ORIGINAL

IN THE SUPREME COURT OF OHIO

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, Ohio Rev. Code, in the Form of an Electric Security Plan.	:	Case No. 2013-0521 Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	:	
The Kroger Company, and Industrial Energy Users-Ohio, Appellants, v. Public Utilities Commission of Ohio, Appellee.	:	

APPENDIX TO MERIT BRIEF OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO

FILED
AUG 12 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)
Frank P. Darr (Reg. No. 0025469)
Joseph E. Oliker (Reg. No. 0086088)
Matthew R. Pritchard (Reg. 0088070)
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Facsimile: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

COUNSEL FOR APPELLANT, INDUSTRIAL ENERGY USERS-OHIO

Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio

William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee (Reg. No. 0017352)
John H. Jones (Reg. No. 0051913)
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
william.wright@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us
john.jones@puc.state.oh.us

COUNSEL FOR APPELLEE, PUBLIC UTILITIES COMMISSION OF OHIO

Mark S. Yurick (Reg. No. 0039176)
(Counsel of Record)
Zachary D. Kravitz (Reg. No. 0084238)
Taft Stettinius & Hollister, LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-3413
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
myurick@taftlaw.com
zkravitz@taftlaw.com

COUNSEL FOR APPELLANT, THE KROGER CO.

Michael L. Kurtz (Reg. No. 0033350)
(Counsel of Record)
David F. Boehm (Reg. No. 0021881)
Jody M. K. Cohn (Reg. No. 0085402)
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Telephone: (513) 421-2255
Facsimile: (513) 421-2764
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkylercohn@bkllawfirm.com

COUNSEL FOR APPELLANT, THE OHIO ENERGY GROUP

Mark A. Hayden (Reg. No. 0081077)
(Counsel of Record)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 761-7735
Facsimile: (330) 384-3875
haydenm@firstenergygroup.com

James F. Lang (Reg. No. 0059668)
N. Trevor Alexander (Reg. No. 0080713)
CALFEE, HALTER & GRISWOLD LLP
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
jlang@calfee.com
talexander@calfee.com

David A. Kutik (Reg. No. 0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

COUNSEL FOR APPELLANT, FIRSTENERGY SOLUTIONS CORP.

Steven T. Nourse (Reg. No. 0046705)
(Counsel of Record)
Matthew J. Satterwhite (Reg. No. 0071972)
AMERICAN ELECTRIC POWER CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway (Reg. No. 0023058)
L. Bradfield Hughes (Reg. No. 0070997)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215
Telephone: (614) 227-2270
Facsimile: (614) 227-1000
dconway@porterwright.com
bhughes@porterwright.com

COUNSEL FOR APPELLEE/CROSS-APPELLANT, OHIO POWER COMPANY

Bruce J. Weston (Reg. No. 0016973)
Ohio Consumers' Counsel

Maureen R. Grady (Reg. No. 0020847)
(Counsel of Record)
Terry L. Etter (Reg. No. 0067445)
Joseph P. Serio (Reg. No. 0036959)
Assistant Consumers' Counsel
OFFICE OF THE OHIO CONSUMERS' COUNSEL
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: (614) 466-9567
Facsimile: (614) 466-9475
grady@occ.state.oh.us
etter@occ.state.oh.us.
serio@occ.state.oh.us

COUNSEL FOR APPELLANT, OFFICE OF THE OHIO CONSUMERS' COUNSEL

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NOTICE OF SECOND APPEAL OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO

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SUPREME COURT OF OHIO

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)
Frank P. Darr (Reg. No. 0025469)
Joseph E. Oliker (Reg. No. 0086088)
Matthew R. Pritchard (Reg. 0088070)
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Facsimile: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

COUNSEL FOR APPELLANT, INDUSTRIAL ENERGY USERS-OHIO

Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio

William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee (Reg. No. 0017352)
John H. Jones (Reg. No. 0051913)
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
william.wright@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us
john.jones@puc.state.oh.us

COUNSEL FOR APPELLEE, PUBLIC UTILITIES COMMISSION OF OHIO

Mark S. Yurick (Reg. No. 0039176)
(Counsel of Record)
Zachary D. Kravitz (Reg. No. 0084238)
TAFT STETTINIUS & HOLLISTER, LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-3413
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
myurick@taftlaw.com
zkravitz@taftlaw.com

COUNSEL FOR APPELLANT, THE KROGER CO.

NOTICE OF SECOND APPEAL OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO

Appellant, Industrial Energy Users-Ohio ("IEU-Ohio" or "Appellant"), hereby gives its notice of appeal, pursuant to R.C. 4903.11 and 4903.13, S.Ct.Prac.R. 10.02(A), and Ohio Adm. Code 4901-1-02(A) and 4901-1-36, to the Supreme Court of Ohio and Appellee, the Public Utilities Commission of Ohio ("Commission" or "PUCO"), from the Commission's Opinion and Order ("Attachment A") ("ESP II Order") issued August 7, 2012, Entry on Rehearing issued January 30, 2013 ("Attachment B") ("ESP II Entry on Rehearing"), and Second Entry on Rehearing ("Attachment C") ("ESP II Second Entry on Rehearing") issued March 27, 2013 in Case Nos. 11-346-EL-SSO, *et al.* (collectively, "ESP II Orders").

This notice of appeal is the second filed with this Court concerning the ESP II Orders. Appellant, The Kroger Company, filed its Notice of Appeal from the ESP II Orders on April 1, 2013.

IEU-Ohio requests that it be designated an appellant in this proceeding.

Appellant was and is a party of record in Case Nos. 11-346-EL-SSO, *et al.*, and timely filed its Application for Rehearing from the Opinion and Order issued on August 30, 2012. The Commission initially granted rehearing for the purpose of further considering the Application for Rehearing of IEU-Ohio and other parties on October 3, 2012, but then denied IEU-Ohio's Application for Rehearing on January 30, 2013. Because the Commission modified the ESP II Order in its ESP II Entry on Rehearing, IEU-Ohio filed a timely second Application for Rehearing of the Commission's ESP II Entry on Rehearing on March 1, 2013. The Commission denied IEU-Ohio's second Application for Rehearing on March 27, 2013.

The ESP II Orders are unlawful and unreasonable for the reasons set out in the following Assignments of Error:

1. The ESP II Orders are unlawful and unreasonable because the as-approved Electric Security Plan ("ESP"), including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is not more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142,[1] as required by R.C. 4928.143(C)(1) ("ESP versus MRO test").

   A. The ESP II Orders are unlawful and unreasonable because they use $188.88/megawatt-day ("MW-day") as the price for the capacity component for generation supply associated with the MRO SSO, thereby overstating the MRO SSO pricing as compared to the as-approved Modified ESP SSO in the ESP versus MRO test.

   B. The ESP II Orders are unlawful and unreasonable because they disregard the costs of the as-approved ESP for over 25% of the ESP term in applying the ESP versus MRO test.

   C. The ESP II Orders are unlawful and unreasonable because they do not include the full cost of the Generation Resource Rider ("GRR") as part of the quantitative costs, thereby understating the cost of the as-approved ESP, in applying the ESP versus MRO test.

[1] This Section allows a utility to fulfill its standard service offer ("SSO") obligation through a market rate offer ("MRO").

D. The ESP II Orders are unlawful and unreasonable because they do not include known costs for the Pool Termination Rider ("PTR"), Retail Stability Rider ("RSR"), and Capacity Shopping Tax[2] as part of the quantitative costs of the as-approved ESP, thereby understating the cost of the as-approved ESP, in applying the ESP versus MRO test.

E. The ESP II Orders are unlawful and unreasonable because they do not include or address the effect of known costs of the energy-only auctions and the "quicker" move to a competitive bid process ("CBP")-based SSO for purposes of conducting the ESP versus MRO test.

2. The ESP II Orders are unlawful and unreasonable because they approve an ESP by introducing subjective and speculative "qualitative benefits" into the ESP versus MRO test, thereby evading compliance with R.C. 4903.09.

3. The ESP II Orders are unlawful and unreasonable because the non-bypassable RSR, Capacity Shopping Tax, and the PTR cannot be lawfully included in an ESP.

A. The ESP II Orders are unlawful and unreasonable because they authorize non-bypassable generation-related riders which are not included in the list of permissive ESP provisions contained in R.C. 4928.143(B)(2).

---

[2] "Capacity Shopping Tax" refers to the non-bypassable rider that will collect the balance of the $188.88/MW-day capacity price that is not collected from competitive retail electric service ("CRES") providers through "RPM-Based Pricing" or through the $1/megawatt hour ("MWh") portion of the RSR. As used herein, this deferred balance to be collected through the Capacity Shopping Tax is referred to as the "Capacity Deferral."

B. The ESP II Orders are unlawful and unreasonable because they conclude that the RSR can be authorized under R.C. 4928.143(B)(2)(d). The RSR does not have the effect of stabilizing or providing certainty regarding retail electric service.

C. The ESP II Orders are unlawful and unreasonable because the Commission's finding that the RSR provides certain and fixed rates is not supported by the manifest weight of the evidence.

D. The ESP II Orders are unlawful and unreasonable because the Commission's finding that the RSR will result in a non-fuel base generation rate freeze is not legally sufficient to support the Commission's authorization of the RSR under R.C. 4928.143(B)(2)(d).

E. The ESP II Orders are unlawful and unreasonable because the Commission may not lawfully approve a rider such as the RSR that renders the Modified ESP less favorable in the aggregate than an MRO.

F. The ESP II Orders are unlawful and unreasonable because the PTR cannot be authorized under R.C. 4928.143(B)(2)(d).

G. The ESP II Orders are unlawful and unreasonable because the Commission has not made the required findings that support the authorization of the PTR under R.C. 4928.143(B)(2)(d).

H. The ESP II Orders are unlawful and unreasonable because the PTR will result in the recovery of wholesale generation revenue through a non-

bypassable charge that results in a violation of the State Energy Policy stated in R.C. 4928.02(H), and the requirements for corporate separation under R.C. 4928.17.

I. The ESP II Orders are unlawful and unreasonable because they conclude that the Capacity Deferral and the Capacity Shopping Tax can be authorized under R.C. 4928.144. The Capacity Deferral and Capacity Shopping Tax do not arise from rates or prices authorized under R.C. 4928.141 to 4928.143, and therefore the Commission's authority in R.C. 4928.144 is unavailable.

4. The ESP II Orders are unlawful and unreasonable because they authorize an increase in SSO prices so as to collect above-market generation-related revenue through the non-bypassable RSR, Capacity Shopping Tax, and the PTR, thereby providing AEP-Ohio with the ability to collect transition revenue or its equivalent at a time when Ohio law requires that AEP-Ohio's generation business be fully on its own in the competitive market. The ESP II Orders also are unlawful and unreasonable because they permit AEP-Ohio to evade its Commission-approved settlement obligation to forego such collection and to not impose lost generation-related revenue charges on shopping customers.

5. The ESP II Orders are unlawful and unreasonable because they assume that the Commission may invent and apply a cost-based ratemaking methodology for purposes of authorizing a significant increase in the price for generation capacity service and then defer the uncollected portion of this significant increase in the

price for generation capacity service and collect such portion plus interest charges through non-bypassable charges applicable to shopping and non-shopping customers after the term of the ESP.

6. The ESP II Orders are unlawful and unreasonable because they function to permit AEP-Ohio, an electric distribution utility ("EDU"), to evade statutory corporate separation requirements of R.C. 4928.17 that call for strict separation between competitive and non-competitive lines of business and services and because they approve an SSO which insulates AEP-Ohio's competitive generation business from the discipline of the electricity market. The RSR, Capacity Shopping Tax, and PTR all function to allow AEP-Ohio, the EDU, to evade such corporate separation requirements, collect above-market generation-related revenue and insulate AEP-Ohio's competitive generation business from the discipline of the electricity market. Following AEP-Ohio's proposed transfer of its generating assets to an affiliate, AEP Generation Resources Company ("Genco"), these three riders will further violate such corporate separation requirements by allowing AEP-Ohio to collect, on a non-bypassable basis, above-market generation-related revenue and remit such revenue to Genco, thereby insulating Genco's competitive generation business from the discipline of the electricity market.

7. The ESP II Orders are unlawful and unreasonable because they fail to promote the State policy contained in R.C. 4928.02.

8. The ESP II Orders are unlawful and unreasonable because they fail to recognize that the rates and charges applicable to non-shopping customers also are

providing AEP-Ohio with compensation for generation capacity service, they ignore or disregard the fact that AEP-Ohio has maintained that non-shopping customers are, on average, paying nearly twice the $188.88/MW-day price, and they fail to establish a mechanism to credit such excess compensation obtained from non-shopping customers against the Capacity Deferral.

9. The ESP II Orders are unlawful and unreasonable because they fail to direct AEP-Ohio to calculate the Phase-In Recovery Rider's ("PIRR") carrying charges on deferred balances adjusted for accumulated deferred income taxes ("ADIT") in accordance with generally accepted accounting principles, regulatory principles, Court precedent, and Commission precedent. The ESP II Orders' failure to require an ADIT adjustment permits AEP-Ohio to accrue carrying charges on overstated balances, thereby requiring customers to overcompensate AEP-Ohio.

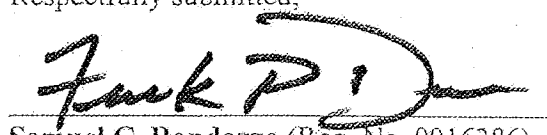
10. The ESP II Orders are unlawful and unreasonable because, without authority to do so under R.C. 4928.143, the ESP II Orders conditionally approve a transfer of generating assets without making the findings required by R.C. 4928.17 and 4928.02 and Rule 4901:1-37, Ohio Adm. Code, and without netting the above-book market value of AEP-Ohio's generating assets against the transition revenue which the ESP II Orders authorize AEP-Ohio to collect on a non-bypassable basis during and after the term of the as-approved Modified ESP.

11. The ESP II Orders are unlawful and unreasonable because they fail to sustain objections to the admission of testimony where the testimony improperly relied

upon settlement agreements from other proceedings for the purpose of addressing contested issues.

WHEREFORE, Appellant respectfully submits that Appellee's ESP II Orders are unlawful, unjust, and unreasonable and should be reversed. The cases should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,



Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)
Frank P. Darr (Reg. No. 0025469)
Joseph E. Oliker (Reg. No. 0086088)
Matthew R. Pritchard (Reg. 0088070)
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Facsimile: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

**COUNSEL FOR APPELLANT,
INDUSTRIAL ENERGY USERS-OHIO**

CERTIFICATE OF FILING

I hereby certify that, in accordance with S.Ct.Prac.R. 3.11(A)(2), Industrial Energy Users-Ohio's Notice of Second Appeal has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Commission in Columbus, Ohio, in accordance with Ohio Adm. Code 4901-1-02(A) and 4901-1-36, on May 8, 2013.

Frank P. Darr
Counsel for Appellant
Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Second Appeal of Appellant Industrial Energy Users-Ohio* was served upon the parties of record to the proceeding before the Public Utilities Commission of Ohio listed below and pursuant to S.Ct.Prac.R. 3.11(A)(2) and R.C. 4903.13 on May 8, 2013, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

Frank P. Darr
Counsel for Appellant
Industrial Energy Users-Ohio

Matthew J. Satterwhite
Steven T. Nourse
Anne M. Vogel
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com
yalami@aep.com

Daniel R. Conway
Christen M. Moore
Porter Wright Morris & Arthur
41 S. High Street
Columbus, OH 43215
dconway@porterwright.com
cmoore@porterwright.com

ON BEHALF OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

Robert A. McMahon
Eberly McMahon LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206

Rocco D'Ascenzo
Elisabeth Watts
Duke Energy Ohio, Inc.
139 East Fourth Street - 1303-Main
Cincinnati, OH 45202

Elizabeth.watts@duke-energy.com
Rocco.d'ascenzo@duke-energy.com

ON BEHALF OF DUKE ENERGY OHIO, INC.

{C40124:3 }

Amy B. Spiller
Jeanne W. Kingery
139 East Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com

Philip B. Sineneng
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Philip.Sineneng@thompsonhine.com

ON BEHALF OF DUKE ENERGY RETAIL SALES, LLC AND DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

ON BEHALF OF THE OHIO ENERGY GROUP

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

ON BEHALF OF ENERNOC, INC.

Kyle L. Kern
Terry L. Etter
Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215-3485
kern@occ.state.oh.us
etter@occ.state.oh.us
grady@occ.state.oh.us

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Richard L. Sites
General Counsel & Senior Director of
Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

OH BEHALF OF OHIO HOSPITAL ASSOCIATION

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

ON BEHALF OF THE KROGER CO.

Terrence O'Donnell
Christopher Montgomery
Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com
mwarnock@bricker.com

ON BEHALF OF PAULDING WIND FARM II LLC

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F Lang
Laura C. McBride
N. Trevor Alexander
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
aehaedt@jonesday.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org

ON BEHALF OF THE APPALACHIAN PEACE AND JUSTICE NETWORK

J. Thomas Siwo
Thomas O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
tsiwo@bricker.com
tobrien@bricker.com

ON BEHALF OF OMA ENERGY GROUP

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
jejadwin@aep.com

ON BEHALF OF AEP RETAIL ENERGY PARTNERS LLC

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
smhoward@vorys.com

ON BEHALF OF PJM POWER PROVIDERS GROUP AND THE RETAIL ENERGY SUPPLY ASSOCIATION

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, PA 19406
gthomas@gtpowergroup.com

Laura Chappelle
4218 Jacob Meadows
Okemos, MI 48864
laurac@chappelleconsulting.net

ON BEHALF OF PJM POWER PROVIDERS GROUP

M. Howard Petricoff
Michael Settineri
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com

Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

ON BEHALF OF THE COMPLETE COALITION

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
callwein@williamsandmoser.com

ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL AND THE SIERRA CLUB

M. Howard Petricoff
Michael J. Settineri
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
smhoward@vorys.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC., DIRECT ENERGY SERVICES, LLC

Gary A Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@aol.com

ON BEHALF OF DOMINION RETAIL, INC.

David I. Fein
Vice President, Energy Policy – Midwest
Constellation Energy Group, Inc.
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
david.fein@constellation.com
cynthia.brady@constellation.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC.

Jeanine Amid Hummer
Thomas K. Lindsey
City of Upper Arlington
C. Todd Jones,
Christopher L. Miller,
Gregory H. Dunn
Ice Miller LLC
250 West Street
Columbus, OH 43215
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
jhummer@uaoh.net
tlindsey@uaoh.net

ON BEHALF OF THE CITY OF GROVE CITY, OHIO AND THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO, THE CITY OF UPPER ARLINGTON, THE CITY OF HILLSBORO, OHIO

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street/P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com

David M. Stahl
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com

ON BEHALF OF EXELON GENERATION COMPANY, LLC

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
kpkreider@kmklaw.com
dmeyer@kmklaw.com

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
Bentonville, AR 72716-0550
Stephen.Chriss@wal-mart.com

ON BEHALF OF WAL-MART STORES EAST, LP AND SAM'S EAST, INC.

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, OH 43212
tsantarelli@elpc.org

ON BEHALF OF THE ENVIRONMENTAL LAW & POLICY CENTER

Nolan Moser
Trent A. Dougherty
Camille Yancy
Cathryn Loucas
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
nolan@theoec.org
trent@theoec.org
camille@theoec.org
cathy@theoec.org.

ON BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL

Robert Korandovich
KOREnergy
P.O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

ON BEHALF OF KORENERGY

William Wright
Werner Margard
Thomas Lindgren
John H. Jones
Assistant Attorneys' General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
william.wright@puc.state.oh.us

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Douglas G. Bonner
Emma F. Hand
Keith C. Nusbaum
Clinton A. Vince
Daniel D. Barnowski
James Rubin
Thomas Millar
SNR Denton US LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
doug.bonner@snrdenton.com
emma.hand@snrdenton.com
keith.nusbaum@snrdenton.com
clinton.vince@snrdenton.com
daniel.barnowski@snrdenton.con
james.rubin@snrdenton.com
thomas.millar@snrdenton.com

Arthur Beeman
SNR Denton US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
arthur.beeman@snrdenton.com

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

ON BEHALF OF HESS CORPORATION

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Jacqueline Lake Roberts,
Counsel of Record
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

ON BEHALF OF CPOWER, INC., VIRIDITY ENERGY, INC., ENERGYCONNECT INC., COMVERGE INC., ENERWISE GLOBAL TECHNOLOGIES, INC., AND ENERGY CURTAILMENT SPECIALISTS, INC.

Benita Kahn
Lija Kaleps-Clark
Vorys Sater, Seymour and Pease LLC
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
bakahn@vorys.com
lkalepsclark@vorys.com

ON BEHALF OF OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

Mark A. Whitt
Whitt Sturtevant LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whit@whitt-sturtevant.com

Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, OH 43016
mswhite@igsenergy.com

ON BEHALF OF INTERSTATE GAS SUPPLY, INC.

Dane Stinson
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215

ON BEHALF OF THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE OHIO SCHOOL BOARDS ASSOCIATION, THE OHIO SCHOOLS COUNCIL AND THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS

Chad A. Endsley
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218-2383
cendsley@ofbf.org.

ON BEHALF OF THE OHIO FARM BUREAU FEDERATION

Brian P. Barger
Brady, Coyle & Schmidt, LTD
4052 Holland-Sylvania Rd.
Toledo, OH 43623
bpbarger@bcslawyers.com

ON BEHALF OF THE OHIO CONSTRUCTION MATERIALS COALITION

Richard Mason
Ohio Restaurant Association
1525 Bethel Road, Suite 201
Columbus, OH 43320
mason@ohiorestaurant.org.

ON BEHALF OF OHIO RESTAURANT ASSOCIATION

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Judi.sobecki@dplinc.com
Randall.griffin@dplinc.com

ON BEHALF OF THE DAYTON POWER AND LIGHT COMPANY

Sara Reich Bruce
Ohio Automobile Dealers Association
655 Metro Place South, Suite 270
Dublin, OH 43017
sbruce@oada.com

ON BEHALF OF THE OHIO AUTOMOBILE DEALERS ASSOCIATION

Joseph M. Clark
Direct Energy Services LLC
And Direct Energy Business LLC
21 East State Street, Suite 1900
Columbus, OH 43215
joseph.clark@directenergy.com

ON BEHALF OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

Todd M. Williams
Williams Allwein and Moser, LLC
Two Maritime Plaza-Third Floor
Toledo, OH 43604
toddm@wamenergylaw.com

ON BEHALF OF THE OHIO BUSINESS COUNCIL FOR A CLEAN ECONOMY

Matthew R. Cox
Matthew Cox Law, Ltd.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

ON BEHALF OF THE COUNCIL OF SMALLER ENTERPRISES (COSE)

Stephanie M. Chmiel
Michael L. Dillard
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Michael.Dillard@ThompsonHine.com

ON BEHALF OF BORDER ENERGY ELECTRIC SERVICES, INC.

Randy J. Hart
Rob Remington
David J. Michalski
200 Public Square, Suite 2800
Cleveland, OH 44114-2316
rhart@hahnlaw.com
rrremington@hahnlaw.com
djmichalski@hahnlaw.com

ON BEHALF OF SUMMIT ETHANOL, LLC AND FOSTORIA ETHANOL, LLC

Greta See
Jon Tauber
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINERS

Robert Burke
Braith Kelly
Competitive Power Ventures, Inc.
8403 Colesville Road, Ste. 915
Silver Spring, MD 20910
rburke@cpv.com
bkelly@cpv.com

Larry F. Eisenstat
(Counsel of Record)
Richard Lehfeldt
Robert L. Kinder, Jr.
Dickstein Shapiro LLP
1825 Eye St. NW
Washington, DC 20006
eisenstatl@dicksteinshapiro.com
lehfeldtr@dicksteinshapiro.com
kinderr@dicksteinshapiro.com

ON BEHALF OF CPV POWER DEVELOPMENT, INC.

Jack D'Aurora
The Behal Law Group LLC
501 South High Street
Columbus, OH 43215
jdaurora@behallaw.com

ON BEHALF OF THE UNIVERSITY OF TOLEDO

Roger P. Sugarman
Kegler, Brown, Hill &Ritter
65 East State Street, Suite 1800
Columbus, OH 43215
rsugarman@keglerbrown.com

ON BEHALF OF NFIB/OHIO

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

OPINION AND ORDER

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The Commission, considering the above-entitled applications, and the record in these proceedings, hereby issues its opinion and order in these matters.

APPEARANCES:

Steven T. Nourse, Matthew J. Satterwhite, and Yazen Alami, American Electric Power Service Corporation, One Riverside Plaza, 29th Floor, Columbus, Ohio 43215-2373, and Porter, Wright, Morris & Arthur, LLP, by Daniel R. Conway and Christen Moore, 41 South High Street, Columbus, Ohio 43215, on behalf of Ohio Power Company.

Mike DeWine, Attorney General of the State of Ohio, by Werner L. Margard III, John H. Jones, and Steven L. Beeler, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of the Staff of the Public Utilities Commission of Ohio.

Bruce J. Weston, Interim Ohio Consumers' Counsel, Office of the Ohio Consumers' Counsel, by Maureen R. Grady, Joseph P. Serio, and Terry L. Etter, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Power Company.

Boehm, Kurtz & Lowry, by Michael L. Kurtz, Kurt J. Boehm and Jody Kyler, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Taft, Stettinius & Hollister, LLP, by Mark S. Yurick and Zachary D. Kravitz, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of The Kroger Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Frank P. Darr, and Joseph E. Oliker, 21 East State Street, Suite 1700, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, on behalf of Dominion Retail, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Lija Kaleps-Clark, and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Covington & Burling, by William Massey, 1201 Pennsylvania Avenue, Washington, D.C. 20004, on behalf of The COMPETE Coalition.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Lija Kaleps-Clark, and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of PJM Power Providers Group.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Lija Kaleps-Clark, 52 East Gay Street, Columbus, Ohio 43216-1008, and Joseph M. Clark, 6641 North High Street, Suite 200, Worthington, Ohio 43085, on behalf of Direct Energy Services, LLC and Direct Energy Business, LLC.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Lija Kaleps-Clark, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Retail Energy Supply Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Lija Kaleps-Clark, and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Eimer, Stahl, Klevorn & Solberg, LLP, by David Stahl and Scott Solberg, 224 South Michigan Avenue, Suite 1100, Chicago, Illinois 60604, on behalf of Exelon Generation Company, Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

Ice Miller, LLP, by Christopher L. Miller, Gregory J. Dunn, and Asim Z. Haque, 250 West Street, Columbus, Ohio 43215, on behalf of the Association of Independent Colleges and Universities of Ohio, the city of Hillsboro, the city of Grove City and the city of Upper Arlington.

Bricker & Eckler, LLP, by Lisa Gatchell McAlister and J. Thomas Siwo, 100 South Third Street, Columbus, Ohio 43215-4291, on behalf of Ohio Manufacturers Association-Energy Group.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215-4291, and Richard L. Sites, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of Ohio Hospital Association.

Calfee, Halter & Griswold, LLP, by James F. Lang, Laura C. McBride, and N. Trevor Alexander, 1400 KeyBank Center, 800 Superior Avenue, Cleveland, Ohio 44114; Jones Day, by David A. Kutik and Allison E. Haedt, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, and Mark A. Hayden, 76 South Main Street, Akron, Ohio 44308, on behalf of FirstEnergy Solutions Corporation.

Joseph V. Maskovyak and Michael Smalz, Ohio Poverty Law Center, 555 Buttles Avenue, Columbus, Ohio 43215, on behalf of Appalachian Peace and Justice Network.

Keating, Muething & Klekamp PLL, by Kenneth P. Kreider, One East Fourth Street, Suite 1400, Cincinnati, Ohio 45202 and Holly Rachel Smith, HITT Business Center, 3803 Rectortown Road, Marshall, Virginia 20115, on behalf of Wal-Mart Stores East, LP, and Sam's East, Inc.

SNR Denton US, LLP, by Emma F. Hand, Daniel D. Barnowski, and Thomas Millar, James Rubin, 1301 K Street NW, Suite 600 East Tower, Washington, D.C. 20005, on behalf of Ormet Primary Aluminum Corporation.

Bricker & Eckler, by Christopher L. Montgomery, Matthew Warnock, and Terrence O'Donnell, 100 South Third Street, Columbus, Ohio 43215-4291, and Richard L. Sites, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of Paulding Wind Farm II, LLC.

Gregory J. Poulos, 471 East Broad Street, Suite 1520, Columbus, Ohio 43215, on behalf of EnerNOC Inc.

William, Allwein & Moser, by Christopher J. Allwien, 1373 Grandview Avenue, Suite 212, Columbus, Ohio 43212, on behalf of Natural Resources Defense Council.

Matthew White, 6100 Emerald Parkway, Dublin, Ohio 43016 and Whitt Sturtevant, LLP, by Mark A. Whitt, Melissa L. Thompson, and Andrew J. Campbell, 155 East Broad Street, Suite 2020, Columbus, Ohio 43215, on behalf of Interstate Gas Supply, Inc.

Bailey Cavalieri, LLC, by Dane Stinson, 10 West Broad Street, Columbus, Ohio 43215, on behalf of Ohio Association of School Business Officials, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Schools Council.

Chad A. Endsley, 280 North High Street, P.O. Box 182383, Columbus, Ohio 43218, on behalf of the Ohio Farm Bureau Federation.

Buckley King, by Deim N. Kaelber, 10 West Broad Street, Suite 1300, Columbus, Ohio 43215, on behalf of Ohio Restaurant Association.

Elizabeth Watts and Rocco D'Ascenzo, 139 East Fourth Street, Cincinnati, Ohio 45202 and Eberly McMahon, LLC, by Robert A. McMahon, 2321 Kemper Lane, Suite 100, Cincinnati, Ohio 45206, on behalf of Duke Energy Ohio, Inc.

Amy B. Spiller and Jeanne W. Kingery, 139 East Fourth Street, Cincinnati, Ohio 43215, and Thompson Hine, LLP, by Philip B. Sineneng, 41 South High Street, Suite 1700, Columbus, Ohio 43215, on behalf of Duke Energy Retail Sales and Duke Energy Commercial Asset Management Inc.

Charles Howard and Sarah Bruce, 655 Metro Place South, Suite 270, Dublin, Ohio 43017, on behalf of Ohio Automobile Dealers Association.

Judi L. Sobecki, 1065 Woodman Drive, Dayton, Ohio 45432, on behalf of Dayton Power and Light Company.

Kegler, Brown, Hill & Ritter, LPA, by Roger P. Sugarman, 65 East State Street, Suite 1800, Columbus, Ohio 43215, on behalf of National Federation of Independent Business – Ohio Chapter.

Thompson Hine, LLP, by Carolyn S. Flahive, Stephanie Chmiel, and Michael Dillard, 41 South High Street, Suite 1700, Columbus, Ohio 43215, on behalf of Border Energy Electric Services, Inc.

The Behal Law Group, LLC, by Mr. Jack D'Aurora, 501 South High Street, Columbus, Ohio 43215, on behalf of University of Toledo Innovation Enterprises Corporation.

Hahn, Loeser & Parks, LLP, by Randy Hart, 200 Huntington Building, Cleveland, Ohio 44114, on behalf of Summit Ethanol, LLC d/b/a POET Biorefining-Leipsic and Fostoria Ethanol, LLC d/ b/a POET Biorefining-Fostoria.

Jay E. Jadwin, 155 West Nationwide Blvd., Suite 500, Columbus, Ohio 43215, on behalf of AEP Retail Energy Partners, LLC.

Matthew Cox Law, Ltd., by Matthew Cox, 4145 St. Theresa Boulevard, Avon, Ohio 44011, on behalf of the Council of Smaller Enterprises.

Williams, Allwein & Moser, by Todd M. Williams, Two Maritime Plaza, Toledo, Ohio 43604, on behalf of the Ohio Business Council for a Clean Economy.

Dickstein Shapiro LLP, by Larry F. Eisenstat, Richard Lehfeldt, and Robert L. Kinder, 1825 Eye St. NW, Washington, D.C. 20006, on behalf of CPV Power Development, Inc.

OPINION:

I. HISTORY OF THE PROCEEDINGS

A. First Electric Security Plan

On March 18, 2009, the Commission issued its opinion and order regarding Columbus Southern Power Company's (CSP) and Ohio Power Company's (OP) (jointly, AEP-Ohio or the Companies) application for an electric security plan (ESP 1 Order) in Case Nos. 08-917-EL-SSO and 08-918-EL-SSO. The ESP 1 Order was appealed to the Supreme Court of Ohio (Court). On April 19, 2011, the Court affirmed the ESP Order in numerous respects, but remanded the proceedings to the Commission. The Commission issued its order on remand on October 3, 2011. In the order on remand, the Commission found that AEP-Ohio should be authorized to continue its recovery of incremental capital carrying costs incurred after January 1, 2009, on past environmental investments (2001-2008) that were not previously reflected in the Companies' existing rates prior to the ESP 1 Order. In addition, the Commission found that the provider of last resort (POLR) charges authorized by the ESP 1 Order were not supported by the record on remand, and directed the Companies to eliminate the amount of the provider of last resort (POLR_ charges authorized in the ESP Order and file revised tariffs consistent with the order on remand.

B. Initial Proposed Electric Security Plan

On January 27, 2011, AEP-Ohio filed the instant application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. This application is for approval of an electric security plan (ESP 2) in accordance with Section 4928.143, Revised Code. As filed, AEP-Ohio's SSO application for ESP 2 would commence on January 1, 2012, and continue through May 31, 2014.

The following parties were granted intervention by entries dated March 23, 2011, and July 8, 2011: Industrial Energy Users-Ohio (IEU), Duke Energy Retail Sales, LLC (Duke Retail), Ohio Energy Group (OEG), Ohio Hospital Association (OHA), Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE),[1] The Kroger Company (Kroger), FirstEnergy Solutions Corporation (FES), Paulding Wind Farm II LLC (Paulding), Appalachian Peace and Justice Network (APJN), Ohio Manufacturers' Association Energy Group (OMAEG), AEP Retail Energy Partners LLC (AEP Retail), Distributed Wind Energy Association (DWEA),[2] PJM Power Providers Group (P3), Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.

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1 Subsequently, OPAE filed a motion to withdraw from the ESP 2 proceedings and the request granted in the Commission's December 14, 2011 Order.

2 On August 4, 2011, DWEA filed a motion to withdraw from the ESP 2 proceedings. DWEA's request to withdraw was granted in the December 14, 2011 Order.

(Constellation), COMPETE Coalition (Compete), Natural Resources Defense Council (NRDC), The Sierra Club (Sierra), city of Hilliard, Ohio (Hilliard), Retail Energy Supply Association (RESA), Exelon Generation Company, LLC (Exelon), city of Grove City, Ohio (Grove City), Association of Independent Colleges and Universities of Ohio (AICUO), Wal-Mart Stores East, LP and Sam's East, Inc., (Wal-Mart), Dominion Retail, Inc. (Dominion Retail), Environmental Law and Policy Center (ELPC), Ohio Environmental Council (OEC), Ormet Primary Aluminum Corporation (Ormet) and EnerNOC, Inc. (EnerNOC).

On September 7, 2011, numerous parties (Signatory Parties) to the ESP 2 proceedings filed a Joint Stipulation and Recommendation (Stipulation). The Stipulation proposed to resolve the ESP 2 cases as well as a number of other related AEP-Ohio matters pending before the Commission.[3] The evidentiary hearing in the ESP 2 cases was consolidated with the related proceedings for the sole purpose of considering the Stipulation. On December 14, 2011, the Commission issued its Opinion and Order, concluding that the Stipulation, as modified by the order, should be adopted and approved. As part of the December 14, 2011, Order, the Commission approved the merger of CSP with and into OP, with OP as the surviving entity.[4]

Several applications for rehearing of the Commission's December 14, 2011, Order in the ESP 2 and consolidated cases were filed. On February 23, 2012, the Commission issued its Entry on Rehearing finding that the Stipulation, as a package, did not benefit ratepayers and was not in the public interest and, thus, did not satisfy the three-part test for the consideration of stipulations. AEP-Ohio was directed to provide notice to the Commission within 30 days whether it intended to modify or withdraw its ESP.

C. Pending Modified Electric Security Plan

On March 30, 2012, AEP-Ohio filed a modified ESP (modified ESP) for the Commission's consideration. As proposed, the modified ESP would commence June 1, 2012, and continue through May 31, 2015. As proposed in the application, the Company states for all customer classes, customers in the CSP rate zone will experience, on average, an increase of two percent annually and customers in the OP rate zone will experience, on average, an increase of four percent annually. The modified ESP proposes the recovery of other costs through riders during the term of the electric security plan. In addition, the

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3 Including an emergency curtailment proceeding in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA (Emergency Curtailment Cases); a request for the merger of CSP with OP in Case No. 10-2376-EL-UNC (Merger Case); the Commission review of the state compensation mechanism for the capacity charge to be assessed on competitive retail electric service (CRES) providers in Case No. 10-2929-EL-UNC (Capacity Case); and a request for approval of a mechanism to recover deferred fuel costs and accounting treatment in Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR (Phase-in Recovery Cases).

4 By entry issued on March 7, 2012, the Commission again approved and confirmed the merger of CSP into OP, effective December 31, 2011, in the Merger Case.

modified ESP contains provisions addressing distribution service, economic development, alternative energy resource requirements, and energy efficiency requirements.

The modified ESP also sets forth that AEP-Ohio will begin an energy auction for 100 percent of its SSO load beginning in 2015, with full delivery and pricing through a competitive auction process for AEP-Ohio's SSO customers beginning in June 2015. Beginning six months after the final order in the modified ESP case, the application states AEP-Ohio will begin conducting energy auctions for five percent of the SSO load. In addition, the modified ESP provides for the elimination of American Electric Power Corporation's East Interconnection Pool Agreement and describes the plan for corporate separation of AEP-Ohio's generation assets from its distribution and transmission assets.

In addition to the parties previously granted intervention in this matter, following AEP-Ohio's submission of its modified ESP, the following parties, were granted intervention on April 26, 2012: Interstate Gas Supply, Inc. (IGS); The Ohio Association of School Business Officials, The Ohio School Boards Association, The Buckeye Association of School Administrators, and The Ohio Schools Council (collectively, Ohio Schools); Ohio Farm Bureau Federation; Ohio Restaurant Association; Duke Energy Ohio, Inc. (Duke); Duke Energy Commercial Asset Management Inc. (DECAM); Direct Energy Services, LLC and Direct Energy Business, LLC (Direct); The Ohio Automobile Dealers Association (OADA); The Dayton Power and Light Company; The Ohio Chapter of the National Federation of Independent Business (NFIB); Ohio Construction Materials Coalition; Council of Smaller Enterprises; Border Energy Electric Services, Inc.; University of Toledo Innovation Enterprises Corporation; Summit Ethanol, LLC d/b/a POET Biorefining-Leipsic and Fostoria Ethanol, LLC d/b/a POET Biorefining-Fostoria (Summit Ethanol); city of Upper Arlington, Ohio; Ohio Business Council for a Clean Economy; IBEW Local Union 1466 (IBEW); city of Hillsboro, Ohio; and CPV Power Development, Inc.

D. Summary of the Hearings on Modified Plan

1. Local Public Hearings

Four local public hearings were held in order to allow AEP-Ohio's customers the opportunity to express their opinions regarding the issues raised within the modified application. Public hearings were held in Canton, Columbus, Chillicothe, and Lima. At the local hearings, a total of 67 witnesses[5] offered testimony: 17 witnesses in Canton, 31 witnesses in Columbus, 10 witnesses in Chillicothe, and nine witnesses in Lima. In addition to the public testimony, numerous letters were filed in the docket regarding the proposed ESP applications.

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5 One witness, Doug Leuthold, testified at both the Columbus and Lima public hearings.

At each of the public hearings, numerous witnesses testified in support of AEP-Ohio's modified ESP. Specifically, many witnesses testified on behalf of community groups and non-profit organizations that praised AEP-Ohio's charitable support to their organizations. Witnesses that testified in favor of the modified ESP also noted that AEP-Ohio maintains a positive corporate presence and promotes economic development endeavors throughout its service territory. Members of local unions testified in support of AEP-Ohio's proposal, explaining it would not only allow AEP-Ohio to retain jobs, but also create new jobs as AEP-Ohio continues to expand its infrastructure throughout the region.

Several residential customers testified at the public hearings in opposition to AEP-Ohio's modified ESP, noting an increase in customer rates would be burdensome in light of the current economic recession. Many of these witnesses pointed out that low-income and fixed-income residential customers would be particularly vulnerable to any rate increases. Several witnesses also argued that the proposed application might limit customers' ability to shop for a CRES supplier.

In addition, many witnesses testified on behalf of small business and commercial customers. These witnesses argued the proposed rate increases would be burdensome on small businesses who cannot take on any electric rate increases without either laying off employees or passing costs on to customers. Representatives on behalf of school districts also testified that the modified ESP could create a financial strain on schools throughout AEP-Ohio's service territory.

2. Evidentiary Hearing

The evidentiary hearing commenced on May 17, 2012. Twelve witnesses testified on behalf of AEP-Ohio, 10 witnesses on behalf of the Staff, and 54 witnesses offered testimony on behalf of various interveners to the cases. In addition, AEP-Ohio offered three witnesses on rebuttal. The evidentiary hearing concluded on June 15, 2012. Initial briefs and reply briefs were due June 29, 2012, and July 9, 2012, respectively. For those parties that filed a brief or reply brief addressing select issues, oral arguments were held before the Commission on July 13, 2012.

E. Procedural Matters

1. Motions to Withdraw

On May 4, 2012, the city of Hilliard filed a notice requesting to withdraw as an intervenor from the modified ESP cases. Also on May 4, 2012, IBEW filed a notice stating that it intends to withdraw as an intervenor in these proceedings. The Commission finds IBEW's and Hilliard's requests to withdraw reasonable and should be granted.

2. Motions for a Protective Order

On May 2, 2012, AEP-Ohio filed a motion for a protective order, seeking protective treatment of supplemental testimony and corresponding exhibits of AEP-Ohio witness Nelson containing confidential and proprietary information relating to the Turning Point Solar project (Turning Point). On May 4, 2012, OMAEG filed a motion for a protective order relating to proprietary business information of OSCO Industries, Summitville Tiles, Belden Brick, Whirlpool Corporation, Lima Refining, and AMG Vanadium. Also, on May 4, 2012, IEU filed a motion for a protective order seeking to protect confidential and proprietary information contained within witness Kevin Murray's testimony. FES filed a motion for protective treatment on May 4, 2012, for confidential items contained in attachments to witness Jonathan Lesser's testimony. In addition, Exelon filed a motion for protective order seeking protection of confidential and proprietary information contained within witness Fein's direct testimony. On May 11, 2012, AEP-Ohio filed an additional motion for protective order to support the protection of confidential AEP-Ohio information contained within IEU witness Murray, FES witness Lesser, and Exelon witness Fein's testimony. Finally, on the record in these proceedings May 17, 2012, AEP-Ohio also sought the continuation of protective treatment of exhibits attached to AEP-Ohio witness Jay Godfrey, as previously set forth in AEP-Ohio's July 1, 2011, motion for a protective order (Tr. at 24).

At the evidentiary hearing on May 17, 2012, the attorney examiners granted the motions for protective order, finding the information specified within the parties' motions constitutes confidential, proprietary, and trade secret information, and meets the requirements contained within Rule 4901-1-24, Ohio Administrative Code (O.A.C.) (*Id.* at 23-24). Rule 4901:1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders prohibiting public disclosure pursuant to Rule 4901:1-24(D), O.A.C., shall automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this order, until February 8, 2014. Until that date, the Docketing Division should maintain, under seal, the conditional diagrams, filed under seal. Rule 4901:1-24(F), O.A.C., requires any party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date, including a detailed discussion of the need for continued protection from disclosure. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to the parties.

In addition, on June 29, 2012, IEU and Ormet filed motions for protective order regarding items contained within their initial briefs. Specifically, both the information for which IEU and Ormet's are seeking confidential treatment was already determined to be confidential in the evidentiary hearing and was discussed in a closed record. On July 5, 2012, AEP-Ohio filed a motion for protective order over the items contained within Ormet and IEU's briefs, noting that it contains proprietary and trade secret information. On July 9, Ormet filed an additional motion for protective order for the same information, which it

also included in its reply brief filed on July 9, 2012. Similarly, AEP-Ohio filed a motion for protective order on July 12, 2012, in support of Ormet's motion, as it contains AEP-Ohio's confidential trade secret information. As the attorney examiners previously found the information contained within the IEU and Ormet's initial briefs and Ormet's reply brief was confidential in the evidentiary hearing, we affirm this decision and find that confidential treatment shall be afforded for a period ending 18 months from the date of this order, until February 8, 2014.

3. Requests for Review of Procedural Rulings

IEU argues that the record improperly includes evidence of stipulations as precedent. Specifically, IEU argues that several witnesses relied on Duke Energy-Ohio's ESP to indicate that certain proposed riders were appropriate. IEU also points out that a witness relied on AEP-Ohio's distribution rate case stipulation as evidence of AEP-Ohio's capital structure. IEU claims that these stipulations expressly state that no party or Commission order may cite to a stipulation as precedent, and accordingly, IEU requests that the references to stipulations be struck.

The Commission finds that IEU's request to strike portions of the record should be denied. We acknowledge that individual components agreed to by parties in one proceeding should not be binding on the parties in other proceedings, but we find that references to other stipulations in this proceeding were limited in scope and did not create any prejudicial impact on parties that signed the stipulations. Consistent with our Finding and Order in Case No. 11-5333-EL-UNC, we also note that, while parties may agree not to be bound by the provisions contained within a stipulation, these limitations do not extend to the Commission.

In addition, IEU claims the attorney examiners improperly denied IEU's motions to compel discovery. In its motions to compel discovery, IEU sought information related to AEP-Ohio's forecasts of the RPM price for capacity, which IEU alleges would have provided information relating to the transfer of AEP-Ohio's Amos and Mitchell generating units.

The Commission finds the attorney examiners' denials of IEU's motions to compel discovery were proper and should be upheld. As noted in AEP-Ohio's memorandum contra the motion to compel, the information IEU sought relates to AEP-Ohio forecasts beyond the period of this modified ESP. As these proceedings relate to the appropriateness of AEP-Ohio's modified ESP, we find that any forecasts beyond the terms contained within AEP-Ohio's application are irrelevant and unlikely to lead to discoverable information. Accordingly, the attorney examiners' ruling is affirmed.

On July 13, 2012, OCC filed a motion to strike four specific portions of AEP-Ohio's reply brief at pages 29-30, 33-34, 68-69, 97-99, including footnotes, and attachments A and

B, as OCC asserts the information is not based on the record in the modified ESP proceeding but reflects the Commission's Order issued in the Capacity Case on July 2, 2012. OCC submits that the Commission has previously recognized that "it is improper to rely on claims in the brief that are unsupported by evidence within the record." In this instance, OCC points out that AEP-Ohio attached to its reply brief, documents that were not part of the record evidence or designated late-filed exhibits, a statement by Standard and Poor's (Attachment A) and the Company's recalculation of its ESP/MRO test (Attachment B) based on the Commission's decision in the Capacity Case. Since neither document is part of the modified ESP record evidence, OCC reasons that the attachments are hearsay which are not excused by any exception to the hearsay rule. OCC also notes that the reply brief includes discussion of recent storms in the Midwest and the East Coast, and there is nothing in the record regarding the strength of the winds or the ability of the Company's system to withstand hurricane force winds. Furthermore, neither the attachments nor AEP-Ohio's assertions was subjected to cross-examination by the parties nor the parties afforded an opportunity to rebut the associated arguments of the Company. For these reasons, OCC requests that Attachments A and B and the specified portions of the reply brief be stricken.

In its memorandum contra, AEP-Ohio asserts that discussion of matters related to the Commission's Capacity Case decision were appropriate. AEP-Ohio notes that it is fair to rely on a Commission opinion and order and reasonable to consider the impact of the Capacity Case on these proceedings, as evidenced by Commission questions during the oral arguments held on July 13, 2012. In addition, AEP-Ohio points out that several parties' reply briefs also included significant discussion of the impact of the Capacity Case on the modified ESP. Similarly, AEP-Ohio notes that the attachments indicate the financial impact of the Capacity Case on AEP-Ohio, and that the items are consistent with the testimony of AEP-Ohio witness Hawkins. Finally, AEP-Ohio provides that its references to major storms that occurred this summer relate to customer expectations and AEP-Ohio's need for the DIR.

The Commission finds that OCC's motion to strike portions of AEP-Ohio's reply brief should be denied. The Company's reply brief reports the impact of the Commission's Order in the Capacity Case based on subject matters and information subjected to extensive cross-examination by the parties in the course of this proceeding. Furthermore, several of the parties to this proceeding discuss in their respective reply briefs the Order in the Capacity Case. For these reasons, we conclude that it would be improper to strike the portions of AEP-Ohio's reply brief, including Attachment B, which reflect AEP-Ohio's interpretation of the Commission Capacity Order as requested by OCC. We, likewise, deny OCC's request to strike the Company's reference to recent storms, where the Company offered support for its position on customer reliability expectations. Customer service reliability was an issue raised and discussed by AEP-Ohio as well as OCC. However, Attachment A to the Company's reply brief is a July 2, 2012 statement by

Standard & Poor's regarding the effect of the Commission's Capacity Charge Order, and should be stricken. We find that the Company's Attachment A is not part of the record and should not be considered by the Commission in this proceeding.

On July 20, 2012, OCC/APJN filed a motion to take administrative notice of several items contained within the record of the Capacity Case. Specifically, OCC/APJN seek administrative notice of pages 3, 9, and 12 of the direct testimony of AEP-Ohio witness Munczinski, pages 19-20 of the rebuttal testimony of AEP-Ohio witness Allen, pages 304, 348-350, and 815 of the hearing transcripts, and AEP-Ohio's post-hearing initial and reply briefs. OCC/APJN opine that the record should be expanded to include these materials in order to have a more thorough record on issues pertaining to customer rates. Further, OCC/APJN state that no parties would be prejudiced as parties, particularly those involved in the Capacity Case, who had opportunities to explain and rebut these items.

AEP-Ohio filed a memorandum contra OCC/APJN's motion on July 24, 2012. AEP-Ohio argues that OCC/APJN improperly seeks to add documents into the record at this late stage, is not only inappropriate, but also unnecessary as there are no further actions to these proceedings except the Commission opinion and order and rehearing. AEP-Ohio notes the Commission has broad discretion in handling its proceedings, but points out that the small subset of information could have a prejudicial effect to parties, and due process would require that other parties be permitted to add other items to the record. In addition, AEP-Ohio explains that OCC/APJN had the opportunity in the ESP proceedings to further explore areas of the Capacity Case that were related to parts of the modified ESP.

On August 6, 2012, FES also filed a memorandum contra OCC/APJN's motion. On August 7, 2012, OCC/APJN filed a motion to strike FES's memorandum contra. In support of its motion to strike, OCC/APJN argues that FES filed its memorandum contra 17 days after OCC/APJN filed its motion, past the procedural deadlines established by attorney examiner entry issued April 2, 2012. The Commission finds that OCC/APJN's motion to strike FES's memorandum contra OCC/APJN's motion should be granted. By entry issued April 2, 2012, the attorney examiner set an expedited procedural schedule establishing that any memoranda contra be filed within five calendar days after the service of any motions. Therefore, as FES filed its memorandum contra 17 days after OCC/APJN filed its motion, OCC/APJN's motion to strike shall be granted.

The Commission finds that OCC's motion to take administrative notice should be denied. AEP-Ohio correctly points out that the timing of OCC/APJN's request is troublesome and problematic. While the Commission has broad discretion to take administrative notice, it must be done in a manner that does not harm or prejudice any other parties that are participating in these proceedings. Were the Commission to take notice of this narrow window of information, we would be allowing a party to supplement

the record in a misleading manner. Further, while we acknowledge that parties may rely on the Commission's order in the Capacity Case, as it speaks for itself, to show effects on items in this proceeding, to exclusively select narrow and focused items in an attempt to supplement the record is not appropriate. Accordingly, we deny OCC's motion.

II. DISCUSSION

A. Applicable Law

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing AEP-Ohio's application, the Commission is cognizant of the challenges facing Ohioans and the electric industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, amended by Senate Bill 221 (SB 221).

Section 4928.02, Revised Code, states that it is the policy of the state, *inter alia*, to:

(1) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.

(2) Ensure the availability of unbundled and comparable retail electric service.

(3) Ensure diversity of electric supplies and suppliers.

(4) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management (DSM), time-differentiated pricing, and implementation of advanced metering infrastructure (AMI).

(5) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems in order to promote both effective customer choice and the development of performance standards and targets for service quality.

(6) Ensure effective retail competition by avoiding anticompetitive subsidies.

(7) Ensure retail consumers protection against unreasonable sales practices, market deficiencies, and market power.

(8) Provide a means of giving incentives to technologies that can adapt to potential environmental mandates.

(9) Encourage implementation of distributed generation across customer classes by reviewing and updating rules governing issues such as interconnection, standby charges, and net metering.

(10) Protect at-risk populations including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource.

In addition, SB 221 enacted Section 4928.141, Revised Code, which provides that effective January 1, 2009, electric utilities must provide consumers with an SSO consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default SSO.

AEP-Ohio's modified application in this proceeding proposes an ESP pursuant to Section 4928.141, Revised Code. Paragraph (B) of Section 4928.141, Revised Code, requires the Commission to hold a hearing on an application filed under Section 4928.143, Revised Code, to send notice of the hearing to the electric utility, and to publish notice in a newspaper of general circulation in each county in the electric utility's certified territory.

Section 4928.143, Revised Code sets out the requirements for an ESP. Under paragraph (B) of Section 4928.143, Revised Code an ESP must include provisions relating to the supply and pricing of generation service. The ESP, according to paragraph (B)(2) of Section 4928.143, Revised Code, may also provide for the automatic recovery of certain costs, a reasonable allowance for certain construction work in progress (CWIP), an unavoidable surcharge for the cost of certain new generation facilities, conditions or charges relating to customer shopping, automatic increases or decreases, provisions to allow securitization of any phase-in of the SSO price, provisions relating to transmission-related costs, provisions related to distribution service, and provisions regarding economic development.

The statute provides that the Commission is required to approve, or modify and approve the ESP, if the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply in an MRO under Section 4928.142, Revised Code. In addition, the Commission must reject an ESP that contains a surcharge for CWIP or for new generation facilities if the benefits derived for any purpose

for which the surcharge is established are not reserved or made available to those that bear the surcharge.

B. Analysis of the Application

1. Base Generation Rates

As part of its modified ESP application, AEP-Ohio proposes to freeze base generation rates until all rates are established through a competitive bidding process. AEP-Ohio maintains that the fixed pricing is a benefit to customers by providing reasonably priced electricity in furtherance of Section 4928.02(A), Revised Code. AEP-Ohio explains that while the base generation rates will remain frozen, it will relocate the current Environmental Investment Carrying Cost Rider (EICCR) into the base generation rates, which will result in the elimination of the EICCR. AEP-Ohio witness Roush provides the change is merely a roll in and will be "bill neutral" for all AEP-Ohio customers (AEP-Ohio Ex. 118 at 8; AEP-Ohio Ex. 111 at 10-11).

While AEP-Ohio's base generation rates will be frozen under the modified ESP, AEP-Ohio witness Roush notes that the generation rates are based on cost relationships, and include cross-subsidies among tariff classes, which, upon class rates being based on an auction, may result in certain customer classes being disproportionately impacted by rate changes. Mr. Roush notes that residential customers with high winter usage may face unexpected impacts, but that a possible solution may be to phase-out lower rates for high winter usage customers (*Id.* at 14-15).

OADA supports the adoption of the base generation rate design as proposed, advocating that the consistency in the rate design is beneficial for GS-2 customers (OADA Br. at 2). OCC and APJN claim that frozen base generation rates is not a benefit to customers, as the price of electricity offered by CRES providers have declined and may continue to decline through the term of the ESP (OCC Ex. 111 at 15). OCC and APJN also point out that the inclusion of numerous riders, including the retail stability rider (RSR) and the deferral created in the Capacity Case will result in increases in the rates residential customers continue to pay. (OCC/APJN Br. at 43-44.)

The Commission finds that AEP-Ohio's proposed base generation rates are reasonable. We note that AEP-Ohio's base generation rate design was generally unopposed, as most parties supported AEP-Ohio's proposal to keep base generation rates frozen. Although OCC and APJN conclude that the base generation rate plan does not benefit customers, OCC and APJN failed to justify their assertion and offer no evidence within the record other than the fact that the modified ESP contains several riders. Accordingly, the modified ESP's base generation rates should be approved. In addition, as AEP-Ohio raised the possibility of disproportionate rate impacts on customers when class rates are set by auction, we direct the attorney examiners to establish a new docket within

90 days from the date of this opinion and order and issue an entry establishing a procedural schedule to allow Staff and any interested party to consider means to mitigate any potential adverse rate impacts for customers upon rates being set by auction. Further, the Commission reserves the right to implement a new base generation rate design on a revenue neutral basis for all customer classes at any time during the term of the modified ESP.

2. Fuel Adjustment Clause and Alternative Energy Rider

(a) Fuel Adjustment Clause

The Commission approved the current fuel adjustment clause (FAC) mechanism in the Company's ESP 1 case pursuant to Section 4928.143(B)(2)(a), Revised Code.[6] In this modified ESP application, AEP-Ohio requests continuation of the current FAC mechanism, with modifications. The Company proposes to modify the FAC by separating out the renewable energy credit (REC) expense component of the fuel clause and recovering the REC expense through the newly proposed alternative energy rider (AER) mechanism. The Company also requests approval to unify the CSP and OP FAC rates into a single FAC rate effective June 2013. AEP-Ohio reasons that delaying unification of the FAC rates until June 2013, to coincide with the implementation of the Phase-In Recovery Rider (PIRR), limits the impact on both CSP and OP rate zones which results in a net decrease in rates of $0.69 per megawatt hour (MWh) for a typical CSP transmission voltage customer and a net increase in rates of $0.02 per MWh for a typical OP transmission voltage customer. (AEP-Ohio Ex. 111 at 5-6; AEP-Ohio Ex. 103 at 14-20.)

Beginning January 1, 2014, after corporate separation is effective, AEP-Ohio's generation affiliate, AEP Generation Resources Inc. (GenResources), will bill AEP-Ohio its actual fuel costs in the same manner and detail as currently performed by AEP-Ohio, and the costs will continue to be recovered through the FAC. As a component of the modified ESP, AEP-Ohio proposes that as of January 1, 2015, all energy and capacity to serve the Company's SSO load be supplied by auction, whereupon the FAC mechanism will no longer be necessary. (AEP-Ohio Ex. 103 at 14-20.)

In opposition to the FAC, Ormet argues that the FAC has caused significant increases in the cost of electric service, rising 22 percent for GS-4 customers since 2011. Ormet asks that the Commission temper the impact of FAC increases and improve the transparency of the cause for increasing FAC costs, as well as reconsider the FAC rate design, to avoid cost shifts between low load factor customers and high load factor customers. Ormet, a 98.5 percent load factor customer, asserts that it pays an equal share of the FAC costs as a customer that uses all its energy on-peak. As such, Ormet contends that the FAC rate design violates the principle of cost causation. Ormet suggests that this

6 In re *AEP-Ohio*, ESP 1 Order at 13-15 (March 18, 2009).

modified ESP presents the Commission with the opportunity, as it is within the Commission's jurisdiction, to redesign the FAC, such that FAC costs are separated into charges which reflect on-peak and off-peak usage. (Ormet Ex. 106B at 19; Ormet Br. at 13-15; Ormet Reply Br. at 14-16.)

The Company responds that Ormet's arguments on the FAC reflect improper calculations and is based on forecasted FAC rates. More importantly, AEP-Ohio points out that the FAC is ultimately based on actual FAC costs and any increases in the FAC rate cannot appropriately be attributed to the modified ESP. Ormet is served by AEP-Ohio pursuant to a unique arrangement and as such avoids charges that other similarly situated customers pay; however, the Company requests that Ormet not be permitted to avoid fuel costs. (AEP-Ohio Reply Br. at 5-6.)

The Commission notes that currently, through the FAC mechanism, AEP-Ohio recovers prudently incurred fuel and associated costs, including consumables related to environmental compliance, purchase power costs, emission allowances, and costs associated with carbon-based taxes. We note that, since January 1, 2012, AEP-Ohio has been collecting its full fuel expense and no further fuel expenses are being deferred.

We interpret Ormet's arguments to more accurately request the institution of a fuel rate cap on the FAC or to revise the FAC rate design. The Commission rejects Ormet's request to review and redesign the FAC. The FAC rate mechanism is reconciled to actual FAC costs each quarter and annually audited for accounting accuracy and prudency. Furthermore, as AEP-Ohio notes, Ormet's rates are set pursuant to its unique arrangement as opposed to the Company's SSO rates paid by other high load industrial and commercial customers. By way of Ormet's unique arrangement, Ormet is provided some rate stability and rate certainty and we see no need to redesign the FAC for Ormet's benefit. No other intervener took issue with the continuation and the proposed modification of the FAC. The Commission finds that the FAC rates should continue on a separate rate zone basis. We note that there are a few Commission proceedings pending that will affect the FAC rate for each rate zone which the Commission believes will be better reviewed and adjusted if the FAC mechanisms remain distinguishable. Further, as discussed, below, maintaining FAC rates on a separate basis is necessary to be consistent with our decision regarding recovery of the PIRR.

(b) Alternative Energy Rider

As noted above, AEP-Ohio proposes to begin recovery of REC expenses, associated with renewable energy purchase agreements (REPAs) or REC purchases by means of the new AER mechanism to be effective with this modified ESP. With the proposed modification, the Company will continue to recover the energy and capacity components of renewable energy cost through the FAC, until the FAC expires. After the FAC ends, energy and capacity associated with REPAs will be sold into the PJM Interconnection, LLC

(PJM) market and offset the total cost of the REPAs, with the balance of REC expense to be recovered from SSO customers through the AER. AEP-Ohio proposes that the AER be bypassable for shopping customers. The Company also proposes that where the REC is part of the REPA, the value of each component be based on the residual method using the monthly average PJM market price to value the energy component, the capacity will be valued using the price at which it can be sold into the PJM market and the remaining value would constitute the cost of the REC. The AER mechanism, according to AEP-Ohio, is consistent with Section 4928.143(B)(2)(a), Revised Code, and is essentially a partial unbundling of the FAC to provide greater price visibility of prudently-incurred REC compliance costs under Section 4928.66, Revised Code. The Company will make quarterly filings, in conjunction with the FAC, to facilitate the audit of the AER. AEP-Ohio reasons that the establishment of the AER for recovery of costs is uncontested, reasonable, and should be approved. The Company argues continuation and unification of the FAC and development and implementation of the AER, is reasonable and should be approved. (AEP-Ohio Ex. 103 at 18-19.)

Staff endorses the Company's requests to continue and consolidate the FAC rates for CSP and OP rate zones and to reclassify the RECs and REPA components for recovery through the AER, as proposed by the Company. However, Staff recommends that annual AER audit procedures be established and that the AER audit be conducted by the same auditor and in conjunction with the FAC audit to determine the appropriateness and recoverability of costs as a part of and between the AER and FAC mechanisms. As to the allocation of cost components, Staff agrees with the Company's proposal to allocate cost components of bundled products but suggests that the auditor detail how to best determine the cost components and how to apply the allocation to specific situations in the context of the FAC/AER audits. Staff recommends, and the Company agrees, that the auditor's allocation process be applied to AEP-Ohio's renewable generation from existing generation facilities. (Staff Ex. 104 at 2-3.)

No party took exception to the implementation of the AER mechanism. As proposed by AEP-Ohio, continuation of the FAC and establishment of the AER, through this modified ESP, is consistent with Section 4928.143(B)(2)(a), Revised Code, for the recovery of prudently incurred fuel costs and fuel-related costs and alternative energy and associated costs. We find the Company's proposal to continue the FAC and create the AER to better distinguish fuel and alternative energy costs to be reasonable and appropriate during the term of the modified ESP. We approve the continuation of the FAC and implementation of the AER mechanisms, consistent with the audit recommendations made by Staff. The next audit of AEP-Ohio's FAC shall also include an audit of the AER mechanisms and the allocation method for classification of the REPA components and their respective values. In all other respects, the Commission approves the continuation of the FAC rate mechanisms and the creation of the AER rate mechanism for each rate zone.

3. Timber Road

AEP-Ohio states that it conducted a request for proposal (RFP) process to competitively bid and secure additional renewable resources. As a result of AEP- Ohio's need for in-state renewables, AEP-Ohio only considered bids for projects in Ohio, and ultimately selected the proposal from Paulding for its Timber Road wind farm. Specifically, the Timber Road REPA will provide AEP-Ohio a 99 MW portion of Timber Road's electrical output, capacity and environmental attributes for 20 years as necessary for the Company to meet its increasing renewable energy benchmarks as required by Section 4928.64(C)(3), Revised Code. (AEP-Ohio Ex. 109 at 10-15; Paulding Ex. 101 at 1-4.)

AEP-Ohio testified that the 20-year agreement facilitates long-term financing by the developer, reduces up front costs, and allows for price certainty for AEP-Ohio customers. Paulding offers that although the project is capital intensive the fact that there are no fuel costs equates to no significant cost variables creating long-term risk for customers. AEP-Ohio argues that the Timber Road REPA provides the Company and its customers, with access to affordable renewable energy from an in-state resource supporting the state policy to facilitate the state's effectiveness in the global economy, Section 4928.02(N), Revised Code. (AEP-Ohio Ex. 109 at 16-18; Paulding Ex. 101 at 4-5.)

Staff supports AEP-Ohio's REPA with Paulding and the Timber Road contract as reasonable and prudent. Accordingly, Staff advocates its approval and that AEP-Ohio be permitted to recover costs associated with energy, capacity, and RECs outlined in the contract, subject to annual FAC and AER audits. The Company agrees with Staff that the implementation of the Timber Road REPA should be subject to the FAC and AER audit, as offered in the testimony of AEP-Ohio witness Nelson. AEP-Ohio commits to acquiring RECs to meet its portfolio requirements on behalf of its SSO load and to recover the costs through the AER once the FAC is terminated. (Staff Ex. 103 at 2-3; Tr. at 2498-2499; AEP-Ohio Ex. 103 at 18.)

