions.

Action of the public utilities commission pursuant to sections 4933.81 to 4933.90 of the Revised Code is subject to review in accordance with Chapter 4903. of the Revised Code but during any appeal therefrom, the continuance of existing electric service is lawful.

Effective Date: 07-12-1978

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4935.03 Rules for energy emergencies.

(A) The public utilities commission shall adopt, and may amend or rescind, rules in accordance with section 111.15 of the Revised Code, with the approval of the governor, defining various foreseen types and levels of energy emergency conditions for critical shortages or interruptions in the supply of electric power, natural gas, coal, or individual petroleum fuels and specifying appropriate measures to be taken at each level or for each type of energy emergency as necessary to protect the public health or safety or prevent unnecessary or avoidable damage to property. The rules may prescribe different measures for each different type or level of declared energy emergency, and for any type or level shall empower the governor to:

(1) Restrict the energy consumption of state and local government offices and industrial and commercial establishments;

(2) Restrict or curtail public or private transportation or require or encourage the use of car pools or mass transit systems;

(3) Order, during a declared energy emergency, any electric light, natural gas or gas, or pipeline company; any supplier subject to certification under section 4928.08 or 4929.20 of the Revised Code; electric power or gas utility that is owned by a municipal corporation or not for profit; coal producer or supplier; electric power producer or marketer; or petroleum fuel producer, refiner, wholesale distributor, or retail dealer to sell electricity, gas, coal, or petroleum fuel in order to alleviate hardship, or if possible to acquire or produce emergency supplies to meet emergency needs;

(4) Order, during a declared energy emergency, other energy conservation or emergency energy production or distribution measures to be taken in order to alleviate hardship;

(5) Mobilize emergency management, national guard, law enforcement, or emergency medical services. The rules shall be designed to protect the public health and safety and prevent unnecessary or avoidable damage to property. They shall encourage the equitable distribution of available electric power and fuel supplies among all geographic regions in the state.

(B) The governor may, after consultation with the chairperson of the commission, declare an energy emergency by filing with the secretary of state a written declaration of an energy emergency at any time the governor finds that the health, safety, or welfare of the residents of this state or of one or more counties of this state is so imminently and substantially threatened by an energy shortage that immediate action of state government is necessary to prevent loss of life, protect the public health or safety, and prevent unnecessary or avoidable damage to property. The declaration shall state the counties, utility service areas, or fuel market areas affected, or its statewide effect, and what fuels or forms of energy are in critically short supply. An energy emergency goes into immediate effect upon filing and continues in effect for the period prescribed in the declaration, but not more than thirty days. At the end of any thirty-day or shorter energy emergency, the governor may issue another declaration extending the emergency. The general assembly may by concurrent resolution terminate any declaration of an energy emergency. The emergency is terminated at the time of filing of the concurrent resolution with the secretary of state. When an energy emergency is declared, the commission shall implement the measures which it determines are appropriate for the type and level of emergency in effect.

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(C) Energy emergency orders issued by the governor pursuant to this section shall take effect immediately upon issuance, and the person to whom the order is directed shall initiate compliance measures immediately upon receiving the order. During an energy emergency the attorney general or the prosecuting attorney of the county where violation of a rule adopted or order issued under this section occurs may bring an action for immediate injunction or other appropriate relief to secure prompt compliance. The court may issue an ex parte temporary order without notice which shall enforce the prohibitions, restrictions, or actions that are necessary to secure compliance with the rule or order. Compliance with rules or orders issued under this section is a matter of statewide concern.

(D) During a declared energy emergency the governor may use the services, equipment, supplies, and facilities of existing departments, offices, and agencies of the state and of the political subdivisions thereof to the maximum extent practicable and necessary to meet the energy emergency, and the officers and personnel of all such departments, offices, and agencies shall cooperate with and extend such services and facilities to the governor upon request.

(E) During an energy emergency declared under this section, no person shall violate any rule adopted or order issued under this section. Whoever violates this division is guilty of a minor misdemeanor on a first offense, and a misdemeanor of the first degree upon subsequent offenses or if the violation was purposely committed.

Effective Date: 06-26-2001

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4963.40 Rules and regulations governing the construction and maintenance of telephone and telegraph wires.

The public utilities commission shall determine standards of maintenance and operation and the nature, location, and character of the construction to be used where telegraph, telephone, electric light, power, or other electric wires of any kind cross or more or less parallel the line of a railroad, interurban railroad, or other public utility, and to this end shall formulate and issue rules, regulations, and complete detailed specifications covering each class of construction, maintenance, and operation of such electric wire crossing or parallel, under the various conditions existing. The commission, upon complaint of any person, railroad, interurban railroad, or public utility claiming to be injuriously affected or subjected to hazard, shall, after hearing, make such order and prescribe such conditions for the construction, maintenance, and operation of the lines, plants, or systems, as seems just and reasonable to it.

Effective Date: 10-01-1953

4963.41 Duty of the public utilities commission.

The public utilities commission shall enforce section 4963.40 of the Revised Code, and for that purpose shall have power to cause the removal of such telegraph, telephone, electric light, power, or other electric wires of any kind crossing or paralleling such other line and not in accordance with the rules, regulations, and specifications issued by it.

Effective Date: 10-01-1953

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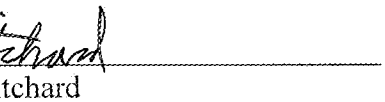
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appendix of Appellant/Cross-Appellee Industrial Energy Users-Ohio, Volume 2 of 2,* was served upon the parties of record this 15th day of July 2013 *via* electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



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