The Commission finds that the long-term Timber Road REPA promotes diversity of supply, consistent with state policies set forth in Section 4928.02, Revised Code. Further, based on the evidence of record, the Timber Road project benefits Ohio consumers and supports the Ohio economy. Accordingly, the Commission finds it reasonable and appropriate to allow the Company to recover the cost of the Timber Road REPA through the bypassable FAC/AER mechanisms.

4. Generation Resource Rider

AEP-Ohio requests establishment of a non-bypassable, Generation Resource Rider (GRR) pursuant to Section 4928.143(B)(2), Revised Code, to recover the cost of new generation resources including, but not limited to, renewable capacity that the Company

owns or operates for the benefit of Ohio customers. At this time, the Company proposes the rider as a placeholder and expects that the only project to be included in the GRR will be the Turning Point facility, assuming need is established in Case Nos. 10-501-EL-FOR and 10-502-EL-FOR.[7] To be clear, although the Company provided an estimate of the revenue requirement for the Turning Point project, as requested by the Commission, AEP-Ohio is not seeking recovery of any costs for the Turning Point facility in this ESP. The Company asks that the GRR be established at zero with the amount of the rider to be determined, and the remaining statutory requirements to be met, as part of a subsequent Commission proceeding. (AEP-Ohio Ex. 103 at 20-21; AEP-Ohio Ex. 104; Tr. at 2514, 599, 1170, 2139- 2140.)

UTIE encourages the Commission's approval of the GRR as a regulatory mechanism pursuant to the authority granted under Section 4928.143(B)(2)(c), Revised Code, to adopt a non-bypassable surcharge for new electric generation (UTIE Br. at 1-2). NRDC and OEC support the proposed GRR, including the Timber Road REPA and the Turning Point project, with certain modifications, as permitted under Section 4928.143(B)(2)(c), Revised Code. NRDC and OEC recommend that the GRR be limited to only renewable and alternative energy projects or qualified energy efficiency projects, and also recommend that the Company develop a crediting system to ensure that shopping customers do not pay twice for renewable energy. NRDC and OEC reason that AEP-Ohio could make the RECs available to CRES providers based on the CRES provider's share of the load served or by liquidating the RECs in the market and crediting the revenue to the GRR. (NRDC Ex. 101 at 11; NRDC/OEC Reply Br. at 1.)

However, while Staff does not foresee any need for additional generation by AEP-Ohio, Staff and UTIE acknowledge and endorse the adoption of the GRR mechanism to facilitate the Commission's allowance for the construction of new generation facilities (Staff Ex. 110 at 7; Tr. at 4599; UTIE Reply Br. 1-2).

On the other hand, numerous interveners oppose the adoption of the GRR. IGS requests that the Commission reject the GRR or if it is not rejected, that the GRR be made bypassable or modified so the benefits flow to shopping customers (IGS Ex. 101 at 27-28). Wal-Mart requests that the GRR not be imposed on shopping customers because approval of a non-bypassable GRR would violate cost causation principles, send an incorrect price signal, and cause shopping customers to pay twice but receive no benefit (Wal-Mart Ex. 101 at 5-6).

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7 A stipulation between the Company and the Staff was filed agreeing, among other things, that as a result of the requirements of Sections 4928.143(B)(2)(c) and 4928.64(B)(2), Revised Code, which require AEP-Ohio to obtain alternative energy resources including solar resources in Ohio, the Commission should find that there is a need for the 49.9 MW Turning Point Solar project. The Commission decision in the case is pending.

RESA and Direct contend that the GRR will inhibit the growth of the competitive retail electric market and violates the state policy set forth in Section 4928.02(H), Revised Code, which prohibits the collection of generation-based rates through a non-bypassable rider. Similarly, IGS reasons that the GRR is intended to recover the cost for new generation to serve SSO customers and, therefore, the GRR amounts to an anticompetitive subsidy on CRES providers for the benefit of noncompetitive retail electric service, or, according to Wal-Mart, requires shopping customers to pay twice. IGS recommends that AEP-Ohio develop renewable energy projects on its own with recovery through market prices. RESA and Direct reason that AEP-Ohio's request is premature and creates uncertainty for CRES providers who are also required to comply with Ohio's renewable energy portfolio standards. RESA and Direct contend that, to the extent the Commission adopts the GRR, the GRR should not be assessed to shopping customers. RESA and Direct propose that the GRR be set at zero and incorporation of the Turning Point project or other facilities should occur in a separate case. (RESA Ex. 102 at 12; RESA/Direct Br. 18-21; IGS Br. at 13; Wal-Mart Ex. 101 at 5.)

To make the GRR benefit shopping and non-shopping customers, IGS suggests that AEP-Ohio sell the generated electricity on the market with revenues to be credited against the GRR or the renewable energy credits used to meet the requirements for all customers. IGS notes that AEP-Ohio witnesses agree that crediting the revenues against the GRR is reasonable. (IGS Ex. 101 at 27-28; Tr. 599, 1169-1170.)

OCC, APJN, IEU and FES contend that AEP-Ohio has inappropriately conflated two unrelated statutes, Sections 4928.143(B)(2)(c) and 4928.64, Revised Code, in support of the GRR. The goals of the two sections are different according to the interpretation of the aforementioned interveners. They contend that the purpose of Section 4928.64, Revised Code, is to require electric distribution utilities and CRES providers to comply with renewable energy benchmarks and paragraph (E) of Section 4928.64, Revised Code, directs that costs incurred to comply with the renewable energy benchmarks shall be bypassable. Whereas, according to IEU and FES, Section 4928.143(B)(2)(c), Revised Code, permits the Commission to implement a market safety valve under specific requirements should Ohio require additional generation. FES notes that AEP-Ohio has sufficient energy and capacity for the foreseeable future. IEU and FES interpret the two statutory provisions to affirmatively deny non-bypassable cost recovery under Section 4928.143(B)(2)(c), Revised Code, for renewable energy projects. IEU and FES contend that their interpretation is confirmed by the language in Section 4928.143(B), Revised Code, which states "Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except...division (E) of section 4928.64... ." Thus, FES reasons the Commission is expressly prohibited from authorizing a provision of an ESP which conflicts with Section 4928.64(E), Revised Code. (FES Br. at 87-90; IEU Br. 74-76; Tr. at 226-227.)

Further, IEU, FES, OCC, IGS and APJN argue that the statute requires, and AEP-Ohio has failed to demonstrate, the need for and the terms and conditions of recovery for

the Turning Point project in this proceeding pursuant to Section 4928.143(B)(2)(c), Revised Code. Finally, IEU submits that AEP-Ohio has failed to offer any evidence as to the effect of the GRR on governmental aggregation, as required in accordance with the Commission's obligation under Section 4928.20(K), Revised Code. For these reasons, IEU, IGS, FES, OCC and APJN request that the Company's request to implement the GRR be denied. (Tr. 1170, 570-574, 2644-2646; FES Br. at 87-94; FES Reply Br. at 22-24, IGS Reply Br. at 5-6; OCC/APJN Br. at 84-85; IEU Br. 74-76.)

Staff notes that there are a number of statutory requirements pursuant to Section 4928.143(B)(2)(c), Revised Code, that OP has not satisfied as a part of this modified ESP proceeding but will be addressed in a future proceeding, including the cost of the proposed facility, alternatives for satisfying the in-state solar requirements, a demonstration that Turning Point was or will be sourced by a competitive bid process, the facility is newly used and useful on or after January 1, 2009, the facility's output is dedicated to Ohio consumers and the cost of the facility, among other issues. Staff notes the need for the Turning Point facility has been raised by parties in another case and a decision by the Commission is pending.[8] Staff emphasizes that the statutory requirements would need to be addressed, and a decision made by the Commission, before recovery could commence via the GRR mechanism. Further, Staff suggests that it is in this future proceeding that parties should explore whether the GRR should be applied to shopping customers. (Staff Ex. 106 at 11-14.)

FES responds that the language of Section 4928.143(B)(2)(c), Revised Code, omits any asserted discretion of the Commission to consider the requirements to comply with the statute outside of the ESP case, as AEP-Ohio and Staff offer. Nor is it sufficient policy support, according to FES and IGS, that customers may transition from shopping to non-shopping and back during the useful life of the Turning Point facility as claimed by AEP-Ohio. The interveners argue AEP-Ohio overlooks that, as proposed by the Company, the load of all its non-shopping customers will be up for bid as of June 1, 2015. With that in mind, FES ponders why customers of AEP-Ohio competitors should pay for AEP-Ohio facilities after May 31, 2015. (FES Reply Br. at 24-25; IGS Reply Br. at 4.)

UTIE notes that parties that oppose the approval of the GRR, on the premise that it will require shopping customers to pay twice, overlook AEP-Ohio's proposal to allocate RECs between shopping and non-shopping customers, to sell the energy and capacity from the Turning Point facility into the market and credit such transactions against the GRR (UTIE Reply Br. at 2).

NRDC and OEC respond that it is disingenuous for parties to argue that establishing a placeholder rider as a part of an ESP is unlawful. The Commission has adopted placeholder riders in several previous Commission cases for AEP-Ohio, Duke

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8 Case Nos. 10-501-EL-FOR and 10-502-EL-FOR.

Energy Ohio and the FirstEnergy operating companies.[9] Further, NRDC and OEC note that no party has waived its right to participate in subsequent GRR-related proceedings before the Commission. (NRDC/OEC Reply Br. at 2.)

The Company notes that four interveners support the adoption of the GRR and of the four supporters, two request modifications which are components already proposed by the Company.

First, AEP-Ohio addresses the arguments of FES and IEU that Section 4928.64(E), Revised Code, prohibits the use of Section 4928.143(B)(2)(c), Revised Code, for renewable generation projects. AEP-Ohio states that it recognizes the overlapping policies of the two statutes and offers that each section relates to the cost recovery aspect of the project, which as the Company interprets the statutes, will be addressed when cost recovery is requested in a future proceeding. Further, AEP-Ohio reasons that IEU's and FES's arguments are inappropriate as they would lead to the disallowance of a statutorily prescribed option merely because another option exists. In addition, AEP-Ohio contends, proper statutory construction seeks to give all statutes meaning and, therefore, both options are available to the Commission at its discretion.

It is premature, AEP-Ohio retorts, to assert as certain interveners have done, that the statutory requirements of Section 4928.143(B)(2)(c), Revised Code, have not been met by the Company. The statutory requirements of Section 4928.143(B)(2)(c), Revised Code, will be addressed in a separate proceeding before any costs can be recovered via the proposed GRR. AEP-Ohio asserts that the Commission is vested with the discretion to establish the GRR, as a zero-cost placeholder, as it has done in other Commission proceedings. The Company also proposes, and Staff agrees, that as a part of this future proceeding, the amount and prudency of costs associated with the Turning Point project and whether the GRR results in shopping customers paying twice for renewable energy compliance costs, among other issues will be determined. AEP-Ohio reiterates its plan to share the RECs from the Turning Point project between shopping and SSO customers on an annual basis. IGS, NRDC and Staff endorse AEP-Ohio's proposal to share the value of the Turning Point project between shopping and non-shopping customers. (AEP-Ohio Reply Br. at 7-10; Tr. at 2139-2140; NRDC/OEC Reply Br. at 1; Staff Ex. 110 at 7; Staff Br. at 20.)

The Commission interprets Section 4928.143(B)(2)(c), Revised Code, to permit a reasonable allowance for construction of an electric generating facility and the establishment of a non-bypassable surcharge, for the life of the facility where the electric utility owns or operates the generation facility and sourced the facility through a competitive bid process. Before authorizing recovery of a surcharge for an electric generation facility, the Commission must determine there is a need for the facility and to

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9 In re AEP-Ohio, ESP 1 (March 18, 2009); *In re Duke Energy-Ohio*, Case No. 08-920-EL-SSO (December 17, 2008); *In re FirstEnergy*, Case No. 08-935-EL-SSO (March 25, 2009).

continue recovery of the surcharge, establish that the facility is for the benefit of and dedicated to Ohio consumers. AEP-Ohio will be required to address each of the statutory requirements, in a future proceeding, and to provide additional information including the costs of the proposed facility, to justify recovery under the GRR. However, the Commission notes that there shall be no allowances for recovery approved unless the need and competitive requirements of this section are met.

Furthermore, we disagree with the arguments that the language in Section 4928.143(B)(2)(c), Revised Code, requires the Commission to first determine, within the ESP proceeding, that there was a need for the facility. The Commission is vested with the broad discretion to manage its dockets to avoid undue delay and the duplication of effort, including the discretion to decide, how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort. *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379; *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560. Accordingly, it is acceptable for the Commission to determine the need for the Turning Point facility as a part of the Company's long-term forecast case filed consistent with Section 4935.04, Revised Code, wherein the Commission evaluates energy plans and needs. To avoid the unnecessary duplication of processes, the Commission has undertaken the determination of need for the Turning Point project in the Company's long-term forecast proceeding. The Commission interprets the statute not to restrict our determination of the need and cost for the facility to the time an ESP is approved but rather to ensure the Commission holds a proceeding before it authorizes any allowance under the statute. FES raises the issue of whether shopping customers should incur charges associated with AEP-Ohio's construction of generation facilities. The Commission finds that Section 4928.143(B)(2)(c), Revised Code, specifically provides that the surcharge be non-bypassable. However, the statute also provides that the electric utility must dedicate the energy and capacity to Ohio consumers. AEP-Ohio has represented that any renewable energy credits will be shared with CRES providers proportionate with such providers' share of the load. Accordingly, as long as AEP-Ohio takes steps to share the benefits of the project's energy and capacity, as well as the renewable energy credits, with all customers, we find that the GRR should be non-bypassable. Further, in the subsequent application for any cost recovery AEP-Ohio will have the burden to demonstrate compliance with the statutory requirements set forth in Section 4928.143(B)(2)(c), Revised Code.

Accordingly, the Commission approves the Company's request to adopt as a component of this modified ESP the GRR mechanism, at a rate of zero. It is not unprecedented for the Commission to adopt a mechanism, with a rate of zero, as a part of

an ESP.[10] The Commission explicitly notes that in permitting the creation of the GRR, it is not authorizing the recovery of any costs, at this time.

5. Interruptible Service Rates

In its modified ESP, AEP-Ohio suggests it would be appropriate to restructure its current interruptible service provisions to make its offerings consistent with the options that will be available upon AEP-Ohio's participation in the PJM base residual auction beginning in June 2015. AEP-Ohio witness Roush provides that interruptible service is more frequently represented as an offset to standard service offer rates as opposed to a separate and distinct rate (AEP-Ohio Ex. 111 at 8). To make AEP-Ohio's interruptible service options consistent with the current regulatory environment, AEP-Ohio proposes that Schedule Interruptible Power-Discretionary (IRP-D) become available to all current customers and any potential customers seeking interruptible service (*Id.*). The IRP-D credit would increase to $8.21 per kw-month upon approval of the modified ESP (AEP-Ohio Ex. 100 at 9). AEP-Ohio proposes to collect any costs associated with the IRP-D through the RSR to reflect reductions in AEP-Ohio's base generation revenues (*Id.*).

OCC believes the IRP-D proposal violates cost causation principles, as the beneficiaries are customers with more than 1 MW of interruptible capacity, and does not apply to residential customers. OCC witness Ibrahim argues it is unfair for non-participating customers to make AEP-Ohio whole for any lost revenues associated with the IRP-D (OCC Ex. 110 at 11-12). Therefore, OCC recommends the IRP-D should not allow for any lost revenue associated with IRP-D credits to be collected through the RSR (*Id.*).

Staff suggests modifying the IRP-D credit based upon the state compensation mechanism approved in the Capacity Case (Staff Ex. 105 at 6-9). Staff witness Scheck recommended lowering the IRP-D credit to $3.34/kw-month (*Id.*). Further, Staff notes its preference of any interruptible service to be offered in conjunction with Commission approved reasonable arrangements, as opposed to tariff service (*Id.*). EnerNOC states that a reasonable arrangement process is more transparent than an interruptible service credit, and notes that a subsidized IRP-D rate may impede AEP-Ohio's transition to a competitive market by reducing the amount of demand response resources that may participate in RPM auctions (EnerNOC Br. at 6-9).

OMAEG and OEG support the proposed IRP-D credit, but recommend it not be tied to approval of the RSR (OMAEG Br. at 21, OEG Br. at 15). Ormet also supports the IRP-D credit, noting that customers should be compensated for taking on an interruptible load (Ormet Br. at 21-22). OEG explains it is reasonable and consistent with state policy

[10] *In re AEP-Ohio*, ESP 1 (March 18, 2009); *In re Duke Energy-Ohio*, Case No. 08-920-EL-SSO (December 17, 2008); *In re FirstEnergy*, Case No. 08-935-EL-SSO (March 25, 2009).

objectives under Section 4928.02, Revised Code, as it will promote economic development and innovation and market access for AEP-Ohio's customers. OEG witness Stephen Baron provides that the credit is beneficial to customers that participate in the IRP-D program who received a discounted price for power in exchange for interruptible service, which retains existing AEP-Ohio customers and can attract new customers to benefit the state's economic development (Tr. IV at 1125-1126, OEG Ex. 102 at 6-8). Mr. Baron notes that the IRP-D is beneficial to AEP-Ohio as well by allowing AEP-Ohio to have increased flexibility in providing its service, thus increasing overall system reliability (OEG Ex. 102 at 6-8). However, Mr. Baron believes that costs associated with the IRP-D would be more appropriate to recover under the EE/PDR rider (*Id.* at 9-10). OEG also disputes Staff's proposal to lower the IRP-D credit to the capacity rate charged to CRES providers, as the credit is only available to SSO customers, and not customers of CRES providers (OEG Br. at 16-21).

The Commission finds the IRP-D credit should be approved as proposed at $8.21/kW-month. In light of the fact that customers receiving interruptible service must be prepared to curtail their electric usage on short notice, we believe Staff's proposal to lower the credit amount to $3.34/kW-month understates the value interruptible service provides both AEP-Ohio and its customers. In addition, the IRP-D credit is beneficial in that it provides flexible options for energy intensive customers to choose their quality of service, and is also consistent with state policy under Section 4928.02(N), Revised Code, as it furthers Ohio's effectiveness in the global economy. In addition, since AEP-Ohio may utilize interruptible service as an additional demand response resource to meet its capacity obligations, we direct AEP-Ohio to bid its additional capacity resources into PJM's base residual auctions held during the ESP.

The Commission agrees with several parties who correctly pointed out that the IRP-D credit should not be tied to the RSR. As we will discuss below, the RSR is tied to rate certainty and stability, and while we have no qualms in finding that the IRP-D is reasonable, it is more appropriate to allow AEP-Ohio to recover any costs associated with the IRP-D under the EE/PDR rider. As the IRP-D will result in reducing AEP-Ohio's peak demand and encourage energy efficiency, it should be recovered through the EE/PDR rider.

6. Retail Stability Rider

In its modified ESP, AEP-Ohio proposes a non-bypassable RSR. AEP-Ohio states the RSR is justified under Section 4928.143(B)(2)(d), Revised Code, as it promotes stability and certainty with retail electric service, and Section 4928.143(B)(2)(e), Revised Code, which allows for automatic increases or decreases by revenue decoupling mechanisms that relate to SSO service. AEP-Ohio provides that in addition to the RSR's promotion of rate stability and certainty, it is essential to ensure the Company does not suffer severe financial repercussions as a result of the proposed ESP's capacity pricing mechanism.

AEP-Ohio witness William Avera explains that the Commission has the duty to ensure there is not an unconstitutional taking that may result in material harm to AEP-Ohio (AEP-Ohio Ex. 150 at 4-6). Dr. Avera stresses that not only does the Commission maintain this obligation to avoid confiscation, but in the event the rate plan is confiscatory, AEP-Ohio's credit rating would likely drop, limiting the ability to attract future capital investments (*Id.*).

The proposed RSR functions as a generation revenue decoupling charge that all shopping and non-shopping customers would pay through June 2015. As proposed, the RSR relies on a 10.5 percent return on equity to develop the non-fuel generation revenue target of $929 million per year, which, throughout the term of the modified ESP, would collect approximately $284 million in revenue (AEP-Ohio Ex. 100, 116 at WAA-6). In establishing the 10.5 percent target, AEP-Ohio witness William Allen considered CRES capacity revenues as based on the proposed two-tiered capacity mechanism, auction revenues, and credit for shopped load to determine where the RSR should be set. AEP-Ohio notes that while the RSR is designed to produce consistent non-fuel generation revenues, the RSR does not guarantee a company total ROE of 10.5 percent, as there are other factors affecting total company earnings, which AEP-Ohio witness Sever estimated at 9.5 percent and 7.6 percent (AEP-Ohio Ex. 151 at 2-4, AEP-Ohio Ex. 108 at OJS-2). Thus, AEP-Ohio explains the RSR only ensures a stable level of revenues during the term of the ESP, not a stable ROE (*Id.* at 3). For every $10/MW-day decrease in the Tier 2 price for capacity, Mr. Allen explains the RSR would increase by $33M (or $.023/MWh) (AEP-Ohio Ex. 116 at 14-15). Mr. Allen explains that the $3 shopped load credit is based on AEP-Ohio's estimated margin it earns from off-system sales (OSS) made as a result of MWh freed as a result of customer shopping. In his testimony, Mr. Allen provides that AEP-Ohio only retains 40 percent of the OSS margins due to its participation in the AEP pool, and of that 40 percent only 50 to 80 percent of reduced retail sales result in additional OSS, thus demonstrating the $3/MWh credit is reasonably based on appropriate OSS assumptions (AEP-Ohio Ex. 151 at 5-8).

In designing the RSR, AEP-Ohio explains that a revenue target is preferable to an earnings target, as decoupling will provide greater stability and certainty for customers and is easier to objectively measure and audit as compared to earnings, which are prone to litigation as evidenced by SEET proceedings (AEP-Ohio Ex. 116 at 13-16). AEP-Ohio believes a revenue target provides for risks associated with generation operations to be on AEP-Ohio while avoiding the need for evaluating returns associated with a deregulated entity after corporate separation (*Id.*) As proposed, the RSR would average $2/MWh (*Id.* at WAA-6).

AEP-Ohio believes the RSR is beneficial in that it freezes non-fuel generation rates and allows for AEP-Ohio's transition to a fully competitive auction by June 2015 (AEP-Ohio Ex. 119 at 2-4). AEP-Ohio opines that the RSR mechanism reflects a careful balance

that will encourage customer shopping through discounted capacity prices while retaining reasonable rates for SSO customers and ensure that AEP-Ohio is not financially harmed as it transitions towards a competitive auction (*Id.*). AEP-Ohio also touts an increase in its interruptible service (IRP-D) credit upon approval of the RSR. AEP-Ohio witness Selwyn Dias explains that the increase in the IRP-D credit will benefit numerous major employers in the state of Ohio and promote economic development opportunities within AEP-Ohio's service territory (*Id.* at 7).

Without the Commission's approval of the RSR as proposed, AEP-Ohio claims that the modified ESP would result in confiscatory rates. In his rebuttal testimony, Mr. Allen argues that if the established capacity charge is below AEP-Ohio's costs, AEP-Ohio will face an adverse financial impact (AEP-Ohio Ex. 151 at 9). As such, AEP-Ohio points out that the 10.5 percent return on equity used to develop the RSR's target revenue is not only appropriate to prevent financial harm but is also necessary to avoid violating regulatory standards addressing a fair rate of return. Mr. Allen contends that the non-fuel generation revenue, which the RSR addresses, is separate and distinct from the total company earnings, which are not addressed by the RSR. This distinction, Mr. Allen states, shows the 10.5 percent return on equity is appropriate for the RSR because when the RSR is combined with total company earnings, AEP-Ohio would be looking at a total company return on equity of 7.5 percent in 2013. Therefore, AEP-Ohio argues it would be inappropriate to allow a RSR rate of return of less than 10.5 percent, as any reduction would lower the total company return on equity downward from 7.5 percent, harming AEP-Ohio's ability to attract capital and potentially putting the company in an adverse financial situation (*Id.* at 4-5).

DER, DECAM, FES, NFIB, OCC, and IEU all contend that the RSR lacks statutory authority to be approved. FES claims that Section 4928.143(B)(2)(d), Revised Code, only authorizes charges that provide stability and certainty regarding retail electric service, which AEP-Ohio has failed to show. OCC witness Daniel Duann argues that the RSR will raise customer rates and cause financial uncertainty to all native load customers (OCC Ex. 111 at 10). OCC contends that even if the RSR provided certainty and stability, it does not qualify as a term, condition, or charge pursuant to Section 4928.143(B)(2)(d), Revised Code (OCC Br. at 40). IEU and Exelon also argue the RSR violates Section 4928.02(H) Revised Code, as it would be tied to a distribution rate based on its charge to shopping customers despite the fact it is a non-bypassable charge designed to recover generation related costs (IEU Br. at 63-64, Exelon Br. at 12).

IEU, Ohio Schools, Kroger, and DECAM/DER argue that AEP-Ohio is improperly utilizing the RSR to attempt to recover transition revenue. IEU notes that AEP-Ohio's attempt to recover generation-related revenue that may not otherwise be collected by statute is an illegal attempt to recover transition revenue (IEU Ex. 124 at 4-10, 24-26). Kroger and Ohio Schools point out that not only has the opportunity to recover generation

transition costs expired with the establishment of electric retail competition in 2001, AEP-Ohio waived its right to generation transition costs when it stipulated to a resolution in Case Nos. 99-1729 and 99-1730 (Kroger Br. at 3-5, Ohio Schools Br. at 18-20). Exelon and FES maintain the RSR is anticompetitive and would stifle competition.

Ormet, OCC, Ohio Schools, OEG, and Exelon indicate that, if the RSR is approved, it should contain exemptions for certain customer classes. Ohio Schools request an exemption from the RSR, pointing out that not only are schools relying on limited funding, but also that the Commission has traditionally considered schools to be a distinct customer class that is entitled to special rate treatment (Ohio Schools Br. at 22-30, citing to Case Nos. 90-717-EL-ATA, 95-300-EL-AIR, 79-629-TP-COI, Ohio Schools Ex. 103, and Tr. XVI at 4573-4574). Exelon believes the RSR should not apply to shopping customers and should be bypassable. While Exelon notes it does not oppose affording AEP-Ohio protection as it transitions its business structure, witness David Fein argues that shopping customers will unfairly be forced pay both the CRES provider and AEP-Ohio for generation (Exelon Ex. 101 at 13-14).

On the contrary, Ormet believes the RSR should not apply to customers like Ormet who cannot shop, as Ormet neither causes costs associated with the RSR nor can Ormet receive the benefits associated with it (Ormet Ex. 106 at 15-17). Ormet maintains that the RSR, as currently proposed, violates cost causation principles (*Id.*). OCC and OEG suggest that if the RSR is approved, it should not be charged to SSO customers, as these customers are not the cause of the RSR costs, and it would be unfair to force these customers to subsidize shopping customers and CRES providers (OEG Br. at 5-6, OCC Ex. 111 at 16-17).

While OEG does not support the creation of the RSR, it understands the Commission may need to provide a means to ensure AEP-Ohio has the ability to attract capital, and as such suggests that the Commission look to AEP-Ohio actual earnings as opposed to revenue (OEG Ex. 101 at 12-18). OEG argues that the RSR's use of revenues does not accurately reflect a utility's financial condition or ability to attract capital in the way that earnings do, as evidenced by earnings being the foundation used by credit agencies to determine bond ratings (*Id.*). OEG witness Lane Kollen points out that revenues are just a single component of AEP-Ohio's earnings and do not reflect a full picture of AEP-Ohio's financial health (*Id.*). Mr. Kollen suggests that if the Commission were to look at AEP-Ohio's earnings, an appropriate return on equity (ROE) would be between seven percent and 11 percent (OEG Ex. at 4-6). If the Commission were to use revenues to determine AEP-Ohio's ROE, as proposed in the RSR, Mr. Kollen believes the ROE should be at seven percent, as it is still double the cost of AEP-Ohio's long-term debt and falls within the Ohio Supreme Court's zone of reasonableness (*Id.* at 7, Tr. X at 2877-79).

In the event the Commission adopts RPM priced capacity, RESA also supports the use of earnings as opposed to revenues in calculating the RSR in the event it is necessary to avoid confiscatory rates (RESA Ex. at 11, Br. at 13-16). RESA also suggests the Commission consider projecting an amount of money necessary for AEP-Ohio to earn a reasonable rate of return and set the RSR accordingly (RESA Br. at 14-16). RESA maintains that either of these alternatives may reduce the possibility that AEP-Ohio and its new affiliate make uneconomic investments or other risks that may result from AEP-Ohio receiving a guarantee of a certain level of annual income (*Id.*). NFIB and OADA express similar concerns that the RSR, as proposed, creates no incentive for AEP-Ohio to limit its expenses (NFIB Br. at 4-6, OADA Br. at 2-3).

In addition, several other parties suggest modifications to the RSR, including its proposed ROE. Ormet states that the 10.5 percent ROE is excessive and unreasonably high. Ormet witness John Wilson explained that AEP-Ohio failed to sustain its burden of showing 10.5 percent ROE was just and reasonable, and upon utilizing Staff's methodology in 11-351-EL-AIR, determined that, based on current economic conditions and AEP-Ohio and comparable utility financial figures, an appropriate ROE would be between eight and nine percent (Ormet Ex. 107 at 8-30). Kroger witness Kevin Higgins testified that the average ROE for electric utilities is 10.2 percent, and based on the fact that AEP-Ohio's proposed two-tier capacity mechanism is above market, the ROE should be below 10.2 percent (Kroger 101 at 10). FES and Wal-Mart state that AEP-Ohio failed to justify its 10.5 percent figure, with Wal-Mart witness Steve Chriss suggesting the ROE be no higher than 10.2 percent (Wal-Mart Ex. 101 at 8-9, FES Ex. 102 at 79-80).

OCC recommends that the Commission allocate the RSR in proportion to each class share of the switched kWh sales as opposed to customer class contribution to peak load, as an allocation based on contribution to peak load is not just and reasonable (OCC Ex. 110 at 8-9). OCC witness Ibrahim points out that the residential customer class share of switched kWh sales is only eight percent, thus, if the Commission reallocates RSR costs, residential customer increases would drop from six percent to three percent (*Id.* at 24-26). Kroger argues the RSR allocates costs to customers by demand, but recovers through an energy cost, resulting in cross subsidies amongst customers (Kroger Ex. 101 at 8). Kroger recommends that costs and charges should be aligned and based on demand as opposed to energy usage (*Id.*)

OCC, FES, and Ormet also submit modifications related to the calculation AEP-Ohio's shopping credit included within the RSR calculation. Ormet argues that AEP-Ohio underestimates its $3 shopping credit. Ormet states that based on AEP-Ohio's 2011 resale percentage of 80 percent, the actual shopping credit increases to $3.75 MWh, with the total amount increasing to $78.5 million (Ormet Br. at 10-12, citing to Tr. XVII at 4905). Ormet also shows that AEP-Ohio will not need to reduce the credit by 60 percent beginning in 2013, as AEP-Ohio will no longer be in the AEP pool, resulting in the credit increasing to

$6.50 per year in 2014 and 2015 (*Id.*). OCC also points out that the shopping credit should increase based on AEP-Ohio's 2011 shopping percentage, as well as the termination of the AEP pool agreement, and recommends the Commission adopt a shipping credit higher than $3/MWh but less than $12/MWh (OCC Br. at 49-54).

The Commission finds that, upon review of the record, it is apparent that no party disputes that the approval of the RSR will provide AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital. There is dispute, however, as to whether the RSR is statutorily justified, and, if it is justified, the amount AEP-Ohio should be entitled to recover, and how the recovery should be allocated among customers. The Commission must first determine whether RSR mechanism is supported by statute. Next, if we find that the Commission has the authority to approve the RSR, we must balance how much cost recovery, if any, should be permitted to ensure customers are not paying excessive costs but that the recovery is enough to allow AEP-Ohio to freeze its base generation rates and maintain a reasonable SSO plan for its current customers as well as for any shopping customers that may wish to return to AEP-Ohio's SSO plan.

In beginning our analysis, we first look to AEP-Ohio's justification of the RSR. While AEP-Ohio argues there are numerous statutory provisions that may provide support for the RSR, the thrust of its arguments in support of the RSR pertain to Section 4928.143(B)(2)(d), Revised Code, which AEP-Ohio notes is met by the RSR's promotion of rate stability and certainty. AEP-Ohio also suggests that Section 4928.143(B)(2)(e), Revised Code, which allows for automatic increases or decreases, justifies the RSR, as its design includes a decoupling mechanism.

Pursuant to Section 4928.143(B)(2)(d), Revised Code, an ESP may include terms, conditions, or charges relating to limitations on customer shopping for retail electric generation that would have the effect of stabilizing retail electric service or provide certainty regarding retail electric service. We believe the RSR meets the criteria of Section 4928.143(B)(2)(d), as it promotes stable retail electric service prices and ensures customer certainty regarding retail electric service. Further, it also provides rate stability and certainty through CRES services, which clearly fall under the classification of retail electric service, by allowing customers the opportunity to mitigate any SSO increases through increased shopping opportunities that will become available as a result of the Commission's decision in the Capacity Case.

In addition, we find that the RSR freezes any non-fuel generation rate increase that might not otherwise occur absent the RSR, allowing current customer rates to remain stable throughout the term of the modified ESP. While we understand that the non-bypassable components of the RSR will result in additional costs to customers, we believe any costs associated with the RSR are mitigated by the effect of stabilizing non-fuel

generation rates, as well as the guarantee that, in less than three years, AEP-Ohio will establish its pricing based on energy and capacity auctions, which this Commission again maintains is extremely beneficial by providing customers with an opportunity to pay less for retail electric service than they may be paying today.

Therefore, we find that the RSR provides certainty for retail electric service, as is consistent with Section 4928.143(B)(2)(d), Revised Code. Until May 31, 2015, AEP-Ohio's SSO rate, as a result of this RSR, will remain available for all customers, including those who are presently shopping, as well as those who may shop in the future. The ability for AEP-Ohio to maintain a fixed SSO rate is valuable, particularly if an unexpected, intervening event occurs during the term of the ESP, which could have the effect of increasing market prices for electricity. The ability for all customers within AEP-Ohio's service territory to have the option to return to AEP-Ohio's certain and fixed rates allows customers to explore shopping opportunities. This is an extremely beneficial aspect of the RSR and is undoubtedly consistent with legislative intent in providing that electric security plans may include retail electric service terms, conditions, and charges that relate to customer stability and certainty. Further, we reject the claim that the RSR allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010 pursuant to Senate Bill 3, as AEP-Ohio does not argue its ETP did not provide sufficient revenues, and, in light of events that occurred after the ETP proceedings, including AEP-Ohio's status as an FRR entity, AEP-Ohio is able to recover its actual costs of capacity, pursuant to our decision in the Capacity Case. Therefore, anything over RPM auction capacity prices cannot be labeled as transition costs or stranded costs.

Moreover, we find that the certainty and stability the RSR provides would be all but erased by its design as a decoupling mechanism. We agree with OCC that the ability for AEP-Ohio to decouple the RSR would cause financial uncertainty, as truing up or down each year will create customer confusion in their rates. NFIB, OADA, and RESA correctly raise concerns that the RSR design creates no incentive for AEP-Ohio to limit its expenses and the Company may make uneconomic investments by its guaranteed level of annual income. While AEP-Ohio should have the opportunity to earn a reasonable rate of return, there is not a right to a guaranteed rate of return, and we will not allow AEP-Ohio to shift its risks onto customers. Thus, because its design may lead to a perverse outcome of AEP-Ohio making imprudent decisions, we find it necessary to remove the decoupling component from the RSR.

Although the RSR is justified by statute, AEP-Ohio has failed to sustain its burden of proving that its revenue target of $929 million is reasonable. The basis of AEP-Ohio's $929 million target is to ensure that its non-fuel generation revenues are stable and that stability may be ensured through a 10.5 percent ROE. However, as we previously established, it is inappropriate to guarantee a rate of return for AEP-Ohio, therefore, we

find it more appropriate to establish a revenue target that will allow AEP-Ohio the opportunity to earn a reasonable rate of return. We note that our analysis of an ROE is not to guarantee a rate of return, as evidenced by the removal of the decoupling components but rather to determine a revenue target that adequately ensures AEP-Ohio can keep its base generation rates frozen and maintain its financial health. Although we believe the more appropriate method to balance these factors would have been through the use of actual dollar figures that relate to stability, because AEP-Ohio utilized a ROE in calculating its proposals, and parties responded with alternative ROE proposals, the record limits us to this approach. Therefore, in determining an appropriate quantification for the RSR, we will consider a ROE of the non-fuel generation revenue only for the purpose of creating an appropriate revenue target that will ensure AEP-Ohio has sufficient capital while maintaining its frozen base generation rates.

Only three witnesses, AEP-Ohio witness Avera, OEG witness Kollen, and Ormet witness Wilson, developed thorough testimony exploring how an appropriate revenue target for the RSR should be established, all of which were driven by an analysis of AEP-Ohio's ROE. Although OEG witness Kollen proposed a mechanism driven by adjusting AEP-Ohio's ROE upward or downward if it does not fall within a zone of reasonableness, Mr. Kollen established that anything between seven and 11 percent could be deemed reasonable (OEG Ex. 101 at 8-9). Mr. Kollen preferred focusing on a zone of reasonableness, but notes that if the Commission preferred to establish a baseline revenue target, it should be set at $689 million (*Id.* at 16-18). Ormet witness Wilson utilized Staff models from Case No. 11-351 including discounted cash flow and capital asset pricing models, and updated calculations in the Staff models to reflect current economic factors, reaching a conclusion that AEP-Ohio's ROE should be between eight and nine percent (Ormet Ex. 107 at 8-18). AEP-Ohio used witness Avera to rebut Dr. Wilson's testimony, noting that Dr. Wilson did not consider a sufficient number of utilities in the proxy group, and the utilities that were considered were not similarly situated to AEP-Ohio (AEP-Ohio Ex. 150 at 5-6). Based on this information, Dr. Avera recommended an ROE range of 10.24 percent to 11.26 percent (*Id.*).

The Commission finds that all three experts provide credible methodologies for determining an appropriate ROE for AEP-Ohio, therefore, we find OEG witness Kollen's zone of reasonableness of seven to 11 percent to be an appropriate starting point. We again emphasize that the Commission does not want to guarantee a ROE nor establish what an appropriate ROE would be, but rather, establish a reasonable revenue target that would allow AEP-Ohio an opportunity to earn somewhere within the seven to 11 percent range. We believe AEP-Ohio's starting point of $929 is too high, particularly in light of the fact that AEP-Ohio is entitled to a deferral recovery pursuant to the Capacity Case but that a baseline of $689 million would be too low to support the certainty and stability the RSR provides. Accordingly, we find that a benchmark shall be set in the approximate middle of this range, and the $929 million benchmark shall be adjusted downward to $826 million.

While we have revised the benchmark amount down to $826 million, we also need to revisit the figures AEP-Ohio used in determining its RSR revenue amounts. In designing the RSR benchmark, Mr. Allen focused on four areas of revenue: retail non-fuel generation revenues; CRES capacity revenues; auction capacity revenues; and credit for shopped load (AEP-Ohio Ex. at WAA-6). In calculating the inputs for these revenue figures, Mr. Allen relied on AEP-Ohio's own estimates ofshopping loads of 65 percent for residential customers, 80 percent for commercial customers, and 90 percent for industrial customers by the end of 2012 (*Id.* at 5).

However, evidence within this record indicates Mr. Allen's projected shopping statistics may be higher than actual shopping levels. On rebuttal, FES presented shopping statistics based on actual AEP-Ohio numbers provided by Mr. Allen as of March 1, 2012, and May 31, 2012 (FES Ex. 120). FES concluded that, based on AEP-Ohio's actual shopping statistics to date, Mr. Allen's figures overestimated the amount of shopping by 36 percent for residential customers, 17 percent for commercial customers, and 29 percent for industrial customers, creating a total overestimate across all customer classes of 27.54 percent. The Commission finds it is more appropriate to utilize a shopping projection which is roughly the midpoint between AEP-Ohio's shopping projections and the more conservative shopping estimates offered by FES. Therefore, we will estimate shopping in the first year at 52 percent, and then increase the shopping projections for years two and three to 62 percent and 72 percent, respectively. These numbers represent a reasonable estimate and are consistent with shopping statistics of other EDUs throughout the State (*See* FES Ex. 114).

Based upon the Commission's revised shopping projections, we need to adjust the calculation of the RSR. The record indicates that lower shopping figures will result in changes to retail generation revenues, CRES margins, and OSS margins, which affects the credit for shopped load, all resulting in an adjustment to the RSR (*See* FES Ex. 121). Our adjustments are highlighted below.

	PY 12/13	PY 13/14	PY 14/15
Retail Non-Fuel Gen Revenues	$528	$419	$308
CRES Capacity Revenues	$32	$65	$344
Credit for Shopped Load	$75	$89	$104
Subtotal	$636	$574	$757
Revenue Target	$826	$826	$826
Retail Stability Rider Amount	$189	$251	$68

All figures in millions

To appropriately correct the RSR based on more conservative shopping projections, we begin our analysis with retail non-fuel generation revenues. As the figures of $402, $309, and $182 are based on Mr. Allen's assumed shopping figures, when we adjust these figures to 52, 62, and 72 percent shopping, AEP-Ohio's revenues would increase to $528 million, $419 million, and $308 million, respectively.

Conversely, as a result of decreasing the shopping statistics, CRES capacity revenues would decrease. Assuming our shopping estimates of 52, 62, and 72 percent, as well as the use of RPM capacity prices, the CRES capacity revenues lower to $32 million, $65 million, and $344 million. Finally, we need to adjust the credit for shopped load based on the revised non-shopping assumptions. Because we assume lower shopping statistics, AEP-Ohio will have less opportunity for off-system sales due to an increased load of its non-shopping customers, which will lower the credit to $75 million, $89 million, and $104 million for each year of the modified ESP. Accordingly, upon factoring in our revised revenue benchmark based on a nine percent return on equity, we find a RSR amount of $508 million is appropriate. The $508 million RSR amount is limited only to the term of the modified ESP.

Although our corrected RSR mechanism ensures customer stability and certainty by providing a means for AEP-Ohio to move towards competitive market pricing, in addition to the $508 million RSR, which allows AEP-Ohio to maintain frozen base generation rates and an accelerated auction process, we must also address the capacity charge deferral mechanism, created in the Capacity Case. As our decision in the Capacity Case to utilize RPM priced capacity considered the importance of developing competitive electric markets, we believe it is appropriate to begin recovery of the deferral costs through AEP-

Ohio's RSR mechanism, as the RSR allows for AEP-Ohio to continue to provide certainty and stability for AEP-Ohio's SSO plan while competitive markets continue to develop as a result of RPM priced capacity. Therefore we believe it is appropriate to begin collection of the deferral within the RSR.

Based on our conclusion that a $508 million RSR is reasonable, as well as our determination that AEP-Ohio is entitled to begin recovery of its deferral, AEP-Ohio will be permitted to collect its $508 million RSR by a recovery amount of $3.50/MWh, through May 31, 2014, and $4/MWh between June 1, 2014 and May 31, 2015. The upward adjustment by 50 cents to $4/MWh reflects the Commission's modification to expedite the timing and percentage of the wholesale energy auction beginning on June 1, 2014. Of the $3.50/MWh and $4/MWh RSR recovery amounts, AEP-Ohio must allocate $1.00 towards AEP-Ohio's deferral recovery, pursuant to the Capacity Case. At the conclusion of the modified ESP, the Commission will determine the deferral amount and make appropriate adjustments based on AEP-Ohio's actual shopping statistics and the amount that has been collected towards the deferral through the RSR, as necessary. Further, although this Commission is generally opposed to the creation of deferrals, the extraordinary circumstances presented before us, which allow for AEP-Ohio to fully participate in the market in two years and nine months as opposed to five years, necessitate that we remain flexible and utilize a deferral to ensure we reach our finish line of a fully-established competitive electric market.

Any remaining balance of this deferral that remains at the conclusion of this modified ESP shall be amortized over a three year period unless otherwise ordered by the Commission. In order to ensure this order does not create a disincentive to shopping, at the end of the term of the ESP, AEP-Ohio shall file its actual shopping statistics in this docket. To provide complete transparency as well as to allow for accurate deferral calculations, AEP-Ohio should maintain its actual monthly shopping percentages on a month-by-month basis throughout the term of this modified ESP, as well as the months of June and July of 2012. All determinations for future recovery of the deferral shall be made following AEP-Ohio's filing of its actual shopping statistics.

We believe this balance is in the best interests of both customers and AEP-Ohio. For customers, this keeps the RSR costs stable at $3.50/MWh and $4/MWh, and with $1.00 of the RSR being devoted towards paying back AEP-Ohio's deferrals, customers will avoid paying high deferral charges for years into the future. In addition, our modifications to the RSR will provide customers with a stable rate that will not change during the term of the ESP due to the elimination of the decoupling components of the RSR. Further, as result of the Capacity Case, customers may be able to lower their bill impacts by taking advantage of CRES provider offers allowing customers to realize savings that may not have otherwise occurred without the development of a competitive retail market. In addition, this mechanism is mutually beneficial for AEP-Ohio because the RSR will ensure

AEP-Ohio has sufficient funds to maintain its operations efficiently and revise its corporate structure, as opposed to a deferral only mechanism.

Finally, we find that the RSR should be collected as a non-bypassable rider to recover charges per kWh by customer class, as proposed. We note that several parties pitched reasons as to why certain customers classes should be excluded, but we believe these arguments are meritless. Ormet contends that the RSR should not apply to customers like Ormet who cannot shop. Interestingly, Ormet again tries to play both sides of the table, forgetting that it is the beneficiary of a unique arrangement that results in Ormet receiving a discount at the expense of other AEP-Ohio customers. We reject Ormet's argument, and note that while Ormet cannot shop pursuant to its unique arrangement, it directly benefits from AEP-Ohio's customers receiving stability and certainty, as these customers ultimately pay for Ormet's discounted electricity. We also find Ohio Schools' request to be excluded from the RSR to be without merit, as it too would result in other AEP-Ohio customers, including taxpayers that already contribute to the schools, paying significantly higher shares of the RSR. It is unreasonable to make AEP-Ohio's customers pay the schools twice.

In addition, in light of the fact that the Commission has established a revenue target to be reached through the RSR in this proceeding, the Commission finds that it is also appropriate to establish a significantly excessive earnings test (SEET) threshold to ensure that the Company does not reap disproportionate benefits from the ESP. The evidence in the record demonstrates that a 12 percent ROE would be at the high end of a reasonable range for return on equity (OEG Ex. 101 at 4-6; Kroger 101 at 10; Ormet Ex. 107 at 8-30; Wal-Mart Ex. 101 at 8-9, FES Ex. 102 at 79-80), and even AEP-Ohio witness Allen agreed that a ROE of 10.5 percent is appropriate. Accordingly, for purposes of this ESP, the Commission will establish a SEET threshold for AEP-Ohio of 12 percent.

Likewise, multiple parties argue that either shopping customers or SSO customers should be excluded from paying the RSR. For non-shopping customers, the RSR provides rate stability and certainty, and ensures all SSO rates will be market-based by June 2015. For shopping customers, the RSR not only keeps a reasonably priced SSO offer on the table in the event market prices increase, but it also enables CRES providers to provide offers that take advantage of current market prices, which is a benefit for shopping customers. Accordingly, we find the RSR, as justified by Section 4928.143(b)(2)(d), Revised Code is just and reasonable, and should be non-bypassable.

Finally, the Commission notes that our determination regarding the RSR is heavily dependent on the amount of SSO load still served by the Company. Accordingly, in the event that, during the term of the ESP, there is a significant reduction in non-shopping load for reasons beyond the control of the Company, other than for shopping, the

Company is authorized to file an application to adjust the RSR to account for such changes.

7. Auction Process

As part of its modified ESP, AEP-Ohio proposes a transition to a fully-competitive auction based SSO format. The first part of AEP-Ohio's proposal includes an energy-only, slice-of system auction of five percent that will occur prior to AEP-Ohio's SSO energy auction. The energy-only slice-of-system auction would commence upon a final order in this proceeding and the corporate separation plan, with the delivery period to extend to December 31, 2014 (AEP-Ohio Ex. 101 at 20-21). AEP-Ohio notes that specific details would be addressed upon the issuance of final orders in this proceeding (*Id*).

AEP-Ohio's transition proposal also includes a commitment to conduct an energy auction for 100 percent of the SSO load for delivery in January 2015. By June 1, 2015, AEP-Ohio will conduct a competitive bid procurement (CBP) process to commit to an energy and capacity auction to service its entire SSO load (*Id.* at 19-21, AEP-Ohio Ex. 100 at 10-11). AEP-Ohio witness Powers explained that the June 1, 2015 energy and capacity auction will permit competitive suppliers and marketers to bid into AEP-Ohio's load, as its FRR obligation will be terminated (*Id.*). AEP-Ohio anticipates the CBP process will be similar to other Ohio utility CBP filings, and explains that specific details of the CBP will be addressed in a future filing.

AEP-Ohio explains that the June 1, 2015, date to service its entire SSO load by auction is based on the need for AEP's interconnection pool to be terminated and AEP-Ohio's corporate separation plan being approved. AEP-Ohio witness Philip Nelson explains that an SSO auction occurring prior to pool termination may expose AEP-Ohio to significant financial harm, and if the auction occurs prior to corporate separation, it is possible that AEP-Ohio's generation may not be utilized in the auction (AEP-Ohio Ex. 103 at 8). Further, AEP-Ohio points out that a full auction prior to June 1, 2015, would conflict with its FRR commitment that continues until May 31, 2015 (AEP-Ohio Reply Br. at 46).

FES and DER/DECAM argue that AEP-Ohio could hold an immediate CBP without waiting for pool termination and corporate separation. FES witness Rodney Frame testified that the AEP pool agreement contains no provisions that would prevent a CBP (FES Ex. 103 at 3). DER/DECAM provide that a delay in the implementation of the CBP process harms customers by preventing them from taking advantage of the current market rates (DECAM Ex. 101 at 5).

Other parties, including RESA and Exelon, propose modifications to AEP-Ohio's proposed auction process. Exelon believes the first energy and capacity auction for the SSO load should be accelerated to June 1, 2014, in order to permit customers to take advantage of competition. Exelon witness Fein notes the June 1, 2014 date would be six

months after the date by which AEP-Ohio indicated its corporate separation and pool termination would be completed (Exelon Ex. 101 at 15-20). RESA makes a similar proposal, but that a June 1, 2014, auction be energy only, as this still allows AEP-Ohio six months to prepare for auction and provides customers with the benefits associated with a competitive market (RESA Br. at 16-17). On the contrary, OCC argues the interim auctions to be held during the first five months of 2015 would be detrimental to residential customers, and suggests that the Commission adopt a different approach (OCC Br. at 100-103). OCC contends that competitive market prices in 2015 may be higher than prices that would result from AEP-Ohio continuing to purchase energy from its affiliate, and recommends that the Commission require the agreement between AEP-Ohio and its affiliate to continue during the first five months of 2015, or, in the alternative, AEP-Ohio should purchase SSO capacity from its generation affiliate at RPM prices (*Id.* at 103).

In addition, Exelon also recommends that the Commission direct AEP-Ohio to conduct its CBP in a manner that is consistent with the processes that Duke Energy Ohio and FirstEnergy used in their most recent auctions. Exelon sets forth that establishing details of the CBP process in a timely manner will expedite AEP-Ohio's transition to competition and ensure there are no delays associated with settling these issues in later proceedings. Specifically, Exelon proposes that the CBP should be consistent with statutory directives set forth in Section 4928.142, Revised Code, and should ensure the dates for procurement events do not conflict with dates of other default service procurements conducted by other EDUs. Exelon warns that if the substantive issues of the procurement process are left open for interpretation, there may be uncertainty that could limit bidder participation and lead to less efficient prices. Exelon also recommends that the Commission ensure the CBP process is open and transparent by having substantive details established in a timely manner (Exelon Ex. 101 at 20-31).

The Commission finds that AEP-Ohio's proposed competitive auction process should be modified. First, we believe AEP-Ohio's energy only slice-of-system of five percent of the SSO load is too low, as AEP-Ohio will be at full energy auction by January 1, 2015, and the slice-of-system auctions will not commence until six months after the corporate separation order is issued. Accordingly, we find that increasing the percentage to a 10 percent slice-of-system auction will facilitate a smoother transition to a full energy auction.

Second, this Commission understands the importance of customers being able to take advantage of market-based prices and the benefits of developing a healthy competitive market, thus we reject OCC's arguments, as slowing the movement to competitive auctions would ultimately harm residential customers by precluding them from enjoying any benefits from competition. Based on the importance of customers having access to market-based prices and ensuring an expeditious transition to a full energy auction, in addition to making the modified ESP more favorable than the results

that would otherwise apply under Section 4928.142, Revised Code, we find that AEP-Ohio is capable of having an energy auction for delivery commencing on June 1, 2014. Therefore, we direct AEP-Ohio to conduct an energy auction for delivery commencing on June 1, 2014, for 60 percent of its load, and delivery commencing on January 1, 2015, for the remainder of AEP-Ohio's energy load. AEP-Ohio's June 1, 2015, energy and capacity auction dates are appropriate and should be maintained. In addition, nothing within this Order precludes AEP-Ohio or any affiliate from bidding into any of these auctions.

Finally, we agree with Exelon that the substantive details of the CBP process need to be established to maximize the number of participants in AEP-Ohio's auctions through an open and transparent auction process. We direct AEP-Ohio to establish a CBP process consistent with Section 4928.142, Revised Code, by December 31, 2012. The CBP should include guidelines to ensure an independent third party is selected to ensure there is an open and transparent solicitation process, a standard bid evaluation, and clear product definitions. We encourage AEP-Ohio to look to recent successful CBP processes, such as Duke Energy-Ohio's, in formulating its CBP. Further, AEP-Ohio is ordered to initiate a stakeholder process within 30 days from the date of this opinion in order.

8. CRES Provider Issues

The modified application includes a continuation of current operational switching practices, charges, and minimum stay provisions related to the process in which customers can switch to a Competitive Retail Electric Service (CRES) provider and subsequently return to the SSO rates (AEP-Ohio Ex. 111 at 4). AEP-Ohio points out that the application includes beneficial modifications for CRES providers and customers, including the addition of peak load contribution (PLC) and network service peak load (NSPL) information to the master customer list. AEP-Ohio witness Roush testified that AEP-Ohio also eliminates the 90-day notice requirement prior to enrolling with a CRES provider, the 12 month stay requirements for commercial and industrial customers that return to SSO rates beginning January 1, 2015, and requirements for residential and small commercial customers that return to SSO rates be required to stay on the SSO plan until April 15th of the following year, beginning on January 1, 2015 (*Id.*)

Exelon argues that AEP-Ohio needs to make additional changes in order to develop the competitive market. Specifically, Exelon requests the Commission implement rate and bill ready billing and a standard purchase of receivables (POR) program, eliminate the 90-day notice requirement immediately, and implement a process to provide CRES providers with data relating to PLC and NSPL values. Exelon witness Fein recommends that, consistent with the Duke ESP order, the Commission order AEP-Ohio provide via electronic data interchange, pertinent data including historical usage and historical interval data, NSPL and PLC data, and provide a quarterly updated list for CRES providers to show accounts that are currently enrolled with the CRES provider. (Exelon Ex. 101 at 33-34). Exelon maintains that this information will allow CRES providers to

more effectively serve customers and result in cost efficient competition (*Id.*) Mr. Fein further provides that clear implementation tariffs will lower costs for customers, plainly describe rules and contract terms, and allow both CRES providers and customers to easily understand AEP-Ohio's competitive process (*Id.* at 35-36).

RESA and IGS provide that AEP-Ohio's billing system is confusing to customers and creates numerous problems for CRES providers, all of which may be corrected through the implementation of a POR program that would provide customers with a single bill and collection point (RESA Ex. 101 at 12-17, IGS Ex. 101 at 15). IGS witness Parisi points out that switching statistics of natural gas utilities and Duke have increased upon the implementation of POR programs (IGS Ex. 1-1 at 18-19). RESA witness Rigenbach also recommends that the Commission direct AEP-Ohio to develop a web-based system to provide CRES providers access to customer usage and account data by May 31, 2014 (RESA Ex. 101 at 12-13). RESA and DER/DECAM also recommend that AEP-Ohio reduce or eliminate customer switching fees, as well as customer minimum stay periods (*Id.*, DER Ex. 101 at). FES witness Banks noted that the fees and minimum stay requirements hinders competition by making it difficult for customers to switch (FES Ex. 105 at 31).

While the Commission supports AEP-Ohio's provisions that encourage the development of competitive markets, modifications need to be made. AEP-Ohio witness Roush notes that customer PLC and NSPL information will be included in the master customer list, AEP-Ohio fails to make any commitment to the time frame this information would become available, nor the specific format in which customers would be able to access this data. We note that recent updates have been revised to the electronic data interchange (EDI) standards developed by the Ohio EDI Working Group (OEWG). This Commission values the efforts of OEWG in developing uniform operational standards and we expect AEP-Ohio to follow such standards and work within the group to implement solutions which are fair and reasonable, and do not discriminate against any CRES provider.

Accordingly, we direct AEP-Ohio to develop an electronic system to provide CRES providers access to pertinent customer data, including, but not limited to, PLC and NSPL values and historical usage and interval data no later than May 31, 2014. Within 30 days from the date of this opinion and order, we direct representatives from AEP-Ohio to schedule a meeting with members of the OEWG to develop a roadmap towards developing an EDI that will more effectively serve customers, and promote state policies in accordance with Section 4928.02, Revised Code. Further, as AEP-Ohio explains that it neither supports nor is opposed to the idea of a POR program (AEP-Ohio Reply Br. at 64-66), we encourage interested stakeholders to attend a workshop in conjunction with the five year rule review of Chapter 4901:1-10, O.A.C., as established in Case No. 12-2050-EL-ORD et al, to be held on August 31, 2012. In our recent order on FirstEnergy's electric

security plan (*See* Case No. 12-1230-EL-SSO), we noted that this workshop would be an appropriate place of stakeholders in the FirstEnergy proceedings to review issues related to POR programs. Similarly, we believe this workshop would also provide stakeholders in this proceeding an opportunity to further discuss the merits of establishing POR programs for other Ohio EDUs that are not currently using them. The Commission concludes that the modified ESP's modification to AEP-Ohio's switching rules, charges, and minimum stay provisions that are set to take effect on January 1, 2015, are consistent with AEP-Ohio's previously approved tariffs. Further, as we previously established in our original opinion and order in this case, these provisions are not excessive or inconsistent with other electric distribution utilities, and will further support the development of competitive markets beginning in January 1, 2015. Therefore, we find these provisions to be reasonable.

9. Distribution Investment Rider

The Company's modified ESP application includes a Distribution Investment Rider (DIR), pursuant to the provisions of Section 4928.143(B)(2)(h) or (d), Revised Code, and consistent with the approved settlement in the Company's distribution rate case,[11] to provide capital funding, including carrying cost on incremental distribution infrastructure to support customer demand and advanced technologies. Aging infrastructure, according to AEP-Ohio, is the primary cause of customer outages and reliability issues. AEP-Ohio reasons that the DIR will facilitate and encourage investments to maintain and improve distribution reliability, align customer expectations and the expectations of the distribution utility, as well as streamline recovery of the associated costs and reduce the frequency of base distribution rate cases. Replacement of aging distribution equipment will also support the advanced technologies of gridSMART which will reduce the duration of customer outages based on preliminary gridSMART Phase 1 information. The Company argues that its existing capital budget forecast includes an annual investment in excess of $150 million plus operations and maintenance in distribution assets. The DIR mechanism, as proposed by the Company, includes components to recover property taxes, commercial activity tax, and to earn a return on plant in-service based on a cost of debt of 5.46 percent, a return on common equity of 10.2 percent utilizing a 47.72 percent debt and 52.28 percent common equity capital structure. The net capital additions to be included in the DIR reflect gross plant in-service after August 31, 2010, as adjusted for accumulated depreciation, because August 31, 2010, is the date certain in the Company's most recent distribution rate case and any increase in net plant that occurs after that date is not recovered in base rates. The Company proposes to cap the DIR mechanism at $86 million in 2012, $104 million for 2013, $124 million for 2014 and $51.7 million for the period January 1 through May 31, 2015, for a total of $365.7 million. As the DIR mechanism is designed, for any year that the Company's investment would result in revenues to be

[11] *In re AEP-Ohio*, Case Nos. 11-351-EL-AIR, et al., Opinion and Order at 5-6 (December 14, 2011) in reference to paragraph IV.A.3 of the Joint Stipulation and Recommendation filed on November 23, 2011.

collected which exceed the cap, the overage would be recovered and be subject to the cap in the subsequent period. Symmetrically, for any year that the revenue collected under the DIR is less than the annual cap allowance, then the difference shall be applied to increase the cap for the subsequent period. The Company notes that the DIR revenue requirement must recognize the $62.344 million revenue credit reflected in the Commission approved Stipulation in the Company's distribution rate case.[12] As proposed by the Company, the DIR would be adjusted quarterly to reflect in-service net capital additions, excluding capital additions reflected in other riders, and reconciled for over and under recovery. The Company specifically requests through the DIR project, that when meters are replaced by the installation of smart meters, that the net book value of the replaced meter be included as a regulatory asset for recovery in a future filing. The DIR mechanism would be collected as a percentage of base distribution revenues. Because the DIR provides the Company with a timely cost recovery mechanism for distribution investment, AEP-Ohio will agree not to seek a change in distribution base rates with an effective date earlier than June 1, 2015. (AEP-Ohio Ex. 116 at 9-12; AEP-Ohio Ex. 110 at 18-19.)

The Company notes that Staff continuously monitors the Company's distribution system reliability by way of service complaints, electric outage reports and compliance provisions pursuant to Chapter 4901:1-10, O.A.C. In reliance on Staff testimony, the Company offers that the reliability of the distribution system was evaluated as a part of this case. (Staff Ex. 106 at 5-6; Tr. at 4339, 4345-4346.)

Customer expectations, as determined by AEP-Ohio, are aligned with the Company's expectations. AEP-Ohio witness Kirkpatrick offered that the updated customer survey results show that 19 percent of residential customers and 20 percent of commercial customers expect their reliability expectations to increase in the next five years. AEP-Ohio points out that when those customers are considered in conjunction with the customers who expect the utility to maintain the level of reliability, customer expectations increase to 90 percent of residential customers and 93 percent of commercial customers. AEP-Ohio states it is currently evaluating, based on several criteria, various asset categories with a high probability of failure and will develop a DIR program, with Staff input, taking into consideration the number of customers affected. (AEP-Ohio Ex. 110 at 11-19.)

OHA supports the adoption of the DIR as proposed by the Company (OHA Br. at 2). Kroger, OCC and APJN, on the other hand, ask the Commission to reject the DIR, as this case is not the proper forum to consider the recovery of distribution-related costs. Kroger, OCC and APJN reason that prudently incurred distribution costs are best considered in the context of a base distribution rate case where such cost are more thoroughly reviewed by the Commission. Kroger asserts that maintaining the distribution

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12 *Id.*

system is a fundamental responsibility of the utility and the Company should continue to operate under the terms of its last distribution rate case until the next such proceeding. If the Commission elects to adopt the DIR mechanism, Kroger endorses Staff's position that the DIR be modified to account for accumulated deferred income taxes (ADIT) and accelerated tax depreciation. In addition, Kroger asserts that the DIR for the CSP rate zone and the OP rate zone are distinct and the cost of each unique service area should be maintained and the distribution costs assigned on the basis of cost causation. OCC and APJN add that the Company's reason for pursuing the DIR, as a component of the ESP rather than in the distribution case, is the expedience of cost recovery and when that rationale is considered in conjunction with the lack of detail on the projects to be covered within the DIR, suggest that the DIR is not needed. (Kroger Ex. 101 at 13-19; Kroger Reply Br. at 3-4; OCC/APJN Br. at 87-89; Tr. at 1184.)

OCC and APJN argue that in determining whether the DIR complies with the requirements of Section 4928.143(B)(2)(h), Revised Code, the Company focuses exclusively on the percentage of residential and commercial customers (71 percent and 73 percent, respectively) who do not believe that their electric service reliability expectations will increase rather than the minority of customers who expect their service reliability expectations to increase (19 percent and 20 percent, respectively). OCC and APJN note that 10 percent of residential customers and seven percent of commercial customers expect their reliability expectations to decrease over the next five years. At best, these interveners assert, the customer survey results are inconclusive regarding an expectation for reliability improvements as the majority of customers are content with the status quo. OCC and APJN state that with the lack of project details, and without providing an analysis of customer reliability expectation alignment with project cost and performance improvements, AEP-Ohio has failed to meet its burden of proof to support the DIR. Accordingly, OCC and APJN request that this provision of the modified ESP be rejected. (AEP-Ohio Ex. 110 at 11-12; OCC/APJN Br. at 987-994).

NFIB and COSE emphasize that the DIR, as AEP-Ohio witness Roush testified, would, if approved as proposed, result in General Service tariff rate customers receiving an increase of approximately 14.2 percent in distribution charges, about $2.00 monthly (NFIB/COSE Br. at 8-9;Tr. at 1162-1163).

Staff testified that consistent with the requirements of Rule 4901:1-10-10(B)(2), O.A.C., AEP-Ohio has rate zone specific minimum reliability performance standards, as measured by the customer average interruption duration index (CAIDI) and system average interruption frequency index (SAIFI).[13] According to Staff, development of each CAIDI and SAIFI takes into account the electric utility's three-year historical system performance, system design, technological advancements, the geography of the utility's

[13] See *In re AEP-Ohio*, Case No. 09-756-EL-ESS, Opinion and Order (September 8, 2010).

service territory, customer perception surveys and other relevant factors. Staff monitors the utility's compliance with the reliability standards. Staff offers that based on customer surveys, 75 to 80 percent of residential and commercial customers are satisfied overall with the Company's service reliability. However, the Company's 2011 reliability measures were below their reliability measures for 2010 for CSP and the SAIFI measure was worse in 2011 than in 2010 for OP. Accordingly, Staff determined that AEP-Ohio's reliability expectations are not currently aligned with the reliability expectations of its customers. Staff further offered that a number of conditions be imposed on the Commission's approval of the DIR, including that the Company be ordered to work with Staff to develop a distribution capital plan, that the DIR mechanism include an offset for ADIT, irrespective of the Company's asserted inconsistency with the distribution rate case settlement, and that gridSMART related cost not be recovered through the DIR, so as to better facilitate the tracking of gridSMART expenditures and savings and benefits of the gridSMART project. Further, Staff proposes that AEP-Ohio be directed to make quarterly filings to update the DIR mechanism, with the filed rate to be effective, unless suspended by the Commission, 60 days after filing. The DIR mechanism, as advocated by Staff, would be subject to annual audits after each May filing and, in addition, subject to a final reconciliation filing on or about May 31, 2015. With the final reconciliation, Staff recommends that any amounts collected by AEP-Ohio in excess of the established cap be refunded to customers as a one-time credit on customer bills. (Staff Ex. 106 at 6-11; Staff Ex. 108 at 3-4; Tr. at 4398.)

AEP-Ohio disagrees with the Staff's rationale that the Company's and customer's expectations are not aligned. The Company reasons that the Staff relies on the reliability indices and the fact that the Company performed below the level of the preceding year. AEP-Ohio notes that in the most recent customer survey results, with the same questions as the prior year, the Company received an 85 percent positive rating from residential customers and a 92 percent positive rating from commercial customers for providing reliable service. Further, AEP-Ohio points out that missing one of the eight applicable reliability standards during the two year period does not, under the rules, constitute a violation. The Company also notes that the reliability standards are affected by storms, which are not defined as major storms, and other factors like tree-caused outages. (Tr. at 4344-4345, 4347, 4366-4367; OCC Ex. 113, Att. JDW-2.)

AEP-Ohio also opposes Staff's recommendation to file the DIR plan in a separate docket, subject to an adversarial proceeding. The Company expresses great concern that this recommendation, if adopted, will result in the Commission micromanaging and becoming overly involved in the "day-to-day operations of the business units within the utility."

As to Staff's and Kroger's proposal to reduce the DIR to account for ADIT, the Company responds that such an adjustment would have resulted in a reduced DIR credit

if taken into account when the distribution rate case settlement was pending. AEP-Ohio argues that the decision on the DIR in the modified ESP should continue to mirror the understanding of the parties to the distribution rate case as any change would improperly impact the overall balanced ESP package. (AEP-Ohio Ex. 151 at 9-10.)

As authorized by Section 4928.143(B)(2)(h), Revised Code, an ESP may include the recovery of capital cost for distribution infrastructure investment to improve reliability for customers. A provision for distribution infrastructure and modernization incentives may, but need not, include a long-term energy delivery infrastructure modernization plan. We find that the DIR is an incentive ratemaking to accelerate recovery of the Company's investment in distribution service. In deciding whether to approve an ESP that contains any provision for distribution service, Section 4928.143(B)(2)(h), Revised Code, directs the Commission, as part of its determination, to examine the reliability of the electric utility's distribution system and ensure that customers' and the electric utility's expectations are aligned and that the electric utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

In this modified ESP, there is some disagreement between Staff and the Company whether or not AEP-Ohio's reliability expectations are aligned with the expectations of its customers. The Company focuses on customer surveys to conclude that expectations are aligned while Staff interprets the slight degradation in the reliability performance measures to indicate that expectations are not aligned. Despite the different conclusions by the Company and Staff, the Commission finds that both Staff and the Company have demonstrated that indeed, customers have a high expectation of reliable electric service. Given that customer surveys are one component in the factor used to establish the reliability indices and the slight reduction in the level of measured performance on which the Staff concludes that reliability expectations are not aligned, we are convinced that it is merely a slight difference between the Company's and customers' expectations. We also recognize that customer satisfaction is dependent on whether the customer has recently experienced any service outages and how quickly service was restored.

The Commission finds that, adoption of the DIR and the improved service that will come with the replacement of aging infrastructure will facilitate improved service reliability and better align the Company's and its customers' expectations. The Company appears to be placing sufficient proactive emphasis on and will dedicate sufficient resources to the reliability of its distribution system. Having made such a finding, the Commission approves the DIR as an appropriate incentive to accelerate recovery of AEP-Ohio's prudently incurred distribution investment costs. We emphasize that the DIR mechanism shall not include any gridSMART costs; the gridSMART projects shall be separate and apart from the DIR mechanism and projects. With this clarification, we believe it is unnecessary to address the Company's request to allow the remaining net

book value of removed meters to be included as a regulatory asset recoverable through the DIR mechanism.

We agree with Staff and Kroger that the DIR mechanism be revised to account for ADIT. The Commission finds that it is not appropriate to establish the DIR rate mechanism in a manner which provides the Company with the benefit of ratepayer supplied funds. Any benefits resulting from ADIT should be reflected in the DIR revenue requirement. Therefore, the Commission directs AEP-Ohio to adjust its DIR to reflect the ADIT offset.

As was noted in the December 14, 2012 Order on the ESP 2, we find that granting the DIR mechanism requires Commission oversight. We believe that it is detrimental to the state's economy to require the utility to be reactionary or allow the performance standards to take a negative turn before we encourage the electric utility to proactively and efficiently replace and modernize infrastructure and, therefore find it reasonable to permit the recovery of prudently incurred distribution infrastructure investment costs. AEP-Ohio is correct to aspire to move from a reactive to a more proactive replacement maintenance program. The Company is directed to work with Staff to develop a plan to emphasize proactive distribution maintenance that focuses spending on where it will have the greatest impact on maintaining and improving reliability for customers. Accordingly, AEP-Ohio shall work with Staff to develop the DIR plan and file the plan for Commission review in a separate docket by December 1, 2012.

With these modifications, we approve the DIR mechanism, and direct Staff to monitor, as part of the prudence review, by an independent auditor for in-service net capital additions and compliance with the proactive distribution maintenance plan developed with the assistance of the Staff. The proactive distribution infrastructure plan shall quantify reliability improvements expected, ensure no double recovery, and include a demonstration of DIR expenditures over projected expenditures and recent spending levels. The DIR mechanism will be reviewed annually for accounting accuracy, prudency and compliance with the DIR plan developed by the Staff and AEP-Ohio.

10. Pool Modification Rider

The modified ESP application includes the planned termination of the AEP East Pool Agreement (Pool Agreement). As a provision of this ESP, AEP-Ohio requests approval of a Pool Termination Rider (PTR), initially set at zero. If the Company's corporate separation plan filed in Case No. 12-1126-EL-UNC is approved as proposed by the Company, and the Amos and Mitchell units are transferred as proposed to AEP-Ohio affiliates, then AEP-Ohio will not seek to implement the PTR irrespective of whether lost revenues exceed $35 million annually. However, if the corporate separation plan is denied or modified, then AEP-Ohio requests permission to file for the recovery of lost revenue in association with termination of the Pool Agreement via a non-bypassable rider. The PTR,

according to AEP-Ohio, is designed to offset the revenue losses caused by the termination of the Pool Agreement since a significant portion of AEP-Ohio's total revenues come from sales of power to other Pool members. The Company argues that with the termination of the Pool Agreement, the Company will need to find new or additional revenue to recover the costs of operating its generating assets, or it will need to reduce the cost associated with those assets. As AEP-Ohio claims the lost revenues[14] from capacity sales to Pool Agreement members cannot be mitigated by off-system sales in the market alone. The Company agrees that it will only seek to recover lost pool termination revenues in excess of $35 million per year during the term of the ESP. (AEP-Ohio Ex. 103 at 21-23.)

OCC, APJN, FES and IEU oppose the adoption of the PTR, as they reason there is no provision of Section 4928.143(B)(2), Revised Code, which authorizes such a charge and no Commission precedent for the PTR. IEU asserts that approval of the PTR would essentially be the recovery of above-market or transition revenue in violation of state law and the electric transition plan (ETP) Stipulations.[15] As proposed, the interveners claim that the PTR is one-sided to the benefit of the Company. FES offers that there is insufficient information in the record to allow the Commission to evaluate the terms and conditions of the PTR, as a part of the modified ESP, to require ratepayers to submit $350-$400 million over the term of the ESP. Furthermore, OCC and APJN note that the Commission has disregarded transactions related to the Pool Agreement for the purpose of considering revenue or sales margins from opportunity sales (capacity and energy) as to FAC costs or consideration of off-system sales in the evaluation of significantly excessive earnings test.[16] Accordingly, OCC and APJN reason that because the Commission has previously disregarded transactions related to the Pool Agreement, that it would be unfair and unreasonable to ensure AEP-Ohio is compensated for lost revenue based on the Pool Agreement at the cost of ratepayers. For these reasons, OCC and APJN believe the PTR should be rejected or modified such that AEP-Ohio customers receive the benefits from the Company's off-system sales. IEU says the PTR provides a competitive advantage to GenResources and, therefore, violates corporate separation requirements. (OCC/APJN Br. at 85-87; IEU Br. at 69; IEU Ex. 124 at 30-31; FES Br. at 106-109; Tr. at 582, 698.)

The Company dispels the assertion that there is no statutory basis for a pool termination cost recovery provision in an ESP on the basis that the Commission has already rejected this argument in its December 14, 2011, Order on the ESP 2, where the Commission determined a pool termination rider may be approved "pursuant to Section

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14 AEP-Ohio would determine the amount of lost revenue by comparing the lost pool capacity revenue for the most recent 12 month period preceding the effective date of the change in the AEP Pool to increases in net revenue related to new wholesale transactions or decreases in generation asset costs as a result of terminating the Pool Agreement.

15 *In re AEP-Ohio*, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Order (September 28, 2000).

16 *In re AEP-Ohio*, ESP I Order at 17 (March 18, 2009); *In re AEP-Ohio*, Case No. 10-1261-EL-UNC, Order at 29 (January 11, 2011).

4928.143(B), Revised Code," and further concluded that establishing a rider "at a zero rate does not violate any regulatory principle or practice."[17] According to the Company, the other criticisms that these parties raise regarding the PTR are objections as to how, or the extent to which, pool termination costs should be recoverable through the rider which are not ripe and should be addressed if, and only if, AEP-Ohio actually pursues recovery of any such costs in the future as part of a separate proceeding. (AEP-Ohio Reply Br. at 59-60.)

We find statutory support for the adoption of the PTR in Section 4928.143(B)(2)(h), Revised Code. The PTR serves as an incentive for AEP-Ohio to move to a competitive market to the benefit of its shopping and non-shopping customers, without regard to the possible loss of revenue associated with the termination of the Pool Agreement with the full transition to market for all SSO customers by no later than June 1, 2015. Therefore, we approve the PTR as a placeholder mechanism, initially established at a rate of zero, contingent upon the Commission's review of an application by the Company for such costs. The Commission notes that in permitting the creation of the PTR, it is not authorizing the recovery of any costs for AEP-Ohio, but is allowing for the establishment of a placeholder mechanism, and any recovery under the PTR must be specifically authorized by the Commission. If, and when, AEP-Ohio seeks recovery under the PTR, it will maintain the burden set forth in Section 4928.143, Revised Code. In addition, the Commission finds that in the event AEP-Ohio seeks recovery under the PTR, AEP-Ohio must first demonstrate the extent to which the Pool Agreement benefitted Ohio ratepayers over the long-term and the extent to which the costs and/or revenues should be allocated to Ohio ratepayers. Further, AEP-Ohio must demonstrate to the Commission that any recovery it seeks under the PTR is based upon costs which were prudently incurred and are reasonable. Importantly, this Commission notes that AEP-Ohio will only be permitted to requests recovery should this Commission modify or amend its corporate separation plan as filed in Case No. 12-1126-EL-UNC only as to divestiture of the generation assets; we specifically deny the Company's request for recovery through the PTR based on any other amendment or modification of the corporate separation plan by this Commission or the Federal Energy Regulatory Commission (FERC) or FERC's denial or impediment to the transfer of the Amos and Mitchell units to AEP-Ohio affiliates. As such, AEP-Ohio's right to recover lost revenues under the PTR is based exclusively on the actions, or lack thereof, of this Commission.

11. Capacity Plan

Pursuant to the Commission's Entry on Rehearing issued February 23, 2012, in the ESP 2 cases, and the Entry issued March 7, 2012, in the Capacity Case, the Commission directed that the Capacity Case proceed, without further delay, to facilitate the development of the record to address the issues raised, outside of the ESP proceeding.

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17 *In re AEP-Ohio*, Case No. 11-346-EL-SSO et al., Order at 50 (December 14, 2011).

While the Capacity Case continued on an expedited schedule to determine the state compensation mechanism, AEP-Ohio nonetheless included, as a component of this modified ESP, a capacity provision different from its litigation position in the Capacity Case, which may be summarized as follows. As a component of this modified ESP, the Company proposes a two-tiered, capacity pricing mechanism, with a tier 1 rate of $145.79 per MW-day and a tier 2 rate of $255.00 per MW-day. Shopping customers, within each rate class, would receive tier 1 capacity rates in proportion to their relative retail sales level based on the Company's retail load. During 2012, 21 percent of the Company's total retail load would receive tier 1 capacity and in 2013, the percentage would increase to 31 percent. In 2014, through the end of the ESP, May 31, 2015, the tier 1 set aside percentage would increase to 41 percent of the Company's retail load. All other shopping customers would receive tier 2 capacity rates. For 2012, an additional allotment of tier 1 priced capacity will be available to non-mercantile customers who are part of a community that approved a governmental aggregation program on or before November 8, 2011, even if the set-aside has been exceeded. AEP-Ohio does not propose any special capacity set-aside for governmental aggregation programs after 2012. (AEP-Ohio Ex. 101 at 15; AEP-Ohio Ex. 116 at 6-7.)

AEP-Ohio argues that its embedded cost-based charge for capacity is $355.72 per MW-day, as supported by the Company in the Capacity Case. Further, AEP-Ohio projects, with forward energy pricing decreasing over the remainder of 2012 by approximately 25 percent and based upon the switching rates experienced by other Ohio electric utilities, that by the end of 2012 shopping rates in AEP-Ohio territory will increase to 65 percent of residential load, 80 percent of commercial load and 90 percent of industrial load (excluding one large customer). AEP-Ohio reasons that the two-tier capacity pricing mechanism is a discount from the Company's embedded cost of capacity which will provide CRES providers headroom, the ability to offer shopping customers lower competitive electric service rates and expand competition in the Company's service territory and, as a component of this modified ESP, balances the revenue losses likely to be experienced by the Company. Further, AEP-Ohio submits that the capacity pricing offered as a part of this modified ESP is intended to mitigate, in part, the financial harm the Company will potentially endure if the Company is required to provide capacity at PJM's RPM-based rate. (AEP-Ohio Ex. 116 at 4-5, 8-9; Tr. at 332-333.)

As an alternative to the two-tiered capacity mechanism, AEP-Ohio proposes as a component of the modified ESP, to charge CRES providers its embedded cost of capacity $355.72 per MW-day with a $10 per MWh bill credit to shopping customers, subject to a cap of $350 million through December 31, 2014. Shopping credits would be limited to up to 20 percent of the load of each customer class for June 2012 through May 2013, and increase to 30 percent for the period June 2013 through May 2014 and then to 40 percent for the period June 2014 through December 2014. AEP-Ohio's rationale for the alternative is to ensure shopping customers receive a direct and tangible benefit to shop that is fixed

and known regardless of the CRES provider selected. (AEP-Ohio Ex. 116 at 15-17; Tr. at 427, 1434.)

On July 2, 2012, the Commission issued the Order in the Capacity Case (Capacity Order) wherein the Commission determined $188.88 per MW-day as the appropriate charge to enable the Company to recover its capacity costs pursuant to its Fixed Resource Requirements (FRR) obligations from CRES providers.[18] However, the Capacity Order also directed that AEP-Ohio's capacity charge to CRES providers shall be the auction-based rate, as determined by PJM via its reliability pricing model (RPM), including final zonal adjustments, on the basis that the RPM rate will promote retail electric competition.[19]

In the Capacity Order, the Commission also authorized AEP-Ohio to modify its accounting procedures to defer the incurred capacity costs not recovered from CRES providers, commencing June 1, 2012, through the end of this modified ESP, with the recovery mechanism to be established in this proceeding.[20]

In this Order on the modified ESP, the Commission adopts, as part of the RSR, the recovery of the difference between the RPM-based capacity rate and AEP-Ohio's state compensation mechanism for capacity as determined by the Commission.

Staff endorses the Company's recovery of the difference between the state compensation mechanism for capacity and the RPM rate (Staff Reply Br. at 13). On the other hand, IEU, OCC and APJN argue that there is no record evidence in this modified ESP case, or any other proceeding, to determine an appropriate mechanism to collect deferred capacity charges in contradiction of the requirements in Section 4903.09, Revised Code, and the parties were not afforded due process on the issue. Furthermore, OCC and APJN reason that the capacity charge deferrals cannot be a provision of an ESP as the charges do not fall within one of the specified categories listed in Section 4928.143(B)(2), Revised Code, and there is no statutory basis under Chapter 4928, Revised Code, for such charges. OCC and APJN also contend approval of the recovery of deferred capacity charges violates state policies expressed in Section 4928.02, Revised Code, at paragraph (A), which requires reasonably priced retail electric service; at paragraph (H), which prohibits anticompetitive subsidies from noncompetitive retail electric service to competitive retail service; and at paragraph (L), which requires the Commission to protect at-risk populations. (OCC/APJN Reply Br. at 18; IEU Reply Br. 6-7).

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18 In re Capacity Case, Order at 33-36 (July 2, 2012).

19 In re Capacity Case, Order at 23 (July 2, 2012).

20 In re Capacity Case, Order at 23 (July 2, 2012).

Certain parties that oppose the Commission's incorporation of the Capacity Case deferrals in the modified ESP overlook the fact that the Capacity Case was opened prior to each of the ESP 2 applications filed by AEP-Ohio and that each of the applications proposed a state compensation capacity charge and plan for resolution of the issue. The Commission rejects the Company's two-tier capacity plan and rates, proposed as a part of this modified ESP 2.

Furthermore, in accordance with Section 4928.144, Revised Code, the Commission may order any just and reasonable phase-in of any rate or price established under Sections 4928.141, 4928.142, or 4928.143, Revised Code, including carrying charges. Where the Commission establishes a phase-in, the Commission must also authorize the creation of the regulatory asset to defer the incurred costs equal to the amount not collected, plus carrying charges on the amount not collected, and authorize the recovery of the deferral and carrying charges by way of a non-bypassable surcharge.

Several of the interveners argue that because the record in the modified ESP was closed when the Capacity Order was issued, the deferral of capacity charges was not made an issue in the modified ESP case, the record does not support the deferral of capacity charges or that the parties were not afforded due process on the issue. We disagree. AEP-Ohio proposed certain capacity charges and a plan as a part of this modified ESP and consistent with the Commission's authority we may approve or modify and approve an ESP. Nothing in the Section 4928.144, Revised Code, limits the Commission's authority to modify the ESP to include deferrals on its own motion. With the Commission's decision to begin collecting the deferral in part through the RSR, all other issues raised on this matter are addressed in that section of the Order.

12. Phase-in Recovery Rider and Securitization

As part of AEP-Ohio's ESP 1 case, to mitigate the impact of the rate increase for customers, the Commission ordered, pursuant to Section 4928.144, Revised Code, the Company to phase-in any increase authorized over an established percentage for each year of the ESP.[21] The Commission authorized CSP and OP to establish a regulatory asset to record and defer fuel expenses, with carrying costs at the weighted average cost of capital (WACC), with recovery through a non-bypassable surcharge to commence January 1, 2012, and continue through December 31, 2018.[22] This aspect of the ESP 1 Order is final and non-appealable. On September 1, 2011, CSP and OP filed the Phase-in Recovery Case application to request the creation of the Phase-In Recovery Rider (PIRR), a mechanism to recover the accumulated deferred fuel costs, including carrying costs, to be effective with the first billing cycle of January 2012. The Phase-in Recovery Case was a part of the proposed ESP 2 Stipulation which was initially approved by the Commission on

[21] ESP 1 Order at 22.

[22] ESP 1 Order at 20-23; First ESP EOR at 6-10.

December 14, 2011. Consistent with the Commission's directive in the February 23, 2012 Entry on Rehearing rejecting the ESP Stipulation, a procedural schedule was established for the Phase-in Recovery Case to proceed independently of any ESP. On August 2, 2012, the Commission issued its decision on the Company's PIRR application.

Notwithstanding the Phase-in Recovery Case, as a part of this modified ESP case, AEP-Ohio requests that recovery of the deferred fuel expenses be delayed, while continuing to accrue carrying cost at WACC, until June 2013. The Company does not propose to extend the recovery period. AEP-Ohio also proposes that the PIRRs of CSP and OP be combined. The rationale presented by the Company for delaying collection of the PIRR is to coincide with and offset the consolidation of the FAC, which the Company reasons will minimize customer rate impacts. According to AEP-Ohio witness Roush, combining the PIRR rates will increase the rate for customers in the CSP rate zone and reduce the rate for customers in the OP rate zone. In this modified ESP proceeding, AEP-Ohio also requests that the Commission suspend the procedural schedule in the PIRR cases. (AEP-Ohio Ex. 118 at 8; AEP-Ohio Ex. 119 at 3; AEP-Ohio Ex. 111 at 5-6.)

AEP-Ohio witness Hawkins acknowledges that legislation permitting the securitization of the PIRR was passed in December 2011 but claims that securitization of the PIRR regulatory asset will likely take about nine months to finalize after the issuance of a final, non-appealable order. AEP-Ohio admits that securitization of the PIRR regulatory assets would reduce customer costs as a result of the reduction in carrying costs and provide the Company with capital to assist with the transition to market. (AEP-Ohio Ex. 102 at 7-8.)

OCC opposes the notion that AEP-Ohio be permitted to earn a return on its own capital at WACC while the PIRR is delayed at the Company's request. Further, OCC and APJN agree with Staff that collection of the PIRR should commence as soon as possible after the Commission issues its Order, the delay in collection amounts to an additional cost of $64.5 million. OCC and APJN argue that there is no justification for the delay and the delay at WACC only serves to benefit the Company. Since the delayed collection is at the Company's request, OCC and APJN advocate that no further carrying charges accrue or the carrying charge be reduced to the long-term cost of debt. (OCC Ex. 115 at 4-7; OCC Ex. 111 at 20-22; OCC/APJN Br. at 64-72)

Similarly, IEU argues that the delay of the PIRR violates Section 4928.144, Revised Code, which requires that the delay in collection at WACC be consistent with sound regulatory practice, just, and reasonable. IEU estimates the additional carrying cost will be at least an additional $40 to $45 million and reasons that AEP-Ohio was only authorized to collect WACC on deferred fuel costs through December 31, 2011, the end of ESP 1. (IEU Ex. 129 at 30-31, 14; Tr. at 3639, 4549.)

Ormet argues that the increased carrying charge to defer the implementation of the PIRR until June 2013 is excessive and presents a number of legal and pragmatic issues. Ormet notes that the interest to be incurred by delaying the implementation of the PIRR is based on an interest rate of 11.26 percent, more than AEP-Ohio utilized to determine the RSR. Ormet encourages the Commission to reduce the carrying cost, in light of the change in economic and financial circumstances since the ESP 1 Order, to the short-term cost of debt and to delay PIRR implementation until securitization is complete or at least until June 2013. (Ormet Br. at 23-24.)

Ormet and IEU request that the Company be directed to maintain the separate PIRR mechanisms for CSP and OP to reduce the impact on ratepayers. IEU notes that CSP customers have contributed approximately one percent of the total PIRR balance. Ormet notes that the deferred fuel expenses that are the basis of the PIRR, as provided in the ESP 1 Order, is a final non-appealable order for which AEP-Ohio may rely to seek securitization. AEP-Ohio has argued such in this case in its filing of March 6, 2012, and Ormet contends that pursuant to *Nationwide Ins. Co. v. Hall*, No. 1258, 1978 WL 214906 at *3 (Ohio App. 7 Dist. Mar. 23, 1978) AEP-Ohio can not now assert a contradictory legal position. (Tr. at 4543-4548; Ormet Ex. 106B at 9; Ormet Br. at 23-27; IEU Ex. 129 at 9-11; IEU Br. at 72)

Ormet asserts that blending the PIRR rate for CSP and OP rate zones constitutes a retroactive change in fuel costs for which AEP-Ohio has failed to offer any justification. Ormet states that at the time the fuel cost were incurred, CSP and OP were not merged and that the overwhelming majority of the PIRR balance is from the OP rate zone. The rationale offered by Ormet is that the blending of the FAC rate is fundamentally different from the blending of the PIRR rate, as FAC is an ongoing look at current and future fuel costs where the PIRR is the collection of previously incurred, deferred fuel costs. Ormet argues that the Commission has previously concluded that the distinction between retrospective and prospective is key to what constitutes prohibited retroactive ratemaking. Ormet asks that, consistent with the Commission's determination in the ESP 1 Entry on Remand Order, that the Commission find the blending of the CSP and OP PIRR balances equates to changing the rate for previously incurred but deferred fuel costs. (Tr. at 1187, 4536-4537, 4540; Ormet Br. at 27-31.)

The Company reasons that the PIRR regulatory asset is on the books of OP, as the surviving entity post-merger, along with all of the other assets and liabilities of the former CSP. Therefore, it is appropriate for all AEP-Ohio customers to pay the PIRR. AEP-Ohio notes that Staff advocates that the FAC and PIRR be immediately unified and implemented, because CSP customers benefit from a rate impact perspective with the merging of both rates (Tr. at 4539-4540).

Staff opposes the Company's request to delay recovery of the merged PIRR rates and recommends that the Commission direct recovery to commence upon approval of the modified ESP to avoid increased carrying charges associated with the dely. Staff notes that with a PIRR balance of approximately $549 million, delaying PIRR recovery until June 2013 results in additional carrying charges of $71 million at the WACC. Further, Staff supports the merger of the PIRR rates. (Staff Ex. 109 at 4-5.)

AEP-Ohio answers that the difference between the Company's proposal to delay collection of the PIRR in comparison to the Staff and certain interveners opposition to the delay is essentially a balancing or prioritizing between two goals: mitigating present rate impacts and reducing the total carrying charges. The Company's proposal was aimed at addressing the first goal and the Staff's position prioritizes the second goal. The Company contends that its proposal to delay implementation of the PIRR until June 2013 to coincide with the unification of FAC rates is reasonable, results in minimal immediate rate impacts to customers, and should be approved.

AEP-Ohio's request to suspend the procedural schedule in the PIRR case is moot, as it does not appear that the Company made a similar request in the Phase-in Recovery Cases, and given that the Commission has issued its decision on the PIRR application. Consistent with the Company's limited request as to the PIRR in this modified ESP, we will address the commencement of the amortization period for the PIRR, combining the PIRR rates for the CSP and OP rate zones and securitization. Any remaining issue raised as to the deferred fuel expense or the PIRR that is not addressed in the Phase-in Recovery Order or this modified ESP Order is denied.

As AEP-Ohio correctly points out, delaying collection of the PIRR to offset against the merged FAC rates, as opposed to immediately commencing collection of the PIRR, is indeed the prioritizing between two goals. AEP-Ohio's request to delay commencement of the amortization period for the PIRR is denied. In this case, where the accrued carrying charges during the requested delay are estimated to be an additional $40 to $71 million, it is unreasonable for the Commission to approve the delay and permit carrying charges to continue to accrue merely to facilitate one charge offsetting another. AEP-Ohio is directed to commence recovery of the PIRR charges as soon as practicable after the issuance of this Order.

We agree with the recommendation of Ormet and IEU to maintain separate PIRR rates for the CSP and OP rate zones. The PIRR balance was incurred primarily by OP customers, and according to cost causation principles, the recovery of the balance should be from OP customers. Further, as discussed above, the Commission directs that FAC rates should be maintained on a separate basis.

IEU argues that the PIRR fails to address the requirements of Section 4928.20(I), Revised Code,[23] that requires non-bypassable charges arising from a phase-in deferral are applicable to customers in governmental aggregation programs only in proportionate to the benefit received. IEU's claim that the PIRR violates Section 4928.20(I), Revised Code, is misdirected. The PIRR is not part of this ESP proceeding but was the directive of the Commission in the Company's prior ESP case. Therefore, the Commission finds that IEU should have raised this issue in the ESP 1 case or when the Commission established the PIRR and that Section 4928.144, Revised Code, as to the collection of the PIRR, is not applicable to this modified ESP proceeding.

The Commission notes that AEP-Ohio witness Hawkins testified that securitization of the PIRR regulatory assets would reduce customer costs through the reduction of the carrying cost and provide AEP-Ohio with the needed capital to assist with the transition to competition. AEP-Ohio also states that recovery of the PIRR can commence before securitization is complete. Ormet supports securitization of the PIRR. (AEP-Ohio Ex. 102 at 8; Ormet Br. at 24-25.)

Finally, while AEP-Ohio does not specifically propose securitization of the PIRR in the modified ESP, AEP-Ohio notes that securitization offers a benefit to both customers and AEP-Ohio. Further, no parties opposed the idea of securitizing the PIRR. Accordingly, we direct AEP-Ohio to take advantage of this extremely useful tool our General Assembly created for electric utilities and their customers through House Bill 364 and securitize the PIRR deferral balance. Securitization not only leads to lower utility bills for all customers as a result of reduced carrying costs, but also leads to lower borrowing costs for AEP-Ohio. The Commission finds it extremely important, particularly when our State has been hit by tough economic times, to keep customer utility bills as low as possible, and securitization of the PIRR provides us with a means to ensure we protect customer interests. Therefore, AEP-Ohio shall initiate the securitization process for the PIRR deferral balance as soon as practicable..

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[23] Section 4928.20(I), Revised Code, states:

Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits, as determined by the commission, that electric load centers within the jurisdiction of the governmental aggregation as a group receive. The proportionate surcharge so established shall apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge shall apply. Nothing in this section shall result in less than full recovery by an electric distribution utility of any surcharge authorized under section 4928.144 of the Revised Code. Nothing in this section shall result in less than the full and timely imposition, charging, collection, and adjustment by an electric distribution utility, its assignee, or any collection agent, of the phase-in-recovery charges authorized pursuant to a final financing order issued pursuant to sections 4928.23 to 4928.2318 of the Revised Code.

13. Generation Asset Divestiture

The Company describes, but does not request as a part of this modified ESP, its proposed application for full corporate separation filed in Case No. 12-1126-EL-UNC (Corporate Separation Case), pursuant to the requirements of Section 4928.17, Revised Code, and Chapter 4901:1-37, O.A.C.[24] AEP-Ohio asserts full corporate separation is a necessary prerequisite for generation asset divestiture and AEP-Ohio's transition to an auction-based SSO. Pursuant to the proposed modified ESP and the Company's proposed corporate separation plan, AEP-Ohio will retain transmission and distribution-related assets, its REPAs and the associated RECs. AEP-Ohio will transfer to its generation affiliate, GenResources, existing generation units and contractual entitlements, fuel-related assets and contracts and other assets and liabilities related to the generation business.[25] The generation assets will be transferred at net book value. AEP-Ohio proposes to retain senior notes and pollution control revenue bonds, as such long-term debt is not secured by the generation assets being transferred to GenResources. The Company expects to complete termination of the Pool Agreement and full corporate separation by January 1, 2014.[26] (AEP-Ohio Ex. 103 at 4-6, 8, 21-22.)

AEP-Ohio is a Fixed Resource Requirement (FRR) entity, pursuant to the requirements of PJM Interconnection LLC (PJM), and must remain an FRR until June 1, 2015. To meet its FRR obligations after full corporate separation and before the proposed energy auctions for delivery commencing January 1, 2015, the Company states GenResources will provide AEP-Ohio, via a full requirements wholesale agreement, its load requirements to supply non-shopping customers. Pursuant to the proposed modified ESP, AEP-Ohio proposes that for the period January 1, 2015 through May 31, 2015, GenResources will provide AEP-Ohio only capacity, no energy, at $255 per MW-day and the contract between AEP-Ohio and GenResources will terminate effective June 1, 2015, when both energy and capacity will be provided to SSO customers through an auction. While AEP-Ohio is an FRR entity, the Company states it will make capacity payments to GenResources for the energy only auctions proposed in this modified ESP at $255 per MW-day. Generation-related revenues paid to AEP-Ohio by Ohio ratepayers will be passed through to GenResources for capacity and energy received for the SSO load, and AEP-Ohio will reimburse GenResources on a dollar-for-dollar basis for transmission, ancillary, and other service charges billed to GenResources by PJM to serve AEP-Ohio's

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24 See *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, filed March 30, 2012.

25 AEP-Ohio notes that after transferring the generation assets and liabilities to GenResources, GenResources will transfer Amos unit 3 and 80 percent of the Mitchell Plant to Appalachian Power Company (APCo) and transfer the balance of the Mitchell Plant to Kentucky Power Company (KYP), so the utilities can meet their respective load requirement absent the AEP East Pool Agreement (AEP-Ohio Ex. 101 at 22).

26 As a part of the modified ESP, AEP-Ohio requests approval for a Pool Termination Rider which is addressed in a separate section of this Order.

SSO load. In addition, AEP-Ohio will remit all capacity payments made by CRES providers pursuant to PJM's Reliability Assurance Agreement to GenResources as well as revenues from the Retail Stability Rider as compensation for fulfillment of AEP-Ohio's FRR obligations. (AEP-Ohio Ex. 101 at 23; AEP-Ohio Ex. 103 at 6-8; Tr. at 515-519.)

IEU, OCC and APJN argue that because AEP-Ohio has made the modified ESP filing contingent on receiving approval of the corporate separation plan yet failed to request consolidation of the Corporate Separation Case, the Commission cannot approve the corporate separation plan as a part of this proceeding. (OCC/APJN Br. at 73; IEU Br. 76-77.)

In fact, IEU argues that AEP-Ohio is not the FRR entity but, American Electric Power Service Corporation (AEPSC) is the FRR entity on behalf of all of the American Electric Power operating companies within PJM and, therefore, AEP-Ohio does not have any FRR obligation. Nor has AEP-Ohio offered into evidence, IEU notes, AEPSC's FRR capacity plan or indicated which of AEP-Ohio's generation assets are part of the capacity plan. IEU reasons that AEP-Ohio's generation assets are not dedicated to AEP-Ohio's distribution customers and may be replaced by other capacity resources. (IEU Ex. 125 at 23, AEP-Ohio Ex. 103 at 9.)

DER and DECAM argue that AEP-Ohio's proposal to contract with GenResources to serve the SSO load at the proposed capacity price after corporate separation is an illegal violation of the corporate separation laws and violates state policy causing a negative impact on the ability of unaffiliated CRES providers to compete in OP territory (Tr. at 812-813; DER/DECAM Br. at 11).

Staff opposes AEP-Ohio's request to retain $296 million in pollution control bonds, where there has not been, according to Staff, any demonstration that use of the intercompany notes would have a substantial negative affect on the generation affiliate's cost of debt. Staff proposes that AEP-Ohio be directed to make a filing with the Commission within six months after the completion of corporate separation, to demonstrate that there is not any substantial negative impact on AEP-Ohio if the debt or intercompany notes are not transferred to the generation affiliate. Therefore, Staff recommends that the Commission deny this aspect of the Company's ESP proposal at this time. Further, Staff recommends that the Corporate Organization chart be updated to reflect the legal entities that are related to American Electric Power Inc., as well as all reportable segments related to AEP-Ohio, in a format and manner similar to the information American Electric Power Inc. provides in its 10K filing to the Securities and Exchange Commission. (Staff Ex. 108 at 5-6; Tr. at 4405-4406.)

AEP-Ohio did not request consolidation of its pending corporate separation plan in conjunction with this modified ESP application, and as such the Commission will consider

the corporate separation application in a separate docket. As such, the primary issues to be considered in this modified ESP proceeding is how the divestiture of the generation assets and the agreement between AEP-Ohio and GenResources will impact SSO rates.

We find IEU's arguments, that AEP-Ohio is not the entity committed to an FRR obligation with PJM to be form over substance. AEPSC entered into the FRR agreement on behalf of AEP-Ohio and other AEP-Ohio operating affiliates and the legal obligation of AEP-Ohio is no less binding than if AEP-Ohio entered into the agreement directly.

The Commission finds that sufficient information regarding the proposed generation asset divestiture and corporate separation, as reflected in more detail in the Corporate Separation Case, has been provided in this modified ESP case to allow the Commission to reasonably conclude that termination of the Pool Agreement and corporate separation facilitate AEP-Ohio's transition to a competitive market in Ohio. With the modification and adoption of the modified ESP, as presented in this Order, the Commission may reasonably determine the ESP rates, including the rate impact of the generation asset divestiture, on the Company's SSO customers for the term of the modified ESP, where upon SSO rates will subsequently be subject to a competitive bidding process. While, AEP-Ohio proposes to enter into an agreement with GenResources to provide AEP-Ohio capacity at $255 per MW-day, we emphasize that based on the Commission's decision in the Capacity Case, AEP-Ohio will not receive any more than the state compensation capacity charge of $188.88 per MW-day from Ohio customers during the term of this ESP.

As the Commission understands the Company's description of the generation divestiture, all AEP-Ohio generation facilities, except Amos and Mitchell, will be transferred to GenResources at net book value. Amos and Mitchell will ultimately be transferred to AEP-Ohio operating affiliates at net book value.

Staff raises some concern with the implementation of corporate separation and the lack of the Company's transfer of all debt and/or intercompany notes to GenResources. Despite the Staff's recommendation, the Commission approves AEP-Ohio's requests to retain the pollution control bonds contingent upon a filing with the Commission demonstrating that AEP-Ohio ratepayers have not and will not incur any costs associated with the cost of servicing the associated debt. More specifically, AEP-Ohio ratepayers shall be held harmless for the cost of the pollution control bonds, as well as any other generation or generation related debt or inter-company notes retained by AEP-Ohio. AEP-Ohio shall file such information with the Commission, in this docket no later than 90 days after the issuance of this Order. Accordingly, the Commission finds that, subject to our approval of the corporate separation plan, the electric distribution utility should divest its generation assets from its noncompetitive electric distribution utility assets by transfer to its separate competitive retail generation subsidiary, GenResources, as represented in this modified ESP. The Company states that it has notified PJM of its intention to enter PJM's

auction process for the delivery year 2015-2016. The Commission will review the remaining issues presented in the Company's Corporate Separation Case.

In regards to the contract between AEP-Ohio and GenResources, FES contends that after corporate separation AEP-Ohio cannot simply pass-through the generation revenues it receives without evidence that the cost are prudent consistent with Section 4928.143(B)(2)(a), Revised Code, and AEP-Ohio has done nothing to establish that $255 per MW-day for capacity is prudent. The price of $255 per MW-day is unrelated to cost or market rates, and according to FES, appears to be well above market. Furthermore, Constellation and Exelon witness Fein testified that Exelon made an offer of energy and capacity and an offer for capacity only to serve AEP-Ohio's SSO load June 1, 2014 through May 31, 2016, at a cost lower than the Company is proposing as a part of this modified ESP. Constellation and Exelon emphasize that the PJM tariff does not prohibit an FRR entity from making bilateral purchases in the market to meet its capacity obligations. (Constellation/Exelon Ex. 101 at 17-19). FES notes that according to testimony offered by AEP-Ohio witness Nelson, the $255 MW-day for capacity is not based on costs nor indexed to the market rate. Furthermore, FES points out that AEPSC is negotiating the contract for both AEP-Ohio and GenResources. AEP-Ohio has no intent, based on the testimony of Mr. Nelson, to evaluate whether the cost of its contract with GenResources for SSO service could be reduced by contracting with another supplier. Based on the record evidence, FES argues that this aspect of the modified ESP does not comply with the requirements of Section 4928.143(B)(2)(a), Revised Code, and the contract between AEP-Ohio and GenResources, after corporate separation does not comply with the FERC *Edgar* guidelines, which direct that no wholesale sale of electric energy or capacity between a franchised public utility with captive customers and a market-regulated power sales affiliate may take place without first receiving FERC authorization for the transaction under section 205 of the Federal Power Act. (Tr. at 523-526; FES Br. at 102-105.)

The Commission finds, that once corporate separation is effective and AEP-Ohio procures its generation from GenResources that it is appropriate and reasonable for certain revenues to pass-through AEP-Ohio to GenResources. Specifically, the revenues AEP-Ohio receives, after corporate separation is implemented, from the RSR which are not allocated to recovery of the deferral, revenue equivalent to the capacity charge of $188.99/MW-day authorized in Case No. 10-2929-EL-UNC, generation-based revenues from SSO customers, and revenue for energy sales to shopping customers, should flow to to GenResources. We recognize, as AEP-Ohio acknowledges and FES discusses in its reply brief, that the contract between AEP-Ohio and GenResources is subject to prior FERC approval. We do not make, as a part of our review of the Company's modified ESP application, any expressed or implied endorsement of the terms or conditions of the AEP-Ohio contract with GenResources, as presented in this case.

14. GridSMART

The Company's modified ESP application proposes the continuation of the gridSMART rider approved by the Commission in the ESP 1 Order, with two modifications. First, AEP-Ohio requests that the gridSMART rates for the CSP rate zone be expanded to the OP rate zone. Second, AEP-Ohio requests that the net book value of meters retired as a result of the gridSMART project be deferred as a regulatory asset for accounting purposes. Currently, the net book value of meters replaced as a result of Phase 1 of the gridSMART project are charged to expense net of salvage and net of meter transfers and included in the over/under calculation of the rider. The Company expects to complete the installation of gridSMART equipment in Phase 1 and to complete gridSMART data submission to the U. S. Department of Energy on Phase 1 of the project by December 31, 2013, with the evaluation to be completed around March 31, 2014. Further, AEP-Ohio states that the Company intends to deploy elements of the gridSMART program throughout the AEP-Ohio service territory as part of the proposed DIR program proposed in this proceeding. (AEP-Ohio Ex. 107 at 10; AEP-Ohio Ex. 110 at 9-13.)

OCC and APJN submit that, to the extent that the Company proposes to include gridSMART costs in the DIR, there are numerous concerns that need to be addressed before the Company is authorized to proceed. Staff, OCC, and APJN retort that the Company's proposed expansion of the gridSMART project, before any evaluation and analysis of the success of gridSMART Phase 1, is inconsistent with sound business principles and should be rejected by the Commission. Therefore, these parties recommend that the Company not proceed with Phase 2 until evaluation of Phase 1, is complete, on or about March 31, 2014. (Staff Ex. 105 at 5-6; OCC/APJN Br. at 96-97.)

More specifically, Staff reasons that the costs of the expansion of various gridSMART technologies have not been determined, the benefits of the gridSMART expansion defined nor customer acceptance of such technologies evaluated. In addition, Staff claims that the Company has stated that certain components of the aging distribution infrastructure do not support gridSMART technologies. Despite Staff's position on the commencement of Phase 2 of the gridSMART project, Staff does not oppose the Company's installation, at the Company's expense and risk of recovery, of proven distribution technologies that can proceed independently of gridSMART, which address near term generation reliability concerns, such as integrated voltage variation control (IVVC), and do not present any security or interoperability issues or violate requirements set forth by the National Institute of Standards and Technology Interagency Report. Staff endorses the continuation of the gridSMART rider to be collected from all AEP-Ohio customers. Staff emphasizes that equipment should not be recoverable in the gridSMART rider until it is installed, has completed and passed thorough testing, and has been placed in-service. (Staff Ex. 105 at 3-6; Staff Ex. 107 at 3-13.)

AEP-Ohio points out that no intervener has expressed any opposition to the continuation and completion of gridSMART Phase 1 and, accordingly, AEP-Ohio requests approval of this aspect of the modified ESP. AEP-Ohio also requests that the Commission provide some policy guidance on whether the Company should proceed with the expansion of the gridSMART program.

As the Commission noted in AEP-Ohio's ESP 1 Order:

> [I]t is important that steps be taken by the electric utilities to explore and implement technologies... that will potentially provide long-term benefits to customers and the electric utility. GridSMART Phase 1 will provide CSP with beneficial information as to implementation, equipment preferences, customer expectations, and customer education requirements... More reliable service is clearly beneficial to CSP's customers. The Commission strongly supports the implementation of AMI [advanced metering infrastructure] and DA [distribution automation initiative], with HAN [home area network], as we believe these advanced technologies are the foundation for AEP-Ohio providing its customers the ability to better manage their energy usage and reduce their energy costs.

(*ESP 1 Order at* 34-35.)

The Commission is not wavering in its conviction as to the benefits of gridSMART. Thus, we direct AEP-Ohio to continue the gridSMART Phase 1 project and to complete the review and evaluation of the project. We are approving the Company's request to initiate Phase 2 of the gridSMART project, prior to the March 31, 2014, completion of the evaluation of gridSMART Phase 1, with those technologies that have to-date demonstrated success and are cost-effective. To require the Company to delay any further expansion or installation of gridSMART is unnecessarily restrictive with respect to the further deployment of successful individual smart grid systems and technologies used in the project. The Company shall file its proposed expansion of the gridSMART project, gridSMART Phase 2, as part of a new gridSMART application, including sufficient detail on the equipment and technology proposed for the Commission to evaluate the demonstrated success, cost-effectiveness, customer acceptance and feasibility of the proposed technology. However, the Company shall include, as Staff recommends, IVVC only within the distribution investment rider, as IVVC is not exclusive to the gridSMART project. IVVC supports the overall electric system reliability and can be installed without the presence of grid smart technologies, although IVVC enhances or is necessary for grid smart technology to operate properly and efficiently. Furthermore, the gridSMART Phase 1 rider was approved with specific limitations as to the equipment for which recovery

could be sought, and a dollar limitation.[27] Any gridSMART investment beyond the Phase 1 pilot, which is not subject to recovery through the DIR mechanism, should be recovered through a mechanism other than the current gridSMART rider, for example, through a gridSMART Phase 2 rider. The current gridSMART rider allows for recovery on an "as spent" basis, with audits directed toward truing-up expenditures with collections through the rider rate. Keeping subsequent non-DIR, gridSMART expenditures in a new separate recovery mechanism facilitates enforcement and a Commission determination that recovery of gridSMART investment occur only after the equipment is installed, tested, and is in-service. With these clarifications, the Commission approves the Company's request to continue, as a part of this modified ESP, the current gridSMART rider mechanism, subject to annual true-up and reconciliation based on the Company's prudently incurred costs, and to extend the rate to include OP as well as CSP customers.

We note that the gridSMART Phase 1 rider was last evaluated for prudency of expenditures, reconciled for over- and under-recoveries and the rate mechanism adjusted in Case No. 11-1353-EL-RDR, with the rate effective beginning September, 1, 2011. Despite the Commission's February 23, 2012 rejection of the application in this ESP 2 proceeding, the recovery of the gridSMART rate mechanism continued consistent with the Entry issued March 7, 2012. Accordingly, the gridSMART rider rate mechanism approved in Case No. 11-1353-EL-RDR shall continue at the current rate until revised by the Commission. We also note that in Case No. 11-1353-EL-RDR, the Commission deducted an amount from the Company's claim for the loss on the disposal of electro-mechanical meters. The Commission notes, as we stated in the Order issued August 4, 2011, that we will address the meter issue in the Company's pending gridSMART rider application, Case No. 12-509-EL-RDR, and nothing in this Order on the modified ESP should be interpreted to the contrary.

15. Transmission Cost Recovery Rider

Pursuant to Commission authority, as set forth in Section 4928.05(A)(2), Revised Code, and the rules in Chapter 4901:1-36, O.A.C., electric utilities may seek recovery of transmission and transmission-related costs. Through this modified ESP, AEP-Ohio proposes only that the transmission cost recovery rider (TCRR) mechanisms of the CSP and OP rate zones be combined. The Company proposes no other changes to the TCRR mechanism as a part of this ESP. (AEP-Ohio Ex. 111 at 6-7; AEP-Ohio Ex. 107 at 8.)

The Commission notes that the current TCRR process has been in place since 2009, and operates appropriately. As structured, with the TCRR mechanism any over- or under-recovery is accounted for in the next semi-annual review of the TCRR mechanism. For this reason, we do not expect any adverse rate impact for customers with the combining of the CSP and OP TCRR rate mechanisms. Given the merger of CSP into OP, effective as of

[27] ESP 1 Order at 37-38; ESP 1 Entry on Rehearing at 18-24 (July 23, 2009).

December 31, 2011, the Commission finds AEP-Ohio's request to combine the TCRR mechanism to be reasonable. The Commission directs that any over-recovery of transmission or transmission-related costs, as a result of combining the TCRR mechanisms, be reconciled in the over and under-recovery component of the Company's next TCRR rider update.

16. Enhanced Service Reliability Rider

As part of AEP-Ohio's ESP 1 case, AEP-Ohio proposed an enhanced service reliability rider (ESRR) program which included four components, of which only the transition to a cycle-based vegetation management program was approved by the Commission. In this modified ESP, AEP-Ohio requests continuation of the ESRR and the Company's transition to a four-year, cycle-based trimming program. Further, the Company proposes the unification of the ESRR rates for each rate zone into a single rate, adjusted for anticipated cost increases over the term of the ESP, with carrying cost on capital assets and annual reconciliation. AEP-Ohio admits that before the initiation of the transitional vegetation management program, the number of tree-related circuit outages had gradually increased. However, the Company states that with the initiation of the new vegetation management program, the number of tree-caused outages has been reduced and service reliability has improved. AEP-Ohio proposes to complete the transition from a performance-based program to a four-year, cycle-based trimming program for all of the Company's distribution circuits as approved by the Commission in the prior ESP. However, the Company notes that the vegetation management plan was implemented as a five-year transition program and, as a result of the delay in adopting a second ESP and increases in the expected costs to complete implementation of the cycle-based trimming program, it is now necessary to extend the implementation period to include an additional year into 2014. AEP-Ohio requests incremental funding for 2014 for both the completion of the transition to a cycle-based vegetation management program of $16 million and an incremental increase of $18 million annually to maintain the cycle-based program. (AEP-Ohio Ex. 107 at 8; AEP-Ohio Ex. 110 at 5-9.)

Staff supports the continuance of the ESRR through 2014 but not any cost incurred thereafter. Staff reasons that after 2014, the Company's transition to a four-year, cycle-based vegetation management program will be complete and regular maintenance pursuant to the program will be part of the Company's normal operations, the cost of which should be recovered through base rates not through the ESRR. Further, Staff argues that the ESRR funding level for the period 2012 through 2014 is overstated due to the increased ESRR baseline reflected in the Company's recent distribution rate case.[28] According to Staff, to reach the rate base in the Stipulation in the distribution rate case, Staff agreed to an increase in the revenue requirement for CSP and OP which incorporated an annual increase in vegetation management operation and maintenance expense of $17.8

[28] *In re AEP-Ohio*, Opinion and Order, Case No. 11-351-EL-AIR, et al. (December 14, 2011).

million annually for 2012 through 2014 over its recommendation in the Staff Report. For that reason, Staff asserts that vegetation management operation and maintenance expense must be reduced by $17.8 million annually for the period 2012 through 2014. Further, Staff recommends that the Commission direct AEP-Ohio to file, pursuant to Rule 4901:1-10-27(E)(2) and (3), O.A.C., by no later than December 31, 2013, a revised vegetation management program which commits the Company to complete end-to-end trimming on all of its distribution circuits every four years beginning January 1, 2014 and beyond. (Staff Ex. 106 at 11-14; Tr. at 4363-4365.)

AEP-Ohio retorts that Staff ignores the fact that the Stipulation, and the Commission Order approving the Stipulation, in the Company's distribution rate case do not detail any increase in the ESRR baseline. AEP-Ohio requests that the Commission reject Staff's view of the rate case settlement as unsupported and improper, after the issuance of a final, non-appealable order in the case. As to Staff's proposed termination of funding after 2014, the Company offers that such would undermine the benefits of the cycle-based trimming. (AEP-Ohio Reply Br. at 76-77.)

The Commission concludes that while the Stipulation in the distribution rate case reflects an increase in the baseline operations and maintenance expense from the level recommended in the Staff Report, there is no evidence in the Stipulation or the Commission's Order adopting the Stipulation which specifically supports a $17.8 million increase in operations and maintenance expense for the vegetation management program. Accordingly, the Commission approves the continuation of the vegetation management program, via the ESRR, and merger of the rates, as requested by the Company for the term of the modified ESP, through May 31, 2015. Within 90 days after the conclusion of the ESRR, the Company shall make the necessary filing for the final year review and reconciliation of the rider. We direct AEP-Ohio to file a revised vegetation management program consistent with this Order and Rule 4901:1-10-27(E)(2) and (3), O.A.C., by no later than December 31, 2012. We see no need to wait until December 2013 for the filing, as requested by Staff, in light of our ruling in this Order.

17. Energy Efficiency and Peak Demand Reduction Rider

Through this modified ESP, the Company proposes the continuation of the EE/PDR Rider, with the unification of the rates into a single rate. The EE/PDR rider would continue to be, as it has been since its adoption in the ESP 1 cases,[29] updated annually. AEP-Ohio notes the proposed regulatory accounting for the EE/PDR rider, is over-under accounting with no carrying charge on the investment and no carrying charge on the over/under balance. The Company states that it has developed energy efficiency and demand response programs for all customer segments and through the implementation of the programs customers have the potential to save approximately $630

[29] ESP 1 Order at 41-48; ESP 1 EOR at 27-31.

million in reduced electric service cost over the life of the programs. Further, the EE/PDR programs cause power plant emissions to be reduced. AEP-Ohio testified that its energy efficiency and peak demand response programs for 2009 through 2011 have been very successful in meeting the benchmarks. Staff endorses the Company's request to continue the EE/PDR rider. (AEP-Ohio Ex. 107 at 8; AEP-Ohio Ex. 118 at 11-12; Staff Br. at 31.)

The Commission approves the merger of the EE/PDR rider rates for the CSP and OP rate zones and, for the term of this modified ESP, the continuation of the EE/PDR rider as adopted in the ESP 1 Order and subsequently confirmed in each of the Company's succeeding EE/PDR cases. In addition, as we established in our analysis of the IRP-D credit, because the IRP-D credit promotes energy efficiency, it is appropriate for AEP-Ohio to recover any costs associated with the IRP-D under the EE/PDR rider, as opposed to the RSR. Further, the Commission directs AEP-Ohio to take the appropriate steps necessary to bid the energy efficiency savings funded by the EE/PDR rider into the next PJM base residual auction and all subsequent auctions held during the term of the ESP.

18. Economic Development Rider

AEP-Ohio's modified ESP application request approval to continue, with one modification, the non-bypassable Economic Development Rider (EDR). The EDR mechanism recovers the costs, incentives, and forgone revenues associated with new or expanding Commission-approved special arrangements for economic development and job retention. As currently designed, the EDR rate is a component of each customer's base distribution rates. The Company wishes to merge the EDR rates for each of the rate zones into a single EDR rate with the EDR rate to continue in all other respects as approved by the Commission in the ESP 1 Order and the Company's subsequent EDR cases. As currently approved by the Commission, the EDR is updated periodically and the regulatory accounting for the EDR, being over-under accounting with no carrying charge on the investment and a long-term interest carrying charge on any unrecovered balance. AEP-Ohio states that the EDR supports Ohio's effectiveness in the global economy as required in Section 4928.02(N), Revised Code. AEP-Ohio asserts that the proposed EDR is reasonable and should be adopted as part of the modified ESP. (AEP-Ohio Ex. 111 at 3, 7 and Ex. DMR-5; AEP-Ohio Ex. 107 at 8; AEP-Ohio Ex. 118 at 7, 13.)

Staff supports the Company's EDR proposal (Staff Br. at 31). However, OCC and APJN argue the Company allocates the EDR rider based only on distribution revenues as opposed to current total revenues (distribution, transmission and generation) between the customer classes in compliance with Rule 4901:1-38-08(A), O.A.C.[30] OCC and APJN note

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[30] Rule 4901:1-38-08(A)(4), O.A.C., states:

> The amount of the revenue recovery rider shall be spread to all customers in proportion to the current revenue distribution between and among classes, subject to change,

that the Commission approved Dayton Power & Light Company's EDR application with a similar allocation to the one they are proposing AEP-Ohio be required to adopt.[31]

The Company argues that because transmission and generation revenues are recovered only from its nonshopping customers, that OCC's and APJN's proposal would actually result in residential customers being responsible for a greater share of the delta revenues than under the current allocation method based only on distribution revenues paid by shopping and non-shopping customers. Further, AEP-Ohio notes that the Commission rejected this same proposal by OCC in the ESP 1 cases and requests that the Commission again reject the proposed change in the allocation methodology. (AEP-Ohio Reply Br. at 78.)

The Commission rejects OCC's and APJN's request to revise the basis for the EDR allocation, given the fact that the EDR is a non-bypassable rider recovered from shopping and non-shopping customers alike. We recognize that the EDR acts to attract new business and to facilitate the expansion of existing businesses in Ohio. In order to allow AEP-Ohio to effectively promote economic development to customers in its service territories, and continue its positive corporate presence in communities throughout Ohio, as evidenced by multiple witnesses at the public hearings, we find it reasonable for AEP to maintain its corporate headquarters in Columbus, Ohio, at a minimum, for the entire term of this ESP and the subsequent collection period associated with the deferral costs included in the RSR. Further, the Commission finds that, the EDR, as a non-bypassable rider, is recovered from all AEP-Ohio shopping and non-shopping customers. Therefore, we approve the Company's request to merge the EDR rates for the CSP and OP rate zones into a single rate and to otherwise continue the EDR mechanism as previously approved by the Commission in the Company's ESP 1 Order, as revised or clarified in its subsequent EDR proceedings.

Additionally, in light of the extenuating economic circumstances, the Commission hereby orders the Company to reinstate the Ohio Growth Fund, to be funded by shareholders at $2 million per year, or portion thereof, during the term of this ESP. The Ohio Growth Fund creates private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio.

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alteration, or modification by the commission. The electric utility shall file the projected impact of the proposed rider on all customers, by customer class.

31 See In re Dayton Power & Light Company, Case No. 12-815-EL-RDR, Order (April 25, 2012).

19. Storm Damage Recovery Mechanism

AEP-Ohio proposes a storm damage recovery mechanism be created to recover any incremental expenses incurred due to major storm events (AEP-Ohio Ex. 110 at 20). AEP-Ohio provides that the mechanism would be created in the amount of $5 million per year in accordance with the settlement in Case Nos. 11-351-EL-AIR and 11-352-EL-AIR. In support of the storm damage recovery mechanism, AEP-Ohio witness Kirkpatrick notes that absent the mechanism, forecasted operation and maintenance (O&M) funds would be constantly diverted to cover the expense of major storms, which could disrupt planned maintenance activities and impact system reliability. The determination of what a major storm is or is not would be determined by methodology outlined in the IEEE Guide for Electric Power Distribution Reliability Indices, as set forth in Rule 4901:1-10-10(B), O.A.C. (*Id.*) Any capital costs that would be incurred due to a major storm would either become a component of the DIR or would be addressed in a distribution rate case (*Id.* at 21). Upon approval of the storm damage recovery mechanism, AEP-Ohio will defer the incremental distribution expenses above or below the $5 million storm expense beginning with the effective date of January 1, 2012 (AEP-Ohio Ex. 107 at 10).

OCC notes that while AEP-Ohio's actual storm costs expenses are currently unknown, it is likely that AEP-Ohio will incur more than $5 million based on historic data, which indicates the average annual expenses amount to approximately $8.97 million per year (OCC Ex. 114 at 20-21). In addition, OCC explains that AEP-Ohio failed to specify the carry charge rate for any storm damage deferrals, but suggests the carrying charges not be calculated using AEP-Ohio's WACC, as the mechanism does not include capital costs (OCC Br. at 97-98). OCC suggests that AEP-Ohio utilize its cost of long-term debt to calculate carrying charges (*Id.*).

In establishing its storm damage recovery mechanism, AEP-Ohio failed to specify how recovery of the deferred asset would actually work or would occur. As proposed, it is unknown when AEP-Ohio would seek recovery, or whether anything over or under $5 million would become a deferred asset or liability. As it currently stands, the storm damage recovery mechanism is open-ended and should be modified.

Therefore, we find that AEP-Ohio may begin deferral of any incremental distribution expenses above or below $5 million, per year, subject to the following modifications. Further, throughout the term of the modified ESP, AEP-Ohio shall maintain a detailed accounting of all storm expenses within its storm deferral account, including detailed records of all incidental costs and capital costs. AEP-Ohio shall provide this information annually for Staff to audit to determine if additional proceedings are necessary to establish recovery levels or refunds as necessary.

In the event AEP-Ohio incurs costs due to one or more unexpected, large scale storms, AEP-Ohio shall open a new docket and file a separate application by December 31

each year throughout the term of the modified ESP, if necessary. In the event an application for additional storm damage recovery is filed, AEP-Ohio shall bear the burden of proof of demonstrating all the costs were prudently incurred and reasonable. Staff and any interested parties may file comments on the application within 60 days after AEP-Ohio dockets an application. If any objections are not resolved by AEP-Ohio, an evidentiary hearing will be scheduled, and parties will have the opportunity to conduct discovery and present testimony before the Commission. Thus, OCC's concern on the calculation of appropriate carrying charges is premature.

20. Other Issues

(a) Curtailable Service Riders

In ESP 1, based on the lack of certain information in the record, the Commission determined that customers under reasonable arrangements with AEP-Ohio, including, but not limited to, energy efficiency/peak demand reduction arrangements, economic development arrangements, unique arrangements, and other special tariff schedules that offer service discounts from the applicable tariff rates, are prohibited from also participating in a PJM demand response program (DRP), unless and until the Commission decides otherwise (First ESP EOR at 41). While the Commission opined on the ability of customers in reasonable arrangements with AEP-Ohio to participate in PJM DRPs, the Commission did not, in the context of the ESP 1, address the ability of AEP-Ohio's retail customers to participate in PJM DRPs.

On March 19, 2010, in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA, AEP-Ohio filed an application to amend its emergency curtailment service riders to permit customers to be eligible to participate in AEP-Ohio's DRPs, integrate their customer-sited resources and assign the resources to AEP-Ohio to meet with the Company's peak demand reduction mandates or conditional retail participation in PJM DRPs.

As a part of this modified ESP, AEP-Ohio recognizes customer participation in the PJM directly or through third-party aggregators and proposes to eliminate two tariff services, Rider Emergency Curtailable Services and Rider Price Curtailable Service, as no customer currently receives service pursuant to either rider. EnerNOC endorses this aspect of AEP-Ohio's modified ESP application on the basis that its supports the provisions of Section 4928.02(D), Revised Code. (AEP-Ohio Ex. 100 at 9; AEP-Ohio Ex. 111 at 9; EnerNOC Br. at 5-6.).

We concur with the Company's request. Accordingly, the Company should eliminate Rider Emergency Curtailable Services and Rider Price Curtailable Service from its tariff service offerings and Case Nos. 10-343-EL-ATA and 10-344-EL-ATA, closed of record and dismissed.

(b) Customer Rate Impact Cap

In order to ensure no customers are unduly burdened by any unexpected rate impacts, as well as to mitigate any customer rate changes, we direct AEP-Ohio to cap customer rate increases at 12 percent over their current ESP I rate plan bill schedules for the entire term of the modified ESP, pursuant to our authority as set forth in Section 4928.144, Revised Code. The 12 percent limit shall be determined not by overall customer rate classes, but on an individual customer by customer basis. The customer rate impact cap applies to items approved within this modified ESP. Any rate changes that arise as a result of past proceedings, including any distribution proceedings, or in subsequent proceedings are not factored into the 12 percent cap. Further, the 12 percent cap shall be normalized for equivalent usage to ensure that at no point any individual customer's bill impacts shall exceed 12 percent. On May 31, 2013, AEP-Ohio should file, in a separate docket, a detailed accounting of its deferral impact created by the 12 percent rate cap. Upon AEP-Ohio's filing of its deferral calculations, the attorney examiners shall establish a procedural schedule, to consider, among other things, the deferral costs created, and the Commission will maintain the discretion to adjust the 12 percent limit, as necessary, throughout the term of the ESP.

(c) AEP-Ohio's Outstanding FERC Requests

The Commission takes notice that American Electric Power Service Corporation filed a renewed motion on AEP-Ohio's behalf for expedited rulings on July 20, 2012, in FERC docket numbers ER11-2183-001 and EL11-32-000. In the event FERC takes any action that may significantly alter the balance of this Commission's order, the Commission will make appropriate adjustments as necessary. Specifically, pursuant to Section 4928.143(F), Revised Code, at the end of each annual period of this modified ESP, the Commission shall consider if any such adjustments, including any that may arise as a result of a FERC order, lead to significantly excessive earnings for AEP-Ohio. In the event that the Commission finds that AEP-Ohio has significantly excessive earnings, AEP-Ohio shall return any amount in excess to consumers.

III. IS THE PROPOSED ESP MORE FAVORABLE IN THE AGGREGATE AS COMPARED TO THE RESULTS THAT WOULD OTHERWISE APPLY UNDER SECTION 4928.142, REVISED CODE.

AEP-Ohio contends that the ESP, as proposed, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. To properly conduct the statutory test, AEP-Ohio states that the proposed ESP must be viewed in the aggregate, which includes the statutory price test, other quantifiable benefits, and the consideration of non-quantifiable benefits (AEP Ex. 114 at 3-4). In evaluating all of these criteria, AEP-Ohio witness Laura Thomas concludes that the proposed ESP, in the aggregate, is more

favorable that the results that would otherwise apply under an MRO by approximately $952 million (AEP-Ohio Ex. 115 at Exhibit LJT-1, page 1). In addition, Ms. Thomas states that there are numerous benefits that are not readily quantifiable (*Id.*).

In conducting the statutory price test, Ms. Thomas explains that she utilized Section 4928.20(J), Revised Code's interpretation of market prices for guidance in determining the competitive benchmark price. In establishing the competitive benchmark price, AEP-Ohio used ten components, including the capacity component, which includes the capacity cost that a supplier would incur to serve a retail customer within AEP-Ohio's service territory (AEP-Ohio Ex. 114 at 15). AEP-Ohio concluded that the capacity cost to be utilized in the statutory price test should be $355.72/MW-day, based on the notion that AEP-Ohio will be operating under its FRR obligation and the full capacity cost rate for AEP-Ohio should be utilized in the competitive benchmark price. By using $355.72/MW-day, Ms. Thomas concludes that the statutory price test shows the ESP is more favorable than an MRO by $256 million (AEP-Ohio Ex. 114 at LJT-1 page 3). Ms. Thomas also conducted an alternative price test utilizing the two-tier capacity proposal numbers of $146 and $255 as the capacity costs, and concludes that modified ESP would be more favorable than an MRO $80 million (*Id.* at LJT-5 page 2). In light of the Commission's decision in Case No. 10-2929, AEP-Ohio indicates the use of the $188.88 capacity price would result in the MRO being slightly less favorable by $12.6 million, but when factoring in AEP-Ohio's energy-only slice-of-system auction the statutory price test comes out almost even, with the MRO being slightly more favorable by approximately 2.6 million (AEP-Ohio Reply Br. at 97-99, Attachment B).

In addition, as AEP-Ohio explains that the statutory test requires the proposed ESP be reviewed in the aggregate in addition to the price test, other quantifiable benefits need to be considered. Specifically, AEP-Ohio points to capacity price discount from AEP-Ohio's $355.72/MW-day to the two-tier discounted capacity pricing for CRES provides, which results in a benefit of $988 million. In addition, in her aggregate test, Ms. Thomas acknowledges that while the RSR is a benefit of the proposed modified ESP, the RSR will cost $284 million during the term of the modified ESP. Ms. Thomas explains that the GRR should not be considered in the aggregate analysis as the results would be the same under the proposed ESP or an MRO, but notes if the Commission determines otherwise the consideration of GRR would reduce the quantifiable benefits by approximately $8 million. By taking these additional quantifiable factors into consideration in addition to the results under the statutory test, AEP-Ohio asserts that the total quantifiable benefits of the modified ESP are $952 million based on the statutory price test using $355.72/MW-day (AEP-Ohio Ex. 115 at LJT-1).

Regarding non-quantifiable benefits, AEP-Ohio states that the modified ESP will provide price certainty for SSO customers while presenting increased customer shopping opportunities. AEP-Ohio provides that the modified ESP will ensure financial stability of

AEP-Ohio and provides for a necessary transition towards the competition while acknowledging AEP-Ohio's existing contractual and FRR obligations. AEP-Ohio also opines that the modified ESP advances state policies and is consistent with Section 4928.02, Revised Code.

In addition to the statutory test conducted by AEP-Ohio witness Thomas, several other parties conducted the statutory test pursuant to Section 4928.143, Revised Code. OCC, FES, IEU, DER and Staff allege that the statutory price test actually indicates that the modified ESP produces results that are less favorable than what would otherwise apply under an MRO by figures ranging from $50 million to $1.427 billion (*See* OCC Ex. 114, DER Ex. 102, IEU Ex. 125, FES Ex. 104, and Staff Ex. 110). Specifically, OCC witness Hixon points out that AEP-Ohio's assumption of a $355.72/MW-day capacity charge is inappropriate, but rather, the capacity charge approved by the Commission in Case No. 10-2929-EL-UNC should be utilized. Further, OCC notes that any costs associated with the GRR should be included in the statutory test, as the GRR would not be available under an MRO (*Id.* at 14-17). In addition, OCC points out that in considering any non-quantifiable benefits associated with the modified ESP, the aggregate test should consider additional costs to customers associated with items such as the DIR, ESRR, and gridSMART rider, which, while not readily quantifiable, are currently known to be costs associated with the modified ESP (*Id.* at 18).

FES and IEU raise similar concerns in utilizing AEP-Ohio's $989 million as a quantifiable benefit. FES states that the Commission previously found the consideration of discounted capacity pricing cannot be considered a benefit because it is too speculative (FES Ex. 104 at 14-16, IEU Ex. at 50-53). IEU, DER, and FES provide that AEP-Ohio overstated the competitive benchmark price by failing to use a market-based capacity price, and failed to properly consider the costs associated with the modified ESP including the RSR, GRR, and possibly the PRR (FES at 16-25, IEU at 49-72, DER Ex. 102 at 3-6). Mr. Schnitzer also concluded that the statutory test indicates that the modified ESP is worse for customers than the Stipulation ESP, and approval of the modified ESP would harm the development of a competitive retail market by limiting CRES providers' ability to provide alternative offers to customers (FES Ex. 104 at 38-41).

IEU, DER, and OCC argue that Ms. Thomas incorrectly assumed the MRO's blending requirement should have been accelerated, as it is unlikely the Commission would authorize an MRO with any blending other than the fault blending provisions of 70 percent ESP pricing and 30 percent market pricing, as is consistent with Section 4928.142, Revised Code (DER Ex. at 3-6, OCC Ex. 114 at 8-9). Further, IEU suggests the Commission consider the June 2015 to May 2016 deliver year as part of the statutory test analysis, as AEP-Ohio is seeking Commission approval to conduct a CBP for the entire SSO load beginning in June 2015 under this modified application (IEU Ex. 125 at 79).

Staff witness Fortney conducted the statutory test by blending the market rate with the SSO rates pursuant to Section 4928.142(D), Revised Code, but noted that the market rate is extremely uncertain due to volatility of forward contract prices. Mr. Fortney calculated the average rates under AEP-Ohio's modified ESP and compared them to the results that would occur under an MRO on RPM price capacity, $146.41, and $255. Mr. Fortney concluded that under all three scenarios the modified ESP is less favorable, but noted there are other non-quantifiable benefits, including AEP-Ohio's transition to competitive markets, which would be achieved more quickly than through an MRO (Staff Ex. 110 at 3-7). FES revised Mr. Fortney's statutory price test using the $188.88 price of capacity and concluded an MRO would be less expensive by $277 million (FES Reply Br. at B-1).

The Commission finds that, while AEP-Ohio made multiple errors in conducting the statutory test, we believe that these errors are correctible based on evidence contained within the record. Under Section 4928.143(C)(1), Revised Code, we must determine whether AEP-Ohio's has sustained its burden of proof of indicating whether the proposed electric security plan, as we've modified it, including its pricing, other terms and conditions including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to results that would otherwise apply under Section 4928.142, Revised Code. Further, we must ensure our analysis looks at the entire modified ESP as a total package, as the Supreme Court of Ohio has held that Section 4928.143(C)(1), Revised Code, does not bind the Commission to a strict price comparison, but rather, instructs the Commission to consider other terms and conditions, as there is only one statutory test that looks at an entire ESP in the aggregate (*In re Columbus S. Power Co.*, 128 Ohio St. 3d 402, 407).

Therefore, as AEP-Ohio presented its analysis of this statutory test, we first look at the statutory pricing test, and then will explore other provisions, terms, and conditions of the proposed ESP that are both quantifiable and non-quantifiable. In considering AEP-Ohio's statutory price test, consistent with Section 4928.143(C)(1), Revised Code, we must look in part at the price AEP-Ohio's proposed ESP, as we've modified it, with the price of the results that would otherwise apply under Section 4928.142, Revised Code. The way AEP-Ohio calculated its statutory price test precludes us from accurately determining the results that would otherwise apply under a market rate offer, as it begins its analysis on June 1, 2012.

To accurately determine what would otherwise apply under Section 4928.142(A)(1), Revised Code, for the purposes of comparing it with this modified ESP, we begin by looking at the statute for guidance. Section 4928.142(A)(1), Revised Code, mandates that any electric distribution utility that wishes to establish its standard service offer price through a market rate offer must ensure the competitive bidding process provides for an open, fair, and transparent competitive solicitation process, with a clear product definition,

standardized bid evaluation criteria, oversight of the process by an independent third party, and an evaluation of the submitted bids prior to selecting a winner. For the Commission to appropriately predict the results that would otherwise occur under this section, we cannot, in good conscience, compare prices during a time period that has elapsed prior to the issuance of this order. Nor can we, by statute, compare this modified ESP price with what would otherwise apply under Section 4928.142, Revised Code, beginning today, as it would be impossible for AEP-Ohio to immediately establish an alternate plan under Section 4928.142, Revised Code, that meets all the statutory criteria. Therefore, for the Commission to appropriately compare the price components of this modified ESP with the results that would otherwise apply under Section 4928.142, Revised Code, we must determine the amount of time it would take AEP-Ohio to implement its standard service offer price with what would otherwise apply under Section 4928.142, Revised Code.

As FES witness Banks testified, a June 1, 2013 start date would provide AEP-Ohio sufficient time to plan for auctions, develop bidding rules, and the auction structure, all of which are requirements of Section 4928.142, Revised Code (FES Ex. 105 at 20). In light of this testimony, we believe that we should begin evaluating the statutory price test analysis approximately ten months from the present, in order to determine what would otherwise apply. Therefore, in considering this modified ESP with the results that would otherwise apply under the statutory price test, we will conduct the statutory price test for the period between June 1, 2013, and May 31, 2015.

Further, in conducting the statutory price test, Ms. Thomas erred by utilizing $355.72/MW-day for the capacity component of the competitive benchmark price. This number was unilaterally determined by AEP-Ohio and justified as AEP-Ohio's cost of capacity, which is entirely inconsistent with the Commission's determination of AEP-Ohio's cost of capacity being $188.88. Although we believe AEP-Ohio's use of the $355.72/MW-day capacity figure is flawed, we are not persuaded by parties who argue the capacity component should be market based and reflect RPM prices. These parties fail to consider that AEP-Ohio, as an FRR entity, will be supplying capacity for its customers throughout the term of this ESP, whether the customer is an SSO customer or the customer takes service through a CRES provider. Thus, even under the results that would otherwise apply consistent with Section 4928.142, Revised Code, due to AEP-Ohio's remaining FRR obligations, it would still be supplying capacity to all of its customers through 2015. We find it is inappropriate to consider market prices in establishing this capacity component, even though RPM prices are consistent with the state compensation mechanism, as AEP-Ohio is and will remain an FRR entity for the immediate future. In conducting the statutory price test, we shall use AEP-Ohio's cost of capacity of $188.88, as supported by Case 10-2929, for the competitive benchmark.

Next, we need to address the appropriate blending method under the statutory price test for the period of January 1, 2015 through June 1, 2015. In light of the clearly defined statutory blending percentages contained within Section 4928.142(D), Revised Code, as well as past Commission precedent in conducting the statutory price test, we do not find it appropriate to use a 100 percent blending rate for the final five months of the modified ESP. *See* Duke Energy Ohio, Case No. 10-2586-EL-SSO (February 23, 2011). Accordingly, we need to adjust the percentages of the MRO pricing component that is indicated in AEP-Ohio's reply brief to 90 percent of the generation service price and ten percent of the expected market price for the period between June 1, 2013 to May 31, 2014, consistent with Section 4928.142(D), Revised Code, and increase the MRO pricing component to 80 percent of the generation service price and 20 percent of the expected market price for the period of June 1, 2014, to May 31, 2015. By making these modifications to the competitive benchmark price, as well as the $188.88 cost of capacity figure, we conclude that the statutory price test indicates the modified ESP is more favorable than the results that would otherwise occur under Section 4928.142, Revised Code, by approximately $9.8 million.

Our analysis does not end here, however, as we must now consider the proposed ESP's other provisions that are quantifiable. As we previously established in the December 14, 2011, Opinion and Order, we believe AEP-Ohio must address costs associated with the GRR, as it is non-bypassable pursuant to Section 4928.143(B)(2)(c), Revised Code, and thus would not occur under an MRO. Therefore, the costs of approximately $8 million must be considered in our quantitative analysis. We understand that the GRR is a placeholder rider, but we find that the costs associated with the GRR are known and should therefore be included in the quantitative benefits. Likewise, we must consider the costs associated with the RSR of approximately $388 million in our quantitative analysis.[32] The inclusion of any deferral amount does not need to be included in our analysis, as it would still be recovered under an MRO pursuant to the Commission's decision in the Capacity Case. After including the statutory price test in favor of the ESP by $9.8 million, and the quantifiable costs of $388 million under the RSR and $8 million for the GRR, we find an MRO is more favorable by approximately $386 million.

By statute, our analysis does not end here, however, as we must consider the non-quantifiable aspects of the modified ESP, in order to view the proposed plan in the aggregate. We acknowledge that there may be costs associated with distribution related

[32] The RSR determination of $388 million is calculated by taking the $508 million RSR recovery amount and subtracting the $1 figure to be devoted towards the Capacity Case deferral, as recovery of this deferral will occur under either an ESP or an MRO. Using LJT-5 in AEP-Ohio Ex. 114, when we consider the total connected load of 48 million kWh and multiply it by $1 over the term of the modified ESP, we reach a figure of $144 million to be devoted towards the Capacity Case deferral. However, as the RSR recovery amount increases to $4/MWh in the final year of the modified ESP, we also must account for an increase in the RSR of $24 million, which is also calculated by connected load in LJT-5. Therefore, the actual amount which should be included in the test is $388 million.

riders and the gridSmart and ESRR that currently are not readily quantifiable, we believe any of these costs are significantly outweighed by the non-quantifiable benefits this modified ESP leads to. Although these riders may end up having costs associated with them, they would support reliability improvements, which will benefit all AEP-Ohio customers, as well as provide the opportunity for customers to utilize efficiency programs that can lead to lower usage, and thus lower costs. Further, these costs will be mitigated by the increase in auction percentages, including the slice-by-slice auction, as we modified to ten percent each year, which will offset some of these costs in the statutory test and moderate the impact of the modified ESP. Further, the acceleration to 60 percent of AEP-Ohio's energy only auction by June 1, 2014, not only enables customers to take advantage of market based prices, but also creates a qualitative benefit which, while not yet quantifiable, may well exceed the costs associated with the GRR and RSR.

In addition, while the RSR and the inclusion of the deferral within the RSR are the most significant cost associated with the modified ESP, but for the RSR it would be impossible for AEP-Ohio to completely participate in full energy and capacity based auctions beginning in June 1, 2015. Although the decision for AEP-Ohio to transition towards competitive market pricing is something this Commission strongly supports and the General Assembly anticipated in enacting Senate Bill 221, the fact remains that the decision to move towards competitive market pricing is voluntary under the statute and in the event this ESP is withdrawn or even replaced with an MRO, there is no doubt that AEP-Ohio would not be fully engaged in the competitive marketplace by June 1, 2015.

The most significant of the non-quantifiable benefits is the fact that in just under two and a half years, AEP-Ohio will be delivering and pricing energy at market prices, which is significantly earlier than what would otherwise occur under an MRO option. If AEP-Ohio were to apply for an MRO it is not feasible to conclude that energy would be at market prices prior to June 1, 2015, even if the Commission were to accelerate the percentages set forth under Section 4928.142, Revised Code. Thirteen years ago our general assembly approved legislation to begin paving the way for electric utilities to transition towards market-based pricing, and provide consumers with the ability to choose their electric generation supplier. While the process has not been easy, we are confident that this plan will result in the outcome the general assembly intended under both Senate Bill 3 and Senate Bill 221, and this modified ESP is the only means in which this can be accomplished in less than two and a half years. Further, while the modified ESP will lead us towards true competition in the state of Ohio, it also ensures not only that customers will have a safe harbor in the event there is any uncertainty in the competitive markets by having a constant, certain, and stable option on the table, but also that AEP-Ohio maintains its financial stability necessary to continue to provide adequate, safe, and reliable service to its customers. Accordingly, we believe these non-quantifiable benefits significantly outweigh any of the costs.

Therefore, in weighing the statutory price test which favors the modified ESP by $9.8 million, as well as the quantifiable costs and benefits associated with the modified ESP, and the non-quantifiable benefits, as we find the modified ESP, is more favorable in the aggregate than what would otherwise apply under an MRO.

IV. CONCLUSION

Upon consideration of the modified ESP application filed by the Company and the provisions of Section 4928.143(C)(1), Revised Code, the Commission finds that the modified ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, as modified by this Order, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Therefore, the Commission finds that the proposed ESP should be approved, with the modifications set forth in this Order. As modified herein, the plan provides rate stability for customers, revenue certainty for the Company, and facilitates a transition to market. To the extent that interveners have proposed modifications to AEP-Ohio's modified ESP that have not been addressed by this Opinion and Order, the Commission concludes that the requests for such modifications are denied.

AEP-Ohio is directed to file, by August 16, 2012, revised tariffs consistent with this Order, to be effective with bills rendered as of the first billing cycle in September 2012.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) OP is a public utility as defined in Section 4905.02, Revised Code, and, as such, the Company is subject to the jurisdiction of this Commission.

(2) Effective December 31, 2011, CSP was merged with and into OP consistent with the Commission's December 14, 2011 Order in the ESP 2 cases. The merger was confirmed by entry issued March 7, 2012 in Case No. 10-2376-EL-UNC.

(3) On March 30, 2012, the Company filed modified applications for an SSO in accordance with Section 4928.141, Revised Code.

(4) On April 9, 2012, a technical conference was held regarding AEP-Ohio's modified ESP applications.

(5) Notice was published and public hearings were held in Canton, Columbus, Chillicothe, and Lima where a total of 66 witnesses offered testimony.

(6) A prehearing conference on the modified ESP application was held on May 7, 2012.

(7) The following parties filed for and were granted intervention in AEP-Ohio's modified ESP 2 proceeding: IEU, Duke Retail, OEG, OHA, OCC, OPAE, Kroger, FES, Paulding, APJN, OMAEG, AEP Retail, P3, Constellation, Compete, NRDC, Sierra Club, RESA, Exelon, Grove City, AICUO, Wal-Mart, Dominion Retail, ELPC, OEC, Ormet, Enernoc, IGS, Ohio Schools, Ohio Farm Bureau Federation, Ohio Restaurant Association; Duke, DECAM, Direct, The Ohio Automobile Dealers Association, Dayton Power and Light Company, NFIB, Ohio Construction Materials Coalition, COSE, Border Energy Electric Services, Inc., UTIE; (Summit Ethanol); city of Upper Arlington, Ohio; Ohio Business Council for a Clean Economy; city of Hillsboro, Ohio; and CPV Power Development, Inc.

(8) Motions for protective orders were filed by AEP-Ohio on July 1, 2011, May 2, 2012, by OMAEG, IEU, FES, and Exelon on May 4, 2012, AEP-Ohio on May 11, 2012. The attorney examiners granted the motions for protective order in the evidentiary hearing on May 17, 2012.

(9) Additional motions for protective order were filed by Ormet on June 29, 2012, and July 9, 2012, by IEU on June 29, 2012, and by AEP-Ohio on July 5, 2012 and July 12, 2012.

(10) The evidentiary hearing on the modified ESP 2 was called on May 17, 2012, and concluded on June 15, 2012.

(11) Briefs and reply briefs were filed on June 29, 2012, and July 9, 2012, respectively.

(12) Oral arguments before the Commission were held on July 13, 2012.

(13) The proposed modified ESP, as modified pursuant to this opinion and order, including the pricing and all other terms and conditions, deferrals and future recovery of the deferrals, and quantitative and qualitative benefits, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

VI. ORDER:

It is, therefore,

ORDERED, That IBEW's and Hilliard's requests to withdraw from these proceedings are granted. It is, further,

ORDERED, That the motions for protective order as discussed herein be granted for 18 months from the date of this Order. It is, further,

ORDERED, That the Company should eliminate Rider Emergency Curtailable Services (ECS) and Rider Price Curtailable Service (PCS) from its tariff service offerings and Case Nos. 10-343-EL-ATA and 10-344-EL-ATA, closed of record and dismissed. It is, further,

ORDERED, That IEU's request to review the procedural rulings is denied. It is, further,

ORDERED, That OCC/APJN's motion to take administrative notice be denied. It is, further,

ORDERED, That OCC/APJN's motion to strike AEP-Ohio's reply brief be granted in part and denied in part. It is, further,

ORDERED, That the Company shall file proposed final tariffs consistent with this Order by August 16, 2012, subject to review and approval by the Commission. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

JJT/GNS/vrm

Entered in the Journal
AUG 08 2012

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

DISSENTING OPINION OF COMMISSIONER CHERYL L. ROBERTO

I decline to join my colleagues in finding that the quantitative advantage of $388 million dollars that an MRO would enjoy over the proposed ESP is overcome by the non-quantifiable benefit of moving to market two years and three months faster than what would have occurred under an MRO. For this reason, I do not find that the proposed modified ESP, as modified pursuant to the opinion and order, including the pricing and all other terms and conditions, deferrals and future recovery of the deferrals, and quantitative and qualitative benefits, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Because of this conclusion, it is unnecessary for me to discuss further any individual conclusion within the order or feature of the ESP.

Cheryl L. Roberto

Cheryl L. Roberto

CLR/sc

Entered in the Journal

AUG 08 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

CONCURRING OPINION OF COMMISSIONER LYNN SLABY

I agree with the conclusions of the majority. However, I write separately to express my reservations on the use of a retail stability rider (RSR). It is my opinion that generally the use of an RSR with decoupling components lacks certain benefits to consumers. In addition, a company that receives that RSR has little, if any, incentive to look for more operating efficiencies to reduce consumer costs. Consequently, these inefficiencies could lead to additional costs to consumers in the long run. Although these concerns led to my reservations in this present case, I am also fully aware that certain cases present specific circumstances that necessitate setting aside individual concerns for the greater good.

In Case No. 10-2929-EL-UNC, the Commission agreed to defer the recovery of the difference between the market price and the companies' cost of generation. This created a need to establish a mechanism to recover those costs. Although I generally disagree with the use of RSRs for recovering deferred costs, in this case I side with the majority in order to meet our mission. Our mission is to ensure all residential and business consumers access to adequate, safe and reliable utility services at a fair price, while facilitating an environment that provides competitive choices. We as a Public Utilities Commission have to balance the rights of the consumer to ensure safe and reliable service at a fair cost while also making sure that companies receive sufficient revenues to provide that service in a safe and reliable manner.

This decision will help move the company to a fully competitive market at the end of the ESP term, which has been the overall goal of the state legislature since the adoption of Senate Bill 3 in 1999. Furthermore, by creating an RSR without decoupling components, we are stabilizing the rate structure over the next three years. This provides customers a stabilized rate or the opportunity to shop for a better rate, depending on what the market presents during the term of the ESP. Overall, this decision is not only important to the State statutory goal of free and open competition in the market place, but also to the philosophy of this Commission. Therefore, in this isolated case, I find the use of an RSR to be an appropriate mechanism to allow the Company to begin to recover its deferred costs.

Lynn Slaby

LS/sc

Entered in the Journal
AUG 08 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

ENTRY ON REHEARING

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The Commission finds:

(1) On March 30, 2012, Ohio Power Company (AEP-Ohio) filed an application for a standard service offer, in the form of an electric security plan (ESP), in accordance with Section 4928.143, Revised Code.

(2) On August 8, 2012, the Commission issued its Opinion and Order, approving AEP-Ohio's proposed ESP, with certain modifications, and directed AEP-Ohio to file proposed final tariffs consistent with the Opinion and Order by August 16, 2012.

(3) Pursuant to Section 4903.10, Revised Code, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the Opinion and Order upon the Commission's journal.

(4) On September 7, 2012, AEP-Ohio, The Kroger Company (Kroger), Ormet Primary Aluminum Corporation (Ormet), Industrial Energy Users-Ohio (IEU), Retail Energy Supply Association (RESA), OMA Energy Group and the Ohio Hospital Association (OMAEG/OHA), the Ohio Energy Group (OEG), FirstEnergy Solutions Corp. (FES), The Ohio Association of School Business Officials, The Ohio School Boards Association, The Buckeye Association of School Administrators, and The Ohio Schools Council (collectively, Ohio Schools), and the Ohio Consumers' Counsel and Appalachian Peace and Justice Network (OCC/APJN) filed applications for rehearing. Memoranda contra the various applications for rehearing were filed by Duke Energy Ohio, Inc. (Duke) and Duke Energy Commercial Asset Management Inc. (DER/DECAM), FES, OCC/APJN, IEU-Ohio, OMAEG/OHA, OEG, Ohio Schools, and AEP-Ohio on September 17, 2012.

(5) By entry dated October 3, 2012, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing of the August 8, 2012, Opinion and Order. The Commission has reviewed and considered all of the arguments on rehearing. Any arguments on rehearing not specifically discussed herein have been thoroughly and

adequately considered by the Commission and are being denied. In considering the arguments raised, the Commission will address the merits of the assignments of error by subject matter as set forth below.

I. PROCEDURAL MATTERS

(6) On September 28, 2012, OCC/APJN moved to strike portions of AEP Ohio's application for rehearing filed on September 7, 2012, as well as portions of its memorandum contra filed on September 17, 2012. Specifically, OCC/APJN allege that AEP-Ohio improperly relies upon the provisions of stipulations from the AEP-Ohio Distribution Rate stipulation in Case No. 11-351-EL-SSO, et al., and the Duke ESP stipulation in Case No. 11-3549-EL-SSO, et al., OCC/APJN opine that both stipulations preclude the use of any provisions as precedent, and that the use of any stipulation provisions is not only contrary to the inherent nature of a stipulation, but also contrary to public policy.

On October 3, 2012, AEP Ohio filed a memorandum contra OCC/APJN's motion to strike. In its memorandum contra, AEP Ohio argues that OCC/APJN should be estopped from moving to strike any provisions contained within AEP-Ohio's application for rehearing, as OCC/APJN failed to allege that the references to Duke's ESP stipulation and the AEP-Ohio distribution case were improper in its memorandum contra AEP Ohio's application. In addition, AEP-Ohio notes that the Commission already rejected OCC/APJN's argument in the Opinion and Order.

The Commission finds OCC/APJN's assignment of error should be dismissed. OCC/APJN failed to raise its objections to the use of stipulation references contained within AEP-Ohio's application for rehearing in its memorandum contra to AEP-Ohio's application for rehearing, so it is unnecessary for us to address those references. Regarding the stipulation references in AEP-Ohio's memorandum contra the applications for rehearing, we find that, consistent with our Opinion and Order in this proceeding, the references to other stipulations by AEP-Ohio were limited in scope and did not create prejudicial impact on any parties, nor were the references used to in any way bind parties to positions they had in any previous

proceeding.[1] In fact, OCC/APJN referred to specific stipulation provisions from a separate proceeding in its own application for rehearing.[2] Accordingly, we find that OCC/APJN's motion to strike should be denied.

(7) In its application for rehearing, IEU contends that the Opinion and Order was unreasonable by failing to strike witness testimony that contained references to stipulations. Specifically, IEU argues that the attorney examiners improperly failed to strike testimony of two AEP Ohio witnesses and a witness for Exelon.

The Commission finds that IEU fails to raise any new arguments, and accordingly, its application for rehearing regarding references to stipulations should be denied.[3]

(8) In its application for rehearing, OCC/APJN allege that the Commission abused its discretion by denying its request to take administrative notice of the Capacity Case materials.

In its memorandum contra, FES provides that the Commission's denial of OCC/APJN's request to take administrative notice was proper. FES points out that the request for administrative notice was made after the evidentiary record was closed and post-hearing briefs were filed. FES adds that had administrative notice been taken, other parties would have been prejudiced.

In the Opinion and Order, the Commission denied OCC/APJN's request to take administrative notice, noting that administrative notice would prejudice parties and would improperly allow OCC/APJN to supplement the record in an inappropriate manner.[4] OCC/APJN fail to present any compelling arguments as to why the Commission's decision was unreasonable, therefore, we find OCC/APJN's request should be denied.

(9) On September 24, 2012, Kroger filed a reply memorandum to AEP-Ohio's memorandum contra the various applications for

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1 Opinion and Order at 10.

2 OCC/APJN Application for Rehearing (AFR) at 113-114.

3 Opinion and Order at 10.

4 *Id.* at 12-13.

rehearing. On September 25, 2012, Kroger filed a motion to withdraw its reply memorandum. Kroger's request to withdraw its reply should be granted as Rule 4901-1-35, Ohio Administrative Code (O.A.C.), does not recognize the filing of replies.

(10) On September 18, 2012, Duke Energy Ohio Inc. (Duke) filed a motion to file memorandum contra instanter to file its memorandum contra. Duke admits that it incorrectly relied on an out of date entry which directed parties to file all memoranda contra within five business days rather than a more recent entry issued April 2, 2012, which directed that memoranda contra be filed within five calendar days. No memorandum contra Duke's motion was filed.

Duke's motion to file its memorandum contra is reasonable and should be granted. The memorandum contra was filed one day late and granting the request will not prejudice any party to the proceeding or cause undue delay.

II. STATUTORY TEST

(11) FES, IEU, OCC/APJN, and OMAEG/OHA argue that the Commission improperly conducted the statutory price test by only considering the time period between June 1, 2013, and May 31, 2015. The parties contend that the Commission failed to consider the first ten months of the modified ESP. Specifically, OCC/APJN believe that the Commission has departed from its past precedent in conducting the statutory test, and that the Commission's test brought "a degree of precision that is not called for under the statute"[5] and, therefore, exceeds the scope of its authority.

AEP-Ohio responds that the Commission's decision to compare the ESP with the results that would otherwise apply under a MRO over a period when the MRO alternative could realistically be implemented was reasonable to develop an accurate prediction of costs.

The Commission notes that the General Assembly explicitly provided, in Section 4928.143(C)(1), Revised Code, that "the electric security plan so approved...is more favorable in the

[5] OCC AFR at 7.

aggregate as compared to the expected results that would otherwise apply under Section 4928.142 of the Revised Code." To properly conduct the statutory test, the Commission must, by statute, consider what the expected results would have been had AEP-Ohio proceeded under Section 4928.142, Revised Code. The Commission properly followed the plain meaning of the text contained within the statute in performing the statutory price test.

Finally, we note that OCC/APJN's claims about the Commission departing from its precedent ignore the fact that, since AEP-Ohio filed its original application in January of 2011, the proceedings have taken a different course than typical Commission precedent. After the Commission rejected AEP-Ohio's Stipulation in February 2012, the Commission entered unchartered waters. In light of the unique considerations associated with his case, we looked first at the statute, and followed it with precision.

(12) In their respective assignments of error, OMAEG/OHA, FES and IEU argue that it was improper for the Commission to use the state compensation mechanism figure of $188.88 in calculating the MRO under the statutory test, as opposed to using RPM capacity prices. IEU explains that the Commission should have used actual CBP results to identify the expected generation price under the MRO. Further, both IEU and FES state that Section 4928.142, Revised Code, provides that the price of capacity should be market-based.

AEP-Ohio responds that the Commission already addressed these arguments, and they should, therefore, be rejected.

The Commission finds that the parties fail to present any new arguments with regard to the appropriate price for capacity to use in developing the competitive benchmark price under the statutory price test. In the Opinion and Order, the Commission explicitly notes that AEP-Ohio's status as an FRR entity makes it appropriate to utilize its cost of capacity, as opposed to utilizing RPM prices.[6] Accordingly, we deny these requests for rehearing.

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[6] Opinion and Order at 74

(13) OCC/APJN and IEU argue that the Commission miscalculated the impact of the various riders when conducting the statutory test. OCC/APJN and IEU state that the Commission failed to consider the costs for the Turning Point project for the entire life of the facility. Further, IEU believes the Commission wrongfully set the pool termination rider (PTR) at zero, and that the impact of the pool termination could be significant. In addition, IEU argues that the Commission did not explain why the entire RSR amount was not included in the statutory test, nor the effect of the deferral created by the Opinion and Order in Case No. 10-2929-EL-UNC (Capacity Case).

In its memorandum contra, AEP-Ohio notes that the Commission thoroughly addressed the potential costs associated with the GRR in its Opinion and Order. AEP-Ohio adds that the Commission rationally declined to include any speculative costs that may be associated with the RSR, and adds that the Commission was correct in not including the capacity deferral figures in the statutory test.

The Commission finds that the applications for rehearing filed by IEU and OCC/APJN should be denied, as the calculations contained within the statutory test do not underestimate the costs associated with the GRR. In light of the Commission's determination that parties failed to demonstrate the need for the Turning Point Solar project, the statutory test may actually contain an overestimate cost of the GRR.[7]

Regarding IEU's other arguments, we reject the claim that the Commission failed to explain the RSR determination of $388 million. In its Opinion and Order, the Commission explained:

> The RSR determination of $388 million is calculated by taking the $508 million RSR recovery amount and subtracting the $1 figure to be devoted towards the Capacity Case deferral, as recovery of this deferral will occur under either an ESP or an MRO. Using LJT-5 in AEP-Ohio Ex. 114, when we consider the total connected load of 48 million kWh and multiply it by $1 over the term of the modified ESP, we reach

[7] See *In the Matter of the Long Term Forecast Report of Ohio Power Company and Related Matters*,. Case No. 10-501-EL-FOR, et al. Opinion and Order (January 9, 2013).

> a figure of $144 million to be devoted towards the Capacity Case deferral. However, as the RSR recovery amount increases to $4/MWh in the final year of the modified ESP, we also must account for an increase in the RSR of $24 million, which is also calculated by connected load in LJT-5. Therefore, the actual amount which should be included in the test is $388 million (Opinion and Order at 75).

IEU's incorrect assertion and attempt to misrepresent the Commission's Opinion and Order is inappropriate, and its assignment of error shall be rejected. Further, the Commission reiterates that any costs that may be associated with the deferral created by the Capacity Case are unknown at this time and dependent on actual customer shopping statistics. In any event, as AEP-Ohio points out and we explained in our Opinion and Order, costs associated with the deferral would fall on either side of the statutory test, in light of the fact that the Commission has adopted a state compensation mechanism.[8] Finally, we reject IEU's assignment of error that costs associated with the PTR should have been included in the statutory test. Not only is the record void of credible numbers associated with the costs of pool termination, but also costs associated with the PTR would only arise if AEP-Ohio's corporate separation is amended, and would be subject to subsequent Commission proceedings.[9]

(14) Ohio Schools, OMAEG/OHA, IEU, and OCC/APJN allege that the modified ESP is not more favorable, in the aggregate, than the results that would otherwise apply pursuant to Section 4928.142, Revised Code. OMAEG/OHA argue that there is no evidence that the expeditious transition to market will provide any benefits to AEP-Ohio or its customers. Ohio Schools states that exempting Ohio's schools from the RSR could be a non-quantifiable benefit that would make the modified ESP more favorable under the statutory test. IEU believes that the benefits associated with the energy auctions and move to a competitive bid process do not outweigh the costs associated with the ESP and are unsupported by the record. IEU alleges

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8 Opinion and Order at 75

9 *Id.* at 49

that the Commission failed to explain how the qualitative benefits outweigh the costs associated with the ESP.

OCC/APJN acknowledge that qualitative benefits set forth by the Commission may have merit, but that a MRO provides similar, and possibly greater non-quantifiable benefits. Specifically, OCC/APJN explain that the ESP's expedient transition to market may be a qualitative benefit, but assert than under a MRO, energy may also be supplied through the market in less than two and a half years, and a MRO provides a safe harbor for customers and financial security for an EDU. OCC/APJN state that Section 4928.142(D), Revised Code, permits the Commission to accelerate the blending requirements associated with a MRO to 100 percent after the second year. Further, OCC/APJN provide that the Commission has the ability to adjust the blending of market prices in order to mitigate any changes in an EDU's standard service offer (SSO). In light of these considerations, OCC/APJN contend that the modified ESP is not more favorable in the aggregate than the results that would otherwise apply under a MRO.

Similarly, FES notes that the qualitative benefits of the modified ESP do not overcome the $386 million difference between a MRO and the modified ESP. FES reasons that AEP-Ohio may participate in full auctions immediately, and that AEP-Ohio must establish competitive auctions unless it can provide that a modified ESP is more favorable than an MRO, negating the transition to market in two and a half years as a benefit.

In its memorandum contra, AEP-Ohio asserts that the Commission correctly concluded that the increased energy auctions would offset any cost impacts associated with the modified ESP, and that the qualitative benefits of the accelerated pace towards a competitive market have a significant value. AEP-Ohio notes that the statute affords the Commission significant discretion, and the Commission appropriately weighed the quantitative costs with the qualitative benefits.

The Commission affirms that under the statutory test, the modified ESP is more favorable, in the aggregate, than the

results that would otherwise apply under a MRO. As we provided in our Opinion and Order, the fact that AEP-Ohio will be delivering and pricing energy at market prices in two and a half years is an invaluable benefit of this ESP, and it will create a robust marketplace for consumers. Even IEU concedes that the objective of accelerating the competitive bid process is a benefit to the public.[10] Our determination that the qualitative benefits outweigh the costs associated with the modified ESP was driven by the fact that customers will be able to benefit from market prices immediately through the enhancement of the competitive marketplace.

Further, customers still maintain protection from any unforeseen risks that may arise from a developing competitive market by having a reasonably priced SSO plan that caps rate increases at 12 percent. In approving the modified ESP, we struck a balance that guarantees reasonably priced electricity while allowing the markets to develop and customers to see future opportunities to lower their electric costs. The General Assembly has vested the Commission with discretion to make these types of decisions by allowing us to view the entire picture, in the aggregate, as to what the effects of the modified ESP would be, going beyond just the dollars and cents aspect of it. While parties may disagree with the Commission's policy decisions, there is no doubt that we have discretion to arrive at our conclusion that the modified ESP is more favorable than the results that would otherwise apply.[11] By utilizing regulatory flexibility, we are allowing the competitive markets to continue to emerge and develop, while maintaining our commitment of ensuring that there are stable prices for customers, as is consistent with our state policy objectives set forth in Section 4928.02, Revised Code. Further, we note that while IEU predicts that the increase in slice-of-system energy auctions and the acceleration of 60 percent AEP-Ohio's energy auction to June 1, 2012, would increase costs associated with the modified ESP, this prediction is conclusory in nature, and IEU fails to develop any arguments based on the record to support this presumption.

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10 Oral Argument Tr. at 46

11 Counsel for OCC and IEU have acknowledged that the Commission has broad discretion in conducting the statutory test. See Oral Argument Transcript at 117, 118. OMAEG/OHA affirm this as well in its AFR at pg. 9

In addition, we find OCC/APJN's assertions that a MRO would provide the same qualitative benefits as the modified ESP to be without merit. OCC/APJN correctly point out that in the Duke ESP the Commission determined that, under a MRO, the Commission may alter the blending proportions beginning in the second year of a MRO, pursuant to Section 4928.142, Revised Code. However, OCC/APJN ignore the fact that modifications may only be made to "mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price... ." Therefore, it is entirely speculative for OCC/APJN to argue that a MRO option would allow for AEP-Ohio to engage in competitive market pricing in less than two and a half years, as it assumes that there will be an abrupt or significant change in AEP-Ohio's SSO price. The plain meaning of the text within Section 4928.142(D), Revised Code, indicates that the default provisions contained within the statute apply, absent an exigent scenario, and we find it would be foolish for the Commission to turn away a guarantee of market-based pricing for AEP-Ohio customers within two and a half years on the off chance there are abrupt or significant changes in the market. Earlier in this proceeding, OCC advocated that AEP-Ohio must carefully follow the blending provision contained within Section 4928.142(D), Revised Code, and utilize the default provisions in the statute.[12] Accordingly, we reject OCC/APJN's assignment of error. Finally, we reject Ohio Schools' assignment of error, as the Commission previously addressed their as to why the schools should not be exempt from the RSR.[13]

(15) OMAEG/OHA argue the Commission conducted the statutory test by relying on extra-record evidence, and that the analysis the Commission used in conducting the statutory price test is not verifiable or supported by any party.

In its memorandum contra, AEP-Ohio responds that the Commission only used record evidence to arrive at its conclusion, and the fact that the Commission reached a different result than what any party advocated is not unusual or improper.

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12 OCC Ex. 114 at 6-7, Initial Brief at 10-11

13 Opinion and Order at 37

The Commission finds OMAEG/OHA's argument to be without merit. In conducting the statutory test, the Commission unequivocally described, in extensive record based detail, its basis in calculating the quantitative aspects of the statutory test.[14] Specifically, we began with the statutory test created by AEP-Ohio witness Thomas and made modifications to the foundation of the test.[15] While the results of the test may have been different than what any party advocated, all parties, including OMAEG and OHA, had the opportunity to cross-examine Ms. Thomas on her methodology and inputs in conducting the statutory test.[16] As this test was admitted in the record, and our corrections to the test were explained in extensive detail within the Opinion and Order describing the flow-through effect of our modifications, we find OMAEG/OHA's assignment of error should be rejected.

(16) In its assignment of error, AEP-Ohio contends that the Commission underestimated the benefits of the modified ESP in the statutory test. Specifically, AEP-Ohio argues the $386 million figure the Commission determined was the quantifiable difference between an MRO and the modified ESP considered the entire term of the ESP, after the Commission concluded that it is appropriate to consider only the period from June 2013 through May 2015. AEP-Ohio states that when looking at quantifiable items during just the two year period, the modified ESP becomes less favorable by only $266 million. AEP-Ohio concludes that the Commission underestimated the value of the modified ESP.

In its memorandum contra, IEU, OCC/APJN, OMAEG/OHA, and FES state that AEP-Ohio underestimates the cost disadvantage of the modified ESP. The parties explain that even if the Commission adopted AEP-Ohio's suggestion, any adjusted dollar figures would still not overcome the quantitative disadvantage of the modified ESP

The Commission finds that AEP-Ohio's assignment of error should be rejected. In adopting AEP-Ohio's methodology of conducting the statutory test, the Commission evaluated three

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14 *Id.* at 73-75

15 AEP-Ohio Ex. 114

16 Tr. at 1260-1342

parts: the statutory price test, other quantifiable considerations, and non-quantifiable factors. The two year time frame pertains only to the statutory price test, which required the Commission to determine that the ESP, as modified, is more favorable than results that would otherwise apply. In looking at just the pricing component, the Commission utilized a two year window in order to determine, with precision, what the price would be when the modified ESP was compared with the results that would otherwise apply. In our next step in conducting the statutory test, the Commission looked at components of the modified ESP that were quantifiable in nature. We evaluated these components from September 2012 through the end of the term of the modified ESP, because, as indicated in the Opinion and Order, these are costs that customers will pay regardless of when an auction would be established. The Commission was not inconsistent when it considered the statutory price test under a two year window but looked at quantifiable costs over the entire term of the ESP, because, pursuant to Section 4928.143(C)(1), Revised Code, we are to compare the modified ESP with results that would otherwise apply based on (a) its pricing, (b) other terms and conditions, including deferrals and future recovery of deferrals, and (c) it must be viewed, in the aggregate. This is consistent with how AEP-Ohio presented the statutory test in the record, and that is how the Commission, in correcting the errors made by AEP-Ohio, followed the statute with precision to determine that AEP-Ohio sustained its burden in indicating that the modified ESP was more favorable than any results that could otherwise apply.[17] Accordingly, AEP-Ohio's assignment of error should be rejected.

III. RETAIL STABILITY RIDER

(17) In its assignment of error, OCC/APJN argue the RSR is not justified by Section 4928.143(B)(2)(d), Revised Code, as it does not provide stability and certainty for retail electric service. Specifically, OCC/APJN believe the Commission failed to determine which of the six categories contained within Section 4928.143(B)(2)(d), Revised Code, it relied upon in approving the RSR. Similarly, Ohio Schools, IEU, and FES assert that

[17] See Opinion and Order at 73-77.

there is no statutory basis for the RSR within Section 4928.143(B)(2)(d), Revised Code.

In its memorandum contra, AEP-Ohio provides that the RSR is clearly justified by Section 4928.143(B)(2)(d), Revised Code. AEP-Ohio points out that the statute has three distinct inquiries. Regarding the first query, AEP-Ohio explains that the RSR is clearly a charge as specified under the statute. In discussing the second query, AEP-Ohio states that the RSR is not only related to limitations on customer shopping for retail electric generation service, but also is related to bypassibility, default service, and amortization periods and accounting or deferrals. However, AEP-Ohio also requests clarification from the Commission on which items the Commission relied upon in reaching its conclusion. Finally, AEP-Ohio argues the Commission used extensive record-based findings to support its finding that the RSR provides stability and certainty regarding retail electric service.

In order to clarify the record in this proceeding, the Commission finds that OCC/APJN's application for rehearing should be granted. In approving the RSR pursuant to Section 4928.143(B)(2)(d), Revised Code, the Commission found that, the RSR, as modified, was reasonable. First, as OCC/APJN admits in its application for rehearing,[18] the RSR is indeed a charge, meeting the first component of the statute. Next, the RSR charge clearly falls within the default service category, as set forth in Section 4928.143(B)(2)(d), Revised Code. The RSR, as we specified in our Opinion and Order, freezes non-fuel generation rates throughout the term of the ESP,[19] allowing all standard service offer customers to have rate certainty throughout the term of the ESP that would not have occurred absent the RSR. As a SSO is the default service plan for AEP-Ohio customers who choose not to shop, the RSR meets the second inquiry of the statute as it provides a charge related to default service. While several parties analyze other sections the RSR charge may or may not be classified in, these issues do not need to be addressed as the RSR clearly is a charge related to default service.

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18 See OCC/APJN AFR pg. 36-38

19 Opinion and Order at 31

Finally, as we discussed in extensive detail in our Opinion and Order, the RSR promotes stable retail electric service prices by stabilizing base generation costs at their current rates, ensuring customers have certain and fixed rates going forward.[20] Therefore, the RSR, as a charge for default service to ensure customer stability and certainty, is consistent with Section 4928.143(B)(2)(d), Revised Code.

In addition, we find IEU's argument that the Commission failed to provide any analysis in support of the RSR to be erroneous.[21] The Commission devoted four pages of its Opinion and Order to examining the RSR in determining its compliance with the statute. In fact, IEU actually acknowledges that the Opinion and Order made multiple justifications for the RSR,[22] and devoted six pages of its application for rehearing to the Commission's justification of the RSR. The RSR is consistent with the text contained within Section 4928.143(B)(2)(d), Revised Code, and its rationale was justified both in this entry on rehearing and in the Commission's Opinion and Order.[23] Accordingly, all other assignments of error pertaining to statutory authority for the creation of the RSR are denied.

(18) Several parties contend that the inclusion of the Capacity Case deferral in the RSR is impermissible by statute. OCC/APJN, OMAEG/OHA, and OEG believe that the deferral contained within the RSR is not lawful under Section 4928.144, Revised Code, as it does not constitute a just and reasonable phase-in. Further, OMAEG/OHA state that a deferral is not authorized as a wholesale charge under the Commission's regulatory ratemaking authority pursuant to Section 4909.15, Revised Code, as the Commission did not comply with ratemaking requirements prior to approval of the capacity charge.

In its memorandum contra, AEP-Ohio responds that the Commission properly invoked Section 4928.144, Revised Code, in implementing a phase-in recovery. AEP-Ohio points out that because the RSR is justified under Section 4928.143,

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[20] *Id.* at 31-32.

[21] IEU AFR at 38.

[22] *Id.* at 41

[23] See Opinion and Order at 31-34.

Revised Code, the deferral recovery mechanism established within the RSR is clearly permissible pursuant to Section 4928.144, Revised Code.

The Commission affirms its decision that the RSR deferral is justified. In the Capacity Case, the Commission authorized that, pursuant to Section 4909.15, Revised Code, AEP-Ohio shall modify its accounting procedures to defer the difference between the state compensation mechanism (SCM) and market prices for capacity, which, as we reiterated in the Capacity Entry on Rehearing, is reasonable and lawful. Further, Section 4928.143(B)(2)(d), Revised Code, allows for the establishment of terms, conditions, or charges relating to limitations on customer shopping for retail generation service, as well as accounting or deferrals, so long as they would have the effect of stabilizing or providing certainty regarding retail electric service. Therefore, the inclusion of the deferral, which is justified by Section 4909.15, Revised Code, within the RSR is permissible by Section 4928.143, Revised Code, as it has the effect of providing certainty for retail electric service by allowing CRES suppliers to purchase capacity at market prices while allowing AEP-Ohio to continue to offer reasonably priced electric service to customers who choose not to shop.

(19) Similarly, in their assignments of error, OEG and Ohio Schools argue that the Commission does not have authority to allow AEP-Ohio to recover wholesale costs associated with the SCM from retail customers through the RSR, thus requiring that the $1/MWh of the RSR that is earmarked towards the difference in capacity costs should be eliminated. Likewise, OMAEG/OHA opine that because wholesale capacity costs are being recovered from retail customers, there is a conflict between the Opinion and Order and the Capacity Case order.

AEP-Ohio responds that given its unique FRR status, the wholesale provision of capacity service is necessary for customers to be able to shop throughout the term of the ESP. AEP-Ohio explains that the impact of wholesale revenues on retail services offered by CRES suppliers is relevant under the ESP statute because it ensures not only that customers have the option to shop, but also it establishes reasonable SSO rates for those who choose not to shop. AEP-Ohio opines that regardless of how the capacity costs are classified, all CRES

suppliers ultimately rely on AEP-Ohio's capacity resources, thereby directly affecting the retail competitive market.

FES also disagrees with the characterization of the RSR as a wholesale rate. FES believes that the deferral is a charge that provides revenue in support of all of AEP-Ohio's services, including distribution, transmission, and competitive generation. Therefore, FES states that because the deferral is made available to AEP-Ohio for all of AEP-Ohio's services, it is properly allocated to all of AEP-Ohio's customers. FES explains that as a result of AEP-Ohio's election to become a FRR entity, AEP-Ohio must bear the competitive obligation to provide the capacity to its entire load.

The Commission finds OEG and OMAEG/OHA's assignments of error to be without merit. Under Section 4928.143(B)(2)(d), Revised Code, the Commission is authorized to establish charges that would have the effect of stabilizing retail electric service. In its application for rehearing, OEG fails to cite to any provision that precludes the Commission from recovering wholesale costs through a retail charge. To the contrary, the Commission has explicit statutory authority to include these costs in the RSR because, although they are wholesale, they were established to allow CRES providers access to capacity at market prices in order to allow retail electric service providers the ability to provide competitive offers to AEP-Ohio customers. The fact that these costs not only open the door to a robust competitive retail electric market, but also stabilize retail electric service by lowering market prices and allowing AEP-Ohio to maintain a reasonable SSO price is clearly permissible under Section 4928.143(B)(2)(d), Revised Code. Accordingly, OEG and OMAEG/OHA's assignments of error should be rejected, as they narrow the plain meaning of the statute.

(20) In its application for rehearing, OCC/APJN opine that the RSR unreasonably violates cost causation principles. Specifically, OCC/APJN assert that retail customers are subsidizing CRES providers and non-shopping customers are being charged for a service they are not receiving. OCC/APJN note that Section 4928.02(H), Revised Code, prohibits anticompetitive subsidies from noncompetitive retail electric service to competitive retail electric service.

FES responds that CRES providers are not the cost causers, but rather, AEP-Ohio is as a result of its FRR status. FES explains that AEP-Ohio bears the obligation to provide capacity to its entire load, and that capacity costs would be incurred regardless of whether there were any CRES providers.

AEP-Ohio rejects OCC/APJN's argument that the RSR creates a cross-subsidy, as the Commission explicitly found in its Opinion and Order that all customers benefit from RPM pricing and the other features the RSR contains. By its very nature, AEP-Ohio asserts, the RSR cannot cause a cross-subsidy because all customers ultimately benefit from the RSR. AEP-Ohio also provides that the RSR does not violate Section 4928.02(H), Revised Code, because it is not a distribution or transmission rate recovering generation-related costs, and points out that all Ohio EDUs have generation-related SSO charges.

The Commission finds OCC/APJN's argument to be without merit. The RSR is not discriminatory in any manner, as it is permissible pursuant to Section 4928.143(B)(2)(d), Revised Code, and provides benefits to all customers in AEP-Ohio's territory, regardless of whether customers are shopping or non-shopping customers. Further, the Commission previously rejected such arguments within in its Opinion and Order, and accordingly, we affirm our decision.[24]

(21) Also in its application for rehearing, OCC/APJN raise the argument that the RAA does not authorize a state compensation mechanism in which non-shopping customers are responsible for compensating AEP-Ohio for its FRR obligations. This, OCC/APJN state, causes unduly preferential and discriminatory pricing because it forces non-shopping customers to pay twice, as they already have capacity charges built into their rates.

AEP-Ohio disagrees with OCC/APJN's contention, explaining that the statute explicitly allows for the creation of stability charges pursuant to Section 4928.143(B)(2)(d), Revised Code, and the fact that all customers benefit from the RSR makes OCC/APJN's assertion incorrect. FES notes that revenue

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24 *Id.* at 37.

included with the deferral cannot be considered a double-charge because it supports all of AEP-Ohio's services, and thus is properly allocated to all of AEP-Ohio's customers.

The Commission finds that OCC/APJN's arguments should be rejected. Both AEP-Ohio and FES agree that the RSR should be collected as a non-bypassable rider, and we agree. As set forth in our Opinion and Order, the RSR benefits all of AEP-Ohio's customers, both shopping and non-shopping in that it allows for the competitive market to continue to develop and expand while allowing AEP-Ohio to maintain a competitive SSO offer for its non shopping customers.[25] Accordingly, as we previously rejected OCC/APJN's arguments, we affirm our decision.

(22) IEU argues that the RSR is improper because it allows for above-market pricing, which the Commission lacks statutory jurisdiction to establish. IEU contends that the RSR's improper collection of above-market prices for capacity violates Section 4928.02, Revised Code, which provides that state policy favors market-based pricing.

AEP-Ohio states that the Commission appropriately addressed the SCM within the Capacity Order, noting that IEU's arguments for market pricing were properly ignored in the Commission's Opinion and Order.

The Commission finds IEU's arguments to be without merit. In its Entry on Rehearing in the Capacity proceedings, the Commission rejected these arguments, explaining that one of the key considerations was the impact of AEP-Ohio's capacity charges on CRES providers and the competitive retail markets. Further, the intent of the Commission in adopting its capacity decision was to further develop the competitive marketplace by fostering an environment that promotes retail competition, consistent with Section 4928.02, Revised Code. Accordingly, as IEU's argument has already been dismissed in the Capacity Case, we find it to be without merit.

(23) Ohio Schools, IEU, and FES allege that the RSR wrongfully allows for AEP-Ohio to collect transition revenue by recovering

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[25] *Id.*

stranded costs. Ohio Schools opine that the approval of cost-based capacity charges is irrelevant because the Commission's decision in the Capacity Case was unlawful. Further, Ohio Schools note that the non-deferral aspects of the RSR still amount to transition charges. IEU adds that the Commission is improperly ignoring its statutory obligation by allowing AEP-Ohio to collect transition revenue, and evade the Commission-approved settlement in which AEP-Ohio was obligated to forgo the collection of any lost revenues. FES and Ohio Schools believe that it is meaningless that AEP-Ohio's status as an FRR entity occurred after the ETP proceedings.

AEP-Ohio believes these arguments should be rejected, as the Commission explicitly dismissed the arguments in the Opinion and Order, as well as in the Capacity Case.

The Commission previously rejected these arguments in its Opinion and Order, noting that AEP-Ohio did not seek transition revenues, and that costs associated with the RSR are permissible in light of AEP-Ohio's status as an FRR entity.[26] We also rejected IEU's arguments again in the Entry on Rehearing in the Capacity Case, finding that AEP-Ohio's capacity costs do not fall within the category of transition costs.[27] As the Commission previously dismissed these arguments, we find that all assignments of error alleging that the RSR allows for the collection of transition revenue should be rejected.

(24) In their respective applications for rehearing, OCC/APJN, OMAEG/OHA and FES argue that even if the RSR is justified, the Commission erred by overestimating the value of the RSR to $508 million. OCC/APJN and OEG believe that the Commission improperly used assumed capacity revenues based on RPM prices, even though AEP-Ohio is authorized to collect capacity revenues at the SCM price. OCC/APJN assert that the current construct forces customers to pay twice for capacity, and if the Commission calculated the RSR based on the $188.88/MW-day figure, it would determine that the RSR is unnecessary. Also, OCC/APJN state that the RSR should have taken into account additional revenue AEP-Ohio will receive

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26 *Id.* at 32.

27 Capacity Case EOR at 56-57

for capacity associated with the energy auctions that will occur during the term of the ESP. OCC/APJN allege that collecting the capacity rate from SSO customers in the energy-only auctions will create capacity revenues that should be offset from the $508 million. In addition, OCC/APJN argue that the Commission applied too low of a credit for the shopped load without providing any rationale in support of its adoption. Ormet argues the proper credit for shopped load was $6.45/MWh, making the RSR overstated by approximately $121 million.

In response, AEP-Ohio points out that it will not book, as revenue, the entire $188.88/MW-day capacity cost. Rather, as established in the Capacity Case, AEP-Ohio explains that the regulatory asset deferral is tied to incurred costs that are not booked as revenues throughout the term of the deferral. AEP-Ohio provides that any revenue collected from CRES providers is limited only to RPM prices and the inclusion of the deferral does not alter the revenue AEP-Ohio receives. Further, AEP-Ohio notes that the Commission's modification of the RSR from a ROE-based revenue decoupling mechanism to a revenue target approach further warrants the use of RPM prices when calculating the RSR in light of the increased risk associated with a fixed RSR. AEP-Ohio also states that the inclusion of capacity revenues associated with the January 2015 energy auction should no longer be applicable, as the Commission does not incorporate any reductions in nonfuel generation revenue associated with the 2014/2015 delivery year. Finally, AEP-Ohio notes that the $3/MWh energy credit was reasonable and supported by the record, and Ormet's request to make an adjustment is speculative and should be rejected. Specifically, AEP-Ohio states that Ormet ignores pool termination concepts and the fact that energy sales margins attributed to transferred plants would become unavailable after pool termination.

The Commission finds that the applications for rehearing should be denied. Claims that the RSR overcompensates AEP-Ohio fail to consider the actual construct of the $188.88/MW-day capacity price, as the deferral established in the Capacity Case will not be booked as a revenue during the deferral

period.[28] The revenue AEP-Ohio will collect for capacity is limited only to the RPM price of capacity. Therefore, all assertions that parties make about AEP-Ohio receiving sufficient revenue from the capacity deferral alone are incorrect and should be rejected. Further, we note that OCC/APJN again mischaracterize the function of the RSR, because, as we have emphasized both in the Opinion and Order and again in this Entry, the RSR allows for stability and certainty for AEP-Ohio's non-shopping customer prices, while the deferral relates to capacity, thereby making it inappropriate to claim customers are being forced to pay twice for capacity.

Finally, we find that OCC/APJN and Ormet's applications for rehearing regarding the $3/MWh energy credit should be denied. In approving the RSR, we determined that off-system sales for AEP-Ohio will be lower than anticipated based on our estimation that AEP-Ohio's shopping statistics were overestimated. In light of the likelihood that AEP-Ohio will not see significant off-system sales as OCC/APJN and Ormet allege, we found it was unreasonable to raise the energy credit. Further, we find AEP-Ohio presented the most credible testimony about the energy credit, as it took into consideration the impacts pool termination would have on energy sales margins.[29] On brief, Ormet introduces extra-record evidence that not only should be rejected, but also even if considered fails to rebut the reasonableness of AEP-Ohio's testimony. Therefore, we affirm our determination that the energy credit calculation of $3/MWh is reasonable.

(25) Also in its application for rehearing, OEG argues that, in the alternative, if the Commission does not use the $188.88/MW-day capacity price in the RSR calculation, then the Commission should include the amount of the capacity deferral for the purposes of enforcing the 12 percent earnings cap. OEG points out that this appears to be consistent with what the Commission intended in its Opinion and Order, and is consistent with Commission precedent. OEG also suggests that the Commission clarify that the earnings cap was an ESP provision adopted pursuant to Section 4928.143(B)(2)(d), Revised Code.

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[28] *In re AEP-Ohio*, Case No. 10-2929-EL-UNC, (Opinion and Order) July 2, 2012.

[29] See AEP-Ohio Ex. 116 at 13, Ex. WAA-6.

AEP-Ohio responds by stating that it is not opposed to including the deferral earnings as deferred capacity revenue when enforcing the 12 percent earnings cap, as it is consistent with the Commission's prior decision regarding AEP-Ohio's fuel deferrals under AEP-Ohio's ESP I.[30]

The Commission finds that OEG's application for rehearing correctly indicated that it was the Commission's intent in its Opinion and Order to include the deferred capacity revenue in AEP-Ohio's 12 percent earnings cap. We believe the inclusion of the deferred capacity revenue is important to ensure AEP-Ohio does not reap a disproportionate benefit as a result of the modified ESP.[31] Therefore, the Commission clarifies that, in the 12 percent SEET threshold established within the Opinion and Order, the complete regulatory accounting of the threshold should include the entire $188.88/MW-day capacity price as current earnings, not just the RPM component, as well as the $3.50 and $4.00 per MWh RSR. The $1.00/MWh of the RSR charge that is to be devoted towards the capacity deferral shall be off-set with an amortization expense of $1.00/MWh. However, we reject OEG's request to include the 12 percent threshold as a condition to the RSR, as the Commission can and will adequately analyze AEP-Ohio's earnings consistent with Section 4928.143(F), Revised Code, without creating an unnecessary regulatory burden, as reiterated in our SEET analysis below. Accordingly, OEG's application for rehearing should be granted in part and denied in part.

(26) In its application for rehearing, OCC/APJN assert that the Commission should not have found that AEP-Ohio may file an application to adjust the RSR in the event that there is a significant reduction in its non-shopping load. OCC/APJN argue that this unreasonably transfers the risks associated with economic downturns from AEP-Ohio and onto customers.

The Commission finds OCC/APJN's application for rehearing should be denied. The Commission has the discretion to take appropriate action, if necessary, in the event there are significant changes in the non-shopping load for reasons beyond AEP-Ohio's control. Further, we note that in the event

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30 *In re AEP-Ohio*, Case No. 10-1261-EL-UNC, (Opinion and Order) January 11, 2011.

31 Opinion and Order at 37.

there are significant changes in the non-shopping load, any adjustments to the RSR are still subject to an application process where parties will be able to appropriately advocate for or against any adjustments.

(27) In addition, OCC/APJN argue that the Commission violated Section 4903.09, Revised Code, by failing to allocate the RSR by the percentage of customers shopping in each class. OCC/APJN believe that cost causation principles dictate that the RSR should be allocated among the different customer classes based on their share of total switched load. To the contrary, Kroger asserts that the Commission's Opinion and Order unreasonably requires demand-billed customers to pay for RSR costs through an energy charge, despite the fact that the costs are capacity based but allocated on the basis of demand. Kroger requests that the Commission eliminate the RSR's improper energy charge to demand-billed customers on rehearing.

In its memorandum contra, AEP-Ohio states that OCC/APJN are misguided in their approach, as shopping customers are not the only cost-causers of the RSR, because all customers have the right to shop at any time. If the Commission were to accept rehearing on this area, AEP-Ohio argues that the cost of the RSR would be dramatically shifted from residential customers to industrial and commercial customers. AEP-Ohio also states that Kroger's proposal would unduly burden smaller load factor customers in commercial and industrial classes. AEP-Ohio reiterates that the RSR benefits for all customer classes.

The Commission rejects arguments raised by OCC/APJN and Kroger. As AEP-Ohio correctly points out, and as we emphasized in our Opinion and Order, all customers, residential, commercial, and industrial, and both shopping and non-shopping, benefit from the RSR, as it encourages competitive offers from CRES providers while maintaining an attractive SSO price in the event market prices rise. Were the Commission to adopt suggestions by either party, these benefits would be diminished, as industrial and commercial customers would be harmed by a reallocation of the RSR if we took up OCC/APJN's application, and smaller commercial and industrial customers would face an undue burden of the RSR were we to adopt Kroger's recommendation. We believe the

Opinion and Order struck the appropriate balance through recovery per kWh by customer class, as it spreads costs associated with the RSR charge among all customers, as all customer ultimately benefit from its design.

(28) Furthermore, IEU, FES, and OCC/APJN contend that the fact that the RSR revenues will continue to be collected after corporate separation and flow to AEP-Ohio's generation affiliate violates Section 4928.02(H), Revised Code. OCC/APJN opine that when the RSR is remitted to AEP-Ohio's affiliate, AEP-Ohio will be acting to subsidize its unregulated generation affiliate. IEU states that the Opinion and Order will provide an unfair competitive advantage to AEP-Ohio's generation affiliate, evading corporate separation requirements.

AEP-Ohio responds that, as it is the captive seller of capacity to support its load consistent with its FRR obligations, it must continue to fulfill its FRR obligations even after corporate separation is completed. Due of the nature of its FRR status, AEP-Ohio points out that it must pass through generation related revenues to its subsidiary in order to provide capacity and energy for its SSO load. While AEP-Ohio acknowledges that it will be legally separated from its affiliate, the fact that it remains obligated to provide SSO service for the term of the ESP and the SSO agreement between AEP-Ohio and its affiliate is subject to FERC approval shows the cross-subsidy allegations are improper.

The Commission rejects the arguments raised by IEU, FES, and OCC/APJN, and finds their applications for rehearing should be denied. As previously addressed in the Commission's Opinion and Order, AEP-Ohio, as an FRR entity, must continue to fulfill its obligations by providing adequate capacity to its entire load. Therefore, in order for AEP-Ohio, and the newly created generation affiliate to continue to provide capacity consistent with its FRR obligations, we maintain our position that AEP-Ohio is entitled to its actual cost of capacity, which will in part, be collected through the RSR in order for AEP-Ohio to begin paying off its capacity deferral. As we previously established, parties cannot claim that AEP-Ohio's

generation affiliate is receiving an improper subsidy when in fact, it is only receiving its actual cost of service.[32]

(29) In addition, Ormet and Ohio Schools renew their request for exemptions from the RSR in their applications for rehearing.

In its memorandum contra, AEP-Ohio asserts that Ormet and Ohio Schools second-guess the Commission's discretion and expertise, noting that the Commission already dismissed such requests in its Opinion and Order.

Again, the Commission rejects arguments raised by Ormet and Ohio Schools, as both have previously been rejected with ample justification in the Opinion and Order.[33]

(30) In its application for rehearing, AEP-Ohio opines that it was unreasonable for the Commission to use nine percent as a starting point in determining the RSR revenue target. AEP-Ohio argues that nine percent ROE is unreasonably low, as evidenced by the recently approved ROEs of 10 and 10.3 percent, respectively, in AEP-Ohio's distribution rate case. AEP-Ohio also points to the recent Capacity Case decision in which the Commission found it appropriate to establish a ROE of 11.15 percent. AEP-Ohio states that the witness testimony the Commission relied upon in reaching its conclusion did not reflect any consideration of AEP-Ohio's actual cost of equity.

In its memorandum contra, IEU explains that AEP-Ohio has failed to present anything new and its request should therefore be rejected. FES argues that AEP-Ohio's request is meaningless, as Ohio law requires AEP-Ohio's generation service to be independent within the competitive marketplace. OCC/APJN state that the use of a nine percent ROE is not unreasonable, and AEP-Ohio cannot rely on the Capacity Case as precedent because it previously asserted that the state compensation mechanism does not apply to SSO service or the capacity auctions. OCC/APJN also argue that AEP-Ohio's reliance on stipulated cases is improper.

The Commission finds that AEP-Ohio has failed to present any additional arguments for the Commission to consider. IEU

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32 *Id.* at 60

33 *Id.* at 37.

correctly points out that AEP-Ohio previously made these arguments both in the record and on brief. In its Opinion and Order, the Commission determined that there was compelling evidence in regards to an appropriate ROE, and the Commission adopted its target of nine percent based on such testimony.[34] Accordingly, as we provided sufficient justification for our establishment of a nine percent ROE to establish AEP-Ohio's revenue target, we find AEP-Ohio's arguments to be without merit, and its application for rehearing should be denied.

(31) In its assignment of error, AEP-Ohio requests that the Commission clarify that all future recovery of the deferral refers only to the post-ESP deferral balance process. AEP-Ohio also seeks a clarification that the remaining deferral balance that is not collected through the RSR during the term of the ESP will be collected over the three years following the ESP term.

OMAEG/OHA responds that at a minimum, the Commission should continue to make the determinations on cost recovery when more information on the delta is available. OCC/APJN also notes that any clarification is unnecessary because the Commission unreasonably found that deferrals could be collected from both shopping and non-shopping customers.

As the Commission emphasized in its Opinion and Order, the remainder of the deferral will be reviewed by the Commission throughout the term of this ESP, and no determinations on any future recovery will be made until AEP-Ohio provides its actual shopping statistics.[35] Accordingly, as the Commission will continue to monitor the deferral process, and as set forth in the Opinion and Order, we will review the remaining balance of the deferral at the conclusion of the modified ESP, we find that AEP-Ohio's application for rehearing has no merit and should be denied.

(32) In addition, AEP-Ohio requests that the Commission establish a remedy in the event the Ohio Supreme Court overturns the RSR. Specifically, AEP-Ohio argues that it would be subject to increased risk without such a backstop, and proposes a

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[34] *Id.* at 33.

[35] *Id.* at 36.

provision that CRES providers would automatically be responsible for the entire $188.88/MW-day capacity charge if either the capacity deferral or deferral recovery aspect of the RSR is reversed or vacated on appeal.

Ohio Schools, DER/DECAM, and OMAEG/OHA argue that AEP-Ohio's request is an unlawful request for rehearing of the Capacity Case, as the level of capacity charges was not determined in this proceeding on the modified ESP. OMAEG/OHA and Ohio Schools also point out that the creation of a backstop would cause instability and uncertainty, as CRES providers paying the delta between RPM and the cost-based rate may pass costs on to customers. IEU asserts that the mechanism, if approved, would result in an unlawful retroactive rate increase.

The Commission agrees with Ohio Schools, DER/DECAM, OMAEG/OHA, and IEU, and finds that AEP-Ohio's request for a backstop in the event the Commission's deferral mechanism is overturned to be an inappropriate request for rehearing that should have been raised in the Capacity Case. Therefore, AEP-Ohio's application for rehearing should be denied.

IV. FUEL ADJUSTMENT CLAUSE

(33) AEP-Ohio asserts that the Commission's failure to establish a final reconciliation and true-up for the fuel adjustment clause (FAC) was unreasonable. AEP-Ohio notes that the Opinion and Order specifically directed reconciliation and true-up for the enhanced service reliability rider (ESRR), and other riders that will expire prior to or in conjunction with the end of the ESP term. Regarding the FAC, AEP-Ohio contends the Commission failed to account for reconciliation and true-up when the AEP-Ohio's SSO load is served through the auction process. AEP-Ohio reasons that the Commission is clearly vested with the authority to direct reconciliation of the rider and has done so in other proceedings.[36]

FES contends that the Opinion and Order unreasonably maintains separate FAC rates for Ohio Power Company (OP)

[36] Case No. 11-3549-EL-SSO, Duke Energy Ohio Inc., Opinion and Order at 32 (November 22, 2011).

and Columbus Southern Power Company (CSP) rate zones. FES argues that AEP-Ohio has merged and there is no basis to continue separate FAC rates. Based on the testimony of FES witness Lesser and AEP-Ohio witness Roush, FES states that OP customers will pay artificially reduced fuel costs, discouraging competition, and beginning in 2013, OP customers will be subject to drastic increases, as compared to CSP customers.[37] With individual FAC rates, FES reasons that CSP customers are discriminated against in comparison to OP customers for the same service in violation of Sections 4905.33 and 4905.35, Revised Code. As such, FES states that the Opinion and Order is unreasonable in its anti-competitive and discriminatory rate design without providing any rational basis.

IEU offers that nothing in the record of supports FES' claim that separate FAC rates for each rate zone causes artificially reduced fuel costs for the OP rate zone. IEU notes that at the briefing phase of these proceedings no party opposed maintaining separate FAC rates for each rate zone.

OCC/APJN also argue that the decision to maintain separate FAC rates for each rate zone is arbitrary and inconsistent, particularly as to the projected time of consolidation for customers in each rate zone, while approving immediate consolidation for the transmission cost recovery rider (TCRR). Further, OCC/APJN believes that the Commission's failure to consolidate the FAC rates while immediately consolidating the TCRR rates, negatively impacts OP customers. OCC/APJN submits that the Opinion and Order does not explain why consistency is necessary between the FAC and PIRR but not with the TCRR. OCC/APJN note that delaying the merger of the FAC rates causes OP customers to incur a $0.02/Mwh increase in rates. OCC/APJN state that the Commission failed to offer any explanation for the inconsistent treatment in the merger of the various rates and continuing separate FAC and PIRR rates, as required by Section 4903.09, Revised Code.

First, we grant rehearing on two issues raised in regard to the FAC. First, we grant OCC/APJN's request for rehearing only to clarify that the Commission did not intend to establish June

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[37] FES Ex. 102A at 45-46; FES Ex. 102B; Tr. at 1075-1077, 1082-1084.

2013, as the date by which the FAC rates of each service zone would be merged. The Commission will continue to monitor the deferred fuel balance of each rate zone to determine if, and when, the FAC rates should be consolidated. Second, we grant AEP-Ohio's request for rehearing to facilitate a final reconciliation and true-up of the FAC upon termination of the FAC rates. We deny the other requests for rehearing in regards to the FAC.

It is necessary to maintain separate FAC rates until the deferred fuel expense incurred by OP rate zone customers has been significantly reduced. Consistent with the Commission's decision in AEP-Ohio's prior ESP, the deferred fuel expenses incurred by each rate zone will be collected through December 31, 2018. We note that a significant portion of the deferred fuel expense incurred by CSP rate zone customers, over $42 million, was offset by significantly excessive earnings paid by CSP rate zone customers.[38] Further, as noted in the Opinion and Order, in addition to delaying the consolidation of the FAC rates to be consistent with the recovery of the PIRR, the Commission noted pending Commission proceedings will likely affect the FAC rate for each rate zone.[39] Furthermore, the Commission notes that the pending 2010[40] and 2011 SEET proceedings for CSP and OP could affect the PIRR for either rate zone. Because of the remaining balance of deferred fuel expense was incurred primarily by OP customers, as noted in the Opinion and Order, the Commission reasoned that maintaining distinct and separate FAC rates for each rate zone would facilitate transparency and review of any ordered adjustments in the pending FAC proceedings as well as any PIRR adjustments.[41]

The deferred fuel charges were incurred prior to the merger of CSP and OP and form the basis for the PIRR rates applicable to CSP and OP rate zone customers. If FES believes that the deferred fuel charges incurred by CSP or OP were discriminatory or imposed an undue or unreasonable prejudice, the appropriate time to address the claim would

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38 *In re AEP-Ohio*, Case No. 10-1261-EL-UNC, Opinion and Order (January 11, 2011); Entry on Rehearing

39 Opinion and Order at 17.

40 *In re AEP-Ohio*, Case Nos. 11-4571-EL-UNC and 11-4572-EL-UNC.

41 *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No. 09-872-EL-FAC, et al., Opinion and Order (January 23, 2012).

have been in the FAC audit proceedings. In this proceeding the Commission has determined that it would be an unreasonable disadvantage for former CSP customers to be required to incur the significant outstanding deferred fuel expense incurred by former OP customers, particularly when possible adjustments to the FAC and PIRR rates for each rate zone are pending. The TCRR is analyzed and reconciled independent of the FAC the PIRR for each rate zone, and is not affected by the outcome of SEET or FAC proceedings. For these reasons, the Commission finds it reasonable and equitable to continue separate FAC and PIRR rates for each rate zone although we merged other components of the CSP and OP rates where we determined the consolidated rate did not impose an unreasonable disadvantage or demand on customers in either rate zone. On that basis, the Opinion and Order complies with Sections 4905.33 and 4905.35, Revised Code. Accordingly, we affirm the decision not to merge the FAC and deny the request of FES and OCC/APJN to reconsider this aspect of the Opinion and Order.

V. BASE GENERATION RATES

(34) In its assignment of error, OCC/APJN contend that the modified ESP's base generation plan does not benefit customers. OCC/APJN point to the testimony indicating that auction prices have gone down and CRES providers have been providing lower priced electric service. In light of these lower prices, OCC/APJN opine that freezing base generation prices is not a benefit because the market may be producing rates at lower prices. OCC/APJN allege that the Commission failed to ensure nondiscriminatory retail rates are available to customers, as the base generation rates were not properly unbundled into energy and capacity components, creating the risk of customers paying different prices for AEP-Ohio's capacity costs.

In its memorandum contra, AEP-Ohio responds that the Commission properly determined that freezing base generation rates for non-shopping SSO customers is beneficial because it allows for a stable and reasonably priced default generation service that will be available to all customers. AEP-Ohio further explains that OCC/APJN do not present any evidence to support its assertion that the base generation rate design makes it difficult for the Commission to ensure that all SSO

customers are receiving non-discriminatory generation service, and points out that OCC/APJN wrongfully attempt to extrapolate the Commission's Capacity order. AEP-Ohio adds that any accusations of the base generation rates being discriminatory are also improper because AEP-Ohio offers different services to its SSO customers than it does to CRES providers. Specifically, AEP-Ohio explains that it only offers capacity service to CRES providers, but it offers a bundled supply of generation service to its SSO customers, thereby eliminating any claim of AEP-Ohio providing discriminatory services.

The Commission affirms its decision in the Opinion and Order, as the frozen base generation rates amount to a reasonably priced, stable alternative that will remain available for all customers who choose not to shop. Further, OCC/APJN failed to provide any foundation in the evidentiary hearing and in its application for rehearing that the base generation rates were not properly unbundled. To the contrary, AEP-Ohio's base generation rates were almost unanimously unopposed by all parties who intervened in this proceeding, which included intervenors representing small business customers, commercial customers, and industrial customers.[42] Further, OCC/APJN fail to recognize that AEP-Ohio is not offering discriminatory rates between its non-shopping customers and those customers who shop, as AEP-Ohio provides different services to the shopping and non-shopping customers. Therefore, OCC/APJN's arguments fail, as Section 4905.33, Revised Code, prohibits discriminatory pricing for like and contemporaneous service, which does not apply here. AEP-Ohio provides capacity service to CRES providers, and provides a bundled generation service to its SSO customers.

VI. INTERRUPTIBLE POWER-DISCRETIONARY SCHEDULE CREDIT

(35) OCC/APJN state that the Commission failed to provide that the interruptible power-discretionary schedule (IRP-D) credit costs should not be collected from residential customers, which was necessary in order for the Commission to be consistent with the intent of the approved stipulation in Case No. 11-5568-EL-POR. Specifically, OCC/APJN argue that the stipulation in

[42] See Opinion and Order at 15-16.

that case provides that program costs for customers in a nonresidential customer class will not be collected from residential customers, and residential program costs will not be collected from non-residential customers.

In its memorandum contra, OEG argues that the credit adopted under the IRP-D is a new credit established in this proceeding, and therefore should not be governed by the EE/PDR stipulation. OEG opines that the Commission acted lawfully and reasonably in approving the IRP-D credit.

The Commission finds OCC/APJN's arguments should be rejected. As OEG correctly points out, the IRP-D credit was established in the modified ESP proceeding, therefore, it is not proper for OCC/APJN to use a stipulation that is only contemplated the programs set forth in the EE/PDR stipulation.

VII. AUCTION PROCESS

(36) In its assignment of error, OEG requests that the Commission clarify that separate energy auctions be held for each AEP-Ohio rate zone. OEG explains that this would be consistent with the FAC and PIRR recovery mechanisms, and without separate energy auctions, the auction may result in unreasonably high energy charges for Ohio Power customers. OEG also suggests that the Commission clarify that it will not accept the results from AEP-Ohio's energy auctions if they lead to rate increases for a particular rate zone, and points out that the Commission maintains the discretion and flexibility to reject auction results.

In its memorandum contra, AEP-Ohio submits that it is not necessary to determine the details relating to the competitive bid procurement (CBP) process, as these issues would be more appropriately addressed in the stakeholder process established pursuant to the Commission's Opinion and Order. In addition, AEP-Ohio opposes the proposal for the Commission to reject any unfavorable auction results, as the General Assembly's plan for competitive markets is not based on short-term market results, but rather based on full development of the competitive marketplace. FES notes in its memorandum contra that OEG presented no evidence in support of its arguments, and that its proposal would actually limit supplier participation and hinder

competition. FES explains that if the Commission were to adopt the ability to nullify auction results, it would discourage suppliers who invest significant time and resources into the auction from participating in any future auctions.

The Commission finds OEG's arguments on separate energy auctions should not be addressed at this time, and are better left to the auction stakeholder process that was established in the Commission's Opinion and Order.[43] We believe that the stakeholder process will allow for a diverse group of stakeholders with unique perspectives and expertise to establish an open, effective, and transparent auction process. However, we agree with FES and AEP-Ohio, who, in a rare showing of unity, oppose OEG's request to reject auction results. The Commission will not interfere with the competitive markets, and accordingly, we believe it is inappropriate to establish a mechanism to reject auction results. Accordingly, OEG's application for rehearing should be denied.

(37) In its application for rehearing, FES contends that Commission's Opinion and Order slows the movement of competitive auctions by only authorizing a 10 percent slice of system of auction and an energy only auction for 60 percent of its load in June 2014. FES argues that this delay is unnecessary as AEP-Ohio cannot show any evidence of substantial harm by earlier auction dates, and that AEP-Ohio is capable of holding an auction in June 2013.

The Commission rejects FES's arguments, as they have been previously raised and dismissed.[44] Further, the Commission reiterates that it is important for customers to be able to benefit from market-based prices while they are low, as evidenced by our decision to expand AEP-Ohio's slice-of-system auction, as well as accelerating the time frame for AEP-Ohio's energy auctions, but it is also important to take time to establish an effective CBP process that will maximize the number of auction participants.

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[43] *Id.* at 39-40.

[44] *Id.* at 38-40.

(38) In its application for rehearing, AEP-Ohio requests a modification to provide that, in light of the acceleration of AEP-Ohio's proposed CBP, base generation rates will be frozen throughout the entire term of the ESP, including the first five months after the January 1, 2015, 100 percent energy auction. AEP Ohio explains that it would flow all energy auction procurement costs through the FAC. Further, AEP-Ohio believes it would be unreasonable to adjust the SSO base generation rates for the first five months of 2015, as proposed in AEP-Ohio's application,[45] in light of the substantial modifications made by the Commission to accelerate and expand the scope of the energy auctions. AEP-Ohio warns that absent a clarification on rehearing, there could be adverse financial impacts of AEP-Ohio based on the Opinion and Order's auction modifications.

In its memorandum contra, FES explains that the Commission's Opinion and Order does not allow for AEP-Ohio to recover additional auction costs through the FAC. FES notes that AEP-Ohio's proposal would have the effect of limiting customer opportunities to lower prices, noting that if auction results were lower than SSO customer generation charges, customers would have to pay the base generation difference on top of the auction price, making the effects of competition meaningless. OMAEG/OHA add that costs associated with the auction are not appropriate for the FAC because it will disproportionately impact larger customers.

We find that AEP-Ohio's request to continue to freeze base generation rates through the auction process is inappropriate and should be rejected. The entire crux of the Opinion and Order was the value in providing customers with the opportunity to take advantage of market-based prices and the importance of establishing a competitive electric marketplace. AEP-Ohio's proposal is completely inconsistent with the Commission's mission and would preclude AEP-Ohio customers from realizing any potential savings that may result from its expanded energy auctions. This is precisely the reason why the Commission expanded and accelerated the CBP in the

45 In its application, AEP Ohio proposed that the 2015 100 percent energy auction costs be blended with the cost of capacity and the clearing price from the energy auction, which would establish new SSO rates. See AEP-Ohio Ex. 101 at 19-21.

first place. Further, we find AEP-Ohio's fear of adverse financial impacts is unfounded, as the RSR will in part ensure AEP-Ohio has sufficient funds to efficiently maintain its operations. Therefore, we find AEP-Ohio's application for rehearing should be denied.

(39) AEP-Ohio opines that the Opinion and Order should be clarified to confirm that the Capacity Order's state compensation mechanism does not apply to the SSO energy auctions or non-shopping customers. DER/DECAM also request further clarification that auctions conducted during the term of the ESP pertain to full service requirements, with any difference between market-based charges and the cost-based state compensation mechanism to be included in the deferral that will be recovered from all customers.

The Commission finds that AEP-Ohio's application for rehearing should be denied. In its modified ESP application, AEP-Ohio originally offered to provide capacity for the January 1, 2015 energy auction at $255 per MW-day. In light of the Commission's decision in the Capacity Case, which determined $188.88 per MW-day would allow AEP-Ohio to recover its embedded capacity costs without overcharging customers, it would be unreasonable for us to permit AEP-Ohio to recover an amount higher than its cost of service. Further, we disagree with AEP-Ohio's assertion that the Commission should not rely on the Capacity Case in determining the cost of capacity for non-shopping customers beginning January 1, 2015, because, as previously stated, the Commission was able to determine that AEP-Ohio's that $188.88 per MW-day establishes a just and reasonable rate for capacity. Therefore, consistent with our Opinion and Order,[46] the use of $188.88 per MW-day allows for AEP-Ohio to be adequately compensated and ensures ratepayers will not face excessive charges over AEP-Ohio's actual costs. In addition, we reject DER/DECAM's request for clarification, as it is not necessary to address the difference between market-based charges and AEP-Ohio's capacity offer for the limited purpose of the January 1, 2015, energy only auction, since the cost of capacity is AEP-Ohio's cost of service.

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[46] See Opinion and Order at 57

(40) In addition, AEP-Ohio argues that it was unreasonable for the Commission to establish early auction requirements and to update to its electronic systems for CRES providers without creating a mechanism for recovery of all prudently incurred costs associated with auctions and the electronic system upgrades.

OCC/APJN respond that AEP-Ohio failed to request any recovery mechanism for these costs within its original application in this proceeding, and that any costs associated with conducting the auction should have been accounted for within its application. Further, OCC/APJN point out that AEP-Ohio has not indicated that the modified auction process would increase its costs over the original auction proposal. Should the Commission grant AEP-Ohio's request, OCC/APJN opine that all costs should be paid by CRES providers, as the costs are caused by the need to accommodate CRES providers.

We agree with OCC/APJN, as AEP-Ohio failed to present any persuasive evidence that it would incur unreasonable and excessive costs in conducting its auction and upgrading its electronic data systems. AEP-Ohio's request is too vague and ambiguous to be addressed on rehearing, and we find that AEP-Ohio's request for an additional recovery mechanism for auction costs should be rejected.

(41) AEP-Ohio requests that the Commission clarify that the auction rate docket will only incorporate revenue-neutral solutions. In support of its request, AEP-Ohio notes that the Commission reserved the rate to implement a new base generation rate design on a revenue neutral basis for all customer classes, and should therefore attach the same condition of revenue neutrality for auction rates.

OCC/APJN argue that the Commission should reject the request for a clarification, as the Commission cannot anticipate all issues that may arise regarding a disparate impact on customers, and encourages the Commission to not box itself into any corners by granting AEP-Ohio's request.

The Commission rejects AEP-Ohio's request to incorporate revenue-neutral solutions within the auction rate docket. However, in the event it becomes apparent that there may be

disparate rate impacts amongst customers, the Commission reserves that right to initiate an investigation, as necessary, as set forth in the Opinion and Order.

(42) In addition, AEP-Ohio seeks clarification regarding costs associated with the CBP process. AEP-Ohio believes that because it is required update its CRES supplier information as well as the fact that it will need to hire an independent bid manager for its auction process, among other costs, AEP-Ohio should be entitled to recover its costs incurred.

In its memorandum contra, OMAEG/OHA oppose AEP-Ohio's request, arguing the Commission should not authorize AEP-Ohio to recover an unspecified amount of revenue without an estimate as to whether any costs actually exist. OMAEG/OHA state that it is not necessary for the Commission to make a preemptive determination about speculative costs.

As we previously determined with AEP-Ohio's previous request for auction related costs associated with electronic system data and the expanded auction process, the Commission finds that AEP-Ohio has not shown any estimates on what the auction related costs would be, nor has it provided any evidence as to what the costs may be. We agree with OMAEG/OHA, and find it is premature for the Commission to permit recovery on costs that are unknown and speculative in nature.

VIII. CUSTOMER RATE CAP

(43) OCC/APJN and OMAEG/OHA contend that the Commission's Opinion and Order regarding the customer rate cap is unlawfully vague. OCC/APJN provide that the Opinion and Order should clarify what it intends the rate cap to cover, and should establish a process to address situations where a customer's bill is increase by greater than 12 percent. Further, OCC/APJN request additional information on who will monitor the percentage of increase, and who will notify customers that they are over the twelve percent cap.

AEP-Ohio also suggests the Commission clarify the 12 percent rate cap, and requests a 90 day implementation period for programming and testing its customer billing system to account for the 12 percent cap. AEP-Ohio notes if the

Commission clarifies that AEP-Ohio shall have time to implement its new program, AEP-Ohio will still run calculations back to September 2012 and provide customer credits, if necessary. AEP-Ohio also seeks clarification that its calculation be based on the customer's total billing under AEP-Ohio's SSO rate, as it does not have the rate that certain customers pay CRES providers, and cannot perform a total bill calculation on any other basis other than SSO rates. Further, AEP-Ohio seeks clarification that it be directly authorized to create and collect deferrals pursuant to Section 4928.144, Revised Code, as well as authorization for carrying charges.

The Commission finds that OCC/APJN, OMAEG/OHA, and AEP-Ohio's applications for rehearing should be granted in regards to the customer rate cap in order to clarify the record. As set forth in the Opinion and Order, the customer rate impact cap applies to items that were established and approved within the modified ESP, and does not apply to any previously approved riders or tariffs that are subject to change throughout the term of the ESP. Specifically, the riders the 12 percent cap intends to safeguard against include the RSR, DIR, PTR and GRR. In addition, the 12 percent rate cap shall apply throughout the entire term of the ESP.

Further, we find that AEP-Ohio should be given 90 days to implement its customer billing system to account for the 12 percent rate increase cap. To clarify OCC/APJN's concerns, by allowing AEP-Ohio 90 days to implement its customer billing system, AEP-Ohio will be able to monitor customer rate increases and provide credits, also if necessary, going back to September 2012. Further, upon AEP-Ohio's implementation of its updated customer billing system, we direct AEP-Ohio to update its bill format to include a customer notification alert if a customer's rates increase by more than 12 percent, and indicate that the bill amount has been decreased in accordance with the customer rate cap.

Finally, as the customer rate impact cap is a provision of the ESP pursuant to Section 4928.143, Revised Code, we authorize the deferral of any expenses associated with the rate cap pursuant to Section 4928.144, Revised Code, inclusive of carrying charges, so we can ensure customer rates are stable for consumers by not increasing more than 12 percent.

IX. SEET THRESHOLD

(44) In its application for rehearing, AEP-Ohio argues that the Commission should eliminate the 12 percent SEET threshold. AEP-Ohio explains that the return on equity (ROE) values contained within the record are forward-looking estimates of its cost of equity, and do not reflect the ROE earned by companies with comparable risks to AEP-Ohio. AEP-Ohio provides that even if the values were from firms with comparable risks, the SEET threshold must be significantly in excess of the ROE earned. Further, AEP-Ohio points to the SEET threshold that the Commission approved for Duke, where the Commission approved a stipulation establishing a SEET threshold of 15 percent.[47] In addition, AEP-Ohio contends that the threshold does not provide any opportunity for the Commission to consider issues such as capital requirements of future committed investments, as well as other items contained within Section 4928.143(F), Revised Code.

In its memorandum contra, OCC/APJN note that the Commission not only followed Section 4928.143(F), Revised Code, but also that the SEET threshold is nothing more than a rebuttable presumption that any earnings above the threshold would be significantly excessive. IEU argues that AEP-Ohio unreasonably relies upon settlements in other proceedings to attempt to resolve contested issues contained within the Commission's Opinion and Order.

The Commission finds AEP-Ohio's application for rehearing should be denied. Under Section 4928.143(F), Revised Code, the Commission shall annually determine whether the provisions contained within the modified ESP resulted in AEP-Ohio maintaining excessive earnings. The rule further dictates that the review shall consider whether the earnings are significantly in excess of the return on equity of other comparable publicly traded companies with similar business and financial risk. The record in the modified ESP contains extensive testimony from three expert witnesses who testified in length on what an appropriate ROE would be for AEP-Ohio, and all considered comparable companies with similar risk in

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[47] *In re Duke*, Case No. 08-920-EL-SSO (Opinion and Order) December 17, 2008 and Case No. 11-3549-EL-SSO (Opinion and Order) November 22, 2011.

reaching their conclusions.[48] In addition, three other diverse parties also presented evidence in the record that was consistent with the recommendations presented by the three expert witnesses, which when taken as a whole, demonstrates that a 12 percent ROE would be at the high end of a reasonable range for AEP-Ohio's return on equity.[49] Further, we believe that the SEET threshold of 12 percent is not only consistent with state policy provisions, including Section 4928.02(A), Revised Code, but also reflects an appropriate rate of return in light of the modified ESP's provisions that minimize AEP-Ohio's risk.[50]

X. CRES PROVIDER ISSUES

(45) In its application for rehearing, FES argues that the Commission unreasonably authorized AEP-Ohio to continue its anti-competitive barriers to shopping, including minimum stay requirements and switching fees without justification. FES asserts that both are contrary to state policies contained within Section 4928.02, Revised Code.

AEP-Ohio responds that FES's assertions present no new arguments, and the record fully supports the findings by the Commission. Further, AEP-Ohio explains that the modified ESP actually offered improvements to CRES providers, further indicating that rehearing is not warranted on this issue.

The Commission finds FES's application for rehearing relating to competitive barriers should be granted. Upon further consideration, we believe AEP-Ohio's switching rules, charges, and minimum stay provisions are inconsistent with our state policy objectives contained within Section 4928.02, Revised Code, as well as recent Commission precedent. The Commission recognizes that the application eliminates the current 90-day notice requirement, the 12-month minimum stay requirement for large commercial and industrial customers, and AEP-Ohio's seasonal stay requirement for residential and smaller commercial customers on January 1, 2015, however, we find that these provisions should be

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[48] Opinion and Order at 33

[49] *Id.* at 37.

[50] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2012-Ohio-5690, (Pfeifer, J., dissenting).

eliminated earlier. We believe it is important to ensure healthy retail electric service competition exists in Ohio, and recognize the importance of protecting retail electric sales consumers right to choose their service providers without any market barriers, consistent with state policy provisions in Sections 4928.02(H) and (I), Revised Code. We are confident that these objectives are best met by eliminating AEP-Ohio's notice and stay requirements in a more expeditious manner, therefore, we direct AEP-Ohio to submit within 60 days, for Staff approval, revised tariffs indicating the elimination of AEP-Ohio's minimum stay and notice provisions effective January 1, 2014, from the date of this entry. Further, these changes are consistent with provisions in both Duke and FirstEnergy's recent ESPs.[51]

Further, we note that, in Duke's most recent ESP, not only did the Commission approve a plan devoid of any minimum stay provisions, but also it granted a reduction in Duke's switching fee to $5.00.[52] Accordingly, we also find that AEP-Ohio's switching fee should be reduced from $10.00 to $5.00, which CRES suppliers may pay for the customer, as is consistent with Commission precedent.[53]

(46) In its application for rehearing, IEU argues the Opinion and Order 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. IEU acknowledges that the Opinion and Order directed AEP-Ohio develop an electronic data system that will allow CRES providers access to PLC data by May 31, 2014, but states that Opinion and Order will allow the PLC allocation process to be unknown for two years until that deadline. IEU proposes that the Commission adopt the uncontested recommendation of its witness to require immediate disclosure of AEP-Ohio's PLC factor.

AEP-Ohio states that IEU is merely trying to rehash arguments previously made. Further, AEP-Ohio points out that because the PLC value is something AEP-Ohio passes on to CRES

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51 *In re Duke Energy Ohio*, Case No. 11-3549-EL-SSO, (November 22, 2011) Opinion and Order, *In re FirstEnergy*, Case No. 12-1230-EL-SSO (July 18, 2012) Opinion and Order.

52 *In re Duke Energy Ohio*, Case No. 11-3549-EL-SSO, (November 22, 2011) Opinion and Order at 39-40.

53 *Id.*

providers, IEU's concerns about transparency in the PLC value allocation process is something IEU should address with any CRES provider from which it or its customers purchase energy.

The Commission rejects IEU's arguments, as the Opinion and Order already directed AEP-Ohio to develop an electronic system that will include PLC values, historical usage, and interval data.[54] Although we did not adopt IEU's recommendation of an immediate system, our intent in setting a May 31, 2014, deadline was to allow for members of the Ohio Electronic Date Interchange Working Group to develop uniform standards for electronic data that will be beneficial for all CRES providers. While IEU may not be pleased with the Commission's decision to develop a uniform program to the benefit of CRES providers, and ultimately customers, as well as to allow for due process in accordance with our five-year rule review of Chapter 4901:1-10, O.A.C., by allowing interested stakeholders to explore the possibility of a POR program, we affirm our decision and find that these provisions are reasonable.

XI. DISTRIBUTION INVESTMENT RIDER

(47) AEP-Ohio asserts that the Commission's failure to establish a final reconciliation and true-up for the distribution investment rider (DIR), which will expire with at the conclusion of the ESP, was unreasonable. AEP-Ohio reasons that it is unable to determine whether the DIR will have a zero balance upon expiration of the rider such that final reconciliation is necessary to address any over-recovery or under-recovery. AEP-Ohio adds that the Commission is clearly vested with the authority to direct reconciliation of the DIR, as was done for the ESRR and in other proceedings. Accordingly, AEP-Ohio contends that it was unreasonable for the Commission to not provide for reconciliation and true-up for the DIR.

We grant AEP-Ohio's request for rehearing to facilitate a final reconciliation and true-up of the DIR at the end of the ESP. Accordingly, within 90 days after the expiration of this ESP, AEP-Ohio is directed to file the necessary information for the

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54 *Id.* at 41

Commission to conduct a final review and reconciliation of the DIR.

(48) AEP-Ohio asserts that the Opinion and Order unreasonably adjusted the revenue requirement for accumulated deferred income taxes (ADIT). AEP-Ohio claims that the ADIT offset is inconsistent with the Commission approved stipulation filed in the Company's latest distribution rate case, Case No. 11-351-EL-AIR et al., (Distribution Rate Case) as the revenue credit did not take into account an ADIT offset which, as calculated by AEP-Ohio, results in the distribution rate case credit being overstated by $21.329 million. AEP-Ohio notes that the DIR was used to offset the rate base increase in the distribution rate case and included a credit for residential customers and a contribution to the Partnership with Ohio fund and the Neighbor-to-Neighbor program. AEP-Ohio argues that it is fundamentally unfair to retain the benefits of the distribution rate case settlement and subsequently impose the cost of ADIT offset through the DIR in the ESP when AEP-Ohio cannot take action to protect itself from the risk. On rehearing, AEP-Ohio asks that the Commission restore the balance struck in the distribution rate case settlement by eliminating the ADIT offset to the DIR.[55]

OCC/APJN reminds the Commission that AEP-Ohio's distribution rate case was resolved by Stipulation and the Stipulation does not include any provision for AEP-Ohio to adjust the revenue credit to customers contingent upon Commission approval of the DIR. OCC/APJN notes that the Distribution Rate Case Stipulation details the DIR revenues and the distribution of the revenue credit and also specifically provides AEP-Ohio the opportunity to withdraw from the Stipulation if the Commission materially modifies the DIR in this proceeding. Finally, OCC/APJN asserts that AEP-Ohio was the drafter of the Distribution Rate Case Stipulation and, pursuant to Ohio law, any ambiguities in the document must be construed against the drafting party.

The Commission has considered the appropriateness of incorporating the effects of ADIT on the calculation of a revenue requirement and carrying charges in several

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55 AEP-Ohio Ex. 151 at 9-10, Tr. at 2239

proceedings. In regard to determination of the revenue requirement for the DIR, we emphasize, as we stated in the Opinion and Order:

> The Commission finds that it is not appropriate to establish the DIR rate mechanism in a manner which provides the Company with the benefit of ratepayer supplied funds. Any benefits resulting from ADIT should be reflected in the DIR revenue requirement.

None of the arguments made by AEP-Ohio convinces the Commission that its decision in this instance is unreasonable or unlawful. As such, we deny AEP-Ohio's request for rehearing of this issue.

(49) Kroger contends that the Opinion and Order notes, but does not directly address or incorporate, Kroger's argument not to combine the DIR for the CSP and OP rate zones without offering any rationale. Kroger reiterates its claims that the DIR costs are unique and known for each rate zone and blending the DIR rates will ultimately require one rate zone to subsidize the costs of service for the other. Kroger requests that the Commission grant rehearing and reverse its decision on this issue.

AEP-Ohio opposes Kroger's request to maintain separate DIR rates and accounts for each rate zone. AEP-Ohio argues that the Commission specifically noted and explained why certain rider rates were being maintained separately. Given that AEP-Ohio's merger application was approved, AEP-Ohio states that it is unreasonable for the Company to establish separate accounts for the DIR.

The Commission notes that the DIR is a new plan approved by the Commission in the ESP and the distribution investment plan will take into consideration the service needs of the AEP-Ohio as a whole. Kroger's request to establish separate and distinct DIR accounts and rates would result in maintaining and essentially continuing CSP and OP as separate entities. Kroger has not provided the Commission with sufficient justification to continue the distinction between the rate zones or demonstrated any unreasonable disadvantage or burden to

either rate zone. The focus of the DIR will be on replacing infrastructure, irrespective of rate zone, that will have the greatest impact on improving reliability for customers. The Commission denies Kroger's request to reconsider adoption of the DIR on a rate zone basis.

(50) OCC/APJN argue on rehearing that the Commission failed to apply the appropriate statutory standard in Section 4928.143(B)(2)(h), Revised Code. As OCC/APJN interpret the statute, it requires the Commission to determine that utility and customer expectations are aligned.

AEP-Ohio retorts that OCC/APJN misinterpret that statute and ignore the factual record in the case to make the position which was already rejected by the Commission. AEP-Ohio reasons that in their attempt to attack the Opinion and Order, OCC/APJN parsed words and oversimplified the purpose of the statute.

The Opinion and Order discusses AEP-Ohio's reliability expectations and customer expectations as well as OCC/APJN's interpretation of the requirements of Section 4928.143(B)(2)(h), Revised Code.[56] OCC/APJN claim that the statutory requirement is that customer and electric distribution utility expectations be aligned at the present time. We reject their claim that the Opinion and Order focused on a forward-looking statutory standard and, therefore, did not apply the standard set forth in Section 4928.143(B)(2)(h), Revised Code. The Commission interprets Section 4928.143(B)(2)(h), Revised Code, to require the Commission to examine the utility's reliability and determine that customer expectations and electric distribution utility expectations are aligned to approve an energy delivery infrastructure modernization plan. The key for the Commission is not, as OCC/APJN assert, to find that customer and utility expectations were aligned, are currently aligned or will be aligned in the future but to maintain, to some degree, the reasonable alignment of customer and utility expectations continuously. As noted in the Opinion and Order, and in OCC/APJN's brief, over 70 percent of customers do not believe their electric service reliability expectations will increase and approximately 20 percent of customers expect

[56] Opinion and Order at 42-47.

their service reliability expectations to increase. AEP-Ohio emphasized aging utility infrastructure and the Commission expects that aging utility infrastructure increases outages and results in the eroding of service reliability. The Commission found it necessary to adopt the DIR to maintain utility reliability as well as to maintain the general alignment of customer and utility service expectations. Thus, the Commission rejects the arguments of OCC/APJN and denies the request for rehearing.

(51) OCC/APJN also assert that the DIR component of the Opinion and Order violates the requirements of Section 4903.09, Revised Code, because it did not address Staff's request for details on the DIR plan. In addition, OCC/APJN contend that the Opinion and Order failed to address details about the DIR plan as raised by Staff, including quantity of assets, cost for each asset class, incremental costs and expected improvement in reliability.

We disagree. The Opinion and Order specifically directed AEP-Ohio to work with Staff to develop the plan, to focus spending where it will have the greatest impact and quantify reliability improvements expected, to ensure no double recovery, and to include a demonstration of DIR expenditures over projected expenditures and recent spending levels.[57] Therefore, we also deny this aspect of OCC/APJN's request for rehearing of the Opinion and Order. Finally, the Commission clarifies that the DIR quarterly updates shall be due, as proposed by Staff witness McCarter, on June 30, September 30, December 30 and May 18, with the final filing due May 31, 2015, and the DIR quarterly rate shall be effective, unless suspended by the Commission, 60 days after the DIR update is filed.

(52) OCC/APJN contend that in their initial brief they argued that adoption of the DIR would impact customer affordability without the benefit of a cost benefit analysis.[58] With the adoption of the DIR, OCC/APJN reason that the Opinion and Order did not address customer affordability in light of the state policies set forth in Section 4928.02, Revised Code, and,

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[57] *Id.* at 47

[58] OCC/APJN Initial Brief at 96-114.

therefore, the Opinion and Order violates Section 4903.09, Revised Code.

We reject the attempt by OCC/APJN to focus exclusively on the DIR as the component of the ESP that must support selective state policies. First, we note that the Ohio Supreme Court has ruled that the policies set forth in Section 4928.02, Revised Code, do not impose strict requirements on any given program but simply expresses state policy and function as guidelines for the Commission to weigh in evaluating utility proposals.[59] Nonetheless, we note that the ESP mitigates customer rate increases in several respects. The provisions of which serve to mitigate customer rate increases include, but are not limited to, stabilizing base generation rates until the auction process is implemented, June 1, 2015; requiring that a greater percentage of AEP-Ohio's standard service offer load be procured through auction sooner than proposed in the application; continuance of the gridSMART project so that more customers will benefit from the use of various technologies to allow customers to better control their energy consumption and costs; and developing electronic system improvements to facilitate more retail competition in the AEP-Ohio service area. Thus, while the adoption of the DIR supports the state policy to ensure reliable and efficient retail electric service to consumers in AEP-Ohio service territory, the above noted provisions of the approved ESP serve not only to mitigate the bill impact for at-risk consumers but all AEP-Ohio consumers. On that basis, the Opinion and Order supports the state policies set forth in Section 4928.02, Revised Code. Thus, we reject OCC/APJN's attempt to narrowly focus on the DIR as the component of the ESP that must support the state policies and deny the request for rehearing.

XII. PHASE-IN RECOVERY RIDER

(53) IEU asserts that the Opinion and Order is unlawful and unreasonable as it authorized recovery of the PIRR without taking into consideration IEU's arguments on the effect of ADIT. IEU argues that the decision is inconsistent with generally accepted accounting principles, regulatory principles,

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[59] *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, at 525, 2011-Ohio-1788

and violated IEU's due process by approving the PIRR without an evidentiary hearing.

AEP-Ohio offers that IEU's claims ignore that the deferred fuel expenses were established pursuant to the Commission's authority under Section 4928.144, Revised Code, in the Company's prior ESP Opinion and Order. The ESP 1 proceeding afforded IEU, and other parties due process when this component of the ESP was established. The purpose of the PIRR Case is to establish the recovery mechanism via a non-bypassable surcharge. AEP-Ohio argues that the ESP 1 order is final and non-appealable on this issue. AEP-Ohio notes that the Supreme Court of Ohio has held that there is no constitutional right to a hearing in rate-related matters if no statutory right to a hearing exists.[60] AEP-Ohio concludes that hearing was not required to implement the PIRR mechanism. Specifically as to IEU's ADIT related objections to the Opinion and Order, AEP-Ohio contends that IEU has made these arguments numerous times and the doctrine of res judicata estops IEU from continuing to make this argument.[61]

The Commission notes as a part of the ESP 1 proceeding, an evidentiary hearing was held on the application and the Commission approved the establishment of a regulatory asset to consist of accrued deferred fuel expenses, including interest. IEU was an active participant in the ESP 1 evidentiary hearing and was afforded the opportunity to exercise its due process rights. However, there is no statutory requirement for a hearing on the application to initiate the PIRR mechanism to recover the regulatory asset approved as a component of the ESP 1 order, as IEU claims. Interested persons were nonetheless afforded an opportunity to submit comments and reply comments on the Company's PIRR application. IEU was also an intervener in the PIRR Case and submitted comments and reply comments. The Commission agrees, as AEP-Ohio states, that IEU and other parties have argued and reargued that deferred fuel expenses should accrue net of taxes. The issue was raised but rejected by the Commission in the ESP 1 proceeding and the issue was raised, reconsidered and again rejected by the Commission in the PIRR Case Opinion and

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60 *Consumers' Counsel v. Pub Util. Comm.* (1994), 70 Ohio St.3d 300, 856 N.E.2d 213.

61 *Office of the Consumers' Counsel v. Pub. Util Comm.* (1984), 16 Ohio St.3d 9.

Order and the Fifth Entry on Rehearing. The Commission finds, as it relates to the PIRR, that the issues in this modified ESP 2 proceedings were appropriately limited to the merger of the PIRR rates and the effective date for collection of the PIRR rates. IEU has been afforded an opportunity to present its position in both the ESP 1 and PIRR proceedings and, as such, there is no need to reconsider the matter as a part of this proceeding. Accordingly, we deny IEU's request for rehearing of the issue.

(54) OCC/APJN argue that the Opinion and Order is inconsistent to the extent that it approves the request to merge the CSP and OP rates for several of the other riders under consideration in the ESP application but maintained separate PIRR riders for the CSP and OP rate zones. OCC/APJN emphasize that the Stipulation initially filed in this proceeding advocated the merger of the PIRR rates and in the December 14, 2011, Opinion and Order the Commission approved the merger of the rates. The Commission's decision not to merge the CSP and OP PIRR rates, according to OCC/APJN, is a reversal of its earlier ruling on the same issue without the justification required pursuant to Section 4903.09, Revised Code.

OEG notes that continuing to maintain separate FAC and PIRR rates for each of the rate zones will cause the need to conduct two separate specific energy-only auctions since the price to beat is different for each rate zone. OEG offers that one way for the Commission to address the issues raised on rehearing as to FAC and PIRR, is to immediately merge the FAC and PIRR rates.

As OCC/APJN explain, the Commission approved without modification, the merger of the PIRR rider rates. However, the Commission subsequently rejected the Stipulation on rehearing. The Commission notes that in regard to the FAC, the vast majority of deferred fuel expenses were incurred by OP rate zone customers, and a significant portion of the deferred fuel expense of former CSP customers was recovered through SEET evaluations. Upon further consideration of the PIRR and FAC rates issues, the Commission has determined that maintaining separate rates for the OP and CSP rate zones, given the significant difference in the outstanding deferred fuel expenses per rate zone, is reasonable, as discussed in the

Opinion and Order and advocated by IEU and Ormet. Accordingly, the Commission affirms its decision and denies OCC/APJN's request for rehearing as to the merger of the PIRR rates.

(55) OEG expresses concern that the PIRR rates will be in effect until December 31, 2018, while the FAC rate will expire with this ESP on May 31, 2015. OEG reasons that as of June 1, 2015, the rates for energy and capacity will be the same for OP and CSP rate zones. OEG requests that the Commission clarify that it is not precluding the merging of the PIRR rates after the current ESP expires. OEG reasons that merging the FAC and PIRR rates for each rate zone would reduce the administrative complexity and burden, increase efficiency, and align the structure of the FAC and PIRR with the other AEP-Ohio rider rates.

Simplification of the auction process for auction participants does not justify ignoring the deferred fuel expense balance incurred for the benefit of OP customers at the expense of CSP customers. The Commission will continue to monitor AEP-Ohio's outstanding deferred fuel expense balance and may reconsider its decision on the merger of the PIRR and FAC rates. However, at this time, we are not convinced by the arguments of OEG to reverse our decision in the Opinion and Order. Accordingly, we deny the request for rehearing.

XIII. ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION RIDER

(56) OCC/APJN offer that the Commission adversely affected the rights of the signatory parties to the EE/PDR Stipulation in Case No. 11-5568-EL-POR et al. by merging the EE/PDR rates in this proceeding. OCC/APJN assert that the parties envisioned separate EE/PDR rates for the CSP and OP rate zones after the merger of CSP and OP.

AEP-Ohio reasons that OCC/APJN's argument to maintain separate EE/PDR rates is without merit and notes that the Commission specifically stated that tariff amendments, as a result of the merger, would be reviewed and rate matters resolved in this proceeding.[62] AEP-Ohio supports the

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62 *In re AEP-Ohio*, Case No. 10-2376-EL-UNC, Entry at 7 (March 7, 2012).

Commission's decision and asks that the Commission deny this request for rehearing

In light of the fact that the Commission reaffirmed AEP-Ohio's merger on March 7, 2012, OCC/APJN should have been aware of the Commission's plan to consider the merging of CSP and OP rates as part of the ESP proceeding. Further, the Commission notes that nothing in the EE/PDR Stipulation or the Opinion and Order approving the Stipulation confirms the assertions of OCC/APJN that the parties expected the EE/PDR rates to be separately maintained after the merger of CSP and OP. In addition, OCC/APJN assert in their application for rehearing that combining the EE/PDR rates prevents the parties from receiving the benefit of the bargain reached in the EE/PDR Stipulation. We therefore deny the request for rehearing.

XIV. GRIDSMART

(57) AEP-Ohio asserts that the Commission's failure to establish a final reconciliation and true-up for the gridSMART rider which will expire prior to or in conjunction with the end of this ESP term, May 31, 2015, was unreasonable.

We grant AEP-Ohio's request for rehearing. Accordingly, the Commission clarifies and directs that within 90 days after the expiration of this ESP 2, AEP-Ohio shall make a filing with the Commission for review and reconciliation of the final year of the Phase I gridSMART rider.

XV. ECONOMIC DEVELOPMENT RIDER

(58) OCC/APJN renew their request on rehearing that the Commission Order AEP-Ohio shareholders maintain the Partnership with Ohio (PWO) fund at $5 million per year and to designate $2 million for the Neighbor-to-Neighbor program. OCC/APJN argue that the Commission's failure to address their request to fund the PWO and Neighbor-to-Neighbor funds, without explanation, is unlawful under Section 4903.09, Revised Code. Further, OCC/APJN reiterate that it is unjust and unreasonable for the Commission not to order AEP-Ohio to fund the PWO program in light of the fact that the Opinion and Order directed the Companies to reinstate the Ohio Growth Fund. OCC/APJN note that the Commission ordered

the funding of the Ohio Growth Fund in its December 14, 2011 order approving the Stipulation. OCC/APJN argue that the at-risk population is also facing extenuating economic circumstances, particularly in southeast Ohio served by AEP-Ohio. OCC/APJN offer that at-risk populations are to be protected pursuant to the policy set forth in Section 4928.02(L), Revised Code.

The Commission notes that provisions were made for the PWO to the benefit of residential and low-income customers, as part of the Company's distribution rate case.[63] The PWO fund directly supports low-income residential customers with bill payment assistance. The Commission concluded, therefore, that the funding in the distribution rate proceeding was adequate and additional funding of the PWO fund, as requested by OCC/APJN was unnecessary. However, as noted in the Opinion and Order, the Ohio Growth Fund, "creates private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio" to support Ohio's economy. For these reasons, the Commission did not revise the Opinion and Order and we deny OCC/APJN's application for rehearing.

XVI. STORM DAMAGE RECOVERY MECHANISM

(59) In its application for rehearing, AEP-Ohio suggests that the Commission clarify that, under the storm damage recovery mechanism's December 31 filing procedure, a cutoff of September 30 be established for all expenses incurred. AEP-Ohio opines that the clarification would allow any qualifying expenses that occur after September 30 of each year to be added to the deferral balance and carried forward. AEP-Ohio notes that absent a cut off date, if an incident occurs late in the reporting year, expenses may not be accounted for at the time of the December 31 filing.

In its memorandum contra, OCC/APJN point out that AEP-Ohio's request for clarification would result in customers accruing carrying costs for any costs that may be incurred between October 1 and December 31. As an alternative,

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[63] *In re AEP-Ohio*, Case No. 11-351-EL-AIR, Opinion and Order at 6, 9 (December 14, 2011).

OCC/APJN suggest the Commission consider a provision allowing AEP-Ohio to amend its filing up to 30 days after the December 31 deadline to include any storm costs from the month of December that were not included in the original filing.

The Commission finds that AEP-Ohio's application for rehearing should be granted. We believe it is important to account for any expenses that may occur just prior to the December 31 filing, however, we are also sensitive to OCC/APJN's concern about carrying costs being incurred over a three-month period as a result of AEP-Ohio's request. Accordingly, we find that under the storm damage recovery mechanism, in the event any costs are incurred but not accounted for prior to the December 31 filing deadline, AEP-Ohio may, upon prior notification to the Commission in its December 31 filing, amend the filing to include all incurred costs within 30 days of the December 31 filing.

XVII. GENERATION RESOURCE RIDER

(60) FES and IEU argue, as each did in their respective briefs, that the dictates of Sections 4928.143(B) and 4928.64(E), Revised Code, require the GRR be established as a bypassable rider. FES, IEU and OCC/APJN request rehearing on the approval of the GRR on the basis that all the statutory requirements of Section 4928.143(B)(2)(c), Revised Code, have not been met as a part of this ESP. FES contends that Sections 4928.143(B)(2)(c) and 4928.64(E), Revised Code, are irreconcilable and the specialized provision of Section 4928.64, Revised Code, prevails. OCC/APJN adds that the Commission's creation of the GRR, even at zero, abrogated Ohio law. For these reasons, FES, IEU, and OCC/APJN submit that the GRR is unreasonable and unlawful.

Each of the above-noted requests for rehearing as to the GRR mechanism was previously considered by the Commission and rejected in the Opinion and Order. Nothing offered in the applications for rehearing persuades the Commission that the Opinion and Order is unreasonable or unlawful. Accordingly, the applications for rehearing on the establishment of the GRR are denied. Further, the Commission notes that we recently

concluded that AEP-Ohio and Staff failed to make the requisite demonstration of need for the Turning Point project.[64]

(61) IEU argues that the language in Section 4928.06(A), Revised Code, imposes a duty on the Commission to ensure that the state policies set forth in Section 4928.02, Revised Code, are effectuated. *Elyria Foundry v. Public Util. Comm.*, 114 Ohio St3d. 305 (2007). IEU contends the adoption of the GRR violates state policy and conflicts with the Capacity Order, in which where the Commission determined that market-based capacity pricing will stimulate true competition among suppliers in AEP-Ohio's service territory and incent shopping, thus, implicitly rejecting that above-market pricing is compatible with Section 4928.02, Revised Code.[65]

The Commission notes that the Supreme Court of Ohio determined that the policies set forth in Section 4928.02, Revised Code, do not impose strict requirements on any given program but simply express state policy and function as guidelines for the Commission to weigh in evaluating utility proposals.[66] IEU does not specifically reference a particular paragraph in Section 4928.02, Revised Code, supporting that the GRR is unlawful. Nonetheless, the Commission reiterates, as stated in the Opinion and Order, that AEP-Ohio would be required to share the benefits of the project with all customers, shopping and non-shopping to advance the policies stated in paragraph (H), Section 4928.02, Revised Code.

XVIII. POOL MODIFICATION RIDER

(62) FES argues that the application did not include a description or tariffs reflecting a PTR and, accordingly, did not request a PTR to be initially established at zero. FES submits that there is no evidence and no justification presented in support of a PTR and, therefore, the Commission's approval of the PTR is unreasonable.

AEP-Ohio responds that FES's claims are misleading and erroneous. AEP-Ohio cites the testimony of witness Nelson

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64 *In re AEP-Ohio*, Case Nos. 10-501-EL-FOR and 10-502-EL-FOR, Opinion and Order at 25-27 (January 9, 2013).

65 *In re AEP-Ohio*, Case No. 10-2929-EL-UNC, Opinion and Order at 23 (July 2, 2012).

66 *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512 , at 525, 2011-Ohio-1788.

which included a complete description of the PTR. AEP-Ohio notes that the Commission was able to discern the structure of the PTR and approved the request. AEP-Ohio asserts that FES's claims do not provide a basis for rehearing.

FES's arguments as to the description of the PTR in the application overlook the testimony in the record and the directives of the Commission. As specifically stated in the Opinion and Order, recovery under the PTR is contingent upon the Commission's review of an application by the Company for such costs and any recovery under the PTR must be specifically authorized by the Commission.[67] Furthermore, the Opinion and Order emphasized that if AEP-Ohio seeks recovery under the PTR, it will maintain the burden set forth in Section 4928.143, Revised Code.[68] Accordingly, the Commission denies the request of FES for rehearing on this issue.

(63) IEU also submits that the PTR (as well as the capacity deferral and RSR) violates corporate separation requirements in that it operates to allow AEP-Ohio to favor its affiliate and ignore the strict separation between competitive and non-competitive services. Specifically, IEU contends that Section 4928.02(H), Revised Code, prohibits the recovery of any generation-related cost through distribution or transmission rates after corporate separation is effective.

We find that IEU made similar arguments as to generation asset divestiture. For the same reasons stated therein, the Commission again denies IEU's requests for rehearing.

(64) IEU also contends that the PTR[69] is unreasonable and unlawful as its approval permits AEP-Ohio to recovery generation-related transition revenue when the time period for recovery of such costs as passed, and where the Company agreed to forgo recovery of such costs in its Commission-approved settlement of its electric transition plan (ETP) cases.[70]

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67 Opinion and Order at 49.

68 *Id.*

69 IEU raises the same argument as to the RSR and the capacity charge.

70 *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 and 99-1730-EL-ETP, Opinion and Order (September 28, 2000).

As to IEU's claim that the PTR is unlawful under the agreement in the ETP cases, the Commission rejects this argument. As we stated in the Opinion and Order, approval of the PTR mechanism does not ensure any recovery to AEP-Ohio. AEP-Ohio can only pursue recovery under the PTR if this Commission modifies or amends its corporate separation plan, filed in Case No. 12-1126-EL-UNC (Corporate Separation Case), as to divestiture of the generation assets only. Further, if the conditions precedent for recovery under the PTR are met, AEP-Ohio has the burden under Section 4928.143, Revised Code, to demonstrate that the Pool Agreement benefitted Ohio ratepayers over the long-term, any PTR costs and/or revenues were allocated to Ohio ratepayers, and that any costs were prudently incurred and reasonable.[71] IEU made substantially similar claims regarding transition cost and the ETP cases in the Capacity Case.[72] The type of transition costs at issue in the ETP cases are set forth in Section 4928.39, Revised Code. We find that recovery for forgone revenue associated with the termination of the Pool Agreement is permissible under Section 4928.143(B)(2)(d), Revised Code, as discussed more fully below. Thus, we find IEU's arguments incorrect and premature. In addition, for the same reasons we rejected these arguments by IEU on rehearing in regard to the RSR and capacity charge, we reject these claims as to the PTR. IEU's request for rehearing is denied.

(65) FES, IEU and OCC/APJN reason that the Commission based its approval of the PTR on Section 4928.143(B)(2)(h), Revised Code, which applies only to distribution service and does not include incentives for transitioning to the competitive market. FES, IEU and OCC/APJN offer that the PTR is generation based and has no relation to distribution service. Further, FES offers that by the time the AEP Pool terminates, the generation assets will be held by AEP-Ohio's generation affiliate and any revenue loss experienced will be that of a competitive generation provider. According to FES and OCC/APJN, nothing in Section 4928.143(B)(2), Revised Code, or any other provision of Ohio law, permits a competitive generation provider to recover lost revenue or to incent the electric distribution utility to transition to market. Furthermore, FES

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71 Opinion and Order at 49.

72 *In re AEP-Ohio*, Case No. 10-2929-EL-UNC, Opinion and Order at (date).

reasons that Section 4928.02(H), Revised Code, specifically prohibits cross-subsidization. IEU likewise claims that Section 4928.06, Revised Code, obligates the Commission to effectuate the state policies in Section 4928.02, Revised Code.

AEP-Ohio replies that despite the claims of FES, IEU and OCC/APJN, statutory authority exists for the adoption of the PTR falls under Section 4928.143(B)(2)(h), Revised Code, as the Commission determined in its Opinion and Order. The PTR, is also authorized, according to AEP-Ohio, under Section 4928.143(B)(2)(d), Revised Code. AEP-Ohio reasons that the purpose of the Pool Agreement is to stabilize the rates of Ohio customers, thus division (B)(2)(d) of Section 4928.143, Revised Code, also supports the recovery of Pool Agreement cost. AEP-Ohio states, in regards to the argument on cross-subsidies, that a significant portion of AEP-Ohio's revenues result from sales of power to other AEP Pool members. With the termination of the Pool Agreement, if there is a substantial decrease in net revenue, under the provisions of the PTR, the Company could be compensated for lost net revenue from retail customers. Based upon this reasoning, AEP-Ohio argues that the PTR is an authorized component of an ESP and was correctly approved by the Commission.

The Commission notes that the Opinion and Order specifically limited AEP-Ohio's right to recover under the PTR, only in the event this Commission modified or amended its corporate separation plan as to the divestiture of its generation assets.[73] The Opinion and Order also directed, subject to the approval of the corporate separation plan, that AEP-Ohio divest its generation assets from its electric distribution utility assets by transfer to its generation affiliate.[74] Further by Finding and Order issued on October 17, 2012, in the Corporate Separation Case, AEP-Ohio was granted approval to amend its corporate separation plan to reflect full structural corporate separation and to transfer its generation assets to its generation affiliate. Applications for rehearing of the Finding and Order in the Corporate Separation Case were timely filed and the Commission's decision on the applications is currently pending. The Commission reasons, however, that if we affirm

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[73] Opinion and Order at 49.

[74] *Id.* at 50.

our decision on rehearing, as to the divestiture of the generation assets, AEP-Ohio has no basis to pursue recovery under the PTR.

Nonetheless, we grant rehearing regarding the statutory basis for approval of the PTR. We find that Section 4928.143(B)(2)(d), Revised Code, supports the adoption of the PTR.[75] The termination of the Pool Agreement is a pre-requisite to AEP-Ohio's transition to full structural corporate separation. With AEP-Ohio's move to full structural corporate separation and CRES providers securing capacity in the market, the number of service offers for SSO customers and shopping customers will likely increase and improve. On that basis, termination of the Pool Agreement is key to the establishment of effective competition and authorized under the terms of Section 4928.143(B)(2)(d), Revised Code. We are not dissuaded from this position by the claims of OCC/APJN and FES. As OCC/APJN correctly assert, revenues received as a result of the Pool Agreement are not recognized in the determination of significantly excessive earnings. However, OCC/APJN fails to recognize that the language of Section 4928.143(F), Revised Code, specifically exclude such revenue. We also note, that while effective competition is indeed the goal of the Commission, Section 4928.02(H), Revised Code, does not strictly prohibit cross-subsidization. The Ohio Supreme Court has ruled that the policies set forth in Section 4928.02, Revised Code, do not impose strict requirements on any given program but simply express state policy and function as guidelines for the Commission to weigh in evaluating utility proposals.[76]

(66) IEU claims that Section 4928.06, Revised Code, raises the state policies set forth in Section 4928.02, Revised Code, to requirements. *Elyria Foundry v. Public Util. Comm.*, 114 Ohio St.3d 305 (2007). We note, that more recently, the Ohio Supreme Court determined that the policies set forth in Section

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[75] Section 4928.143(B)(2)(d), Revised Code, states:

> 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.

[76] *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, at 525, 2011-Ohio-1788

4928.02, Revised Code, do not impose strict requirements on any given program but simply express state policy and function as guidelines for the Commission to weigh in evaluating utility proposals.[77] Consistent with the Court's ruling we approved the establishment of the PTR subject to the Company making a subsequent filing for the Commission's review including the effectuation of state policies.

XIX. GENERATION ASSET DIVESTIURE

(67) In its application for rehearing, AEP-Ohio asserts that the Commission should have approved the corporate separation application at the same time that it issued the Opinion and Order or made approval of the Opinion and Order contingent on approval of the Company's corporate separation application filed in Corporate Separation Case. AEP-Ohio argues that structural corporate separation is a critical component of the ESP which is necessary for AEP-Ohio to transition to implementing an auction-based SSO. Thus, AEP-Ohio requests that the Commission clarify on rehearing, that the ESP will not be effective until the Commission approves AEP-Ohio's corporate separation application.

The Opinion and Order was issued August 8, 2012. The order in AEP-Ohio's Corporate Separation Case was issued October 17, 2012, approving the corporate separation plan subject to certain conditions. The Commission denies AEP-Ohio's request to make the ESP effective upon the approval of the corporate separation plan. AEP-Ohio had the option of designing its modified ESP application to incorporate its corporate separation plan or to timely request consolidation of the Corporate Separation Case and the ESP cases. AEP-Ohio did not undertake either option. Furthermore, the rates and tariffs in compliance with the Opinion and Order were approved and have been effective since the first billing cycle of September 2012. Accordingly, it would be unreasonable and unfair to make the effective date of the ESP the date the corporate separation case was approved. AEP-Ohio's request for rehearing is denied.

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[77] *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512 , at 525, 2011-Ohio-1788.

(68) IEU argues that the Opinion and Order is unlawful and unreasonable to the extent that the Commission approved the conditional transfer of the generation assets without determining that the transfer complied with Sections 4928.17, 4928.02, and 4928.18(B), Revised Code, and Chapter 4901:1-37, O.A.C.

As we previously acknowledged, AEP-Ohio did not request that the Corporate Separation Case and the ESP proceedings be consolidated. Therefore, as was noted in the Opinion and Order, the primary considerations in the ESP proceeding was how the divestiture of the generation assets and the agreement between AEP-Ohio and its generation affiliate would impact SSO rates and customers. The requirements for corporate separation contained in Sections 4928.17 and 4928.18(B), Revised Code, and the applicable rules in Chapter 4901:1-37, O.A.C., were addressed in the Corporate Separation Case which was issued subsequent to the Opinion and Order in this matter. As the issues raised by IEU have subsequently been addressed, we deny the request for rehearing.

(69) AEP-Ohio also requests that the Commission reconsider and modify the directives as to the pollution control revenue bonds (PCRB). AEP-Ohio requests that, at a minimum, the Commission clarify that the 90-day filing be limited to a demonstration that AEP-Ohio customers have not and will not incur any additional costs caused by corporate separation, and that the hold harmless obligation pertains to the additional costs caused by corporate separation. AEP-Ohio requests permission to retain the PCRB or, in the alternative, authorize AEP-Ohio to transfer the PCRB to its generation affiliate consistent with the Corporate Separation Case. AEP-Ohio suggest that the PCRBs be retained by AEP-Ohio until their respective tender dates and transfer the liabilities to its generation affiliate with inter-company notes during the period between closing of corporate separation and the respective tender dates of the PCRB. AEP-Ohio attests that either option offered would not cause customers to incur any additional costs that could arise from corporate separation and eliminate the need for any 90-day filing.

We grant rehearing on the issue of the PCRB to clarify and reiterate, consistent with the Commission's decision in the

Corporate Separation Case, that ratepayers be held harmless. In the Corporate Separation Case, in recognition of the Company's request for rehearing in this matter and as a condition of corporate separation, the Commission directed the Company utilize an intercompany note between AEP-Ohio and its generation affiliate wherein AEP-Ohio could retain the PCRB and avoid any burden on AEP-Ohio EDU ratepayers.[78] Thus, with the Commission's decision in the Corporate Separation Case, the 90-day filing previously ordered in this proceeding was no longer necessary.

(70) IEU argues that the Opinion and Order is unreasonable and unlawful as it allows AEP-Ohio, the electric distribution utility, to evade strict separation between competitive and non-competitive services and, as such insulates AEP-Ohio's generation affiliate, in violation of Section 4928.17(A)(3), Revised Code, affording its generation affiliate an undue preference or advantage. Similarly, FES argues that the Opinion and Order, to the extent that it permits AEP-Ohio, to pass revenue to AEP-Ohio's generation affiliate, violates Section 4928.143(B)(2)(a), Revised Code, as the statute requires that any cost recovered be prudently incurred, including purchased power acquired from an affiliate. According to FES, the record evidence demonstrates that the capacity price of $188.88 per MW-day is significantly higher than the price that can be acquired in the market and AEP-Ohio has not evaluated the arrangement with AEP-Ohio's generation affiliate or considered options available in the competitive market. As to the pass-through of generation based revenues from SSO customers, FES claims there is no record evidence to support an "arbitrary" price for energy and capacity from SSO customers. FES asserts that AEP-Ohio's base generation rate is not based on cost or market and that AEP-Ohio argued that the base generation rate reflects a $355 per MW-day charge for capacity. For these reasons, FES reasons that the base generation revenues reflect an inappropriate cross-subsidy and are a detriment of the competitive market.

Finally, IEU, FES, and OCC/APAC submits that the pass-through of revenues from AEP-Ohio to its generation affiliate,

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78 *In re Ohio Power Company*, Case No. 12-1126-EL-UNC, Order at 17-18 (October 17, 2012).

violates the state policy set forth in Section 4928.02(H), Revised Code.

AEP-Ohio replies that AEP-Ohio is a captive seller of capacity to support shopping load under its FRR obligations and is required to fulfill that obligation during the term of this ESP after corporate separation. AEP-Ohio states four primary reasons why payments to its generation affiliate are not illegal cross subsidies and should be passed to its generation affiliate after corporate separation during this ESP. First, the Commission approved functional separation and AEP-Ohio is presently a vertically-integrated utility. Second, during a portion of the term of this ESP, AEP-Ohio will be legally, structurally separated but remain obligated to provide SSO service at the tariff rates for the full term of the ESP. Third, after corporate separation, AEP-Ohio's generation affiliate will be obligated to support SSO service (energy and capacity) and AEP-Ohio reasons it is only appropriate that its generation affiliate receive the same generation revenue streams agreed to by AEP-Ohio for such service. Finally, there will be an SSO agreement between AEP-Ohio and its generation affiliate for the services, which is subject to the jurisdiction and approval by the Federal Energy Regulatory Commission (FERC). Furthermore, AEP-Ohio warns that without the generation revenues the arrangement between AEP-Ohio and its generation affiliate will not take place. AEP-Ohio also notes that FES has supported this approach on behalf of the First Energy operating companies for several years. AEP-Ohio concludes that the interveners' cross-subsidy arguments are not a basis for rehearing.

First, as we have noted at other times in this Entry on Rehearing, the Ohio Supreme Court has ruled that the policies set forth in Section 4928.02, Revised Code, do not impose strict requirements on any given program but simply expresses state policy and function as guidelines for the Commission to weigh in evaluating utility proposals.[79]

The Commission recently approved AEP-Ohio's application for structural corporate separation to facilitate the Company's transition to a competitive market. Given that the term of this

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[79] *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, at 525, 2011-Ohio-1788.

> ESP, corporate separation of the generation assets, and AEP-Ohio's FRR obligations are not aligned, in the Opinion and Order the Commission recognized that revenues previously paid to AEP-Ohio for SSO service will be paid to its generation affiliate for the services provided. However, while we believe it is appropriate and reasonable for revenues to pass thru AEP-Ohio to its generation affiliate for the services provided by no means will we ignore Section 4928.143(B)(2)(a), Revised Code. The costs incurred by AEP-Ohio for SSO service will be evaluated for prudence as a part of AEP-Ohio's FAC/Alternative Energy Rider audit. None of the arguments presented by FES, IEU or OCC/APJN convince the Commission that this decision is unreasonable or unlawful and, therefore, we deny the requests for rehearing of this issue.

It is, therefore,

ORDERED, That Duke's motion to file memorandum contra instanter is granted. It is, further,

ORDERED, That Kroger's request to withdraw its reply memorandum filed on September 24, 2012, is granted. It is, further,

ORDERED, That AEP-Ohio's motion to consolidate is moot. It is, further,

ORDERED, That OCC/APJN's motion to strike is denied. It is, further,

ORDERED, That IEU's request to review the procedural rulings is denied. It is, further,

ORDERED, That the applications for rehearing of the Commission's August 8, 2012, Opinion and Order, be denied, in part, and granted, in part, as set forth herein. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

GNS/JJT/vrm

Entered in the Journal
JAN 30 2013

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

SECOND ENTRY ON REHEARING

The Commission finds:

(1) On March 30, 2012, Ohio Power Company (AEP-Ohio) filed an application for a standard service offer, in the form of an electric security plan (ESP), in accordance with Section 4928.143, Revised Code.

(2) On August 8, 2012, the Commission issued its Opinion and Order, approving AEP-Ohio's proposed ESP, with certain modifications (Order). Further, the August 8 Order directed AEP-Ohio to file proposed final tariffs consistent with the Opinion and Order by August 16, 2012.

(3) On August 16, 2012, AEP-Ohio submitted its proposed compliance rates and tariffs to be effective as of the first billing cycle of September 2012. By entry issued on August 22, 2012, the Commission approved the proposed tariffs and rates to be effective with the first billing cycle of September 2012.

(4) Pursuant to Section 4903.10, Revised Code, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(5) On September 7, 2012, AEP-Ohio, The Kroger Company, Ormet Primary Aluminum Corporation, Industrial Energy Users-Ohio

(IEU), Retail Energy Supply Association, OMA Energy Group (OMAEG) and the Ohio Hospital Association (OHA), the Ohio Energy Group (OEG), FirstEnergy Solutions Corporation (FES), jointly by The Ohio Association of School Business Officials, The Ohio School Boards Association, The Buckeye Association of School Administrators, and The Ohio Schools Council (collectively the Ohio Schools), and jointly by the Ohio Consumers' Counsel (OCC) and Appalachian Peace and Justice Network filed applications for rehearing of the Commission's August 8, 2012 Order. Memoranda contra the various applications for rehearing were filed jointly by Duke Energy Ohio, Inc. and Duke Energy Commercial Asset Management Inc., FES, OCC/APJN, IEU, OMAEG/OHA, OEG, Ohio Schools, and AEP-Ohio on September 17, 2012.

(6) By entry dated October 3, 2012, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing of the Order.

(7) On January 30, 2013, the Commission issued its Entry on Rehearing addressing the merits of the various applications for rehearing (January 30 EOR).

(8) On March 1, 2013, OCC and IEU filed applications for rehearing of the January 30 EOR. On March 11, 2013, AEP-Ohio filed a memorandum contra the applications for rehearing.

(9) In its application for rehearing, IEU argues that Section 4928.143(B)(2)(d), Revised Code, does not provide the Commission authority to approve AEP-Ohio's retail stability rider (RSR). Specifically, IEU states that the fact that the RSR will result in a non-fuel base generation rate freeze does not satisfy the requirements of Section 4928.143(B)(2)(d), Revised Code, and the determination that the RSR provides certainty and stability goes against the manifest weight of the evidence in this proceeding. IEU also points out that the Commission may not approve a rider that causes the modified ESP to be less favorable in the aggregate than a market rate offer.

AEP-Ohio responds that IEU raised similar arguments in its first application for rehearing and fails to raise any new arguments in its second application for rehearing. AEP-Ohio

adds that IEU's interpretation of Section 4928.143(B)(2)(d), Revised Code, unnecessarily narrows the statute. In addition, AEP-Ohio points out that IEU previously raised arguments regarding the statutory test in its initial application for rehearing and fail to provide any new arguments.

The Commission finds that IEU fails to raise any new arguments for the Commission's consideration in its application for rehearing. In both the order and the entry on rehearing, the Commission determined that the RSR is justified pursuant to Section 4928.143(B)(2)(d), Revised Code. (Order at 31-32; January 30 EOR at 15-16). Similarly, IEU previously raised its arguments pertaining to the statutory test, which the Commission denied in the January 30 EOR. Accordingly, IEU's application for rehearing should be denied.

(10) In its application for rehearing, OCC claims that the classification of the RSR as a charge related to default service is not supported by the record, violating Section 4903.09 Revised Code, and Section 4903.13, Revised Code.

In its memorandum contra, AEP-Ohio responds that the Commission clearly explained how the RSR falls into default service, and adds that even one of OCC's witnesses agreed that the RSR relates to AEP-Ohio's generation revenues.

The Commission finds OCC's assignment of error is without merit and should be denied. In the entry on rehearing, the Commission emphasized that the RSR meets the statutory criteria contained in Section 4928.143(B)(2)(d), Revised Code, as it is a charge relating to default service that provides certainty and stability for AEP-Ohio's customers. (January 30 EOR at 15-16.) Specifically, the Commission explained that the RSR allows for price certainty and stability for AEP-Ohio's standard service offer (SSO) customers, which, is AEP-Ohio's default service for customers who choose not to shop. (*Id.*) Accordingly, OCC's assignment of error should be rejected.

(11) In its application for rehearing, IEU claims that the customer rate impact cap fails to identify the incurred costs that may be deferred, but rather only provides that AEP-Ohio may defer the difference in revenue as a result of the customer rate cap. In addition, IEU argues the Commission should identify the

specific carrying charges that will apply to the deferred amount. IEU states that if the Commission continues to authorize the customer rate impact cap deferral, it should set the level of the carrying charges on the deferral balance to a reasonable level below AEP-Ohio's long or short term cost of debt.

In its memorandum contra, AEP-Ohio provides that the carrying cost rate should be the weighted average cost of capital, consistent with Commission precedent and AEP-Ohio's phase in recovery rider. AEP-Ohio opines that the same regulatory principles should be applied here, and any deferrals under the customer rate impact cap would accrue a carrying charge during the period of deferral and a lower debt rate charge during the recovery period.

The Commission finds that IEU's application for rehearing should be denied, as the customer rate impact cap is permissible pursuant to Section 4928.144, Revised Code. Section 4928.144, Revised Code, provides the Commission with discretion to establish a deferral to ensure rate or price stability for customers, which the customer rate cap establishes by limiting any customer rate increases to no more than a 12-percent increase. The Commission determined this was necessary in its order, and emphasized it again in its entry on rehearing. (Order at 70; January 30 EOR at 40). Further, the entry on rehearing clarified that AEP-Ohio was entitled to the deferral of the incurred costs equal to the amount not collected, as well as carrying costs associated with the deferral. We do clarify, however, that these carrying costs should be set at AEP-Ohio's long-term cost of debt rate, as recovery of these costs are not only guaranteed but also are consistent with Commission precedent. Finally, the collection of the deferral is on a non-bypassable surcharge, and protects customers from any potential rate increases associated with AEP-Ohio's newly established non-bypassable riders, consistent with Section 4928.144, Revised Code. Therefore, as the customer rate impact cap complies with Section 4928.144, Revised Code, IEU's arguments should be dismissed.

(12) IEU argues that the Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue pursuant to Section 4928.143(B)(2)(d), Revised Code. IEU

argues that only divisions (b) and (c) of Section 4928.143(B)(2), Revised Code, allow for a generation-related, non-bypassable charge for the recovery of construction costs. Therefore, according to IEU, there is no basis under Section 4928.143(B)(2)(d), Revised Code, to approve the Pool Termination Rider (PTR).

AEP-Ohio notes that while Section 4928.143(B)(2)(b) and (c), Revised Code, specifically require that the charges established there under be nonbypassable, subdivision (d) contains no such requirement. AEP-Ohio reasons that Section 4928.143(B)(2)(d), Revised Code, specifically grants the Commission the authority to establish a non-bypassable charge as part of an ESP.

The Commission finds that IEU's argument is without merit. Section 4928.143(B)(2)(d), Revised Code, specifically permits the Commission to consider the "bypassability" of the "[t]erms conditions or charges relating to limitations on customer shopping for retail electric generation service ... as would have the effect of stabilizing or providing certainty regarding retail electric service" as a component of an ESP. The Commission interprets the language in this section to grant the Commission the authority to approve a particular component of an ESP as bypassable or non-bypassable. Thus, we deny IEU's request for rehearing.

(13) IEU also argues that the Commission failed to make the necessary findings to demonstrate that the PTR would have the effect of stabilizing or providing certainty regarding retail electric service. IEU asserts that nothing in the record in this case demonstrates that the Pool Agreement prevented an auction for the provision of standard offer service (SSO) and did not have any bearing on the Commission's conclusion in AEP-Ohio's Capacity Case.[1] Accordingly, IEU reasons that there is no basis for the Commission to conclude that termination of the Pool Agreement is "key to the establishment of effective competition." IEU reasserts that the PTR recovers from retail customers lost wholesale Pool Agreement revenue and shifts AEP-Ohio's wholesale risks to retail customers. Therefore, IEU submits that there is no basis for the Commission to find that the PTR has the effect of providing

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1 *In re AEP-Ohio*, Case No. 10-2929-EL-UNC, Order (July 2, 2012).

certainty or stability in the provision of retail electric service to retail customers.

In its memorandum contra, AEP-Ohio submits that IEU's claim that an increase in service offers is not equivalent to certainty or stability in service is misplaced. AEP-Ohio states, as it and other parties to this proceeding have previously asserted, that the nature of the Pool Agreement has historically been to stabilize rates for Ohio ratepayers and, on that basis, AEP-Ohio claims that the PTR, therefore, qualifies as a charge that would have the effect of stabilizing or providing certainty regarding retail electric service in compliance with the requirements of Section 4928.143(B)(2)(d), Revised Code. Further, AEP-Ohio emphasizes the rationale offered in the August 8 Order, that the PTR serves as an incentive for AEP-Ohio to move to a competitive market to the benefit of its shopping and non-shopping customers. Furthermore, AEP-Ohio explains that the rationale offered in the August 8 Order is consistent with the reasoning offered by the Commission in the January 30 EOR, which is essentially that termination of the Pool Agreement and increases in service offers likely will promote price stability, through the development of a more robust and transparent retail electric service market. With that understanding, AEP-Ohio reasons that the Commission properly determined that Section 4928.143(B)(2)(d), Revised Code, authorizes the PTR and adequately explained the basis for its decision.

We find no merit in IEU's claims that the Commission failed to make the necessary findings to demonstrate that the PTR would have the effect of stabilizing or providing certainty regarding retail electric service. While the Commission reconsidered its statutory basis for approval of the PTR in the January 30 EOR, the rationale for approval has not changed. As noted in the August 8 Order "the PTR serves as an incentive for AEP-Ohio to move to a competitive market to the benefit of its shopping and non-shopping customers, without regard to the possible loss of revenue associated with the termination of the Pool Agreement" (Order at 49). The basis for Ohio electric utilities transitioning to a competitive market is to encourage retail electric suppliers to pursue customers with a variety of service offers. A competitive market will ultimately result in more offers for retail electric service for shopping customers and put pressure on AEP-Ohio to retain non-shopping

customers with better service offers. Nonetheless, the Commission limited AEP-Ohio's right to recover under the PTR (January 30 EOR at 59-60), and even assuming that the conditions for pursuing recovery under the PTR were met, AEP-Ohio maintained the burden set forth in Section 4928.143, Revised Code, to first file an application to "demonstrate the extent to which the Pool Agreement benefitted Ohio ratepayers over the long-term and the extent to which the costs and/or revenues should be allocated to Ohio ratepayers... that any recovery it seeks under the PTR is based upon costs which were prudently incurred and are reasonable" (Order at 49). Thus, at this juncture, the PTR has only been approved to facilitate the possibility of recovery. The Commission finds that the rationale previously offered is sufficient to allow AEP-Ohio the possibility to file an application for recovery under the PTR and, therefore, we deny IEU's application for rehearing.

(14) Finally, IEU again asserts, as argued in its application for rehearing of the August 8 Order, that the approval of the PTR, violates Sections 4928.02(H) and 4928.17, Revised Code. IEU submits that Section 4928.02(H), Revised Code, prohibits the recovery of any generation-related costs through distribution or transmission rates after corporate separation is effective.

In response, AEP-Ohio notes that the IEU made the same arguments in its application for rehearing of the August 8 Order which were rejected by the Commission in the January 30 EOR. AEP-Ohio recommends that the Commission decline to consider the argument again on rehearing.

In yet another attempt to support its arguments about Section 4928.02(H), Revised Code, IEU overstates the January 30 EOR and the Sporn Decision.[2] We thoroughly considered and addressed these claims in the January 30 EOR. IEU fails to raise any new arguments which persuade the Commission that approval of the PTR violates Sections 4928.02(H) and 4928.17, Revised Code. Thus, we must again deny IEU's request for rehearing.

It is, therefore,

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2 *In re Ohio Power Company*, Case No. 10-1454-EL-RDR, Finding and Order (January 11, 2012).

ORDERED, That the applications for rehearing of the January 30 EOR filed by OCC and IEU are denied as discussed herein. It is, further,

ORDERED, That a copy of this Second Entry on Rehearing be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

M. Beth Trombold

GNS/JJT/vrm

Entered in the Journal

MAR 27 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE AUGUST 8, 2012 OPINION AND ORDER AND MEMORANDUM IN SUPPORT

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PUCO

Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, Suite 1700
Columbus, OH 43215-4228
Telephone: 614-469-8000
Telecopier: 614-469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

September 7, 2012

Attorneys for Industrial Energy Users-Ohio

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C. The ESP II Order is unlawful and unreasonable because the PTR cannot be authorized under Section 4928.143(B)(2)(h), Revised Code. The PTR has no relationship to AEP-Ohio's distribution service. 46

D. The ESP II Order is unlawful and unreasonable because it concludes that the Capacity Deferral and the Capacity Shopping Tax can be authorized under Section 4928.144, Revised Code. These items do not arise from rates or prices authorized under Sections 4928.141 to 4928.143, Revised Code, and therefore the Commission's authority in Section 4928.144, Revised Code, is unavailable. 48

4. The ESP II Order is unlawful and unreasonable because it authorizes AEP-Ohio to increase SSO prices so as to collect above-market generation-related revenue through the non-bypassable RSR, Capacity Shopping Tax, and the PTR, thereby providing AEP-Ohio with the ability to collect transition revenue or its equivalent at a time when Ohio law commands that AEP-Ohio's generation business be fully on its own in the competitive market. By allowing AEP-Ohio to collect transition revenue, the Commission unreasonably and unlawfully ignored the statutory bar against such collection. The ESP II Order is similarly unreasonable and unlawful because it permits AEP-Ohio to evade its Commission-approved settlement obligation to forego such collection and to not impose lost generation-related revenue charges on shopping customers. 50

5. The ESP II Order is unlawful and unreasonable because it assumes that the Commission may invent and apply a cost-based ratemaking methodology for purposes of authorizing a significant increase in the price for generation capacity service. It is similarly unlawful and unreasonable because it authorizes AEP-Ohio to defer the uncollected portion of this significant increase in the price for generation capacity service and then, after the term of the ESP, collect such portion plus interest charges through non-bypassable charges applicable to shopping and non-shopping customers. 57

6. The ESP II Order is unlawful and unreasonable because it functions to permit AEP-Ohio, an electric distribution utility ("EDU"), to evade statutory corporate separation requirements that call for strict separation between competitive and non-competitive lines of business and services and because it approves an SSO which insulates AEP-Ohio's competitive generation business from the discipline of the electricity market. The RSR, Capacity Shopping Tax, and PTR all function to allow AEP-Ohio, the EDU, to evade such corporate separation requirements, collect above-market generation-related revenue and insulate AEP-Ohio's competitive generation business from the discipline of the electricity market. Following AEP-Ohio's proposed and untimely transfer of its generating assets to an affiliate, AEP Generation Resources Company ("Genco"), these three riders will further violate such corporate separation requirements by allowing AEP-Ohio to collect, on a non-bypassable basis, above-market generation-related revenue and remit such revenue to Genco thereby insulating Genco's competitive generation business from the discipline of the electricity market. 62

7. The ESP II Order is unlawful and unreasonable because it fails to promote the State policy contained in Section 4928.02, Revised Code. As the Commission found in the Capacity Order, market-based pricing promotes the policies contained in Section 4928.02, Revised Code, by incenting shopping, promoting true competition, and by placing EDUs and CRES providers on a level playing field. Despite finding that market-based pricing promotes State policy, the ESP II Order authorizes AEP-Ohio to collect above-market pricing for generation-related services through the RSR, PTR, Capacity Shopping Tax, and the GRR. 65

8. The ESP II 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 ESP II Order in combination with the Capacity Order work to create by comparing RPM-Based Pricing to the $188.88/MW-day price. The non-symmetrical and arbitrary bias embedded in these Orders' description of how the Capacity Deferral 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. 67

9. The ESP II Order is unlawful and unreasonable inasmuch as the Commission failed to adopt the uncontested recommendation of IEU-Ohio witness Kevin Murray contained at page 49 of IEU-Ohio Exhibit 125, which, if adopted, would provide much needed transparency to the process AEP-Ohio used to derive the billing determinants for generation capacity service. 69

10. The ESP II Order is unlawful and unreasonable because the GRR cannot be lawfully approved under Section 4928.143(B)(2)(c), Revised Code. 70

A. The ESP II Order is unlawful and unreasonable because it authorizes AEP-Ohio to establish the GRR to recover the cost of compliance with Section 4928.64, Revised Code (renewable energy resource requirements), through a non-bypassable charge in violation of Ohio law. Section 4928.64(E), Revised Code, states that all costs incurred by an EDU to comply with such requirements shall be bypassable by any consumer that has exercised its choice of supplier under Section 4928.03, Revised Code. The ESP II Order is also unlawful and unreasonable because the Commission violated Section 4903.09, Revised Code, by failing to address this issue raised on brief by IEU-Ohio; the Ohio Supreme Court has held that the failure to address all material matters brought to the Commission's attention is a reversible error. 71

B. The ESP II Order is unlawful and unreasonable because the Commission failed to make the findings required by Section 4928.143(B)(2)(c), Revised Code, to support its authorization of the GRR. 72

11. The ESP II Order is unlawful and unreasonable because it authorized the Phase-In Recovery Rider ("PIRR") without allowing IEU-Ohio an opportunity to present testimony or to introduce exhibits regarding the effect of accumulated deferred income taxes ("ADIT") on the carrying charges in the PIRR trespassing on IEU-Ohio's due process rights. Generally accepted accounting principles, regulatory principles, Court precedent, and Commission precedent all support an offset to account for ADIT. 76

A. The ESP II Order is unlawful and unreasonable because IEU-Ohio was denied the opportunity to present evidence regarding the effect of ADIT on the calculation of carrying charges in the PIRR in violation of due process. 77

B. The ESP II Order is unlawful and unreasonable because it fails to direct AEP-Ohio to calculate the PIRR's carrying charges on deferred balances adjusted for ADIT in accordance with generally accepted accounting principles, regulatory principles, Court precedent, and Commission precedent. The ESP II Order's failure to require an ADIT adjustment permits AEP-

Ohio to accrue carrying charges on overstated balances; thereby, requiring customers to overcompensate AEP-Ohio. 78

IV. GENERATION ASSET DIVESTITURE 82

12. The ESP II Order is unlawful and unreasonable because, without authority to do so under Section 4928.143, Revised Code, the ESP II Order conditionally approves a transfer of generating assets without making the findings required by Sections 4928.17 and 4928.02, Revised Code, and Rule 4901:1-37, OAC, and without netting the above-book market value of AEP-Ohio's generating assets against the transition revenue which the ESP II Order authorizes AEP-Ohio to collect on a non-bypassable basis during and after the term of the as-approved Modified ESP. 82

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
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INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE AUGUST 8, 2012 OPINION AND ORDER AND MEMORANDUM IN SUPPORT

Pursuant to Section 4903.10, Revised Code, and Rule 4901:1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing which is directed at the Opinion and Order ("ESP II Order")[1] issued by the Public Utilities Commission of Ohio ("Commission") on August 8, 2012. The ESP II Order authorizes AEP-Ohio[2] to significantly increase electric bills for shopping and non-shopping customers and insulates AEP-Ohio's competitive

[1] Hereinafter "ESP II Order" shall refer to the August 8, 2012 Opinion and Order in the instant proceedings, and "*ESP II Case*" shall refer to the cases identified above (Case Nos. 11-346-EL-SSO, *et al.*).

[2] Ohio Power Company ("OP") merged with Columbus Southern Power Company ("CSP"). The merged company is referred to herein as "AEP-Ohio."

generation business from the discipline of the electric market through a new Electric Security Plan ("ESP").

As a result of the many significant errors made in the ESP II Order modifying and approving the March 30, 2012 application for a modified ESP ("Modified ESP"), AEP-Ohio's shopping and non-shopping customers will pay substantially higher electric prices for years to come. These increases begin at a time when wholesale electricity prices are relatively low. Thus, the above-market increases work to deprive AEP-Ohio customers of their customer choice dividend while increasing the dividends AEP-Ohio will make available to its parent. The ESP II Order subordinates the interests of customers to provide AEP-Ohio's competitive generation business with more time to transition to a competitive electric market even though Ohio law states that the time for such a transition ended long ago. Thus, the ESP II Order provides AEP-Ohio with the means to secure an illegitimate end.

The ESP II Order is unlawful and unreasonable in the following respects:

1. The ESP II Order is unlawful and unreasonable because the as-approved Modified ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is not more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.[3]

   A. The ESP II Order is unlawful and unreasonable because it uses $188.88/megawatt-day ("MW-day") as the price for the capacity component for generation supply associated with the MRO SSO, thereby overstating the MRO SSO pricing as compared to the as-approved Modified ESP SSO.

   B. The ESP II Order is unlawful and unreasonable because it disregards the costs of the as-approved Modified ESP for over 25% of the ESP term.

[3] This Section allows a utility to fulfill its standard service offer ("SSO") obligation through a market rate offer ("MRO").

C. The ESP II Order is unlawful and unreasonable because it does not include the full cost of the Generation Resource Rider ("GRR") as part of the quantitative costs in its application of the ESP versus MRO test, thereby understating the cost of the as-approved Modified ESP.

D. The ESP II Order is unlawful and unreasonable because it does not include known costs for the Pool Termination Rider ("PTR"), Retail Stability Rider ("RSR"), and Capacity Shopping Tax[4] as part of the quantitative costs of the as-approved Modified ESP for purposes of applying the ESP versus MRO test, thereby understating the cost of the as-approved Modified ESP.

E. The ESP II Order is unlawful and unreasonable because it does not include or address the effect of known costs of the energy-only auctions and the "quicker" move to a competitive bid process ("CBP") based SSO for purposes of conducting the ESP versus MRO test.

2. The ESP II Order is unlawful and unreasonable because it approves an ESP by introducing subjective and speculative "qualitative benefits" into the ESP versus MRO test, thereby evading compliance with Section 4903.09, Revised Code.

3. The ESP II Order is unlawful and unreasonable because the non-bypassable RSR, Capacity Shopping Tax, and the PTR cannot be lawfully included in an ESP SSO.

A. The ESP II Order is unlawful and unreasonable because it authorizes non-bypassable generation-related riders which are not included on the list of permissive ESP provisions contained in Section 4928.143(B)(2), Revised Code.

B. The ESP II Order is unlawful and unreasonable because it concludes that the RSR can be authorized under Section 4928.143(B)(2)(d), Revised Code. The RSR does not have the effect of stabilizing or providing certainty regarding retail electric service.

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[4] As used throughout this pleading, "Capacity Shopping Tax" refers to the non-bypassable rider that will collect the balance of the $188.88/MW-day capacity price that is not collected from competitive retail electric service ("CRES") providers through "RPM-Based Pricing" or through the $1/megawatt hour ("MWh") portion of the RSR. As used herein, this deferred balance to be collected through the Capacity Shopping Tax is referred to as the "Capacity Deferral." Throughout this Application for Rehearing and Memorandum in Support, the PJM Interconnection, LLC ("PJM") Reliability Pricing Model ("RPM") capacity pricing method and resulting prices are referred to as the "RPM Pricing method" and the "RPM-Based Price," respectively.

C. The ESP II Order is unlawful and unreasonable because the PTR cannot be authorized under Section 4928.143(B)(2)(h), Revised Code. The PTR has no relationship to AEP-Ohio's distribution service.

D. The ESP II Order is unlawful and unreasonable because it concludes that the Capacity Deferral and the Capacity Shopping Tax can be authorized under Section 4928.144, Revised Code. These items do not arise from rates or prices authorized under Sections 4928.141 to 4928.143, Revised Code, and therefore the Commission's authority in Section 4928.144, Revised Code, is unavailable.

4. The ESP II Order is unlawful and unreasonable because it authorizes AEP-Ohio to increase SSO prices so as to collect above-market generation-related revenue through the non-bypassable RSR, Capacity Shopping Tax, and the PTR, thereby providing AEP-Ohio with the ability to collect transition revenue or its equivalent at a time when Ohio law commands that AEP-Ohio's generation business be fully on its own in the competitive market. By allowing AEP-Ohio to collect transition revenue, the Commission unreasonably and unlawfully ignored the statutory bar against such collection. The ESP II Order is similarly unreasonable and unlawful because it permits AEP-Ohio to evade its Commission-approved settlement obligation to forego such collection and to not impose lost generation-related revenue charges on shopping customers.

5. The ESP II Order is unlawful and unreasonable because it assumes that the Commission may invent and apply a cost-based ratemaking methodology for purposes of authorizing a significant increase in the price for generation capacity service. It is similarly unlawful and unreasonable because it authorizes AEP-Ohio to defer the uncollected portion of this significant increase in the price for generation capacity service and then, after the term of the ESP, collect such portion plus interest charges through non-bypassable charges applicable to shopping and non-shopping customers.

6. The ESP II Order is unlawful and unreasonable because it functions to permit AEP-Ohio, an electric distribution utility ("EDU"), to evade statutory corporate separation requirements that call for strict separation between competitive and non-competitive lines of business and services and because it approves an SSO which insulates AEP-Ohio's competitive generation business from the discipline of the electricity market. The RSR, Capacity Shopping Tax, and PTR all function to allow AEP-Ohio, the EDU, to evade such corporate separation requirements, collect above-market generation-related revenue and insulate AEP-Ohio's competitive generation business from the discipline of the electricity market. Following

AEP-Ohio's proposed and untimely transfer of its generating assets to an affiliate, AEP Generation Resources Company ("Genco"), these three riders will further violate such corporate separation requirements by allowing AEP-Ohio to collect, on a non-bypassable basis, above-market generation-related revenue and remit such revenue to Genco thereby insulating Genco's competitive generation business from the discipline of the electricity market.

7. The ESP II Order is unlawful and unreasonable because it fails to promote the State policy contained in Section 4928.02, Revised Code. As the Commission found in the Capacity Order,[5] market-based pricing promotes the policies contained in Section 4928.02, Revised Code, by incenting shopping, promoting true competition, and by placing EDUs and CRES providers on a level playing field. Despite finding that market-based pricing promotes State policy, the ESP II Order authorizes AEP-Ohio to collect above-market pricing for generation-related services through the RSR, PTR, Capacity Shopping Tax, and the GRR.

8. The ESP II 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 ESP II Order, in combination with the Capacity Order, work to create by comparing RPM-Based Pricing to the $188.88/MW-day price. The non-symmetrical and arbitrary bias embedded in these Orders' description of how the Capacity Deferral 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.

9. The ESP II Order is unlawful and unreasonable inasmuch as the Commission failed to adopt the uncontested recommendation of IEU-Ohio witness Kevin Murray contained at page 49 of IEU-Ohio Exhibit 125 which, if adopted, would provide much needed transparency to the process AEP-Ohio used to derive the billing determinants for generation capacity service.

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[5] Hereinafter "Capacity Order" shall refer to the July 2, 2012 Opinion and Order in *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 and "Capacity Case" shall refer to the docket above (Case No. 10-2929-EL-UNC).

10. The ESP II Order is unlawful and unreasonable because the GRR cannot be lawfully approved under Section 4928.143(B)(2)(c), Revised Code.

A. The ESP II Order is unlawful and unreasonable because it authorizes AEP-Ohio to establish the GRR to recover the cost of compliance with Section 4928.64, Revised Code (renewable energy resource requirements), through a non-bypassable charge in violation of Ohio law. Section 4928.64(E), Revised Code, states that all costs incurred by an EDU to comply with such requirements shall be bypassable by any consumer that has exercised its choice of supplier under Section 4928.03, Revised Code. The ESP II Order is also unlawful and unreasonable because the Commission violated Section 4903.09, Revised Code, by failing to address this issue raised on brief by IEU-Ohio; the Ohio Supreme Court has held that the failure to address all material matters brought to the Commission's attention is a reversible error.

B. The ESP II Order is unlawful and unreasonable because the Commission failed to make the findings required by Section 4928.143(B)(2)(c), Revised Code, to support its authorization of the GRR.

11. The ESP II Order is unlawful and unreasonable because it authorized the Phase-In Recovery Rider ("PIRR") without allowing IEU-Ohio an opportunity to present testimony or to introduce exhibits regarding the effect of accumulated deferred income taxes ("ADIT") on the carrying charges in the PIRR, trespassing on IEU-Ohio's due process rights.[6] Generally accepted accounting principles, regulatory principles, Court precedent, and Commission precedent all support an offset to account for ADIT.

A. The ESP II Order is unlawful and unreasonable because IEU-Ohio was denied the opportunity to present evidence regarding the effect of ADIT on the calculation of carrying charges in the PIRR in violation of due process.

B. The ESP II Order is unlawful and unreasonable because it fails to direct AEP-Ohio to calculate the PIRR's carrying charges on deferred balances adjusted for ADIT in accordance with generally accepted accounting principles, regulatory principles, Court precedent, and Commission precedent. The ESP II Order's failure to require an ADIT adjustment permits AEP-Ohio to accrue carrying charges on overstated balances; thereby requiring customers to overcompensate AEP-Ohio.

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[6] *Vectren Energy Delivery of Ohio, Inc. v. Pub Util. Comm.*, 113 Ohio St.3d 180, 192 (2007).

12. The ESP II Order is unlawful and unreasonable because, without authority to do so under Section 4928.143, Revised Code, the ESP II Order conditionally approves a transfer of generating assets without making the findings required by Sections 4928.17 and 4928.02, Revised Code, and Rule 4901:1-37, OAC, and without netting the above-book market value of AEP-Ohio's generating assets against the transition revenue which the ESP II Order authorizes AEP-Ohio to collect on a non-bypassable basis during and after the term of the as-approved Modified ESP.

13. The ESP II Order is unlawful and unreasonable because it fails to sustain objections to the admission of testimony where the testimony improperly relied upon settlement agreements from other proceedings for the purpose of addressing contested issues in the *ESP II Case.*

As discussed in the attached Memorandum in Support, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing, terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the as-approved Modified ESP, and issue such orders as are necessary to continue the provisions, terms, and conditions of AEP-Ohio's most recent SSO until a subsequent SSO is lawfully authorized pursuant to Section 4928.142 or 4928.143, Revised Code. The Commission's restoration of the most recent SSO must require that AEP-Ohio's compensation for generation capacity service available to CRES providers be determined based on the capacity valuation and pricing method that is part of PJM's RPM. Further, IEU-Ohio requests that the order granting rehearing direct that any revenue increase collected by AEP-Ohio pursuant to the ESP II Order or pursuant to the Stipulation and Recommendation ("Stipulation ESP"), filed September 7, 2011 that was approved and then rejected on February 23, 2012, be refunded.

Respectfully submitted,

Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Throughout the *ESP II Case*, AEP-Ohio's misguided proposals to increase default generation supply prices, extract above-market revenue for generation capacity service available to CRES providers, and block shopping opportunities have placed seriously contested legal, policy, and practical questions before the Commission. Initially these questions arose in the ESP application ("Application") filed by AEP-Ohio on January 27, 2011. The Commission's Staff ("Staff") and every other stakeholder opposed the Application because it contained unlawful and unreasonable proposals to increase SSO rates and block customer choice.[7] Eventually, the focus of the litigation

[7] IEU-Ohio filed a motion to dismiss without prejudice that identified several material procedural errors in AEP-Ohio's Applications. Motion to Dismiss and Memorandum in Support of Industrial Energy Users-Ohio (May 10, 2011) ("May 2011 Motion"). IEU-Ohio renewed that motion at the completion of AEP-Ohio's case-in-chief during the hearing on the Stipulation. Stipulation Tr. Vol. VI at 956-58. The Commission denied the motion in its Opinion and Order approving the Stipulation. Opinion and Order at 8 (Dec. 14, 2011).

shifted to proposals contained in the Stipulation ESP filed on September 7, 2011, but the main contested issues remained substantially the same.

On December 14, 2011, the Commission issued an Opinion and Order modifying and approving the contested Stipulation ESP. The Commission's approval, however, was short-lived. When customers opened their January 2012 bills and the Commission-approved Stipulation ESP's rate shock became evident, a public outcry inundated the Commission. On February 23, 2012, the Commission issued an Entry on Rehearing rejecting the Stipulation ESP because AEP-Ohio failed to demonstrate that the Stipulation ESP benefited ratepayers and was in the public interest.[8]

The February 23, 2012 Entry on Rehearing did not abate AEP-Ohio's ambitions to protect its generation revenue and block shopping. Instead, AEP-Ohio's focus shifted to the pursuit of an unlawful cost-based ratemaking methodology in the *Capacity Case* and a Modified ESP that was financially worse for customers than the Stipulation ESP.[9]

After additional months of discovery and another evidentiary hearing, the Commission issued the ESP II Order modifying and approving AEP-Ohio's Modified ESP. Because of the ESP II Order and the Capacity Order, AEP-Ohio has been authorized to significantly increase electricity prices applicable to shopping and non-shopping customers.

In the *Capacity Case*, the Commission unlawfully invented a cost-based ratemaking methodology and then applied that methodology to produce a significant

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[8] Entry on Rehearing at 12 (Feb. 23, 2012).

[9] FirstEnergy Solutions Corp. ("FES") Ex. 104 at 37-43.

increase in AEP-Ohio's compensation for capacity available to CRES providers.[10] After the Commission unlawfully authorized AEP-Ohio to significantly increase its generation service capacity compensation through the application of a price of $188.88/MW-day, the Commission divided responsibility for this competitive service compensation between CRES providers and customers (shopping and non-shopping alike). The Commission limited the generation capacity service compensation responsibility of CRES providers to the much lower RPM-Based Price while condemning shopping and non-shopping customers to pick up the positive difference between $188.88/MW-day and the RPM-Based Price[11] through non-bypassable charges payable during the term of the Modified ESP and for three years after it ends. The practical effect of the Commission's decision in the *Capacity Case* and the *ESP II Case* is to insulate, at customers' expense, AEP-Ohio's competitive generation business from the discipline of market forces at a time when Ohio law requires AEP-Ohio's generation business to be fully on its own in the competitive market.[12]

In addition to authorizing AEP-Ohio to significantly increase its compensation for generation capacity service in the *Capacity Case* and *ESP II Case,* the Commission authorized AEP-Ohio to collect even more compensation for SSO service through additional non-bypassable riders. This incremental increase in compensation for SSO

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[10] The lawfulness and reasonableness of the Capacity Order is currently subject to several applications for rehearing. The Commission has granted rehearing to permit it additional time to consider the applications.

[11] This difference being the "Capacity Shopping Tax" or the above-market compensation for generation capacity service.

[12] Section 4928.38, Revised Code. This requirement was strengthened in Section 4928.141, Revised Code (enacted after Section 4928.38, Revised Code) by the General Assembly's termination of any future transition revenue collection opportunity.

service is not warranted since the Commission has no authority to approve any of the new generation-related non-bypassable riders as a part of an ESP, and its approval also violates corporate separation requirements.[13]

The ESP II Order goes through the motions required by the ESP versus MRO test and then wrongly concludes that the as-approved Modified ESP is more favorable in the aggregate than an MRO. But, the ESP II Order itself confirms that the as-approved Modified ESP is, in the aggregate, substantially worse than the expected results of an MRO-based SSO.

II. ESP VERSUS MRO TEST

AEP-Ohio had the burden of demonstrating that its Modified ESP satisfied the statutory requirement that the ESP SSO's pricing and all other terms and conditions, including any deferred amounts and the collection of those deferred amounts, are more favorable in the aggregate than an MRO SSO.[14] In its Modified ESP Application, AEP-Ohio claimed that the Commission should approve the Modified ESP because it satisfied the test by $960 million and provided several qualitative benefits.[15]

To support its claim, AEP-Ohio proposed that the Commission divide the statutory better-than test for approving an ESP into three steps.[16]. The first step, the Price Test, consisted of a comparison of some of the provisions contributing to the Modified ESP price and an administratively-determined price of the MRO. In particular,

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[13] The Application for the Modified ESP also requested Commission approval of AEP-Ohio's separate application to divest generating assets and to amend its corporate separation plan. As discussed below, those matters are not properly before the Commission in this proceeding.

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

[15] AEP-Ohio Ex. 114 at LJT-1.

[16] Ohio Power Company's Initial Post-Hearing Brief at 127 (June 29, 2012) ("AEP-Ohio Initial Brief").

AEP-Ohio's version of the Price Test did not include the effects of the RSR. The second step presented the "other" quantifiable costs and benefits of the provisions of the ESP not addressed by the Price Test. To justify the Modified ESP, AEP-Ohio claimed that a proposed above-market capacity pricing scheme that increased capacity prices paid by CRES providers for capacity to serve shopping load was "discounted" as compared to a much higher and never-proven number and that the hypothetical discount provided a $989 million benefit.[17]

The third step presented the "qualitative benefits" (but not the costs) which AEP-Ohio attributed to its Modified ESP.[18]

In the ESP II Order, the Commission used a three-part test similar to that advanced by AEP-Ohio, but rejected AEP-Ohio's claim that it had demonstrated that the Modified ESP was more favorable because "AEP-Ohio made multiple errors in conducting the statutory test."[19] Having failed to find that AEP-Ohio had sustained its burden of proof to establish that the Modified ESP was lawful, the Commission then began its own search of the record to "correct" AEP-Ohio's errors.[20] During this search, the Commission substantially modified the input variables and their assigned value which AEP-Ohio used in its ESP versus MRO test. Based on the Commission's modifications, the ESP II Order identifies that the as-approved Modified ESP is financially worse than an MRO by $386 million.[21]

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[17] AEP-Ohio Ex. 116 at 8.

[18] AEP-Ohio Ex. 114, *passim*.

[19] ESP II Order at 73.

[20] *Id.*

[21] *Id.* at 75.

Despite finding that customers would pay several hundred million dollars more under the Commission's as-approved Modified ESP, the Commission nevertheless concluded that "in weighing the statutory price test which favors the modified ESP by $9.8 million [wrongly derived as discussed below], as well as the quantifiable costs and benefits associated with the modified ESP, and the non-quantifiable benefits, as we find the modified ESP, is more favorable in the aggregate than what would otherwise apply under an MRO [sic]."[22]

The revisions the Commission made to the Modified ESP and the ESP versus MRO test presented by AEP-Ohio were substantial. In the first step, the Commission's so-called Price Test, the Commission modified AEP-Ohio's calculation in two ways.

First, the Commission replaced the capacity price used by AEP-Ohio, $355/MW-day, with $188.88/MW-day, the capacity compensation the Commission authorized in the *Capacity Case*.[23] The Commission also decided to exclude the first nine months of the term of the as-approved Modified ESP in conducting the ESP versus MRO test stating that AEP-Ohio would be unable to conduct an auction for several months.[24] Based on the Commission's unreasonable and unlawful specifications for the Price Test, the ESP II Order concludes that the as-approved Modified ESP is $9.8 million more favorable than the MRO for the 2013-2014 and 2014-2015 PJM planning years (the last 24 months of the Modified ESP).[25] Of course, since the ESP II Order does not

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[22] *Id.* at 77.

[23] *Id.* at 74.

[24] *Id.*

[25] *Id.* at 75. The PJM planning year runs from June through May. Thus, the 2013-2014 planning year runs from June 2013 through May 2014.

use the full term of the as-approved Modified ESP, the $9.8 million "more favorable" conclusion offers a fictional account of the cost of the as-approved Modified ESP.

In the second step of the Commission's three-part approach to the ESP versus MRO test, the Commission again modified AEP-Ohio's ESP versus MRO test. The Commission removed AEP-Ohio's so-called "capacity discount" that AEP-Ohio had claimed in the Modified ESP Application.[26] Although AEP-Ohio's ESP versus MRO test included the full revenue effect of its proposed RSR, the ESP II Order's ESP versus MRO test omits the full impact of the non-bypassable RSR from the cost of the as-approved Modified ESP. The ESP II Order does not explain why the full amount of the non-bypassable RSR was not picked up in the Commission's ESP versus MRO test.[27] With a bit more tinkering to pick up $8 million associated with the illegally approved GRR as a cost of the as-approved Modified ESP,[28] the ESP II Order winds its way to the conclusion that the as-approved Modified ESP is worse than an MRO SSO by $386 million.[29]

The ESP versus MRO test applied by the Commission in the ESP II Order fails to recognize all of the quantifiable costs of the as-approved Modified ESP and is therefore unreasonable and unlawful. First, the ESP II Order understates the cost of the as-approved Modified ESP by the ignored portion of the RSR. Had the full effect of the RSR been recognized, the disadvantage of the as-approved Modified ESP would have

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[26] The Commission does not explicitly state that it removed the claimed "discount," but the Commission's conclusion that the Modified ESP fails the ESP versus MRO test impliedly supports that result. *Id.* at 75.

[27] *Id.* at 75 n.32.

[28] *Id.* The illegality of the GRR is discussed below.

[29] *Id.* at 75.

increased by $144 million (bringing the total disadvantage to $530 million as discussed below). Second, it also fails to include the full revenue effect of the Turning Point Solar Project ("Turning Point") over the life of the facility as part of the cost of the GRR included in the as-approved Modified ESP. Third, the ESP versus MRO test contained in the ESP II Order ignores the cost of two additional non-bypassable riders contained in the as-approved Modified ESP, the PTR and the Capacity Shopping Tax.[30]

In the third step, the ESP II Order resorts to qualitative judgments[31] regarding the as-approved Modified ESP and concludes that several qualitative benefits offset the (understated) $386 million by which the ESP II Order acknowledges that the as-approved Modified ESP flunks the ESP versus MRO test. The ESP II Order puts distribution-related benefits attributed to customer-paid distribution riders,[32] an expanded energy-only auction, and a claimed accelerated use of a CBP to set the default generation supply price relative to what would be available under an MRO in the Commission's qualitative benefits quiver.[33] But the ESP II Order is, qualitatively speaking, unreasonable and unlawful because it is very one-sided; it fails to recognize

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[30] The details of the Capacity Shopping Tax are discussed below.

[31] Although qualitative benefits are, by definition, not subject to quantification, the test established by Ohio law obligates the Commission to articulate some proven rationale as to why the alleged qualitative benefits of an ESP outweigh its known costs. Otherwise, the Commission's ESP versus MRO analysis would, in every case, boil down to relying simply on the Commission's say-so and effectively put the Commission's decision and non-bypassable consequences beyond challenge or review. The statutory test is supposed to be beneficial to consumers and does not allow the Commission to, in substance, exercise unfettered discretion through a one-sided, back-door, qualitative analysis.

[32] The ESP II Order points to the ESP's distribution-related riders, such as the Enhanced Service Reliability Rider ("ESSR") and the gridSMART Rider. These riders, however, are also available to AEP-Ohio *via* a distribution rate case and thus would be available to AEP-Ohio under an MRO. Thus, the ESSR and the gridSMART Riders are not qualitative benefits of the as-approved Modified ESP.

[33] *Id.* at 75-76. These so-called qualitative benefits are a byproduct of AEP-Ohio's overdue transition to the competitive market and compliance with Ohio's corporate separation requirements. They can only be called benefits by ignoring the corporate separation that is otherwise required by Ohio law.

and include the costs of these so-called qualitative benefits in the ESP versus MRO test applied to the as-approved Modified ESP or objectively explain how these so-called qualitative benefits override the $386 million by which the ESP II Order finds that the as-approved Modified ESP fails the ESP versus MRO test.[34]

For the following reasons, the ESP II Order's application of the ESP versus MRO test and the finding that the as-approved Modified ESP is more favorable in the aggregate than the expected results of an MRO SSO are unlawful and unreasonable.

1. **The ESP II Order is unlawful and unreasonable because the as-approved Modified ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is not more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.**

The ESP II Order unreasonably and unlawfully specifies and applies the statutory ESP versus MRO test to the as-approved Modified ESP. Once this unreasonable and unlawful specification and application are cured, the Commission must find that the as-approved Modified ESP fails the ESP versus MRO test. When the ESP II Order's findings and conclusions are corrected to account for all the costs of the as-approved Modified ESP, it quantitatively fails the ESP versus MRO test by $1.736 billion[35] and there are no offsetting qualitative benefits.

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[34] *Id.* at 77.

[35] The Commission identified that the as-approved Modified ESP was $386 million less favorable than an MRO. As demonstrated below, the as-approved ESP should include the full revenue effects of the RSR (an additional $144 million), the revenue effect of the PTR (an additional $410 million), the effect of the deferral of the deferred Capacity Shopping Tax (an additional $447 million as detailed in Attachment A), and the full revenue effect of the GRR that would account for the life of the generating facility ($349.2 million). If the ESP II Order is corrected for these amounts, the as-approved Modified ESP fails the ESP versus MRO test by $1.736 billion.

A. The ESP II Order is unlawful and unreasonable because it uses $188.88/megawatt-day ("MW-day") as the price for the capacity component for generation supply associated with the MRO SSO, thereby overstating the MRO SSO pricing as compared to the as-approved Modified ESP SSO.

The ESP II Order unreasonably and unlawfully assumes that the MRO SSO's generation supply price would compensate AEP-Ohio for generation capacity service based on a price of $188.88/MW-day, the amount authorized by the Commission in the *Capacity Case* as the "state compensation mechanism."[36] The ESP II Order reached this result based on its assumption that a state compensation mechanism price of $188.88/MW-day applies where all or part of the MRO generation supply is procured through a CBP.[37] It does not so apply. According to the ESP II Order, the $188.88/MW-day price is appropriate because AEP-Ohio is an FRR Entity and will be supplying capacity whether the customer is an SSO customer or the customer is taking service through a CRES provider.[38] The ESP II Order's use of a capacity price of $188.88/MW-day to identify the expected results of an MRO SSO is unlawful and unreasonable for several reasons.

The ESP II Order's assumption that the state compensation mechanism price of $188.88/MW-day (adopted in the *Capacity Case*) applies in the MRO context is incorrect. As demonstrated in this case (as well as in the *Capacity Case*), the state

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[36] ESP II Order at 74.

[37] AEP-Ohio technically is not a Fixed Resource Requirement ("FRR") Entity; American Electric Power Service Corporation ("AEPSC") is the signatory party of the Reliability Assurance Agreement ("RAA"). AEPSC is the agent of AEP-Ohio under the agreement. The RAA is contained IEU-Ohio exhibit 124 at KMM-15. Duke Energy Ohio, Inc.'s ("Duke") recent application in Case Nos. 12-2400-EL-UNC, *et al.* suggests that Duke will also seek advantage from this incorrect assumption as it pushes the Commission to provide to Duke what the Commission has rendered unto AEP-Ohio at customers' expense.

[38] ESP II Order at 74.

compensation mechanism under Section D.8 of Schedule 8.1 of the RAA deals only with generation capacity service compensation available from an alternative load serving entity or "LSE" (which in Ohio is a CRES provider) that is serving a retail customer.[39] Under the MRO option, the EDU procures an escalating portion of the SSO generation supply through a Commission-supervised CBP. The winning generation supply bidders in this MRO SSO process do not serve retail customers; they provide generation supply, including capacity, on a wholesale or sale for resale basis to the EDU (AEP-Ohio in this case) with the delivered total price of the generation supply determined through the CBP. Regardless of what role the state compensation mechanism might have for determining the price CRES providers pay AEP-Ohio for capacity when such CRES providers are serving retail customers, the state compensation mechanism has no role in establishing AEP-Ohio's compensation when the MRO generation supply is procured through a wholesale CBP. The demand served by the supply provided by the bidder is not "switched load," it is the demand of non-shopping customers (non-switched load). As a result, the wholesale generation supplier bidding in the MRO CBP is free to secure capacity by contract with AEP-Ohio, provide its own capacity, or enter into a bilateral transaction for capacity with a third party, and it is unreasonable to assume that a bidding wholesale supplier would pay above-market prices for capacity.[40] Indeed, the Commission's supervisory role with regard to this CBP process and statutory obligations would require the Commission to reject an above-market bid.

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[39] Capacity Order at 23.

[40] IEU-Ohio Ex. 125 at 64.

The pricing under the RAA's state compensation mechanism simply does not apply to a wholesale supplier selected in the MRO's CBP process to meet all or part of the demand of the EDU's non-shopping customers. And by using $188.88/MW-day as the price for the capacity component of the MRO's default generation supply price, the ESP II Order significantly overstates the cost of the MRO's default generation supply. Indeed, the Commission's supervisory role with regard to this CBP process and statutory obligations would require the Commission to reject an above-market bid.

Even if a wholesale bidder in the MRO's default generation supply CBP was required to pay the same price for capacity as a CRES provider, the ESP II Order ignores the decision in the *Capacity Case* which holds that CRES providers pay the RPM-Based Price.[41] Thus, the use of the $188.88/MW-day price to establish the capacity component of the MRO default generation supply price is incorrect and unreasonable based on the reasoning contained in the ESP II Order.

Instead of assuming (wrongly) that the $188.88/MW-day price was proper to identify the capacity component of the cost of default generation supply in an MRO context and as a matter of sound decision-making, the Commission should have used actual CBP results to identify the expected generation supply price for the MRO. As Mr. Murray correctly concluded, "it is unreasonable to use administratively-determined price estimates to portray the MRO option in view of the actual CBP information that is readily available for at least a portion of the period covered by the Modified ESP."[42]

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[41] Capacity Order at 23.

[42] IEU-Ohio Ex. 125 at 58.

Moreover, the record includes detailed information to establish a generation supply price based on the actual CBP results for part of the Modified ESP term. In his application of the ESP versus MRO test, Mr. Murray divided the ESP term into two periods to account for the availability of relevant auction information to develop the competitive benchmark price.[43] For only the period of June 2012 to December 2014 and based on the same shopping assumptions used by AEP-Ohio, Mr. Murray estimated that the Modified ESP would fail the ESP versus MRO test by $330 million if the actual CBP results were relied upon to establish the competitive benchmark price.[44] Mr. Murray estimated the Modified ESP would fail the ESP versus MRO test for the period of January 2015 to May 2015 by another $77 million,[45] and this second calculation does not reflect the additional higher costs of the 5% energy-only auction, discussed below.[46]

Additionally and as discussed below and in IEU-Ohio's Post-Hearing Brief and Application for Rehearing in the *Capacity Case*,[47] the Commission has no authority to invent and apply the cost-based ratemaking methodology for purposes of increasing AEP-Ohio's compensation for generation capacity service. Therefore, it was unlawful and unreasonable to assume for purposes of the ESP versus MRO test that the capacity price component of the MRO's default generation supply would be dictated by

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[43] *Id.* at 65-69.

[44] *Id.* at 69-70 & Ex. KMM-20.

[45] *Id.* During his examination, Mr. Murray corrected Exhibit KMM-20 to reflect the ESP being less favorable than an MRO between January 2014 and May 2015 by $13.34/MWh, rather than $13.53/MWh.

[46] *Id.* at 72-74.

[47] *Capacity Case*, Post-Hearing Brief of Industrial Energy Users-Ohio (May 23, 2012) and Industrial Energy Users-Ohio's Application for Rehearing (Aug. 1, 2012).

the cost-based ratemaking methodology used in the *Capacity Case* to produce the $188.88/MW-day price.

Finally, by assuming an above-market $188.88/MW-day capacity price for purposes of portraying the expected results of the MRO, the ESP II Order also unreasonably and unlawfully assumes that AEP-Ohio would be entitled to collect above-market compensation for generation-related service provided to non-shopping customers through the MRO option. As discussed below and in IEU-Ohio's Application for Rehearing in the *Capacity Case*, this above-market compensation for generation-related service is "transition revenue" under Ohio law. Since the opportunity to collect transition revenue or its equivalent expired years ago and since AEP-Ohio agreed, in a Commission-approved settlement in AEP-Ohio's Electric Transition Plan ("ETP") proceedings,[48] to forego any recovery of generation-related transition revenue, the ESP II Order's use of the above-market $188.88/MW-day price is precluded by operation of Ohio law. The expected results of the MRO cannot, as a matter of law, include above-market compensation for generation-related service or be structured to provide AEP-Ohio's generation business with additional time to transition to a competitive market.

B. The ESP II Order is unlawful and unreasonable because it disregards the costs of the as-approved Modified ESP for over 25% of the ESP term.

The ESP II Order's quantitative analysis of the as-approved Modified ESP is improper because it ignores certain and quantifiable costs of the ESP. The ESP II Order states that it must "begin evaluating the statutory price test analysis

[48] *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 (Sept. 28, 2000). The Opinion and Order is IEU-Ohio Ex. 104.

approximately ten months from the present" and, thus, is limited to a comparison of the ESP versus an MRO in the Commission's Price Test between June 1, 2013 and May 31, 2015.[49] The ESP II Order states this limitation results from the fact that AEP-Ohio's quantitative analysis was prepared as of June 2012 and the Order was not issued until August 2012. The ESP II Order further states that because FES witness Banks offered testimony that AEP-Ohio *could* participate in a 100% energy-only auction as of June 2013, then somehow an MRO could not be established until then.[50] This explanation defies logic, reason, and the statutory test required by Section 4928.143(C)(1), Revised Code. It also ignores the fact that AEP-Ohio and its affiliates have participated in CBPs associated with default generation pricing for other Ohio EDUs,[51] and AEP-Ohio, itself, has used CBPs to establish default generation supply pricing for its retail customers.[52]

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[49] ESP II Order at 74.

[50] *Id.*

[51] IEU-Ohio Ex. 125 at KMM-6 & 7.

[52] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of their Plan to Provide Additional Options for Customer Participation in the Electric Market*, Case No. 06-1153-EL-UNC, Application (Sept. 22, 2006). *See also In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated With Reconciliation Mechanism and Phase In, and Tariffs for Generation Service*, Case Nos. 07-769-EL-ATA, *et al.*, Comments of Columbus Southern Power Company and Ohio Power Company at 5 (Sept. 5, 2007) (AEP-Ohio indicated that if a CBP were held to obtain SSO generation for AEP-Ohio's load, given AEP-Ohio's FRR status, AEP-Ohio would sell capacity to winning bidders at the RPM clearing price until such time as AEP-Ohio could terminate its FRR status); *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, Case No. 05-765-EL-UNC, Opinion and Order at 14-17 (Nov. 9, 2005) (the Commission authorized AEP-Ohio to conduct a Request for Proposals ("RFP") for the generation supply that AEP-Ohio said it needed to meet the default supply needs of the former Monongahela Power Company customers). AEP-Ohio has also been able to secure other forms of market-based compensation for the default generation supply costs associated with the load of Ormet Primary Aluminum Corp. and Ormet Aluminum Mill Products Corp. *Columbus Southern Power Company's and Ohio Power Company's Application to Set the 2007 Generation Market Price for Ormet's Hannibal Facilities*, Case No. 06-1504-EL-UNC, Finding and Order at 2-3 (June 27, 2007); *Columbus Southern Power Company's and Ohio Power Company's Application to Set the 2008 Generation Market*

Section 4928.143(C)(1), Revised Code, requires that the ESP, even as modified by the Commission and including all of its terms and conditions, be more favorable in the aggregate than the expected results of an MRO. By virtue of the ESP II Order, the as-approved Modified ESP is effective September 1, 2012 and runs until May 31, 2015 assuming AEP-Ohio does not reject the as-approved Modified ESP. There is no term or condition in the as-approved Modified ESP that would cause the effective date to be delayed until June 1, 2013. All of its costs must be considered, and ignoring over 25% of the costs of the ESP through delayed recognition of its actual start date is unreasonable and unlawful.

To the extent AEP-Ohio requires more time to prepare for the MRO's CBP, Ohio law provides that AEP-Ohio's current ESP, with limited adjustments, continues until a subsequent SSO is authorized.[53] Thus, at the very least, the current ESP rates that would remain in effect until June 2013 should be included in the projected costs of an MRO (if it actually would take that long for the CBP to be instituted, and there is no evidence to that effect). The ESP II Order's exclusion of the costs associated with over 25% of the term of the as-approved Modified ESP is unlawful and unreasonable.

Finally, the Commission's own experience with Duke belies the conclusion that it would take nine months to set up a proper full requirements auction. The Commission approved Duke's full-requirements auction process on November 22, 2011.[54] Duke

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Price for Ormet's Hannibal Facilities, PUCO Case No. 07-1317-EL-UNC, Columbus Southern Power Company's and Ohio Power Company's Ormet-Related 2008 Generation Market Price Submission at 1 (Dec. 27, 2007).

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

[54] *In the Matter of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, Opinion and Order (Nov. 22, 2011).

conducted the first full requirements auction on December 14, 2012.[55] Based on real world experience, it is nonsensical to conclude that it would take nine months to implement a full-requirements auction under the MRO alternative.

C. The ESP II Order is unlawful and unreasonable because it does not include the full cost of the Generation Resource Rider ("GRR") as part of the quantitative costs in its application of the ESP versus MRO test, thereby understating the cost of the as-approved Modified ESP.

The ESP II Order authorized the GRR to be included in the as-approved Modified ESP and set the initial non-bypassable GRR rate at zero.[56] As discussed below, the ESP II Order erred in authorizing the non-bypassable GRR. But, once authorized, the Commission is obligated to recognize the full cost of the GRR in conducting the ESP versus MRO test.

In its application of the ESP versus MRO test, the ESP II Order did assign some cost to the GRR. The ESP II Order assumed that Turning Point would be recovered as a "known" cost through the GRR during the term of the ESP and assigned $8 million to the Modified ESP for the GRR.[57] While $8 million represented a "known" ESP-related cost of the GRR during the term of the as-approved Modified ESP, the ESP II Order unlawfully and unreasonably understated the costs recoverable through the GRR by not accounting for the cost of Turning Point over the life of the facility.

By law, the Commission must consider "all the terms and conditions" of the as-approved Modified ESP.[58] A non-bypassable charge for a new generating plant cannot

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[55] *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 11-6000-EL-UNC, Finding and Order (Dec. 15, 2011).
[56] ESP II Order at 24-25.

[57] *Id.* at 75

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

be authorized by the Commission as part of an MRO SSO.[59] When a non-bypassable generating plant-related charge is established as part of an ESP, customers become responsible for the non-bypassable charge "for the life of the facility,"[60] and this continuing responsibility to pay the surcharge is a term or condition of the as-approved Modified ESP. Based on the testimony of AEP-Ohio, the estimated life-of-facility revenue requirement for Turning Point is $357.2 million, leaving an unrecognized balance of $349.2 million.[61] Despite its assumption that Turning Point would be recovered from customers through the GRR, the ESP II Order fails to include the $349.2 million as a quantitative cost of the as-approved Modified ESP in the application of its ESP versus MRO test. By failing to include the full life-of-facility cost of Turning Point in the ESP versus MRO test, the ESP II Order is unreasonable and unlawful. Therefore, the Commission must grant rehearing and include the full cost of Turning Point, $357.2 million, as a cost of the as-approved Modified ESP.

D. The ESP II Order is unlawful and unreasonable because it does not include known costs for the Pool Termination Rider ("PTR"), Retail Stability Rider ("RSR"), and Capacity Shopping Tax as part of the quantitative costs of the as-approved Modified ESP for purposes of applying the ESP versus MRO test, thereby understating the cost of the as-approved Modified ESP.

The ESP II Order authorizes an ESP that includes the PTR, RSR, and the Capacity Shopping Tax. In its application of the ESP versus MRO test, however, the ESP II Order does not include the full costs of the RSR or any costs of the PTR or the Capacity Shopping Tax. As a result, the cost of the as-approved Modified ESP is

[59] Section 4928.142, Revised Code.

[60] Section 4928.143(B)(2)(c), Revised Code.

[61] Office of the Ohio Consumers' Counsel ("OCC") Ex. 114 at 17-18 (based on the supplemental testimony of AEP-Ohio witnesses Thomas, Nelson, and Roush).

unlawfully and unreasonably understated as compared to the expected results of the MRO. Under the MRO option, the RSR, PTR, and the Capacity Shopping Tax are not lawful.

The PTR is a generation-related non-bypassable rider designed to permit AEP-Ohio to recover "lost revenue in association with the termination of the Pool Agreement."[62] The ESP II Order set the initial PTR rate at zero.[63] As discussed below, the inclusion of the non-bypassable PTR in the as-approved Modified ESP is, as in the case of the GRR, unlawful and unreasonable. Nonetheless, once the ESP II Order authorized the inclusion of the PTR in the as-approved Modified ESP, the effect of the PTR must be included as a cost of the as-approved Modified ESP for purposes of conducting the ESP versus MRO test.

AEP-Ohio failed to offer any evidence on the cost customers will face through the PTR. FES, however, presented evidence that shows that the PTR's impact could be as much as $410 million for the period of January 1, 2014 to May 31, 2015.[64] Yet, the ESP II Order ignores this potential impact, thereby unreasonably and unlawfully ignoring "all the terms and conditions" of the as-approved Modified ESP for purposes of conducting the ESP versus MRO test.

The ESP II Order's application of the ESP versus MRO test also unreasonably and unlawfully fails to account for the two non-bypassable riders that make shopping and non-shopping customers responsible for the portion of the generation capacity

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[62] ESP II Order at 47. The Pool Agreement deals with generation-related relationships between AEP-Ohio and its affiliates.

[63] *Id.* at 49.

[64] FES Ex. 104 at 31.

service compensation that is driven by the $188.88/MW-day price and is not paid by CRES providers. In the Capacity Order, the Commission authorized AEP-Ohio to make accounting changes to defer the difference between the RPM-Based Price and the $188.88/MW-day price for capacity provided to CRES providers serving customers in the AEP-Ohio service territory, setting the stage for the decision in the *ESP II Case*.[65]

In the ESP II Order, the Commission authorized the RSR and held that $1/MWh of the RSR would be applied to begin to pay the RPM-Based Price/$188.88 difference created by the terms of the Capacity Order.[66] Under the ESP II Order, any remaining deferred balance is to be collected through the non-bypassable Capacity Shopping Tax rider that will begin after the term of the as-approved Modified ESP.[67] As discussed below, the authorizations of the RSR and the Capacity Shopping Tax are unlawful and unreasonable. However, since the ESP II Order authorized the inclusion of the RSR and the Capacity Shopping Tax in the as-approved Modified ESP, it is unreasonable and unlawful for the ESP II Order to not recognize the full costs of these non-bypassable riders for purposes of conducting the ESP versus MRO test.

First, the ESP II Order fails to include the full cost of the RSR in its version of the ESP versus MRO test. The as-approved RSR will generate $508 million over the term of the ESP.[68] When it assigned a value to the RSR in its version of the ESP versus MRO test, however, the ESP II Order removed $144 million of the $508 million indicating that the removal was related to the portion of the RSR initially dedicated to

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[65] Capacity Order at 23.

[66] ESP II Order at 36.

[67] *Id.* at 52.

[68] ESP II Order at 35.

paying the Capacity Shopping Tax ($1/MWh).[69] The ESP II Order does not explain why it is appropriate to remove the $144 million from the cost of the RSR. Certainly, customers will see the RSR's full $508 million in their bills.[70]

Second, the ESP versus MRO test must include consideration of "any deferrals and any future recovery of deferrals."[71] Yet, the effect of the Capacity Shopping Tax is not recognized in the ESP versus MRO test identified in the ESP II Order. In total, the Capacity Shopping Tax balance resulting from the Commission's Capacity Order could amount to $447 million, based on the shopping projections adopted by the Commission in its calculation of the RSR and without any carrying charges.[72]

E. The ESP II Order is unlawful and unreasonable because it does not include or address the effect of known costs of the energy-only auctions and the "quicker" move to a competitive bid process ("CBP") based SSO for purposes of conducting the ESP versus MRO test.

The ESP II Order concludes that an expansion of the energy-only auctions is a qualitative benefit of the as-approved Modified ESP[73] because the costs of various distribution riders that the Commission continued and the Distribution Investment Rider ("DIR") "will be mitigated by the increase in [energy-only] auction percentages."[74] Additionally, the ESP II Order concludes that an additional significant qualitative benefit

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[69] *Id.* at 75 n.32.

[70] In fact, because of bill language changes approved on August 22, 2012, customers will see a line item detailing exactly how much they are paying in above-market RSR charges to AEP-Ohio. Entry at 1-2 (Aug. 22, 2012).

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

[72] *See* Attachment A to this Memorandum in Support. *See* ESP II Order at 34 (Commission shopping assumptions).

[73] ESP II Order at 76.

[74] *Id.*

was the faster transition to a full CBP to establish the SSO default generation supply price than would be available under an MRO.[75] The ESP II Order's conclusions that the energy auctions and the quicker move to a CBP to establish the SSO's default generation supply price provide qualitative benefits are not supported by the record.

AEP-Ohio offered no evidence that the auctions would reduce or mitigate the impact of the as-approved Modified ESP. Notably, AEP-Ohio treated its proposal to conduct energy-only auctions as a "qualitative" benefit; it did not assign any quantitative value to the auctions.[76] On the other hand, IEU-Ohio provided testimony demonstrating that the energy-only auctions were likely to increase the cost of AEP-Ohio's Modified ESP due to the manner in which AEP-Ohio proposed to treat the results of the auctions in its Fuel Adjustment Clause ("FAC").

> AEP-Ohio indicated it plans to flow the costs of the 5% energy-only bid through the FAC and make no other changes to base SSO rates for distribution, transmission and generation. If that is the case, the only way that the limited energy-only SSO bid will not require an overall price increase to SSO customers is if the cleared bid price is lower than AEP-Ohio's FAC. The market price estimates presented in this case suggest that the results of the energy-only auction will likely be above the FAC rate and thereby increase the cost of the ESP as compared to the MRO and make the rates less stable and predictable as well.[77]

In addition to Mr. Murray's testimony, the administratively-determined competitive benchmark prices advanced by AEP-Ohio in support of its Modified ESP also indicate that the energy-only auctions will increase the SSO price (a quantitative

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[75] *Id.*

[76] AEP-Ohio Ex. 116, LJT-1.

[77] IEU-Ohio Ex. 125 at 72-73. Mr. Murray provided two separate demonstrations of the probable results of the auctions in his testimony. *Id.* at 73-74.

disadvantage).[78] Similarly, IEU-Ohio provided evidence, noted in the ESP II Order but then ignored without explanation,[79] that the energy and capacity auction used to set 2015-2016 ESP rates would, if considered individually and without regard to the other defects in the ESP versus MRO test as applied by the ESP II Order, result in an ESP that is less favorable than the MRO by $26 million (a quantitative disadvantage).[80]

Thus, the ESP II Order ignores the record evidence regarding the effect of the energy-only auctions, evidence confirmed by AEP-Ohio's competitive benchmark prices. That evidence shows that the energy-only auctions increase the cost of the as-approved Modified ESP. That same evidence shows that that customers will be quantitatively disadvantaged (relative to the MRO alternative) by accelerating complete reliance on a CBP to set the default generation supply price beginning with the first year after the term of the as-approved Modified ESP.

Furthermore, the ESP II Order's assumption that a move (faster or otherwise) to a CBP to set the default generation supply price will yield a qualitative benefit demonstrates that the ESP II Order is based on a fundamental misconception about the statutory outcomes required by Chapter 4928, Revised Code, including the policies and the priorities set forth therein.

As discussed more fully below (in the context of the illegally authorized RSR), the General Assembly has declared retail generation service to be a competitive service.[81]

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[78] *Id.* at 73-74.

[79] ESP II Order at 72.

[80] IEU-Ohio Ex. 125 at 70 & 79-80. Stated more plainly, accelerating the use of a CBP to set the default generation supply price will produce a higher cost for SSO customers when market prices are rising. By any reasonable definition, this produces a quantitative disadvantage not a qualitative advantage.

[81] Section 4928.03, Revised Code.

The SSO, whether based on an ESP or MRO, contains a default generation supply component for those customers not receiving competitive service from a CRES provider.[82] The goal, clearly expressed by the General Assembly, is to encourage customer choice through actions by individual customers having comparable and non-discriminatory access to a diverse group of CRES providers.[83] The goal includes a statutory scheme that specifically limits the role of the EDU to that of a default supplier of competitive service and prohibits an EDU from being directly engaged in the business of providing competitive services. Yet, the ESP II Order hobbles the ability of individual customers to meaningfully exercise their customer choice rights during the term of the as-approved Modified ESP so as to maybe, someday, produce a somewhat better, qualitatively speaking, default generation supply outcome. In other words, the ESP II Order wrongly elevates future qualitative goals regarding the default generation supply available from an EDU and the near-term success of AEP-Ohio's competitive generation business above the present goal of providing customers with meaningful access to the electricity market at a time when market prices are the lowest they have been in ten years. Fundamentally, the ESP II Order has embraced a mission statement that is different than the one given to the Commission by the General Assembly.

The ESP II Order unreasonably and unlawfully reverses the priorities clearly expressed in Ohio law. The Commission's role in setting the SSO's default generation supply price is specifically limited to the role provided by Sections 4928.141 through 4928.143, Revised Code. That role does not permit the Commission to subordinate the

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[82] Section 4928.14, Revised Code.

[83] Section 4928.02(A), Revised Code.

customer choice rights of individual customers because the Commission wants to help an EDU and its generation business evade the discipline provided by customer choice or because the Commission believes that a future default generation supply option may be better, qualitatively speaking. So the fundamental premise of the ESP II Order (a premise that permits future qualitative benefits[84] associated with an unknown default generation supply option outcome to override a clear, near-term quantitative customer choice disadvantage) unreasonably and unlawfully conflicts with the driving purpose of Ohio's electric restructuring legislation contained in Chapter 4928, Revised Code.

Additionally, the ESP II Order unlawfully and unreasonably assumes that the as-approved Modified ESP will produce a qualitative "benefit" through some future default generation supply price outcome when that outcome is not within the control of the Commission. Chapter 4928, Revised Code, does not require AEP-Ohio to submit an ESP SSO that establishes default generation supply prices based on a capacity and energy auction, and if the Commission orders an auction-based SSO as part of some future ESP, AEP-Ohio may reject it,[85] at which point the Commission must issue an order to continue the provisions, terms, and conditions of the most recent SSO.[86] Further, AEP-Ohio's view of Section 4928.141(C)(1), Revised Code (as demonstrated in its tariff submission letter), is that the EDU never has to say "yes" to the Commission's version of the Modified ESP, but can say "no" and withdraw compliance with the ESP II

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[84] As discussed above, establishing the SSO's default generation supply price by means of a CBP beginning in June 2015 produces, after the term of the as-approved Modified ESP, a disadvantage for non-shopping customers while hurting shopping and non-shopping customers in the meantime. There is no qualitative advantage. There is a quantitative disadvantage.

[85] Section 4928.143(C)(2)(a), Revised Code, permits an EDU to withdraw its ESP application, thereby terminating it, if the Commission modifies and approves the application.

[86] Section 4928.142(C)(2)(b), Revised Code.

Order at any time.[87] Thus, not only does the Commission lack authority to require AEP-Ohio to move to the auction-based SSO in 2015, AEP-Ohio's "commitment" in the Modified ESP can be revoked unilaterally and, according to AEP-Ohio, at any time. AEP-Ohio's assumed ability to terminate the as-approved Modified ESP is particularly relevant in this case because AEP-Ohio's commitment to an auction-based ESP SSO in 2015 was tied to numerous conditions, some of which (*e.g.*, adoption of AEP-Ohio's capacity pricing scheme and RSR) have already been rejected by the Commission.[88] Under these circumstances, it is unreasonable and unlawful for the ESP II Order to conclude that the as-approved Modified ESP provides a future qualitative benefit more powerful than the near-term quantitative disadvantage of the as-approved Modified ESP.

2. The ESP II Order is unlawful and unreasonable because it approves an ESP by introducing subjective and speculative "qualitative benefits" into the ESP versus MRO test, thereby evading compliance with Section 4903.09, Revised Code.

In a contested case, Section 4903.09, Revised Code, requires the Commission to issue "findings of fact and [a] written opinion[] setting forth the reasons prompting the decision[] arrived at, based on said findings of fact." As the Supreme Court has indicated, the Commission in assessing the record must explain its rationale, respond to

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[87] Letter of Steven T. Nourse to Greta See at 2 (Aug. 16, 2012). In *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. ("*ESP I Case*"), AEP-Ohio took the position that "[t]he right to withdraw an ESP application under §4928.143(C) (2), Ohio Rev. Code, contains no time restriction." *ESP I Case*, Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra IEU-Ohio's Motion for Immediate Relief from Electric Rate Increases at 4 (Apr. 23, 2010).

[88] AEP-Ohio Ex. 101 at 4-5.

contrary positions, and support its decision with appropriate evidence.[89] "The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom."[90]

The ESP II Order "weighs" the various parts of AEP-Ohio's three-part approach to the ESP versus MRO test and eventually concludes that the as-approved Modified ESP is more favorable. Because the as-approved Modified ESP is substantially less favorable than the MRO on a quantitative basis, the ESP II Order assigns some indeterminate, but apparently significant, weight to over-the-horizon qualitative benefits attributed to the as-approved Modified ESP.

Although the ESP II Order identifies the qualitative benefits for which it has affection, the ESP II Order does not address the evidence that demonstrates that each of the alleged benefits carries an uncounted cost. The ESP II Order does not explain how the three qualitative "benefits" outweigh the $386 million by which the ESP II Order finds that the as-approved Modified ESP fails the ESP versus MRO test.[91]

Without an objective and articulated explanation of how each of the so-called qualitative benefits was weighted, the ESP II Order's subjective qualitative benefits test prevents the parties, the Supreme Court, and the public from assessing the validity of the Commission's decision. Section 4903.09, Revised Code, requires more than the

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[89] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 519 (2011).

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

[91] The unreasonableness of the subjective test is further demonstrated by the lack of objective means to measure the effect of corrections to the ESP II Order for the costs of the as-approved Modified ESP that were not addressed by the ESP II Order. There is no objective basis by which a party can determine that the quantitative costs of $1.736 billion are "outweighed" by the qualitative benefits.

"trust me" reasoning contained in the ESP II Order.[92] As a result, the ESP II Order's conclusion that the Modified ESP is more favorable in the aggregate based on "subjective belief" violates the requirements of Section 4903.09, Revised Code, that require the Commission to make findings of fact, to base its decisions based on those findings, explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.

III. NON-BYPASSABLE GENERATION-RELATED RIDERS

The ESP II Order authorized five new non-bypassable generation-related riders under Section 4928.143, Revised Code: the RSR, the Capacity Shopping Tax, the PTR, the GRR, and the PIRR. As discussed below in this section and the following two sections, the portions of the ESP II Order authorizing these riders are unlawful and unreasonable for various reasons and, therefore, the Commission must grant rehearing to remedy these errors.

3. The ESP II Order is unlawful and unreasonable because the non-bypassable RSR, Capacity Shopping Tax, and the PTR cannot be lawfully included in an ESP SSO.

A. The ESP II Order is unlawful and unreasonable because it authorizes non-bypassable generation-related riders which are not included on the list of permissive ESP provisions contained in Section 4928.143(B)(2), Revised Code.

The Commission may authorize a provision of an ESP only if its fits within one of the provisions of Section 4928.143(B)(2), Revised Code.[93] Of the provisions in (B)(2), only divisions (b) and (c) allow for a generation-related non-bypassable charge.

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[92] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512 at 519.

[93] *Id.* at 519-20.

However, the RSR, the PTR, and the Capacity Shopping Tax were not authorized under divisions (b) or (c), nor could they be.

A non-bypassable charge under (B)(2)(b) or (c) is only available to recover costs associated with generating facilities under construction or constructed after 2009 that meet additional statutory requirements. The RSR, Capacity Shopping Tax, and PTR are not designed to recoup the costs of a generating facility under construction or newly built after 2009; no party has claimed as much. Therefore, there is no basis under Section 4928.143(B)(2), Revised Code, to approve the RSR, Capacity Shopping Tax, and the PTR as non-bypassable charges.

B. The ESP II Order is unlawful and unreasonable because it concludes that the RSR can be authorized under Section 4928.143(B)(2)(d), Revised Code. The RSR does not have the effect of stabilizing or providing certainty regarding retail electric service.

The ESP II Order is unlawful and unreasonable because the RSR cannot be authorized under Section 4928.143(B)(2)(d), Revised Code, since the RSR does not have the effect of stabilizing or providing certainty regarding retail electric service. That division provides that an ESP may include "[t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, ... [and] default service ... as would have the effect of stabilizing or providing certainty regarding retail electric service." Retail electric service is defined by Section 4928.01(A)(27), Revised Code, to mean "any service involved in supplying or arranging for the supply of electricity to ultimate customers in this state." The terms "certainty" and "stabilizing," however, are not defined in Chapter 4928, Revised Code.

Because there is no statutory definition of "certainty" or "stabilizing," it is necessary to rely on the ordinary and appropriate dictionary meanings of the terms.[94] Under that standard, the ordinary and appropriate definition of "certainty" is that the subject is made more probable of occurrence.[95] "Stabilizing" denotes "to hold steady."[96] Because the burden of proof rested with AEP-Ohio to demonstrate that the charge is reasonable and lawful, AEP-Ohio was required to show that the RSR was necessary to make it probable that customers would receive retail electric service or to hold steady the provision of retail electric service.

The ESP II Order finds that the RSR meets the statutory requirements of Section 4928.143(B)(2)(d), Revised Code, because the RSR: (1) "ensures certainty regarding retail electric service;" and (2) "promotes stable retail electric service prices."[97] As discussed below, the record does not support the first finding, and the ESP II Order does not provide any analysis to support that finding. The second finding does not meet the statutory requirements and, in any event, the RSR does not promote stable prices. Despite its burden to demonstrate the reasonableness and lawfulness of the RSR, the testimony AEP-Ohio offered did not explain how the RSR would have the effect of making retail electric service more stable or certain. The only statement AEP-Ohio witness Allen offered relative to this statutory requirement appears to be the following

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[94] *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049 at ¶ 14 (*quoting Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70 (1988) ("[w]here a particular term employed in a statute is not defined, it will be accorded its plain, everyday meaning.")).

[95] Webster's Ninth New Collegiate Dictionary at 223 (1983).

[96] *Id.* at 1146.

[97] *See, e.g.*, ESP II Order at 31 (the RSR "promotes stable retail electric service prices ..." and the RSR allows a freeze of "non-fuel generation rate increase that might not otherwise occur absent the RSR").

question and answer taken from his direct testimony that offers only a conclusion without explanation:

> Q. Is there a reason that you are proposing a retail stability rider that focuses on revenues instead of earnings?
>
> A. Yes. There are several reasons: 1) it provides greater certainty and stability for customers and AEP Ohio ... .[98]

Mr. Allen's testimony merely contrasts the difference between an RSR that is focused on guaranteeing earnings and an RSR that is focused on guaranteeing revenue (including a specified earnings component). Saying that one illegal version of the RSR provides more stability and certainty than another is not responsive to the requirements of Section 4928.143(B)(2)(d), Revised Code. In addition, Mr. Allen acknowledged, both in his direct and rebuttal cross-examination that the EDU operates within the PJM system and the reliability of retail generation service is a function of PJM's control.[99] If AEP-Ohio did not have any generating facilities, PJM would still dispatch supply-side resources under its control to satisfy the needs of AEP-Ohio's customers.[100]

The only other testimony offered by AEP-Ohio applicable to the requirements of Section 4928.143(B)(2)(d), Revised Code, likewise fails to demonstrate how the RSR makes it probable that customers would receive retail electric service or would hold steady the provision of retail electric service. In his Supplemental Direct Testimony, Mr. Dias offered that the lack of the above-market RSR generation-related revenue might result in less investment, but provided no demonstration of any likely impact on

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[98] AEP-Ohio Ex. 114 at 15.

[99] Tr. Vol. V at 1495-96.

[100] *Id.* Section 4928.12, Revised Code, confirms that regional transmission entities such as PJM are responsible for maintaining reliability.

retail service.[101] He also did not assert that increasing rates by the introduction of the RSR would make things better. In fact, AEP-Ohio has admitted that it does not plan to make any new generation investment other than Turning Point during the term of the ESP.[102] As a result of AEP-Ohio's failure to demonstrate that the statutory requirements of Section 4928.143(B)(2)(d), Revised Code, are satisfied, the ESP II Order is unlawful and unreasonable.[103]

The holding that the RSR was authorized by Section 4928.142(B)(2)(d), Revised Code, is also inconsistent with the terms of the as-approved Modified ESP. Although the Commission found the RSR promoted "stable retail electric services prices" by freezing base generation rates, the base generation rates are but one part of AEP-Ohio's generation rates under the Modified ESP. As approved, the Modified ESP has ten generation or transmission-related riders besides the RSR that can and will fluctuate. These include the FAC, the Alternative Energy Rider ("AER"), the DIR, the gridSMART Rider, the Transmission Cost Recovery Rider ("TCRR"), the ESRR, the Energy Efficiency and Peak Demand Reduction Rider ("EE/PDR"), and the Economic Development Rider ("EDR").[104] Additionally, the Commission approved the GRR and the PTR that are initially set at zero but could eventually collect hundreds of millions of

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[101] AEP-Ohio Ex. 119 at 5.

[102] Tr. Vol. I at 226-227. See also Tr. Vol. II at 564-65; Tr. Vol. VI at 1976-80. Additionally, there is no evidence that Turning Point will be operational during the term of the as-approved Modified ESP.

[103] ESP II Order at 31.

[104] *Id.* at 16-18, 42, 61-67.

dollars.[105] The structure of the as-approved Modified ESP and all of its moving parts preclude stability and certainty.

The ESP II Order also establishes a foundation for post-ESP riders so that shopping and non-shopping customers pick up the tab for the ESP II Order and Capacity Order liabilities not funded during the term of the as-approved Modified ESP. Further, the Commission indicated that it would adjust the RSR if shopping increased.[106] In fact, the only certainty or stability that the RSR offers is that, as one witness eloquently explained, it guarantees that AEP-Ohio never has a bad year.[107] Thus, the RSR in combination with frozen base generation rates do not promote "stable retail electric service prices" as the prices customers will see over the term of the ESP and, as a result of the deferral mechanisms, thereafter may and likely will vary dramatically. The ESP II Order confirms the electric bill instability produced by the as-approved Modified ESP by directing AEP-Ohio to impose a percentage limitation on the magnitude of some of the increases that ***each individual customer*** will see as a result of the as-approved Modified ESP. Ironically, the ESP II Order then makes customers responsible for a revenue shortfall created by this limitation through another future rider.[108]

The ESP II Order references three other justifications for the RSR, but none of these supports its decision that the RSR is authorized by Section 4928.143(B)(2)(d), Revised Code. The ESP II Order claims the RSR: (1) will provide AEP-Ohio with

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[105] *Id.* at 19-24, 47-49.

[106] *Id.* at 37-38.

[107] Tr. Vol. XIII at 3615.

[108] *See* ESP II Order at 70.

"financial integrity;"[109] (2) allows AEP-Ohio to transition to a market "in two years and nine months as opposed to five years;"[110] and (3) allows AEP-Ohio to offer a "reasonably priced SSO."[111] Because these three justifications do not make it more probable that customers would receive retail electric service or hold steady the provisions of retail electric service, they lend no support to the RSR's legality under Section 4928.143(B)(2)(d), Revised Code.

First, the financial integrity of an EDU's generation is, as a general matter, not relevant in an ESP proceeding. Since the end of AEP-Ohio's Market Development Period ("MDP") on December 31, 2005, AEP-Ohio's generation business has been required to be on its "own in the competitive market."[112] AEP-Ohio has previously argued, and the Commission has agreed, that AEP-Ohio's earnings for its generation business are not a relevant consideration when fixing its default SSO rates.[113]

> [W]ith the expiration of the MDP, generation rates are subject to the market (not the Commission's traditional cost-of-service rate regulation) .... We make this observation to point out that, under the statutory scheme, company earnings levels would not come into play for establishing generation rates–market tolerances would otherwise dictate, just as AEP argued.[114]

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[109] ESP II Order at 31 (The RSR "will provide AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital."); *id.* at 33 (The RSR will allow AEP-Ohio to "maintain its financial health."); *id.* at 37 (the RSR ensures "AEP-Ohio has sufficient funds to maintain its operations efficiently ... .").

[110] *Id. at 36.*

[111] *Id.* at 37 (The Commission claimed that the RSR provides shopping customers with a reasonably priced SSO offer should market prices increase and they wish to return to SSO service).

[112] Section 4928.38, Revised Code.

[113] IEU-Ohio Ex. 119 at 18.

[114] *Id.*

Thus, the financial integrity of AEP-Ohio's generation business is not a relevant or lawful justification for the RSR.

Second, the ESP II Order states that, as a package that includes the RSR, the as-approved Modified ESP allows AEP-Ohio to transition to a CBP to set its default SSO generation supply price in under three years instead of the five-year timeframe under an initial MRO application.[115] Even if this were a benefit (which, as discussed previously, it is not), there is no basis in Section 4928.143, Revised Code, or elsewhere in Ohio law for such a transition rider. Additionally, the offered justification is not accurate since the MRO statute allows the Commission "[b]eginning in the second year" of the MRO to "alter prospectively the proportions of the blend" if the Commission deems it necessary "to mitigate any effect of an abrupt or significant change" in SSO rates.[116] Thus, the CBP approved in the ESP II Order will not necessarily occur sooner than what would be possible under an MRO, and, in any event, the CBP set to occur in 33 months is likely to increase customers' rates, not benefit customers.

Finally, the ESP II Order states that the RSR allows AEP-Ohio to "keep[] a reasonably priced SSO offer on the table in the event market prices increase."[117] This statement ignores the fact that both AEP-Ohio and the Commission are obligated to a reasonable outcome as a matter of law regardless of whether the SSO is an ESP or MRO.

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[115] *See* ESP II Order at 36.

[116] Section 4928.142(A), Revised Code.

[117] ESP II Order at 37. Moreover, AEP-Ohio has also claimed that the RSR could be classified as a provider of last resort ("POLR") rider. AEP-Ohio Ex. 119 at 5.

Additionally, this circular reasoning essentially treats the RSR as a POLR charge. Unlike the POLR charge that the PUCO previously and illegally approved for AEP-Ohio, however, the RSR is not bypassable by a customer or a governmental aggregation program that agrees to return to SSO service at a market price.

The Supreme Court has described a POLR obligation as the "obligation to stand ready to accept returning customers" and defined POLR costs as "those costs incurred by [the utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to [the utility] for generation service."[118] The Commission has described the underlying POLR obligation as the requirement that an EDU "stand ready to provide SSO service to returning customers" which then allows customers to "return at any time" to the SSO,[119] and has defined POLR charges as "charges related to standby and default service, [which] provide certainty for both the [EDU] and [its] customers regarding retail electric service."[120]

Approval of the RSR as a POLR charge is not warranted in this case. The Supreme Court has admonished the Commission to consider carefully what costs it is attributing to POLR obligations.[121] Responding to the Supreme Court's direction, the Commission has required that there be a showing of cost to establish a POLR

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[118] *In re Columbus Southern Power Co.*, 128 Ohio St.3d at 517-18.

[119] *ESP I Case*, Order on Remand at 18 (Oct. 3, 2011).

[120] *Id.*

[121] *In re Columbus Southern Power Co.*, 128 Ohio St.3d at 518. *See also, Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990 at ¶¶ 31-33.

charge.[122] AEP-Ohio did not demonstrate any costs that the RSR recovers; rather, the RSR is designed to supplement AEP-Ohio's generation-related revenue in a manner that provides AEP-Ohio a 9% return on equity based on its 2011 common equity capitalization. In other words, the RSR is designed to provide AEP-Ohio with revenue that it might not otherwise receive if customers shopped, *i.e.* "migrated", and left the SSO. It is a lost revenue charge, non-bypassable and payable by both shopping and non-shopping customers.

The Commission, however, has held that a POLR obligation relates only to the cost of returning customers, not migration risk. As the Commission explained, "migration risk is more properly regarded as a business risk faced by all retail suppliers as a result of competition rather than a risk resulting from an EDU's POLR obligation."[123] And, as already mentioned, the Commission has held that a POLR charge must be bypassable by customers agreeing to return to SSO service at market price.[124] Section 4928.20, Revised Code, also provides governmental aggregation program customers with the right to bypass such charges. Because the RSR compensates AEP-Ohio for revenue that is lost if customers migrate, and it does not allow customers to avoid the charge by agreeing to return to the SSO at market prices, the RSR violates Commission precedent, is unlawful and unreasonable.

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[122] *ESP I Case*, Order on Remand at 22 (company failed to demonstrate out-of-pocket cost of serving POLR obligation). If viewed as a stand-by charge, Section 4928.20, Revised Code, requires that the charge be bypassable for customers served by governmental aggregation programs upon election by the relevant unit of government.

[123] *Id.* at 31-32.

[124] *ESP I Case*, Opinion and Order at 40 (Mar. 18, 2009).

In summary, there is no legal or factual basis to support the RSR. The RSR does not meet the requirements of Section 4928.143(B)(2)(d), Revised Code. AEP-Ohio's generation business earnings are irrelevant when establishing default generation supply prices or considering an SSO. The RSR does not necessarily provide a faster-than MRO transition to full reliance on a CBP to establish the default generation supply price, and the ESP II Order's rush to a CBP is likely to increase non-shopping customers' bills relative to the pace of the MRO. Finally, the RSR is not a lawful POLR charge. Thus, the Commission must grant rehearing and reject the RSR as a part of the as-approved Modified ESP.

C. The ESP II Order is unlawful and unreasonable because the PTR cannot be authorized under Section 4928.143(B)(2)(h), Revised Code. The PTR has no relationship to AEP-Ohio's distribution service.

The ESP II Order approves the PTR pursuant to Section 4928.143(B)(2)(h), Revised Code, and states that:

> in the event AEP-Ohio seeks recovery under the PTR, AEP-Ohio must first demonstrate the extent to which the Pool Agreement benefitted Ohio ratepayers over the long-term and the extent to which the costs and/or revenues should be allocated to Ohio ratepayers. Further, AEP-Ohio must demonstrate to the Commission that any recovery it seeks under the PTR is based upon costs which were prudently incurred and are reasonable.[125]

The ESP II Order is unlawful and unreasonable because the PTR may not be approved under Section 4928.143(B)(2)(h), Revised Code. That Section can only be applied to approve distribution-related items. Specifically, that Section states:

> The plan may provide for or include ... 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

[125] ESP II Order at 49.

> 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*. (Emphasis added.)

The scope of the above-quoted provision is not ambiguous; it does not provide a basis to authorize a generation-related rider. Moreover, the Commission has only relied upon the section to approve distribution-related items. For example, another portion of the ESP II Order states, "[a]s authorized by Section 4928.143(B)(2)(h), Revised Code, an ESP may include the recovery of capital cost for distribution infrastructure investment to improve reliability for customers."[126] Similarly, in *ESP I*, the Commission stated that "the Commission recognizes that Section 4928.143(B)(2)(h), Revised Code, authorizes the Companies to include in its ESP provisions regarding single-issue ratemaking for distribution infrastructure and modernization incentives."[127] The PTR, however, is put in place to recover lost generation-related revenue if AEP-Ohio makes the appropriate showing.[128] Because the PTR provides a home for a generation-related lost revenue charge, it cannot be lawfully approved under Section 4928.143(B)(2)(h), Revised Code.

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[126] *Id.* at 46.

[127] *ESP I Case*, Opinion and Order at 32 (Mar. 18, 2009).

[128] ESP II Order at 49.

D. The ESP II Order is unlawful and unreasonable because it concludes that the Capacity Deferral and the Capacity Shopping Tax can be authorized under Section 4928.144, Revised Code. These items do not arise from rates or prices authorized under Sections 4928.141 to 4928.143, Revised Code, and therefore the Commission's authority in Section 4928.144, Revised Code, is unavailable.

The Capacity Order invented and applied a cost-based ratemaking methodology to develop a price for capacity of $188.88/MW-day and authorized, under Sections 4905.04, 4905.05, and 4905.06, 4905.13 and Chapter 4909, Revised Code, AEP-Ohio to collect part of that price now (through RPM-Based Pricing) and part of that price through future rates.[129] The ESP II Order allows AEP-Ohio to collect part of the Capacity Order's $188.88/MW-day price through the RSR, and the remainder through the Capacity Shopping Tax authorized under Section 4928.144, Revised Code.[130]

Section 4928.144, Revised Code, however, grants the Commission authority to authorize a phase-in only of an EDU rate or price established in an ESP or MRO. Specifically, Section 4928.144, Revised Code, provides 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. (Emphasis added.)

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[129] Capacity Order at 23.

[130] ESP II Order at 52. Additionally, AEP-Ohio was authorized to collect part of the $188.88/MW-day price through RPM-Based Pricing charged to CRES providers.

As discussed above, the Commission authorized the $188.88/MW-day price for generation capacity service under its general supervisory jurisdiction contained in Sections 4905.04, 4905.05, and 4905.06, Revised Code, and, under Section 4905.13, Revised Code, authorized the accounting changes required to defer the difference between the RPM-Based Price charged to CRES providers and $188.88/MW-day. Because Section 4928.144, Revised Code, is not available when the rate or price is established under Sections 4905.04, 4905.05, and 4905.06, and 4905.13, Revised Code, the Commission is without authority to authorize a phase-in of the Capacity Shopping Tax and, therefore, the ESP II Order is unreasonable and unlawful.

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. 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 $188.88/MW-day state compensation mechanism, was based on a "formula rate" methodology that bears no relationship to AEP-Ohio's cost to meet its FRR obligation.[131] For these reasons, the ESP II Order is unlawful and unreasonable and rehearing should be granted.

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[131] Capacity Order at 11 (AEP-Ohio's capacity cost calculation is based upon formulas).

4. **The ESP II Order is unlawful and unreasonable because it authorizes AEP-Ohio to increase SSO prices so as to collect above-market generation-related revenue through the non-bypassable RSR, Capacity Shopping Tax, and the PTR, thereby providing AEP-Ohio with the ability to collect transition revenue or its equivalent at a time when Ohio law commands that AEP-Ohio's generation business be fully on its own in the competitive market. By allowing AEP-Ohio to collect transition revenue, the Commission unreasonably and unlawfully ignored the statutory bar against such collection. The ESP II Order is similarly unreasonable and unlawful because it permits AEP-Ohio to evade its Commission-approved settlement obligation to forego such collection and to not impose lost generation-related revenue charges on shopping customers.**

AEP-Ohio has made it abundantly clear that it believes that it is entitled to a second bite at the "transition revenue" apple, through the RSR, Capacity Shopping Tax, and the PTR that hit shopping and non-shopping customers with the cost of satisfying AEP-Ohio's appetite. However, as demonstrated by IEU-Ohio through the testimony of its witnesses,[132] its initial and reply briefs,[133] and other pleadings before the Commission,[134] the Ohio Revised Code and the commitments AEP-Ohio made as part of a Commission-approved settlement in AEP-Ohio's ETP proceedings prohibit AEP-Ohio from collecting transition revenue.[135] In lieu of repeating all of the transition

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[132] IEU-Ohio Ex. 124, *passim*; IEU-Ohio Ex. 125 at 3-4, 30-35.

[133] Initial Brief of IEU-Ohio at 22-36 (June 29, 2012); Reply Brief of IEU-Ohio at 21-23 (July 9, 2012).

[134] 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); *Capacity Case*, 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); *Capacity Case*, IEU-Ohio Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 18-20 (March 27, 2012); *Capacity Case*, IEU-Ohio Application for Rehearing of the May 30, 2012 Entry and Memorandum in Support at 12 (June 19, 2012); *Capacity Case*, IEU-Ohio Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support at 34-36 (Aug. 1, 2012).

[135] Additionally, the Initial Brief of Buckeye Association of School Administrators, Ohio Association of School Business Officials, Ohio School Board Association, and Ohio School Council (June 29, 2012), The Kroger Company's Post Hearing Brief (June 26, 2012) and the Initial Brief By Duke Energy Commercial Asset Management, Inc. and Duke Retail Sales, LLC (June 29, 2012) support IEU-Ohio's arguments that AEP-Ohio is barred from collecting stranded costs. *See* ESP II Order at 28.

revenue/stranded costs discussion in IEU-Ohio's initial and reply briefs, IEU-Ohio hereby incorporates these arguments by reference and summarizes them below.[136]

Under Ohio law, AEP-Ohio had an opportunity to collect generation-related transition revenue while it prepared its competitive generation business for competition.[137] The "transition" period is over, and Ohio law now prohibits the collection of transition revenue.[138] AEP-Ohio does not dispute this.

> ***Under SB 3, all of these generation assets were subjected to market and EDUs therefore were given a temporary opportunity to recover stranded generation investments during a transition period. That transition period is over.*** EDUs can no longer recover stranded generation investments ... .[139]

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."[140] That commitment was reaffirmed and incorporated into AEP-Ohio's Rate Stabilization Plan ("RSP") which was effective into 2009.[141] Despite Ohio law and AEP-Ohio's previous commitments, it has sought and now obtained authority to collect additional transition

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[136] Initial Brief of IEU-Ohio at 22-36 (June 29, 2012); Reply Brief of IEU-Ohio at 21-23 (July 9, 2012).

[137] Sections 4928.37 to 4928.40, Revised Code.

[138] Section 4928.40, Revised Code.

[139] IEU-Ohio Ex. 124 at 14. The quote contained in the testimony of IEU-Ohio witness Hess was taken from a pleading AEP-Ohio filed with the Commission in March 2012. *Id.* (*quoting In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Application at 7 (March 30, 2012) (emphasis added)).

[140] IEU-Ohio Ex. 124 at 13.

[141] *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) ("*RSP Proceeding*").

revenue in the *ESP II Case*, and the *Capacity Case*. The ESP II Order's approval of the RSR, Capacity Shopping Tax, and PTR delivers the apple to AEP-Ohio and provides a second "transition revenue" bite.

In particular, the above-market generation capacity service charges sought by AEP-Ohio and authorized in the ESP II Order through the RSR and Capacity Shopping Tax are based on the same assumptions as the transition revenue claim AEP-Ohio previously made and agreed to forgo in its ETP proceeding.[142] Both the revenue in the ETP proceeding and that collected as a result of the authorizations in the *Capacity Case* and the *ESP II Case* were based on AEP-Ohio's total net book value of its generation assets, and both included assumptions about the generation-related revenue that AEP-Ohio would be able to receive in the electric market (wholesale and retail).[143] As described by IEU-Ohio witness Hess:

> Regardless of the form or level of the capacity charge proposal, AEP-Ohio is persistently seeking another opportunity to collect transition revenue. The proposal which AEP-Ohio has put forward in this proceeding is designed to provide AEP-Ohio with generation-related revenue it says it will lose if customers shop and CRES suppliers pay a market-based capacity price.[144]

Although the ESP II Order rejects AEP-Ohio's two-tiered capacity proposal, the Order nonetheless approves collection of above-market generation-related revenue through the RSR, the Capacity Shopping Tax, and the PTR.[145] Thus, these new non-bypassable riders will allow AEP-Ohio to collect unlawful transition revenue, or its

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[142] IEU-Ohio Ex. 124 at 9-11.

[143] *Id.*

[144] *Id.* at 17.

[145] Capacity Order at 23, 33-35; ESP II Order at 36, 49-52.

equivalent, in violation of Ohio law and AEP-Ohio's Commission-approved ETP settlement.

The uncontested evidence shows that the RSR, the Capacity Shopping Tax, and the PTR are designed to replace generation-related revenue that AEP-Ohio claimed it could not recover in the market. As proposed, the RSR was designed to supplement AEP-Ohio's generation revenue stream to produce $826 million annually.[146] The differential used to calculate the RSR is based on the "lost" revenue associated with customer shopping.[147] As a means of providing AEP-Ohio with revenue it could not recover through its SSO rates and capacity charges to CRES providers, the RSR is nothing more than a prohibited transition revenue recovery mechanism.[148]

Likewise, the PTR, as AEP-Ohio witness Nelson explained, would recover "lost revenue" because "[t]he Capacity payments received by AEP Ohio cannot be mitigated by opportunity sales in the market alone" after the Pool Agreement is terminated.[149] To calculate the amount to be recovered through the PTR, AEP-Ohio would "compare the lost AEP Pool capacity revenue to increases in net revenue related to new wholesale transactions or decreases in generation asset costs that result from the AEP Pool termination."[150] AEP-Ohio proposes to then collect the "lost" revenue through the

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[146] *Id.* at 33.

[147] *See* ESP II Order at 34-35 (calculating the level of the RSR necessary to meet the $826 million revenue target as shopping increases and SSO revenues decrease).

[148] IEU-Ohio Ex. 124 at 23-25.

[149] AEP-Ohio Ex. 103 at 21.

[150] *Id.* at 22-23.

PTR.[151] Since the calculation is designed to ensure that AEP-Ohio can continue to recover generation-related revenue that is not recoverable in the market, the PTR is another mechanism to recover transition revenue.[152] Although the Commission required AEP-Ohio to satisfy certain conditions[153] prior to implementing the PTR to increase electric bills, those conditions do not change the fact that the PTR authorizes AEP-Ohio to recover transition revenue or its equivalent. Accordingly, the ESP II Order's conditions do not change the unlawful nature of the rider.

The Capacity Order and the ESP II Order have largely ignored the arguments of IEU-Ohio and other intervenors which demonstrate that AEP-Ohio's proposals are, in substance, simply another request for transition revenue. The Capacity Order entirely failed to address the issue, and the ESP II Order only contained the following two sentences addressing the argument:

> Further, we reject the claim that the RSR allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010 pursuant to Senate Bill 3, as AEP-Ohio does not argue its ETP did not provide sufficient revenues, and, in light of events that occurred after the ETP proceedings, including AEP-Ohio's status as an FRR Entity, AEP-Ohio is able to recover its actual costs of capacity, pursuant to our decision in the Capacity Case. Therefore, anything over RPM auction capacity prices cannot be labeled as transition costs or stranded costs.[154]

The above-quoted statement, however, is factually incorrect and entirely illogical.

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[151] *Id.* at 22.

[152] IEU-Ohio Ex. 124 at 21-23.

[153] The ESP II Order states, "in the event AEP-Ohio seeks recovery under the PTR, AEP-Ohio must first demonstrate the extent to which the Pool Agreement benefitted Ohio ratepayers over the long-term and the extent to which the costs and/or revenues should be allocated to Ohio ratepayers. Further, AEP-Ohio must demonstrate to the Commission that any recovery it seeks under the PTR is based upon costs which were prudently incurred and are reasonable." ESP II Order at 49.

[154] *Id.* at 32.

First, AEP-Ohio has in fact claimed in the *ESP II Case* that its prior rates were insufficient;[155] however, this statement has absolutely nothing to do with whether the RSR allows AEP-Ohio to collect transition revenue. Second, AEP-Ohio is not an FRR Entity, AEPSC made an FRR Alternative election under the RAA for the combined pool of American Electric Power Co., Inc. ("AEP") operating companies in PJM, which includes AEP-Ohio.[156] Thus, the FRR Entity is AEPSC on behalf of all the AEP-East operating companies, and the footprint is the AEP-East region, not the AEP-Ohio service territory. AEP-Ohio does not dispute this fact.[157]

Additionally, whatever opportunities the RAA may provide an FRR Entity to charge above-market rates for generation capacity service again have absolutely nothing to do with whether the Commission may, ***under Ohio law***, approve a certain charge.[158] Ohio law provided each EDU with a time-limited opportunity to seek and obtain generation-related transition revenue associated with the transition to a competitive market. Before authorizing collection of any transition revenue, the Commission had to find that the costs were "prudently incurred," "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state," "the costs are unrecoverable in a

[155] AEP-Ohio Ex. 101 at 7-9 (the Commission "acted to prevent utilities from collecting the higher market-based rates.").

[156] IEU-Ohio Ex. 125 at 23; AEP-Ohio. Ex. 103 at 9; *see also* Initial Brief of IEU-Ohio at 85 (June 29, 2012).

[157] "Through the PJM planning year 2014/2015 (PY14/15) AEP Ohio together with the other AEP East operating companies, APCo, I&M, KPCo, Kingsport Power Company and WPCo, have elected as a group (East System) to be under the FRR option in PJM. This requires the East System to provide its own capacity resources to meet its load obligations rather than rely on the PJM RPM market to provide capacity resources." AEP-Ohio. Ex. 103 at 9.

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

competitive market" and the EDU "would otherwise be entitled an opportunity to recover the costs."[159] As described above, the RSR, Capacity Shopping Tax, and the PTR are designed to provide AEP-Ohio with generation-related revenue that it claims that it will not be able to collect in a competitive market. Those riders, therefore, are unlawful, regardless of what might be authorized under the RAA by a state regulatory agency with the proper jurisdictional authority.

As Mr. Hess's testimony demonstrates, the one-and-done opportunity to recover above-market generation revenue was through the ETP process.[160] The time for that recovery is long gone (and AEP-Ohio agrees).[161] Based on the unequivocal restriction on the Commission's authority, the ETP settlement, and the unrebutted testimony that the RSR, Capacity Shopping Tax, and the PTR collect above-market generation-related revenue, the ESP II Order unlawfully and unreasonably authorized these three provisions of the ESP.

The ESP II Order's authorization is also unreasonable and unlawful because it completely ignores AEP-Ohio's analysis that the cash flow available from the utilization of the generating fleet will be (assuming AEP-Ohio collects RPM-Based Pricing[162]), over the longer term, some $22 billion in excess of the cash flow level required to support the currently recorded generation asset book values.[163]

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[159] Section 4928.39, Revised Code.

[160] IEU-Ohio Ex. 124, *passim*.

[161] *Id.* at 14.

[162] IEU-Ohio Ex. 117.

[163] OCC and IEU-Ohio both introduced an internal analysis conducted by AEP that demonstrates that "the estimated generation cash flows are sufficient to recover the companies' generating assets." OCC Ex. 104 at 4; IEU-Ohio Ex. 124 at Exhibit KMM-23; *see also* IEU-Ohio Ex. 117. In fact, the document shows that even with an estimated $100 million per year in additional environmental expenditures from 2012-

5. **The ESP II Order is unlawful and unreasonable because it assumes that the Commission may invent and apply a cost-based ratemaking methodology for purposes of authorizing a significant increase in the price for generation capacity service. It is similarly unlawful and unreasonable because it authorizes AEP-Ohio to defer the uncollected portion of this significant increase in the price for generation capacity service and then, after the term of the ESP, collect such portion plus interest charges through non-bypassable charges applicable to shopping and non-shopping customers.**

Although the price AEP-Ohio is allowed to charge for generation capacity service is squarely in front of the Commission in the *Capacity Case* through IEU-Ohio's Application for Rehearing, as well as the Applications for Rehearing filed by several other parties, the ESP II Order has also injected the same contested issues into the *ESP II Case.*[164] As previously noted, the Capacity Order referred to the *ESP II Case* the determination of how the difference between the RPM-Based Price billed and collected from CRES providers for shopping load and $188.88/MW-day would be collected, and did so after the record in the *ESP II Case* closed.[165] The ESP II Order authorizes the RSR under Section 4928.143(B)(2)(d), Revised Code, and the Capacity Shopping Tax under Section 4928.144, Revised Code, to recover the difference between the $188.88/MW-day price and the RPM-Based Price.

In addition to the fact that the statutory timeframe for approving transition revenue has long since passed, the Commission is otherwise without authority to invent and apply a cost-based ratemaking methodology for purposes of substantially

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2014, AEP's generating function would generate positive cash flows more than $22 billion in excess of the asset book value. OCC Ex. 104 at 4. The AEP-Ohio specific cash flows are identified in a confidential exhibit. IEU-Ohio Ex. 121. IEU-Ohio also addressed the confidential AEP-Ohio specific cash flows in the confidential portion of its Initial Brief filed in this proceeding. Initial Brief of IEU-Ohio at 55 (June 29, 2012).

[164] ESP II Order at 36, 51-52.

[165] Capacity Order at 23.

increasing AEP-Ohio's compensation for generation capacity service. The Commission may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.[166]

With the enactment of Amended Substitute Senate Bill 3 ("SB 3"), generation-related retail electric service became, and remains today, a competitive retail electric service.[167] The Ohio Supreme Court has held on several occasions that the generation component of retail electric service is not subject to the Commission's regulation:

> [i]t 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.[168]

The definitions in Section 4928.01, Revised Code,[169] in combination with the declarations and limitations in Sections 4928.03 and 4928.05, Revised Code, likewise,

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[166] *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234, 661 N.E. 2d 1097 (1996).

[167] "Beginning on the starting date of competitive retail electric service [January 1, 2001], *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." Section 4928.03, Revised Code (emphasis added).

[168] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶20. The Court's use of "regulation" was in reference to the Commission's ability to use its traditional "cost-based" ratemaking authority. *Id.* at ¶19. That Court was effectively holding that in the context of competitive retail electric services, the Commission could only approve rates based on market prices, just as AEP-Ohio has claimed. IEU-Ohio Ex. 119 at 18.

[169] "'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.

make 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 that service is declared competitive, except under very narrowly defined circumstances. From these definitions and limitations, this conclusion holds irrespective of the force of federal preemption regarding sales for resale transactions[170] and regardless of whether the service is called wholesale or retail.

The definition of "retail electric service" includes *any service, i.e.*, generation, transmission, and distribution service, from the point of generation to the point of consumption.[171] Since January 1, 2001, the effective date of competitive retail electric service, generation service has been deemed competitive. Section 4928.03, Revised Code, provides:

> 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[172] that the consumers may obtain subject to this chapter from any supplier or suppliers.

Because the General Assembly declared retail electric generation service competitive many years ago, that service (which by definition includes any generation

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[170] Of course, the Commission can exercise no authority except that authority that has been delegated to it by the General Assembly. To have any jurisdiction over wholesale services, the Commission would thus have to find some specific grant of authority by the General Assembly and this fundamental principle is true irrespective of the powers conveyed to the federal government. But the General Assembly could not lawfully delegate authority to the Commission to regulate or supervise wholesale electric transactions because the authority to regulate commerce among the states is reserved to the federal government. U.S. Const., Art. I, § 8, cl. 3.

[171] Section 4928.01(A)(27), Revised Code.

[172] 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.

service from the point of generation to the point of consumption) is not subject to the Commission's supervision or regulation except as may be specifically permitted by Sections 4928.141 to 4928.144, Revised Code (which relate exclusively to the establishment of an SSO for *retail* electric customers), and Section 4905.06, Revised Code, as it provides for safety and reliability.[173] Additionally, Section 4928.05(A), Revised Code, precludes the Commission from regulating such a competitive service under Chapter 4909, Revised Code. Thus, the Commission is barred from using its supervisory powers or the regulatory authority in Chapters 4905, 4909, and 4928, Revised Code, except as specifically noted, to address pricing for any generation service from the point of generation to the point of consumption.

With respect to establishing rates for competitive retail electric services, the Commission's authority is limited to an EDU's SSO.[174] The Supreme Court has also held that concerns about the future do not empower the Commission to create remedies beyond those permitted by the law.[175] As the Commission held in its decision denying recovery of closure costs for the Sporn 5 generating facility:

> Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code. Just as the construction and maintenance of an electric generating facility are fundamental to the

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[173] Section 4928.05(A), Revised Code.

[174] "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 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." Section 4928.05(A)(1), Revised Code (emphasis added).

[175] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 23.

> generation component of electric service, we find that so too is the closure of an electric generating facility. Additionally, although there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances, the enumerated statutory exceptions do not include Sections 4905.20 and 4905.21, Revised Code, which otherwise govern applications to abandon or close certain facilities.
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> OP also requests approval of a rider to collect the costs associated with the closure of Sporn Unit 5. As discussed above, Section 4928.05(A)(1), Revised Code, generally prohibits Commission regulation of retail electric generation service. However, that section expressly provides that it does not limit the Commission's authority under Sections 4928.141 to 4928.144, Revised Code.[176]

Despite the Commission's acknowledgement that it can only regulate retail electric service rates as part of an SSO, the Commission authorized AEP-Ohio to collect an above-market price for capacity under its general supervisory powers, and under Section 4905.13, Revised Code, authorized AEP-Ohio to defer for future collection the difference between RPM-Based Pricing and $188.88/MW-day in the Capacity Order.[177] It then compounded the Capacity Order's errors by unlawfully authorizing, in the ESP II Order, AEP-Ohio to recover this difference through the RSR and the Capacity Shopping Tax. Because the riders unlawfully authorized and guarantee above-market compensation for competitive generation-related service, they are unlawful and unreasonable.

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[176] *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 16-17 (Jan. 11, 2012) ("*Sporn Decision*").

[177] Capacity Order at 12-13, 23

6. **The ESP II Order is unlawful and unreasonable because it functions to permit AEP-Ohio, an electric distribution utility ("EDU"), to evade statutory corporate separation requirements that call for strict separation between competitive and non-competitive lines of business and services and because it approves an SSO which insulates AEP-Ohio's competitive generation business from the discipline of the electricity market. The RSR, Capacity Shopping Tax, and PTR all function to allow AEP-Ohio, the EDU, to evade such corporate separation requirements, collect above-market generation-related revenue and insulate AEP-Ohio's competitive generation business from the discipline of the electricity market. Following AEP-Ohio's proposed and untimely transfer of its generating assets to an affiliate, AEP Generation Resources Company ("Genco"), these three riders will further violate such corporate separation requirements by allowing AEP-Ohio to collect, on a non-bypassable basis, above-market generation-related revenue and remit such revenue to Genco thereby insulating Genco's competitive generation business from the discipline of the electricity market.**

Chapter 4928, Revised Code, and the rules the Commission has adopted to implement the corporate separation requirements are designed to assure that retail customers as well as CRES providers are not subjected to the EDU's discretion in ways that would allow the EDU to favor its or its affiliate's assets or competitive lines of business.[178] The ESP II Order violates the corporate separation requirements, which call for a strict separation between competitive and non-competitive services. The ESP II Order also violates the corporate separation requirements because it authorizes an SSO that functions to insulate AEP-Ohio's competitive generation business from the discipline of the electricity market. As Mr. Hess explains:

> Instead of being competitively neutral, AEP-Ohio, the EDU, is selectively advancing proposals to provide its generation business segment with financial and other benefits or preferences not available to any other supplier of generation service. Throughout this proceeding and in other cases, AEP-Ohio has often portrayed itself as competing with CRES suppliers even though AEP-Ohio, the EDU, can only provide generation

[178] *See, e.g.*, Section 4928.17, Revised Code; Rule 4901:1-16, OAC; Rule 4901:1-37, OAC; IEU-Ohio Ex. 124 at 26.

> supply when a customer is not served by a CRES supplier. AEP-Ohio has also asserted that the generation supply benefits of Ohio's customer choice must be delayed to allow AEP-Ohio to adjust its latest business model. The claim that AEP-Ohio needs additional time is irreconcilably inconsistent with the somewhat unique wires-transfer corporate separation plan approved by the Commission for AEP-Ohio. It is also my understanding that any competitive service provided by AEP-Ohio, the EDU, must be provided through a separate entity that is not benefitted by anything that AEP-Ohio, the EDU, does with regard to the provision of non-competitive services.
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> When AEP-Ohio's capacity charge, Pool Termination Provision and RSR proposals are considered in light of the role and purpose of the corporate separation requirements, I believe it is clear that the Modified ESP is essentially an attempt to bypass the corporate separation requirements for the benefit of AEP-Ohio's generation business segment and to the disadvantage of retail customers and CRES suppliers. Thus, the blueprint used by AEP-Ohio to assemble its Modified ESP ignores the building code established by the General Assembly and the Commission's rules.[179]

As a result of the ESP II Order, AEP-Ohio's corporate separation violations through the RSR, Capacity Shopping Tax, and the PTR will occur in two stages.

Before AEP-Ohio satisfies the full structural corporate separation requirement that has been part of Ohio law for more than a decade, AEP-Ohio will be providing its generation business preferential treatment[180] through the rates charged by the EDU function in its capacity as a default supplier of generation service. While AEP-Ohio continues to operate under functional corporate separation in accordance with Section 4928.17(C), Revised Code, its separation plan must provide "for ongoing compliance with the policy specified in section 4928.02 of the Revised Code." Section 4928.02(H), Revised Code, states that it is the policy of the State to ensure effective competition in the provision of retail electric service "by prohibiting the recovery of any generation-

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[179] IEU-Ohio Ex. 124 at 30-31.

[180] Section 4928.17(A)(3), Revised Code, prohibits the extension of any undue preference to an affiliate, division, or part of its business.

related costs through distribution or transmission rates." The Commission has correctly concluded that a non-bypassable charge to recover generation-related costs would result in a subsidy of generation services through a rider that is collected from all distribution customers.[181] Despite this prohibition, the non-bypassable RSR, Capacity Shopping Tax, and PTR will allow AEP-Ohio to recover generation-related costs from all of its distribution customers at a point in time when AEP-Ohio's generation business is required to be a stand-alone, separate business, fully on its own in the competitive market.

After the transfer of generating assets and a delayed, eventual compliance with Ohio's corporate separation requirements, the ESP II Order allows AEP-Ohio to violate corporate separation requirements by permitting it to "pass through" the above-market SSO revenue collected through the RSR, Capacity Shopping Tax, and PTR to Genco, its competitive affiliate.[182] The transfer of above-market generation revenue to Genco provides Genco an undue preference in violation of Section 4928.17(A)(3), Revised Code, and provides Genco an unfair competitive advantage in violation of Section 4928.17(A)(2), Revised Code. Under this arrangement, AEP-Ohio, the EDU, will pass all generation-related revenue, including the RSR, Capacity Shopping Tax, and PTR revenue to Genco.[183] Because the competitive affiliate will receive the revenue AEP-Ohio has identified is necessary to make up for the "lost" generation-related revenue associated with shopping, these three generation-related non-bypassable riders

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[181] *Sporn Decision* at 19.

[182] AEP-Ohio. Ex. 104 at 6-8.

[183] *Id.* at 8.

improperly subsidize Genco's competitive generation function, effectively evade the corporate separation requirements and are unlawful and unreasonable.

7. **The ESP II Order is unlawful and unreasonable because it fails to promote the State policy contained in Section 4928.02, Revised Code. As the Commission found in the Capacity Order,[184] market-based pricing promotes the policies contained in Section 4928.02, Revised Code, by incenting shopping, promoting true competition, and by placing EDUs and CRES providers on a level playing field. Despite finding that market-based pricing promotes State policy, the ESP II Order authorizes AEP-Ohio to collect above-market pricing for generation-related services through the RSR, PTR, Capacity Shopping Tax, and the GRR.**

Section 4928.02, Revised Code, declares the State policies the Commission is obligated to effectuate pursuant to Section 4928.06, Revised Code. These policies generally support customer choice, 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. And the Commission has confirmed that "standard service offers must be consistent with state policy under Section 4928.02, Revised Code."[185]

> The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to "ensure the policy specified in section 4928.02 of the Revised Code is effectuated."
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[184] Hereinafter "Capacity Order" shall refer to the July 2, 2012 Opinion and Order in *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 and "Capacity Case" shall refer to the docket above (Case No. 10-2929-EL-UNC).

[185] *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Ration Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, *et al.*, Order on Remand at 37 (Oct. 24, 2007) (*citing Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305 (2007)).

> Moreover, we disagree with FirstEnergy's claim that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies. The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy provisions of Section 4928.02, Revised Code. *See Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Accordingly, an electric utility should be deemed to have met the statutory requirements of Section 4928.142(A), Revised Code, only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in Section 4928.02, Revised Code.[186]

As the Commission correctly determined, an SSO may only be approved if it complies with State policy; however the as-approved Modified ESP does not promote State policy.

In the Capacity Order, issued July 2, 2012, the Commission found that market-based pricing supports State policy. "RPM-based capacity pricing will stimulate true competition among suppliers in AEP-Ohio's service territory" and will "incent shopping."[187] The Commission also found that RPM-Based Pricing has "been used successfully throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field."[188] The Capacity Order did not find that an above-market capacity charge could comply with Section 4928.02, Revised Code, and the Commission's reasoning in that Order implicitly rejects the notion that above-market capacity pricing is compatible with Section 4928.02, Revised Code.[189]

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[186] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (Nov. 25, 2008); *see also Elyria Foundry v. Public Util. Comm.*, 114 Ohio St. 3d.305 (2007).

[187] Capacity Order at 23.

[188] *Id.*

[189] As noted in IEU-Ohio's Application for Rehearing in the *Capacity Case*, the Commission did not comply with the State law or act within its jurisdictional scope of authority when it invented and applied a

Despite the State's policies and the Capacity Order's reaffirmation that market-based pricing complies with State policy, the ESP II Order authorizes AEP-Ohio to increase electric bills so that it can collect hundreds of millions of dollars in above-market, generation-related compensation through the RSR, PTR, Capacity Shopping Tax, and the GRR.[190] This outcome violates Ohio policy, the Commission's duty to effectuate that policy and conflicts with the Commission's findings in the Capacity Order. Therefore, the ESP II Order is unlawful and unreasonable.

8. **The ESP II 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 ESP II Order in combination with the Capacity Order work to create by comparing RPM-Based Pricing to the $188.88/MW-day price. The non-symmetrical and arbitrary bias embedded in these Orders' description of how the Capacity Deferral 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.**

The ESP II Order is unlawful and unreasonable inasmuch as it fails to recognize that AEP-Ohio secures compensation for generation capacity service from non-

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cost-based ratemaking methodology to develop a $188.88/MW-day capacity price and referred a decision concerning the recovery of the difference between the price it permitted AEP-Ohio to bill and collect from CRES providers to the ESP II Order. In the ESP II Order, the Commission abandoned the State policy and authorized unlawful and shopping killing non-bypassable charges that will skew customer choice for years to come.

[190] *See* ESP II Order at 31-37, 70-77 (authorizing the RSR, which causes the ESP, based upon the Commission's own quantification, to be more expensive than the market-based MRO option by hundreds of millions of dollars); ESP II Order at 36, 52 (authorizing the Capacity Shopping Tax); ESP II Order at 49 (conditionally authorizing a yet-to-be-defined amount through the PTR). As Attachment A indicates, the Capacity Shopping Tax will collect an estimated $447 million.

shopping customers receiving default generation supply and from the generation capacity service pricing that applies in the case of shopping customers. In the case of non-shopping customers, AEP-Ohio claimed that it was receiving, on average and prior to the ESP II Order, generation capacity service compensation at a rate of $355/MW-day.[191] Thus, according to AEP-Ohio, its SSO customers are providing AEP-Ohio with significantly more compensation for generation capacity service than AEP-Ohio would be able to obtain if the Commission-specified $188.88/MW-day price governed compensation for generation capacity service from SSO customers. It is unreasonable and unlawful for the Commission to substantially increase AEP-Ohio's compensation for generation capacity service by authorizing a price of $188.88/MW-day in the case of shopping customers and then ignore the much higher level of generation capacity service compensation available to AEP-Ohio through its SSO for purposes of measuring the actual total generation capacity service compensation difference caused by limiting the compensation collected from CRES providers to RPM-Based Pricing. The analytical bias in the ESP II Order works to totally ignore excessive generation capacity service compensation available to AEP-Ohio through the SSO.

To eliminate this non-comparable, unreasonable and unlawful discrimination between generation capacity service compensation in the case of SSO customers and shopping customers and to avoid overstating the amount of the Capacity Deferral payable by shopping and non-shopping customers, the Commission must grant rehearing. More specifically, the Commission must modify the ESP II Order to credit the amount of generation service capacity compensation available from SSO customers

[191] Tr. Vol. V at 1438.

above the $188.88/MW-day price against the amount of the Capacity Deferral eligible for recovery through non-bypassable riders.

9. The ESP II Order is unlawful and unreasonable inasmuch as the Commission failed to adopt the uncontested recommendation of IEU-Ohio witness Kevin Murray contained at page 49 of IEU-Ohio Exhibit 125, which, if adopted, would provide much needed transparency to the process AEP-Ohio used to derive the billing determinants for generation capacity service.

The ESP II Order 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 RAA.[192] Through its testimony and briefs, IEU-Ohio demonstrated the lack of transparency that currently exists with regard to the PLC billing determinant.[193] The means by which AEP-Ohio is specifying each customer's PLC has never been identified by AEP-Ohio. Despite the fact that no party challenged IEU-Ohio's testimony or briefs on this issue, the Commission failed to require AEP-Ohio to immediately disclose how it assigns a PLC value to each customer.

Instead, the ESP II Order directs AEP-Ohio to set up a meeting with the Ohio EDI Working Group ("OWEG")[194] within 30 days after the issuance of the ESP II Order to "develop an electronic system to provide CRES providers access to pertinent customer data, including but not limited to, PLC and [network service peak load] values and

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[192] 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 determine whether certain customers or customer classes within AEP-Ohio's territory are unfairly being assigned their PLCs.

[193] IEU-Ohio Ex. 125 at 49; Initial Brief of IEU-Ohio at 91-92 (June 29, 2012); Reply Brief of IEU-Ohio at 5, 54 (July 9, 2012).

[194] EDI is defined as electronic data interchange. ESP II Order at 41.

historical usage and interval data no later than May 31, 2014."[195] Unfortunately, the ESP II Order will allow AEP-Ohio's PLC allocation process to remain a mystery for another two years.

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. It is also important to note that this PLC specification requirement is critically important to the determination of how much revenue AEP-Ohio may eventually be able to collect for generation capacity service through the Capacity Shopping Tax 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.

10. The ESP II Order is unlawful and unreasonable because the GRR cannot be lawfully approved under Section 4928.143(B)(2)(c), Revised Code.

The ESP II Order authorizes a non-bypassable GRR, at an initial rate of zero, pointing to Section 4928.143(B)(2)(c), Revised Code.[196] As discussed below, the ESP II Order's approval of the GRR is neither lawful nor reasonable.

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[195] *Id.*

[196] *Id.* at 24.

A. The ESP II Order is unlawful and unreasonable because it authorizes AEP-Ohio to establish the GRR to recover the cost of compliance with Section 4928.64, Revised Code (renewable energy resource requirements), through a non-bypassable charge in violation of Ohio law. Section 4928.64(E), Revised Code, states that all costs incurred by an EDU to comply with such requirements shall be bypassable by any consumer that has exercised its choice of supplier under Section 4928.03, Revised Code. The ESP II Order is also unlawful and unreasonable because the Commission violated Section 4903.09, Revised Code, by failing to address this issue raised on brief by IEU-Ohio; the Ohio Supreme Court has held that the failure to address all material matters brought to the Commission's attention is a reversible error.

The ESP II Order is unlawful and unreasonable in several respects. Although Section 4928.143(B)(2)(c), Revised Code, authorizes the Commission to approve a non-bypassable charge for a generating facility if certain requirements are satisfied, the Section cannot authorize a non-bypassable rider to recover the cost of compliance with renewable energy requirements. Specifically, Section 4928.143(B), Revised Code, states that the Commission cannot approve a provision of an ESP that is "contrary" to Section 4928.64(E), Revised Code.[197] Section 4928.64(E), Revised Code, states that "*[a]ll costs* incurred by an electric distribution utility in complying with the requirements of this section [renewable energy requirements] shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code." (Emphasis added.) According to AEP-Ohio, the only project cost scheduled for collection through the GRR is related to Turning Point, a proposed 49.9 MW solar generating facility; the only purpose of the Turning Point project is to comply with renewable energy requirements.[198] Solar generating resources are defined as

[197] Section 4928.143(B), Revised Code.

[198] Tr. Vol. II at 704; Tr. Vol. VII at 2124.

renewable resources.[199] Accordingly, the GRR violates the statutory prohibition against recovering the cost of compliance with renewable energy requirements through a non-bypassable charge. Because the non-bypassable feature of the GRR is unlawful, the Commission must grant rehearing and reject the GRR or make it bypassable.

The ESP II Order is also unlawful and unreasonable because it fails to address this issue which was raised by IEU-Ohio during the evidentiary hearings preceding the ESP II Order and during the briefing process. 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.[200] Because the Commission failed to address a contested and material matter with a reasoned explanation as required by Section 4903.09, Revised Code, the ESP II Order is unlawful and unreasonable.[201]

B. The ESP II Order is unlawful and unreasonable because the Commission failed to make the findings required by Section 4928.143(B)(2)(c), Revised Code, to support its authorization of the GRR.

Even if the Commission could approve a non-bypassable rider to recover the cost of compliance with renewable energy requirements, the ESP II Order is unlawful and unreasonable because it approves the GRR prior to and without satisfying the requirements contained in Section 4928.143(B)(2)(c), Revised Code. The ESP II Order states that it is not making any decision regarding the appropriateness of the costs of Turning Point, but nonetheless approves the GRR on the unrelated notion that the

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[199] Section 4928.01(A)(35), Revised Code.

[200] *In re Columbus Southern Power Company*, 128 Ohio St.3d at 526-27.

[201] *Id.*

Commission is "vested with the broad discretion to manage its dockets to avoid undue delay and duplication of effort."[202]

The ESP II Order's holding that it can approve the GRR now and position AEP-Ohio to satisfy the statutory conditions that must be met before the Commission can approve a non-bypassable cost-recovery mechanism in an ESP proceeding is unreasonable and unlawful. It also works to promote the very duplication of effort that the ESP II Order says the Commission may avoid by managing its dockets.

Section 4928.143(B)(2)(c), Revised Code, requires the EDU seeking the non-bypassable rider to demonstrate that the proposed generating facility is newly used and useful after January 1, 2009, and is sourced through a CBP subject to rules adopted by the Commission. No such non-bypassable surcharge mechanism shall be authorized by the Commission until there is first a determination in the ESP "... proceeding that there is a need for the facility based on resource planning projections submitted by the electric distribution utility." Section 4928.143(B)(2)(c), Revised Code, makes it clear that the need for the facility must be demonstrated in the ESP before the Commission has the authority to allow a non-bypassable cost recovery mechanism for a new generation facility to become part of an ESP. The reason for these requirements is obvious; equipping an EDU with the ability to recover the cost of a new generating facility through a non-bypassable charge works against the pro-competitive goals of Ohio law.

If the requirements of Section 4928.143(B)(2)(c), Revised Code, are met, the Commission is not required to—but may—approve a surcharge under that Section, in

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[202] ESP II Order at 24.

which case the rider "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."

Whatever discretion the Commission may have to manage its dockets to avoid duplication, the plain meaning of Section 4928.143(B)(2)(c), Revised Code, precludes the Commission from approving a non-bypassable cost recovery mechanism under Section 4928.143(B)(2)(c), Revised Code, and then pushing the satisfaction of conditions precedent for the authorization of such a mechanism into other "dockets." Ohio law does not allow the Commission to evade the clear constraints on its authority expressed in Section 4928.143(B)(2)(c), Revised Code by kicking the required determinations into other dockets or through a piecemeal review process conducted outside the ESP in which the mechanism is proposed and approved.

The ESP II Order's reliance on *Duff v. Public Utilities Commission*[203] and *Toledo Coalition for Safe Energy v. Public Utilities Commission*[204] for the proposition that the Commission may ignore the statutory requirements in this proceeding is without merit.[205] In *Duff* and *Toledo*, the Court determined that Section 4901.13, Revised Code, provides the Commission with discretion to conduct its hearings. Section 4901.13, Revised Code, provides that "[t]he public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it." While the Commission may set its own rules with respect to the governance of its

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[203] 56 Ohio St.2d 367, 379 (1978).

[204] 69 Ohio St.2d. 559, 560 (1982).

[205] ESP II Order at 24.

hearings, those rules cannot conflict with more specific statutory requirements that dictate how and when the Commission may exercise authority to increase electric bills or approve non-bypassable cost recovery mechanisms that create a launching pad for such increases.[206] Because Section 4928.143(B)(2)(c), Revised Code, requires that the identification of the facility, its sourcing through a CBP, the surcharge, and need must be presented and addressed in the ESP proceeding; the Commission does not have the discretion to permit AEP-Ohio to submit this information and satisfy these statutory requirements in separate proceedings.[207]

While the plain meaning of the statute is controlling, the requirement for full review of a request for a non-bypassable generation-related rider in an ESP is also consistent with the process the Commission must undertake when it reviews an ESP application. Under Section 4928.143(C)(1), Revised Code, the Commission must determine if the ESP is more favorable than an MRO. A non-bypassable placeholder cost recovery mechanism with unspecified costs prevents the Commission from making that determination in a manner that complies with the ESP versus MRO test because

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[206] *See Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St.3d 232, 234 (1988).

[207] Section 4928.143(B)(2)(c), Revised Code. Section 4928.143(C)(1), Revised Code, states that an application containing a non-bypassable surcharge mechanism pursuant to Section 4928.143(B)(2)(b) or (c), Revised Code, must be denied unless the Commission first ensures "... that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge." Since costs related to an EDU's compliance with Ohio's renewable energy portfolio requirements must be bypassable for customers who exercise their choice rights, there can be no benefit of the Turning Point facility for these customers. In the circumstances presented by the *ESP II Case*, the approval of a non-bypassable cost recovery mechanism as a host for costs related to Turning Point is also unlawful by the terms of Section 4928.143(C)(1), Revised Code. It is also important to note that Section 4928.20(K), Revised Code, obligates the Commission to encourage and promote large-scale governmental aggregation programs and, within the context of an ESP proceeding, to "... consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan ..." Here again, the requirement that these required determinations be made in the ESP proceeding and not in some unidentified other "dockets" has been clearly written into Ohio law by the General Assembly. As with the other requirements that must be met before the Commission may authorize a non-bypassable cost recovery mechanism for generation-related costs, the ESP II Order unreasonably and unlawfully omits compliance with Ohio law.

the Commission will have no basis to determine whether the ESP as presented will satisfy the test during the term of the ESP.

11. The ESP II Order is unlawful and unreasonable because it authorized the Phase-In Recovery Rider ("PIRR") without allowing IEU-Ohio an opportunity to present testimony or to introduce exhibits regarding the effect of accumulated deferred income taxes ("ADIT") on the carrying charges in the PIRR trespassing on IEU-Ohio's due process rights.[208] Generally accepted accounting principles, regulatory principles, Court precedent, and Commission precedent all support an offset to account for ADIT.

The ESP II Order addresses only two issues with respect to the PIRR: (1) AEP-Ohio's request to delay implementation of the PIRR until 2013; and (2) AEP-Ohio's request to combine and average the PIRR rates[209] and collect the averaged PIRR from both CSP and OP customers. The Commission denied both requests.

Authorization of the PIRR, however, presented an additional issue that should have been addressed in either the *ESP II Case* or through an evidentiary hearing in the *PIRR Case*.[210] Specifically, IEU-Ohio sought Commission determinations addressing the calculation of carrying charges on the deferred balance adjusted to account for ADIT.[211] Through a combination of procedural errors, the Commission did not address this issue and trespassed on IEU-Ohio's due process rights as a result.

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[208] *Vectren Energy Delivery of Ohio, Inc. v. Pub Util. Comm.*, 113 Ohio St.3d 180, 192 (2007).

[209] There remains a deferred balance of approximately $7 million on the books of CSP. *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144*, Ohio Revised Code, Case Nos. 11-4920-EL-RDR, *et al.*, Compliance Tariffs (Aug. 8, 2012) ("*PIRR Case*").

[210] IEU-Ohio has filed an Application for Rehearing in the *PIRR Case* raising issues regarding the treatment of the adjustment for ADIT.

[211] IEU-Ohio Ex. 129.

A. The ESP II Order is unlawful and unreasonable because IEU-Ohio was denied the opportunity to present evidence regarding the effect of ADIT on the calculation of carrying charges in the PIRR in violation of due process.

The Attorney Examiner, in the *ESP II Case*, determined that the Commission would only address the PIRR in the *ESP II Case* as it pertained to the two issues AEP-Ohio raised in the Modified ESP Application: delaying the implementation of the rider and spreading the costs of the rider to both CSP and OP customers.[212] The Attorney Examiner held that the remaining issues, which included ADIT, would be addressed in a separate docket,[213] the *PIRR Case*, and struck IEU-Ohio's testimony filed in the ESP II proceedings on that subject.[214] In the *PIRR Case*, however, the Commission approved AEP-Ohio's application without a hearing and without the development of an evidentiary record regarding the contested issues highlighted by the comments submitted in the separate *PIRR Case*.

The Commission's actions violate IEU-Ohio's due process rights. Due process in a Commission proceeding requires that a party is: (1) given "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) permitted to "introduce exhibits;" (5) permitted to "argue its position through the filing of post hearing briefs;" and, (6) permitted to "challenge the PUCO's findings through an application for rehearing."[215] Failure to develop an appropriate record as a basis for the Commission's decision is

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[212] Tr. Vol. IX at 2738-39.

[213] *Id.*

[214] Tr. Vol. XIII at 3635-36 (Striking portions of IEU-Ohio Ex. 129).

[215] *Vectren Energy Delivery of Ohio, Inc. v. Pub Util. Comm.*, 113 Ohio St.3d 180, 192 (2007).

ground for reversal.[216] Likewise, the United States Supreme Court has held that parties have the right to a fair hearing,[217] and that "[t]he right to such a hearing is one of 'the rudiments of fair play.'"[218]

By granting the motion to strike IEU-Ohio's PIRR-related testimony in the *ESP II Case* and approving the PIRR in the *PIRR Case* without testimony or a hearing, the Commission has denied IEU-Ohio a meaningful opportunity to demonstrate that carrying charges should be calculated on a deferred balance adjusted for ADIT. As a result, the Commission has violated IEU-Ohio's due process rights and the statutory requirements governing the Commission's hearings. To remedy this violation, the Commission should either grant rehearing in the *ESP II Case* and allow the parties to address the proper ADIT adjustments to the balance eligible for amortization through the PIRR, or permit these issues to be addressed through an evidentiary hearing in the *PIRR Case* in which IEU-Ohio has also submitted an application for rehearing.

B. The ESP II Order is unlawful and unreasonable because it fails to direct AEP-Ohio to calculate the PIRR's carrying charges on deferred balances adjusted for ADIT in accordance with generally accepted accounting principles, regulatory principles, Court precedent, and Commission precedent. The ESP II Order's failure to require an ADIT adjustment permits AEP-Ohio to accrue carrying charges on overstated balances; thereby, requiring customers to overcompensate AEP-Ohio.

Pursuant to Section 4928.144, Revised Code, the Commission must ensure that the PIRR is just and reasonable, and the amounts deferred for collection through the PIRR comply with generally accepted accounting principles. Moreover, in ensuring that

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[216] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 92-93 (1999).

[217] *West Ohio Gas Co. v. Pub. Util. Comm.*, 294 U.S. 63, 70 (1935).

[218] *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292, 304-305 (1937).

the PIRR is just and reasonable, the Commission must follow the policy and statutory requirements set forth under Chapter 4928, Revised Code.[219] Because Section 4928.144, Revised Code, may convert bypassable charges into future non-bypassable charges, the Commission must exercise the utmost caution to ensure that the phase-in is just and reasonable. The Commission's jurisdiction and supervision over the phase-in is ongoing.[220] On rehearing, the Commission must exercise its ongoing jurisdiction over the phase-in and direct AEP-Ohio to calculate carrying charges on deferred balances adjusted for ADIT to ensure that the PIRR complies with generally accepted accounting principles, State policy, and precedent, because the PIRR, as approved in the ESP II Order, is unlawful and unreasonable inasmuch as it requires customers to overcompensate AEP-Ohio.

The PIRR, as approved, fails to comply with generally accepted accounting principles because AEP-Ohio has been authorized to accrue carrying charges on deferred balances without an adjustment for ADIT. As Section 4928.144, Revised Code, states, the Commission may authorize the creation of regulatory assets, but such regulatory assets must comply with generally accepted accounting principles. CSP and OP record regulatory assets (deferred expenses) and regulatory liabilities (future revenue reductions or refunds) to reflect the economic effects of regulation by matching expenses with their recovery through regulated revenues and income with its passage

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[219] Section 4928.02, Revised Code, states that it is the policy of this State to ensure the availability of reasonably priced electric service, and promote customer choice and competition. Section 4928.06(A), Revised Code, requires the Commission to ensure that the policy goals enumerated in Section 4928.02, Revised Code, are effectuated. Thus, the Commission must ensure that its actions and orders further the State policy goals enumerated in Section 4928.02, Revised Code.

[220] *PIRR Case*, Finding and Order at 17-18; *see also In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 569-70 (2011).

to customers through the reduction of regulated revenues. This treatment is required under generally accepted accounting principles, specifically under Financial Accounting Standards Board ("FASB") Accounting Standards Codification 980 (former FASB 71). The regulatory asset is capitalized on the asset side of the balance sheet, just like electric plant investment in traditional ratemaking.

Also in accordance with generally accepted accounting principles, there is a book to tax timing difference that results from deferring expenses. That book to tax accounting difference results in ADIT being recorded on the liability side of the balance sheet. Likewise, in traditional cost of service ratemaking for electric plant investment there may be book to timing differences created by differences in book and tax depreciation, which result in ADIT. The Commission's and Ohio Supreme Court's precedent dealing with capitalized assets where there is related ADIT supports the view that ADIT must be recognized in determining the amounts that are eligible to be recovered from customers.[221] The Commission, moreover, has recognized this regulatory principle in a different part of its ESP II Order, stating:

> We agree with Staff and Kroger that the DIR mechanism be revised to account for ADIT. The Commission finds that it is not appropriate to establish the DIR rate mechanism in a manner which provides the Company with the benefit of ratepayer supplied funds. Any benefit resulting from ADIT should be reflected in the DIR revenue requirement. Therefore, the Commission directs AEP-Ohio to adjust its DIR to reflect the ADIT offset.[222]

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[221] *Cincinnati v. Public Utilities Comm.*, 161 Ohio St. 395, 405-06 (1954); *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 68 Ohio St.2d 193, 194 (1981); *Cleveland Electric Illuminating Company v. Public Utilities Comm.*, 12 Ohio St.2d 320, 323 (1984) (determining that the Commission's order is consistent with the principle that tax benefits must be passed through to customers).

[222] ESP II Order at 47.

Carrying charges are intended to compensate the utility for the cost of financing or delaying the recovery of an expense. Despite the fact that the tax benefit recognized in the ADIT offset means that AEP-Ohio does not finance the entire deferred amount, the ESP II Order authorized AEP-Ohio to accrue carrying charges on the total deferred amount. The consequence of the ESP II Order's neglect of the ADIT offset permits AEP-Ohio to accrue and then recover from customers carrying charges on unreasonably inflated balances. Moreover, it would allow AEP-Ohio to convert, through the phase-in structure, what would have otherwise been a bypassable charge into an inflated non-bypassable charge, which works against Ohio's policy objectives (customer choice and reasonable prices, for example).[223] Such a result is not just and reasonable, nor does it comply with generally accepted accounting principles, regulatory practices and principles, or precedent.

On rehearing, the Commission must direct AEP-Ohio to calculate carrying charges on deferred balances adjusted for ADIT. Because the Commission has ongoing jurisdiction to modify the phase-in, the Commission should direct AEP-Ohio to recalculate the carrying charges that have accrued on the deferred balances from the beginning of the phase-in to ensure that AEP-Ohio does not recover more than its actual costs from ratepayers. Alternatively, the Commission must permit these issues to be addressed through an evidentiary hearing in the *PIRR Case* in which IEU-Ohio has also submitted an application for rehearing.

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[223] Section 4928.02, Revised Code.

IV. GENERATION ASSET DIVESTITURE

12. The ESP II Order is unlawful and unreasonable because, without authority to do so under Section 4928.143, Revised Code, the ESP II Order conditionally approves a transfer of generating assets without making the findings required by Sections 4928.17 and 4928.02, Revised Code, and Rule 4901:1-37, OAC, and without netting the above-book market value of AEP-Ohio's generating assets against the transition revenue which the ESP II Order authorizes AEP-Ohio to collect on a non-bypassable basis during and after the term of the as-approved Modified ESP.

Although AEP-Ohio filed testimony discussing its plan to transfer generation assets to Genco with its Modified ESP Application, it did not request approval of its corporate separation plan and such generation transfer in the Modified ESP proceeding. That request was filed in Case No. 12-1126-EL-UNC ("*Corporate Separation Case*") and AEP-Ohio stated in its Modified ESP Application that it requested such approvals to be made in the *Corporate Separation Case*.[224] Additionally, AEP-Ohio did not move to consolidate the *Corporate Separation Case* with the *ESP II Case*.[225] Because AEP-Ohio did not move to consolidate the *Corporate Separation Case*, the Commission stated that "the primary issues to be considered in this modified ESP proceeding is [*sic*] how the divestiture of the generation assets and the agreement between AEP-Ohio and [Genco] will impact SSO rates."[226]

Despite determining that the Commission's review was limited to the impact of the transfer on SSO rates, the ESP II Order then conditionally approved the generating asset transfer, stating, "the Commission finds that, subject to our approval of the

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[224] AEP-Ohio Ex. 100 at 3-4.

[225] ESP II Order at 58-59.

[226] *Id.* at 59.

corporate separation plan, the electric distribution utility should divest its generation assets from its noncompetitive electric distribution utility assets by transfer to its separate competitive retail generation subsidiary, [Genco], as represented in this modified ESP."[227] The ESP II Order provided conditional approval of the transfer: (1) without determining whether the transfer is just, reasonable, and in the public interest; (2) without making specific findings regarding the effect of the generating asset transfer on customers or SSO rates; (3) without directing AEP-Ohio to offset the transition revenue collection opportunity (presented by the RSR, the Capacity Shopping Tax, the PTR and other mechanisms discussed herein and permitting AEP-Ohio to collect above-market compensation for generation-related functions) by the above-market value of the to-be-transferred generating assets; and (4) without requiring Genco or other AEP-Ohio affiliates to consent to jurisdiction under Section 4928.18, Revised Code. Because the conditional approval is beyond the scope of the issues the Commission said it would address in this proceeding and evades the requirements that must be satisfied prior to approval, conditional or otherwise, of any such transfer, the ESP II Order is unlawful and unreasonable; and the Commission must grant rehearing.

Initially, the ESP II Order's conditional approval of the generation asset transfer was unlawful because approval was not sought as part of the Modified ESP. As noted above, AEP-Ohio filed a separate application in the *Corporate Separation Case*, AEP-Ohio failed to move to consolidate the *Corporate Separation Case*,[228] and AEP-Ohio explicitly stated that it was not requesting approval of its corporate separation plan and

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[227] *Id.* at 59.

[228] ESP II Order at 58.

divestiture in this proceeding.[229] Additionally, there is no basis for the Commission in a proceeding designated to establish an SSO to approve, conditionally or otherwise, a transfer of generation assets as a term of the Modified ESP under Section 4928.143, Revised Code.[230] As a result, the ESP II Order's conditional approval of the transfer of generation assets is beyond the Commission's legal authority.

Even if the matter was properly before the Commission, the ESP II Order contains none of the findings required by statute and Commission rules before any such Commission approval, conditional or otherwise, may be lawfully extended. It does not determine that the transfer is just, reasonable, and in the public interest,[231] consistent with Rule 4901:1-37, OAC,[232] and the State energy policy, as required by the Commission's rules.[233] The ESP II Order failed to determine whether AEP-Ohio had satisfied the requirements contained in Rule 4901:1-37-09, OAC,[234] which are intended

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[229] AEP-Ohio Ex. 100 at 3-4; ESP II Order at 57.

[230] For a related application of this principle in which the Commission sought to expand its authority to expand the terms of an ESP beyond those provided by Section 4928.143(B)(2), Revised Code, see *In re Columbus Southern Power Company*, 128 Ohio St.3d at 519-20.

[231] Rule 4901:1-37-09, OAC.

[232] Rule 4901:1-37-02, OAC, states :

> (A) The purpose of this chapter is to require all of the state's electric utilities to meet the same standards so a competitive advantage is not gained solely because of corporate affiliation.
>
> (B) This chapter is intended to create competitive equality, prevent unfair competitive advantage, prohibit the abuse of market power and effectuate the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.

[233] Rule 4901:1-37-02, OAC.

[234] Rule 4901:1-37-09, OAC, requires:

> (B) An electric utility may apply for commission approval to sell or transfer its generating assets by filing an application to sell or transfer.
>
> (C) An application to sell or transfer generating assets shall, at a minimum:

to assist the Commission in determining whether the transfer is just, reasonable, and in the public interest.

In addition to failing to address the requirements for approval of a generation asset transfer, the ESP II Order did not address the likely effect of the transfer of assets on future SSO prices or future capacity prices, the same issue that the Commission itself identified in its Entry on Rehearing as so serious a concern that it could not find that the Stipulation was in the public interest.[235] Because the as-approved Modified ESP calls for the generation supply price of a future SSO to be established through a CBP, the price of capacity will impact suppliers' bids into the CBP.[236] The Commission previously determined that its "intent in approving the generation asset divestiture was based on our understanding that AEP-Ohio would place all of its current (as of September 7, 2011) generation assets into the 2015 base residual auction."[237] After that outcome was put into question by AEP-Ohio's Federal Energy Regulatory Commission ("FERC) filing to divest generating assets to affiliates subject to FRR Alternative requirements, the Commission, on rehearing, determined that "Parties have not met their burden of demonstrating that the Stipulation, as a package, benefits

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(1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.

(2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.

(3) Demonstrate how the proposed sale or transfer will affect the public interest.

(4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.

[235] Entry on Rehearing at 5-8 (Feb. 23, 2012).

[236] *See* Initial Brief of IEU-Ohio at 77 (June 29, 2012); Reply Brief of IEU-Ohio at 53 (July 9, 2012).

[237] Entry on Rehearing at 8 (Feb. 23, 2012).

ratepayers and the public interest" and rejected the Stipulation.[238] The concerns about the potential effect of AEP-Ohio's generation asset transfer plans upon future capacity prices that the Commission identified in the Entry on Rehearing have not been addressed by AEP-Ohio because its plans still indicate that it will withhold some generating assets (the Amos and Mitchell Units) from the RPM-related auction process. Yet, the Commission does not even mention this concern in the ESP II Order or address the requirement that AEP-Ohio must address the implications of its generation asset transfer plans on future SSO or RPM-Based Pricing of capacity. It is unreasonable and unlawful for the Commission to not address such implications and, on its own initiative, then proceed to grant conditional approval of the transfer planned by AEP-Ohio but not proposed in the ESP proceedings. Regardless, no amount of review can make the transfer as proposed — a transfer that withholds generation from the RPM's base residual auction — just, reasonable, and in the public interest. Accordingly, at a minimum, the Commission must condition the transfer on any subsequent owner of AEP-Ohio's generating units bidding such units into all future RPM auctions. As discussed further below, the Commission has the authority to enforce such a restriction pursuant to Section 4928.18, Revised Code.

Furthermore, approval of the transfer of assets is unlawful because AEP-Ohio has not complied with the requirement to provide the Commission with the net book and market value of its generating assets.[239] Without this information, it is impossible for the Commission to determine whether the transfer as proposed at net book value is just,

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[238] *Id.*

[239] Rule 4901:1-37-09(C)(4), OAC.

reasonable and in the public interest. The ESP II Order's authorization of AEP-Ohio's requests to collect transition revenue has further increased the necessity for a review of the market value of the to-be-transferred generating assets.[240] IEU-Ohio contests the lawfulness and reasonableness of these above-market transition revenue collection mechanisms for reasons explained in other parts of this rehearing request. But it is, in any event, unreasonable and unlawful for the ESP II Order to, on one hand, permit AEP-Ohio to collect above-market charges for generation-related services and, on the other hand, permit AEP-Ohio to avoid netting the above-book market value of any of its generating assets to determine the amount of any transition revenue recoverable from shopping and non-shopping customers as required by Section 4928.39, Revised Code. The problem is compounded because the ESP II Order then facilitates AEP-Ohio's efforts to then convey the above-book market value of such generating assets to an affiliate such as Genco and pass on to such affiliate the above-market revenue collected through the non-bypassable transition revenue collection mechanisms. The combination of results put in motion by the ESP II Order evades the discipline mandated by Ohio law upon the Commission's ability to authorize the collection of transition revenue assuming that the Commission is not otherwise barred from doing so for the reasons discussed herein.

The need for AEP-Ohio to comply with the requirement to provide a market valuation of the generation takes on special significance because of the evidence here. According to AEP-Ohio's internal analysis (the "Impairment Test Memo"), AEP-Ohio has

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[240] ESP II Order at 26-38 (RSR); *id.* at 47-49 (PTR). While AEP-Ohio claims that these transition costs are not barred by SB 3, one thing remains clear regardless of the legality of AEP-Ohio's claim: the Commission authorized AEP-Ohio to collect generation-related transition revenue.

determined that the future cash flow from the AEP-East generating fleet for generation-related services[241] is billions of dollars more than the cash flow required to support the current book value of this generating fleet even assuming that compensation for generating capacity service is based on RPM-Based Prices.[242]

Before the Commission approves the transfer of generating assets and allows AEP-Ohio to flow hundreds of millions of dollars of non-bypassable generation-related charges to Genco, it must determine whether the transfer at net book value as proposed by AEP-Ohio is in the public interest, which is clearly affected by the imposition of non-bypassable generation-related charges that unlawfully provide AEP-Ohio with another opportunity to collect transition revenue. Because the Impairment Test Memo indicates that the market value of the generating fleet that includes AEP-Ohio's generating assets exceeds the book value, it is unreasonable and unlawful for the ESP II Order to not impose conditions on the transfer that require AEP-Ohio to net the above-book value of to-be-transferred generating assets against the transition revenue collection opportunity provided by the mechanisms discussed herein.

Finally, pursuant to Section 4928.18, Revised Code, the Commission has authority to exercise jurisdiction over AEP-Ohio's affiliates to enforce Section 4928.17, Revised Code, or any order issued pursuant to that section. The Commission, however, failed to require AEP-Ohio's affiliates to submit to Commission jurisdiction

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[241] OCC Ex. 104; IEU-Ohio Ex. 117.

[242] IEU-Ohio Ex. 120; OCC Ex. 104. The Impairment Test Memo states that the need for the analysis occurred because there was a "triggering" regulatory event: the United States Environmental Protection Agency's ("EPA") Cross-State Air Pollution Rule ("CSAPR") OCC Ex. 104 at 1. The analysis reduced projected cash flow by $100 million for 2012-2013 to account for the effects of the rule. *Id.* at 4. On August 21, 2012, however, the United States Court of Appeals for District of Columbia Circuit vacated CSAPR. *EME Homer City Generation v. EPA*, Case No. 11-1302, 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012).

under Section 4928.18, Revised Code. To the extent the transfer occurs without such consent, any ability of the Commission to remedy subsequently discovered problems may be impaired by a preemption defense. Without assurances from AEP-Ohio's affiliates that they will consent to jurisdiction of the Commission, the transfer cannot be deemed just, reasonable, and in the public interest.

V. PROCEDURAL MATTERS

13. The ESP II Order is unlawful and unreasonable because it fails to sustain objections to the admission of testimony where the testimony improperly relied upon settlement agreements from other proceedings for the purpose of addressing contested issues in the *ESP II Case.*

On May 4, 2012, IEU-Ohio filed a Motion to Strike Ohio Power Company's Application and Supporting Testimony and Memorandum in Support. On May 11, 2012, IEU-Ohio filed a Motion to Strike Intervenor Testimony. In each, IEU-Ohio requested that the Commission strike portions of testimony that relied upon stipulations which contain provisions prohibiting reliance on them as precedent in other matters.[243] During the hearing, the Attorney Examiners denied the Motions to Strike.[244]

As a result of the Attorney Examiners' failure to grant the Motion to Strike, the testimony of several witnesses improperly relied on stipulations to support their recommendations. Exelon witness Fein claimed that the Duke ESP Stipulation[245]

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[243] Industrial Energy Users-Ohio's Motion to Strike Ohio Power Company's Application and Supporting Testimony and Memorandum in Support at 14-15 and Attachment 1 (May 4, 2012) ("Motion to Strike Company Testimony"); Motion to Strike Intervenor Testimony and Memorandum in Support of Industrial Energy Users-Ohio and Office of the Ohio Consumers' Counsel at 6-7 (May 11, 2012).

[244] Tr. Vol. I at 24-25; Tr. Vol. II at 447-448; Tr. Vol. IV at 1253.

[245] *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.*, Stipulation and Recommendation at 2 (Oct. 24, 2011) ("Duke ESP Stipulation").

provides a basis for the RSR.[246] AEP-Ohio witness Powers used the Duke ESP Stipulation as evidence that non-bypassable riders in the Modified ESP are lawful.[247] AEP-Ohio witness Hawkins relied upon the AEP-Ohio Distribution Rate Case Stipulation[248] for evidence of AEP-Ohio's capital structure.[249] Each of those stipulations, however, expressly states that neither the stipulation nor any Commission order adopting it may be cited as precedent. IEU-Ohio raised the issue again in its Initial Brief, challenging the Attorney Examiners' decision to deny the Motion to Strike.

The ESP II Order affirmed the Attorney Examiners' decision, stating:

> The Commission finds that IEU's request to strike portions of the record should be denied. We acknowledge that individual components agreed to by parties in one proceeding should not be binding on the parties in other proceedings, but we find that references to other stipulations in this proceeding were limited in scope and did not create any prejudicial impact on parties that signed the stipulations. Consistent with our Finding and Order in Case No. 11-5333-EL-UNC, we also note that, while parties may agree not to be bound by the provisions contained within a stipulation, these limitations do not extend to the Commission.[250]

The ESP II Order's ruling is unreasonable and unlawful. Citations to stipulations that are "limited in scope" do not lessen the violation of the terms of such stipulations. Moreover, the Commission's determination that it is not

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[246] Exelon Ex. 101 at 9, 13.

[247] AEP-Ohio Ex. 101 at 6-7.

[248] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, *et al.*, Joint Stipulation & Recommendation (Nov. 23, 2011) ("Distribution Rate Case Stipulation").

[249] AEP-Ohio Ex. 102 at 4-5.

[250] ESP II Order at 10.

"bound by the provisions contained within a stipulation" is wrong. The Commission adopted each of the stipulations containing the following language:

> This Stipulation is submitted for purposes of these proceedings only, and *neither this Stipulation nor any Commission Order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon in any other proceedings*, except as necessary to enforce the terms of this Stipulation.[251]

The Commission orders adopting the stipulations did not modify this term; thus, the Commission agreed to enforce the prohibition against citation to and reliance upon the stipulations. However, the ESP II Order fails to do so.

The Commission has an interest in facilitating settlements. The quoted language is designed to facilitate the settlement process. By allowing parties to violate the terms of these stipulations in the *ESP II Case*, the Commission's interest in encouraging settlements in contested cases has been undermined and the failure has negatively affected the rights of parties such as IEU-Ohio. As a result, future settlements will be more difficult to achieve and, in the near term, the ESP II Order unreasonably and unlawfully prejudices the rights of parties such as IEU-Ohio to have contested issues resolved based on the evidence presented and the applicable law. Therefore, the failure to grant IEU-Ohio's Motions to Strike portions of testimony that relied upon such stipulations renders the ESP II Order unlawful and unreasonable and otherwise evades the Commission's obligation to address contested issues on the merits based on the evidence properly admissible and applicable law. Stipulations containing recommendations which are subsequently adopted by the Commission as a packaged resolution of any potentially contested issues are not properly included in testimony and

[251] *Duke ESP Stipulation* at 2 (emphasis added).

they may not be relied upon by the Commission to address or consider contested issues in these proceedings or any other.

VI. CONCLUSION

Based on the errors identified herein, considered both individually and combined, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing, terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the as-approved Modified ESP, and issue such orders as are necessary to continue the provisions, terms, and conditions of AEP-Ohio's most recent SSO until a subsequent SSO is lawfully authorized pursuant to Section 4928.142 or 4928.143, Revised Code. The Commission's restoration of the most recent SSO must require that AEP-Ohio's compensation for generation capacity service available to CRES providers be based on the capacity valuation and pricing method that is part of PJM's RPM. Further, IEU-Ohio requests that the order granting rehearing direct that any revenue unlawfully collected by AEP-Ohio pursuant to the ESP II Order or pursuant to the Stipulation and Recommendation filed September 7, 2011 (that was approved and then rejected on February 23, 2012) be refunded.

Respectfully submitted,

Matt Pritchard

Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support* was served upon the following parties of record this 7th day of September 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

Matt Pritchard

Matthew R. Pritchard

Matthew J. Satterwhite
Steven T. Nourse
Anne M. Vogel
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com
yalami@aep.com

Daniel R. Conway
Christen M. Moore
Porter Wright Morris & Arthur
41 S. High Street
Columbus, OH 43215
dconway@porterwright.com
cmoore@porterwright.com

ON BEHALF OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

Robert A. McMahon
Eberly McMahon LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206

Rocco D'Ascenzo
Elisabeth Watts
Duke Energy Ohio, Inc.
139 East Fourth Street - 1303-Main
Cincinnati, OH 45202
Elizabeth.watts@duke-energy.com
Rocco.d'ascenzo@duke-energy.com

ON BEHALF OF DUKE ENERGY OHIO, INC.

Amy B. Spiller
Jeanne W. Kingery
139 East Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com

Philip B. Sineneng
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Philip.Sineneng@thompsonhine.com

ON BEHALF OF DUKE ENERGY RETAIL SALES, LLC AND DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

ON BEHALF OF THE OHIO ENERGY GROUP

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

ON BEHALF OF ENERNOC, INC.

{C38514:11 }

Kyle L. Kern
Terry L. Etter
Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215-3485
kern@occ.state.oh.us
etter@occ.state.oh.us
grady@occ.state.oh.us

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

OH BEHALF OF OHIO HOSPITAL ASSOCIATION

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

ON BEHALF OF THE KROGER CO.

Terrence O'Donnell
Christopher Montgomery
Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com
mwarnock@bricker.com

ON BEHALF OF PAULDING WIND FARM II LLC

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F Lang
Laura C. McBride
N. Trevor Alexander
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
aehaedt@jonesday.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org

ON BEHALF OF THE APPALACHIAN PEACE AND JUSTICE NETWORK

Lisa G. McAlister
J. Thomas Siwo
Thomas O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
lmcalister@bricker.com
tsiwo@bricker.com
tobrien@bricker.com

ON BEHALF OF OMA ENERGY GROUP

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
jejadwin@aep.com

ON BEHALF OF AEP RETAIL ENERGY PARTNERS LLC

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
smhoward@vorys.com

ON BEHALF OF PJM POWER PROVIDERS GROUP AND THE RETAIL ENERGY SUPPLY ASSOCIATION

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, PA 19406
gthomas@gtpowergroup.com

Laura Chappelle
4218 Jacob Meadows
Okemos, MI 48864
laurac@chappelleconsulting.net

ON BEHALF OF PJM POWER PROVIDERS GROUP

M. Howard Petricoff
Michael Settineri
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com

Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

ON BEHALF OF THE COMPLETE COALITION

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
callwein@williamsandmoser.com

ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL AND THE SIERRA CLUB

M. Howard Petricoff
Michael J. Settineri
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
smhoward@vorys.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC., DIRECT ENERGY SERVICES, LLC

Gary A Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@aol.com

ON BEHALF OF DOMINION RETAIL, INC.

David I. Fein
Vice President, Energy Policy – Midwest
Constellation Energy Group, Inc.
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
david.fein@constellation.com
cynthia.brady@constellation.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC.

Jeanine Amid Hummer
Thomas K. Lindsey
City of Upper Arlington
C. Todd Jones,
Christopher L. Miller,
Gregory H. Dunn
Asim Z. Haque
Ice Miller LLC
250 West Street
Columbus, OH 43215
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
asim.haque@icemiller.com
jhummer@uaoh.net
tlindsey@uaoh.net

ON BEHALF OF THE CITY OF GROVE CITY, OHIO AND THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO, THE CITY OF UPPER ARLINGTON, THE CITY OF HILLSBORO, OHIO

Sandy I-ru Grace
Assistant General Counsel
Exelon Business Services Company
101 Constitution Ave., NW
Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street/P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com

David M. Stahl
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com

ON BEHALF OF EXELON GENERATION COMPANY, LLC

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
kpkreider@kmklaw.com
dmeyer@kmklaw.com

Holly Rachel Smith
Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, VA 20115
holly@raysmithlaw.com

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
Bentonville, AR 72716-0550
Stephen.Chriss@wal-mart.com

ON BEHALF OF WAL-MART STORES EAST, LP AND SAM'S EAST, INC.

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, OH 43212
tsantarelli@elpc.org

ON BEHALF OF THE ENVIRONMENTAL LAW & POLICY CENTER

Nolan Moser
Trent A. Dougherty
Camille Yancy
Cathryn Loucas
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
nolan@theoec.org
trent@theoec.org
camille@theoec.org
cathy@theoec.org.

ON BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL

Robert Korandovich
KOREnergy
P.O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

ON BEHALF OF KORENERGY

Douglas G. Bonner
Emma F. Hand
Keith C. Nusbaum
Clinton A. Vince
Daniel D. Barnowski
James Rubin
Thomas Millar
SNR Denton US LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
doug.bonner@snrdenton.com
emma.hand@snrdenton.com
keith.nusbaum@snrdenton.com
clinton.vince@snrdenton.com
daniel.barnowski@snrdenton.con
james.rubin@snrdenton.com
thomas.millar@snrdenton.com

Arthur Beeman
SNR Denton US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
arthur.beeman@snrdenton.com

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

ON BEHALF OF HESS CORPORATION

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Jacqueline Lake Roberts,
Counsel of Record
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

ON BEHALF OF CPOWER, INC., VIRIDITY ENERGY, INC., ENERGYCONNECT INC., COMVERGE INC., ENERWISE GLOBAL TECHNOLOGIES, INC., AND ENERGY CURTAILMENT SPECIALISTS, INC.

Benita Kahn
Lija Kaleps-Clark
Vorys Sater, Seymour and Pease LLC
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
bakahn@vorys.com
lkalepsclark@vorys.com

ON BEHALF OF OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

Mark A. Whitt
Whitt Sturtevant LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, OH 43215
whit@whitt-sturtevant.com

Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, OH 43016
mswhite@igsenergy.com

ON BEHALF OF INTERSTATE GAS SUPPLY, INC.

Dane Stinson
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215

ON BEHALF OF THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE OHIO SCHOOL BOARDS ASSOCIATION, THE OHIO SCHOOLS COUNCIL AND THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS

Chad A. Endsley
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218-2383
cendsley@ofbf.org.

ON BEHALF OF THE OHIO FARM BUREAU FEDERATION

Brian P. Barger
Brady, Coyle & Schmidt, LTD
4052 Holland-Sylvania Rd.
Toledo, OH 43623
bpbarger@bcslawyers.com

ON BEHALF OF THE OHIO CONSTRUCTION MATERIALS COALITION

Diem N. Kaelber
Robert J Walter
BUCKLEY KING LPA
10 West Broad Street, Suite 1300
Columbus, OH 43215
kaelber@buckleyking.com
walter@buckleyking.com

ON BEHALF OF OHIO RESTAURANT ASSOCIATION

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Judi.sobecki@dplinc.com
Randall.griffin@dplinc.com

ON BEHALF OF THE DAYTON POWER AND LIGHT COMPANY

Sara Reich Bruce
Ohio Automobile Dealers Association
655 Metro Place South, Suite 270
Dublin, OH 43017
sbruce@oada.com

ON BEHALF OF THE OHIO AUTOMOBILE DEALERS ASSOCIATION

Joseph M. Clark
Direct Energy Services LLC
And Direct Energy Business LLC
6641 North High Street, Suite 200
Worthington, OH 43085
joseph.clark@directenergy.com

ON BEHALF OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

Todd M. Williams
Williams Allwein and Moser, LLC
Two Maritime Plaza-Third Floor
Toledo, OH 43604
toddm@wamenergylaw.com

ON BEHALF OF THE OHIO BUSINESS COUNCIL FOR A CLEAN ECONOMY

Matthew R. Cox
Matthew Cox Law, Ltd.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

ON BEHALF OF THE COUNCIL OF SMALLER ENTERPRISES (COSE)

Stephanie M. Chmiel
Michael L. Dillard
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Michael.Dillard@ThompsonHine.com

ON BEHALF OF BORDER ENERGY ELECTRIC SERVICES, INC.

Randy J. Hart
Rob Remington
David J. Michalski
200 Public Square, Suite 2800
Cleveland, OH 44114-2316
rhart@hahnlaw.com
rrremington@hahnlaw.com
djmichalski@hahnlaw.com

ON BEHALF OF SUMMIT ETHANOL, LLC AND FOSTORIA ETHANOL, LLC

Robert Burke
Braith Kelly
Competitive Power Ventures, Inc.
8403 Colesville Road, Ste. 915
Silver Spring, MD 20910
rburke@cpv.com
bkelly@cpv.com

Larry F. Eisenstat
(Counsel of Record)
Richard Lehfeldt
Robert L. Kinder, Jr.
Dickstein Shapiro LLP
1825 Eye St. NW
Washington, DC 20006
eisenstatl@dicksteinshapiro.com
lehfeldtr@dicksteinshapiro.com
kinderr@dicksteinshapiro.com

Robert L. Kinder, Jr.
Dickstein Shapiro LLP
1825 Eye St. NW
Washington, DC 20006
kinder@DicksteinShapiro.com

ON BEHALF OF CPV POWER DEVELOPMENT, INC.

Jack D'Aurora
The Behal Law Group LLC
501 South High Street
Columbus, OH 43215
jdaurora@behallaw.com

ON BEHALF OF THE UNIVERSITY OF TOLEDO

Roger P. Sugarman
Kegler, Brown, Hill &Ritter
65 East State Street, Suite 1800
Columbus, OH 43215
rsugarman@keglerbrown.com

ON BEHALF OF NFIB/OHIO

William Wright
Werner Margard
Thomas Lindgren
John H. Jones
Assistant Attorneys' General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
william.wright@puc.state.oh.us

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Jon Tauber
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINERS

Estimated Deferrals Related to Capacity Charges

Delivery Year	Cost-Based Capacity Charge in $/MW-Hour (a)	RPM Capacity Price in $/MW-Day	RPM-Capacity Charge in $/MW-Hour (b)	Estimated Wire Sales in MW-Hour (c)	Estimated % Shopping (d)	Shopped Load in MW-Hour	Estimated Revenue Shortage in $	$1.00/MWH against deferral (e)	Annual Deferral Without Carrying Charges (f)
2012/2013	$12.19	$20.01	$1.29	35,401,642.407	52.00%	18,408,854	$200,696,156	$35,401,642	$165,294,514
2013/2014	$12.19	$33.71	$2.18	48,260,877.259	62.00%	29,921,744	$299,746,733	$48,260,877	$251,485,856
2014/2015	$12.19	$153.89	$9.94	48,171,845.757	72.00%	34,683,729	$78,348,290	$48,171,846	$30,176,444
						Total	$578,791,180		$446,956,815

a) $12.19/MWH cost based capacity charge based on capacity cost of $188.88/MW-day and 64.54% load factor. $188.88/MW-day capacity cost per page 51 of PUCO Order dated August 8, 2012 in Case No. 11-346-EL-SSO, et al.

b) Based on RPM Capacity Price MW day and 64.54% load factor

c) MWH sales per Company witness Allen "Load Forecast" workpapers. 2012/2013 delivery year is September 2012 - May 2013.

d) Estimated shopping percentages per page 34 of PUCO Order dated August 8, 2012 in Case No. 11-346-EL-SSO, et al.

e) $1.00/MWh credit per page 36 of PUCO Order dated August 8, 2012 in Case No. 11-346-EL-SSO, et al.

f) Estimated deferral amounts do not include any carrying charges

ATTACHMENT A

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

APPLICATION FOR REHEARING OF THE JANUARY 30, 2013 ENTRY ON REHEARING AND MEMORANDUM IN SUPPORT BY INDUSTRIAL ENERGY USERS-OHIO

Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, Suite 1700
Columbus, OH 43215-4228
Telephone: 614-469-8000
Telecopier: 614-469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

March 1, 2013

Attorneys for Industrial Energy Users-Ohio

{C39654: }

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2. The Commission's determination that the RSR will result in a non-fuel base generation rate freeze is not legally sufficient to support the Commission's authorization of the RSR under Section 4928.143(B)(2)(d), Revised Code 7

3. The Commission's determination that the RSR is authorized by Section 4928.143(B)(2(d), Revised Code, because it provides certain and fixed rates is not supported by the manifest weight of the evidence. 8

4. The Commission may not lawfully approve a rider such as the RSR that renders the modified ESP less favorable in the aggregate than a Market Rate Offer ("MRO"). 10

B. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Pool Termination Rider ("PTR") under Section 4928.143(B)(2)(d), Revised Code. 12

1. The Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue under Section 4928.143(B)(2)(d), Revised Code. 14

2. The Commission has not made the required findings that support the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code 14

3. The Commission's determination that the PTR will result in the recovery of wholesale generation revenue through a non-bypassable charge results in a violation of the State Energy Policy stated in Section 4928.02(H), Revised Code, and the requirements for corporate separation under Section 4928.17, Revised Code 16

C. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes the deferral of revenue in excess of a 12% rate cap, fails to identify the incurred costs that may be deferred, and fails to identify the carrying charges that apply to the deferred amount 18

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

APPLICATION FOR REHEARING OF THE JANUARY 30, 2013 ENTRY ON REHEARING BY INDUSTRIAL ENERGY USERS-OHIO

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 issued by the Public Utilities Commission of Ohio ("Commission") on January 30, 2013 ("January 30 Entry on Rehearing") for the following reasons:

A. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Rate Stability Rider ("RSR") under Section 4928.143(B)(2)(d), Revised Code.

1. Section 4928.143(B)(2)(d), Revised Code, does not provide the Commission authority to authorize a non-bypassable rider to bill and collect generation-related revenue.

2. The Commission's determination that the RSR will result in a non-fuel base generation rate freeze is not legally sufficient to support the Commission's authorization of the RSR under Section 4928.143(B)(2)(d), Revised Code.

3. **The Commission's determination that the RSR is authorized by Section 4928.143(B)(2(d), Revised Code, because it provides certain and fixed rates is not supported by the manifest weight of the evidence.**

4. **The Commission may not lawfully approve a rider such as the RSR that renders the modified Electric Security Plan ("ESP") less favorable in the aggregate than a Market Rate Offer ("MRO").**

B. **The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Pool Termination Rider ("PTR") under Section 4928.143(B)(2)(d), Revised Code.**

1. **The Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue under Section 4928.143(B)(2)(d), Revised Code.**

2. **The Commission has not made the required findings that support the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code.**

3. **The Commission's determination that the PTR will result in the recovery of wholesale generation revenue through a non-bypassable charge results in a violation of the State Energy Policy stated in Section 4928.02(H), Revised Code, and the requirements for corporate separation under Section 4928.17, Revised Code.**

C. **The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes the deferral of revenue in excess of a 12% rate cap, fails to identify the incurred costs that may be deferred, and fails to identify the carrying charges that apply to the deferred amount.**

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

Respectfully submitted,

/s/ Frank P. Darr
Samuel C. Randazzo
Frank P. Darr
Joseph Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF THE JANUARY 30, 2013 ENTRY ON REHEARING BY INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

On August 8, 2012, the Commission issued its Opinion and Order modifying and approving AEP-Ohio's[1] March 30, 2012 modified ESP application. In the Opinion and Order, the Commission substantially increased the amount of revenue that AEP-Ohio recovers through the non-bypassable RSR and provided AEP-Ohio with authorization to seek to increase its non-bypassable charges more in the future. In the January 30 Entry on Rehearing, the Commission had an opportunity to ratchet back AEP-Ohio's unlawful revenue recovery. While the Commission granted rehearing to address several unlawful provisions of the ESP authorized in the August 8, 2012 Opinion and

[1] AEP-Ohio is used to designate the electric distribution utility ("EDU") resulting from the merger of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP").

Order, it reaffirmed on alternative grounds the decisions it had previously made to increase AEP-Ohio's revenue claims from shopping and non-shopping customers. Because these new grounds on which the January 30 Entry on Rehearing relies are also unlawful, the Commission should grant rehearing to prevent AEP-Ohio from recovering now and in the future rates and charges that are unlawful and unreasonable.

II. ARGUMENT

A. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Rate Stability Rider ("RSR") under Section 4928.143(B)(2)(d), Revised Code.

In the modified ESP Application filed March 30, 2012, AEP-Ohio sought an RSR. In a demonstration of the calculation for the RSR based on a target return on equity of 10.5%, it claimed that the RSR should generate total revenue of $284.1 million during the term of the ESP. In the Opinion and Order, the Commission modified and approved an RSR that increased the total revenue AEP-Ohio may recover to $508 million as a "revenue target."[2] IEU-Ohio and others challenged the Commission's authorization of the RSR on both its legal and factual foundations.[3]

In its January 30 Entry on Rehearing, the Commission granted rehearing to clarify the basis for its finding that the RSR was authorized by Section 4928.143(B)(2)(d), Revised Code. In its Entry on Rehearing, the Commission stated:

> [T]he RSR is indeed a charge, meeting the first component of the statute. ...The RSR, as we specified in our Opinion and Order, freezes non-fuel generation rates throughout the term of the ESP, allowing all standard service offer customers to have rate certainty throughout the term of the ESP that would not have occurred absent the RSR. As a SSO is the default service plan for AEP-Ohio customers who choose not to shop, the RSR meets the second inquiry of the statute as it provides a charge

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[2] Opinion and Order at 33 (Aug. 8, 2012) ("Opinion and Order").

[3] IEU-Ohio does not waive any of its prior assignments of error concerning the RSR.

> related to default service. Finally, as we discussed in extensive detail in our Opinion and Order, the RSR promotes stable retail electric service prices by stabilizing base generation costs at their current rates, ensuring customers have certain and fixed rates going forward.[4]

Thus, the Commission has claimed authority to approve a non-bypassable rider pursuant to Section 4928.143(B)(2)(d), Revised Code, on the assertion that the RSR provides price certainty as it relates to default Standard Service Offer ("SSO") service.

1. Section 4928.143(B)(2)(d), Revised Code, does not provide the Commission authority to authorize a non-bypassable rider to bill and collect generation-related revenue.

The Commission summarily dismissed all arguments regarding its legal authority to approve a non-bypassable RSR in its January 30 Entry on Rehearing.[5] The Commission's clarification that Section 4928.143(B)(2)(d), Revised Code, however, again violates the limited authority the Commission has to authorize a non-bypassable rider to collect generation-related revenue. The Commission may authorize a provision of an ESP only if it fits within one of the provisions of Section 4928.143(B)(2), Revised Code.[6] Only divisions (b) and (c) authorize a generation-related non-bypassable charge under narrowly defined circumstances. A non-bypassable charge under (B)(2)(b) or (c) is only available to recover costs associated with generating facilities under construction or constructed after 2009 that meet additional statutory requirements. The RSR is not designed to recoup the costs of a generating facility under construction or newly built

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[4] Entry on Rehearing at 15-16 (Jan. 30, 2013) ("January 30 Entry on Rehearing").

[5] *Id.* at 16 ("all other assignments of error pertaining to statutory authority for the creation of the RSR are denied").

[6] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-20 (2011).

after 2009. Therefore, there is no basis under Section 4928.143(B)(2), Revised Code, to approve the RSR as a non-bypassable charge.

2. The Commission's determination that the RSR will result in a non-fuel base generation rate freeze is not legally sufficient to support the Commission's authorization of the RSR under Section 4928.143(B)(2)(d), Revised Code.

In order to authorize a rider under Section 4928.143(B)(2)(d), Revised Code, the Commission must find that the rider relates to:

> 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.

According to the Commission, the RSR "freezes" non-fuel base generation rates and results in price certainty.[7] The Commission's conclusion that the RSR "freezes" non-fuel base generation rates so as to provide price stability or certainty, however, is not sufficient to authorize the rider.

Section 4928.143(B)(2)(d), Revised Code, requires that "retail electric service" be made more stable or certain. "Retail electric service" is defined to mean the physical "supplying or arranging for the supply of electricity to ultimate customers in this state, from the point of generation to the point of consumption."[8] Thus, the Commission may authorize a term, condition, or charge that makes the physical supply of retail electric service more stable or certain. If the General Assembly had intended the phrase "as would have the effect of stabilizing or providing certainty regarding retail electric service"

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[7] January 30 Entry on Rehearing at 15-16.

[8] Section 4928.01(A)(27), Revised Code.

to encompass "pricing stability" as the Commission has concluded in the January 30 Entry on Rehearing,[9] it would have specified that requirement as it did in Section 4928.144, Revised Code.[10] Instead, the General Assembly made clear that the charges that could be authorized under Section 4928.143(B)(2)(d), Revised Code, were to assure that physical supply of electricity would be made more stable and certain. The Commission's finding that the RSR will produce price certainty, even if true, does not satisfy the finding the Commission must make to authorize the RSR. Thus, the Commission's authorization of the RSR is unlawful.

3. The Commission's determination that the RSR is authorized by Section 4928.143(B)(2(d), Revised Code, because it provides certain and fixed rates is not supported by the manifest weight of the evidence.

In the January 30 Entry on Rehearing, the Commission approved the RSR because it "promotes stable electric prices by stabilizing base generation costs at their current rates, ensuring customers have certain and fixed rates going forward."[11] That conclusion bears no relationship to the volatility and increases in rates that AEP-Ohio will collect from SSO and shopping customers under the ESP modified and approved by the Commission.

Customers' bills consist of more than base generation rates. All customers are paying an additional $508 million in RSR charges over the next three years. AEP-Ohio's authorized charges also include several charges that adjust periodically. As approved, the ESP has ten generation or transmission-related riders besides the RSR

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[9] January 30 Entry on Rehearing at 16.

[10] Section 4928.144, Revised Code, authorizes the use of a phase in of a rate or price "to ensure rate or price stability for consumers."

[11] January 30 Entry on Rehearing at 16.

that can and will fluctuate. These include the FAC, the Alternative Energy Rider ("AER"), the Distribution Investment Rider ("DIR"), the gridSMART Rider, the Transmission Cost Recovery Rider ("TCRR"), the Enhanced Service Reliability Rider ("ESSR"), the Energy Efficiency and Peak Demand Reduction Rider ("EE/PDR"), and the Economic Development Rider ("EDR").[12] Additionally, the Commission approved the Generation Resource Rider ("GRR") and the PTR that are initially set at zero but could eventually collect hundreds of millions of dollars.[13] The structure of the as-approved Modified ESP and all of its moving parts preclude stability and certainty. In addition to increasing the costs of shopping customers through the RSR, the Commission recently assigned a portion of previously bypassable transmission costs to shopping customers.[14] Finally, the collection of the deferred balance of any remaining unamortized capacity compensation awaits all customers after the conclusion of the ESP.[15] The only certainty or stability provided by the RSR is that AEP-Ohio's default service rate will be among the highest in Ohio and shopping will not result in substantial benefits that might otherwise be realized because of the number and amount of non-bypassable charges approved in this and other proceedings.

Further, the Commission did not comply with the requirements of Section 4928.143(C)(1), Revised Code, when it approved the RSR in the Application for Rehearing. Under that Section, AEP-Ohio has the burden of proof in the proceeding to

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[12] Opinion and Order at 16-18, 42, 61-67.

[13] *Id.* at 19-24, 47-49.

[14] *In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates*, Case No. 12-1046-EL-RDR, Finding and Order (Oct. 24, 2012).

[15] Opinion and Order at 49-52. Further, the Commission retained the option of adjusting the RSR to account for increased shopping if that occurs. *Id.* at 37-38.

approve the ESP.[16] As IEU-Ohio demonstrated in its September 7, 2012 Application for Rehearing, AEP-Ohio failed to provide any testimony that showed that retail electric service was made more stable or certain.[17] Because AEP-Ohio failed to sustain its burden of proof that retail electric service is made more stable as a result of the RSR, the Commission could not lawfully approve the provision in either its initial order or its clarification in the January 30 Entry on Rehearing.

Thus, AEP-Ohio failed to provide evidence to support its assertion that the RSR was authorized by that section, and the manifest weight of the evidence contradicts the Commission's conclusion that RSR relates to default service because it ensures certain and fixed rates. The Commission's clarification on rehearing that the RSR can be authorized under Section 4928.143(B)(2)(d), Revised Code, therefore, was both unlawful and unreasonable.

4. The Commission may not lawfully approve a rider such as the RSR that renders the modified ESP less favorable in the aggregate than a Market Rate Offer ("MRO").

The Commission's conclusion that it may authorize an RSR it values at $508 million results in an ESP that cannot meet the requirement that the ESP is more favorable in the aggregate than an MRO.[18] As the Commission itself found, the version of the ESP filed on March 30, 2012, with the modifications required by the Commission, is less favorable than an MRO, by $386 million.[19] The RSR drives the unfavorable

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

[17] Industrial Energy Users-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 37-46 (Sept. 7, 2012).

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

[19] Opinion and Order at 75. As noted in IEU-Ohio's September 7, 2012 Application for Rehearing, the Commission's assessment of the cost of the modified ESP underestimates the cost of the modified ESP as modified and approved by hundreds of millions of dollars. Industrial Energy Users-Ohio's Application

result. Under the Commission's "Price Test," which is calculated without the RSR, the modified ESP is more favorable than an MRO by $9.8 million when the effects of the energy-only bidding (improperly limited to only two years of the ESP) are used to price ESP service.[20] When the RSR (and GRR) are added to the modified ESP, however, the modified ESP fails the ESP versus MRO test by $386 million, by the Commission's estimate.[21] To avoid rejecting the Commission-modified ESP, the Commission then found sufficient "nonquantifiable" value in the move to competitive bidding to offset the $386 million that the ESP was less favorable than an MRO.[22] Simply put, the Commission ignored the substantial negative effect of the RSR by assigning an indeterminate value to a bidding process that is not within the term of the ESP.

In the Application for Rehearing, the Commission again ignores the substantial negative effect of the RSR that results in an ESP that is less favorable in the aggregate than an MRO. Although the January 30 Entry on Rehearing points to the "invaluable" benefits of a faster move to an SSO premised on competitive bidding than would be available under an MRO to justify approving the ESP,[23] the claimed benefit occurs outside the term of the ESP. The Commission has already denied consideration of any costs of generation outside the term of the ESP when it refused to consider the long-

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for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 26-29 (Sept. 7, 2012).

[20] Opinion and Order at 75. IEU-Ohio has already challenged the Commission's decision to delay the bidding start for purposes of calculating the ESP versus MRO "price test." Industrial Energy Users-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 22-25 (Sept. 7, 2012).

[21] Opinion and Order at 75.

[22] *Id.* at 75-76. The Commission also pointed to distribution riders that the Commission acknowledged customers are paying for. *Id.*

[23] January 30 Entry on Rehearing at 11.

term costs of the GRR.[24] It is unreasonable for the Commission to now turn around and offset the amount that the Commission-approved ESP fails the ESP versus MRO test with the "invaluable benefits" of competitive bidding that will occur only after the term of the ESP. (Any value of a faster move to an auction based ESP for energy during the term of the ESP is already incorporated into the SSO price.[25])

While the Commission might approve the ESP without the RSR because the results of its calculation of the ESP versus MRO test demonstrates that the Commission-approved ESP is more favorable in the aggregate than an MRO, the Commission cannot lawfully approve an RSR as part of an ESP if doing so renders the ESP less favorable in the aggregate than the MRO. Yet, the Commission has approved the RSR that results in an ESP that fails the ESP versus MRO test in its Opinion and Order and Entry on Rehearing. Because the resulting Commission-approved ESP fails the statutory test and is unlawful, the RSR cannot be lawfully approved.

B. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Pool Termination Rider ("PTR") under Section 4928.143(B)(2)(d), Revised Code.

In its March 30, 2012 modified ESP Application, AEP-Ohio sought authorization for "an opportunity to make a subsequent application if needed to recover lost revenues as part of the move to competitive markets" due to the dissolution of the Interconnection Agreement ("Pool Agreement").[26] AEP-Ohio further proposed that it would not need to file the subsequent application to recover lost revenue if the Commission approved its corporate separation plan, including the plan for the transfer of the Amos and Mitchell

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[24] *Id.* at 8.

[25] Opinion and Order at 74.

[26] AEP-Ohio Ex. 104 at 22-23.

generation stations, without modification.[27] In the Opinion and Order, the Commission approved the PTR under Section 4928.143(B)(2)(h), Revised Code.[28] On rehearing, the Commission rejected IEU-Ohio's argument that the PTR operated to unlawfully allow AEP-Ohio to violate corporate separation requirements and to recover transition revenue in violation of Section 4928.39, Revised Code, and its Electric Transition Plan Stipulation.[29] The Commission, however, did grant rehearing to find that the PTR was authorized under Section 4928.143(B)(2)(d), Revised Code. The Commission's rationale for approving the PTR under this Section rested on the following claims:

> The termination of the Pool Agreement is a pre-requisite to AEP-Ohio's transition to full structural corporate separation. With AEP-Ohio's move to full structural corporate separation and CRES providers securing capacity in the market, the number of service offers for SSO customers and shopping customers will likely increase and improve. On that basis, termination of the Pool Agreement is key to establishment of effective competition and authorized under the terms of Section 4928.143(B)(2)(d), Revised Code.[30]

The Commission's grant of rehearing to authorize the PTR was unlawful. First, the Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue. Second, the Commission has not made a finding that supports the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code. Third, the Commission's authorization of the collection of wholesale generation revenue through the PTR will result in a violation of Section 4928.02(H) and Section 4928.17, Revised Code.[31]

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[27] *Id.* at 23.

[28] Opinion and Order at 49.

[29] January 30 Entry on Rehearing at 57-58.

[30] *Id.* at 60.

[31] IEU-Ohio does not waive any of its prior assignments of error concerning the PTR.

1. The Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue under Section 4928.143(B)(2)(d), Revised Code.

The PTR would authorize AEP-Ohio to seek to recoup lost wholesale generation revenue when the Pool Agreement is terminated.[32] Under Section 4928.143(B)(2), only divisions (b) and (c) allow for a generation-related non-bypassable charge. A non-bypassable charge under (B)(2)(b) or (c) is available to recover costs associated only with generating facilities under construction or constructed after 2009 that meet additional statutory requirements. The PTR is not designed to recoup the costs of a generating facility under construction or newly built after 2009. Therefore, there is no basis under Section 4928.143(B)(2), Revised Code, to approve the RSR, Capacity Shopping Tax, and the PTR as non-bypassable charges.

2. The Commission has not made the required findings that support the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code.

As discussed above, AEP-Ohio has the burden of proof to demonstrate the lawfulness of its ESP, and the Commission must find that the PTR satisfies the requirements of Section 4928.143(B)(2)(d), Revised Code. Unless the Commission makes the necessary findings, the Commission cannot approve the rider under Section 4928.143(B)(2)(d), Revised Code.[33] The Section, in particular, requires the Commission to find that the PTR has the "effect of stabilizing or providing certainty regarding retail electric service." As discussed above, "retail electric service" is defined as the supply or arrangements for the supply of retail electric service.

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[32] Opinion and Order at 48-49.

[33] *In re Columbus S. Power Co.*, 128 Ohio St. 3d at 519-20.

The Commission has not made the necessary findings to demonstrate that the PTR would have the effect of stabilizing or providing certainty regarding retail electric service. According to the Commission, termination of the pool is pre-requisite to full corporate separation and the Commission expects that the number of service offers for SSO customers and shopping customers will "increase and improve"[34] after CRES providers secure capacity in the market. More offers does not equate to stable or certain service. The Commission has not made any finding that demonstrates that the PTR will result in the supply of retail electric service that will be more certain or stable.

Even if there was some connection between an increased number of offers by CRES providers and the provision of stable or certain retail electric service, the factual findings that the Commission relies upon are not consistent with either the record in this case or the Commission's decision in the *AEP-Ohio Capacity Case*.[35] The record in this case demonstrated that nothing in the current Pool Agreement prevented a system-wide auction for the provision of SSO service.[36] Further, the Commission's decision to price capacity sold at the RPM-Based Price in the *AEP-Ohio Capacity Case* was predicated on the conclusion that CRES providers would be able to compete effectively and expand and improve their offerings.[37] Dissolution of the Pool Agreement had no bearing on the Commission's conclusion. Based on the record in this case and the Commission's finding in the *AEP-Ohio Capacity Case*, there is no basis for the

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[34] January 30 Entry on Rehearing at 60.

[35] *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, Opinion and Order (July 2, 2012) (*AEP-Ohio Capacity Case*).

[36] FES Ex. 103 at 19 (Testimony of Rodney Frame).

[37] *AEP-Ohio Capacity Case*, Opinion and Order at 23 (July 2, 2012).

Commission to conclude that termination of the Pool Agreement is "key to the establishment of effective competition."[38]

In fact, the PTR does not even address retail electric service as required by the terms of Section 4928.143(B)(2)(d), Revised Code. As proposed by AEP-Ohio and as acknowledged by the Commission,[39] the PTR will recover from *retail* customers lost *wholesale* Pool revenue. It is one more example of the efforts of AEP-Ohio to transfer the risks it faces in the wholesale market to its retail customers. Because it is a means of shifting wholesale risks, there is no basis for the Commission to find that the PTR has the effect of providing certainty or stability in the provision of retail electric service to those retail customers.

3. The Commission's determination that the PTR will result in the recovery of wholesale generation revenue through a non-bypassable charge results in a violation of the State Energy Policy stated in Section 4928.02(H), Revised Code, and the requirements for corporate separation under Section 4928.17, Revised Code.

The Commission is required to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."[40] It is State policy to "[e]nsure 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 ... including by *prohibiting the recovery of any generation-related costs through distribution or transmission rates.*"[41] (Emphasis added.) Further, the requirements for corporate separation require that AEP-Ohio comply with the policy

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[38] January 30 Entry on Rehearing at 60.

[39] *Id.*

[40] Section 4928.06(A), Revised Code.

[41] Section 4928.02(H), Revised Code.

specified in Section 4928.02, Revised Code, including the provision that prohibits the recovery of any generation-related costs through distribution rates.[42] As the Commission has recognized, a non-bypassable charge to recover generation-related costs would violate the requirement of Section 4928.02(H), Revised Code.[43]

The Commission apparently agrees that AEP-Ohio will be recovering a subsidy through the PTR. In response to Applications for Rehearing that demonstrated that the PTR resulted in cross-subsidy, the Commission stated, "[W]hile effective competition is indeed the goal of the Commission, Section 4928.02(H), Revised Code, does not strictly prohibit cross-subsidization. The Ohio Supreme Court has ruled that the policies set forth in Section 4928.02, Revised Code, do not impose strict requirements on any given program but simply express state policy and function as guidelines for the Commission to weigh in evaluating utility proposals."[44] The January 30 Entry on Rehearing implicitly accepts that a subsidy will occur because generation-related costs will be recovered through a non-bypassable rider, but then concludes that Section 4928.02(H), Revised Code, is merely a guideline that the Commission need not enforce in this case.[45]

The Commission's conclusion that it may disregard subsidies, however, misreads the applicable law. Unlike many of the provisions in the State Energy Policy which seek to "ensure" or "encourage" particular outcomes, the policy expressed in Section 4928.02(H), Revised Code, requires the Commission to "*prohibit[] the recovery of any*

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[42] Section 4928.17(A), Revised Code.

[43] *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) ("*Sporn Decision*").

[44] *Id.*

[45] January 30 Entry on Rehearing at 60.

generation-related costs through distribution or transmission rates." (Emphasis added.) The directive in Section 4928.06(A), Revised Code, that the Commission shall ensure that the State policy is effectuated, can be accomplished in only one way: by prohibiting the recovery of generation-related costs, including lost wholesale revenue associated with the dissolution of the Pool.

The Commission cannot lawfully ignore that policy under the guise that the State Energy Policy is only a "guideline." In this case, the "guideline" expressly prohibits the recovery of the generation-related costs through a non-bypassable charge, as the Commission already correctly determined in the *Sporn* decision. Based on the explicit statutory requirement of Section 4928.02(H), Revised Code, and the Commission's prior holding in the *Sporn* decision, the Commission's approval of the non-bypassable recovery of generation-related costs through the RSR is unlawful.

A violation of Section 4928.02(H), Revised Code, also results in a violation of Section 4928.17, Revised Code. Under the latter section, AEP-Ohio must implement and operate under a corporate separation plan that is "consistent with the policy specified in section 4928.02 of the Revised Code." The Commission's approval of the recovery of generation-related costs through what is effectively a distribution rider, however, permits AEP-Ohio to violate the prohibition contained in Section 4928.02(H), Revised Code. As a result, the Commission's approval of the PTR also is unlawful under Section 4928.17(A)(1), Revised Code.

C. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes the deferral of revenue in excess of a 12% rate cap, fails to identify the incurred costs that may be deferred, and fails to identify the carrying charges that apply to the deferred amount.

In its Opinion and Order, the Commission directed that "AEP-Ohio ... cap customer rate increases at 12 percent over their current ESP I rate plan bill schedules for the entire term of the modified ESP."[46] The 12% cap is to be determined on an individual customer basis.[47] The Commission also ordered that AEP-Ohio file in a separate docket on May 31, 2013 a "detailed accounting of its deferral impact created by the 12 percent rate cap."[48] The Commission further stated that it would "maintain the discretion to adjust the 12 percent limit, as necessary, throughout the term of the ESP."[49]

AEP-Ohio, the Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network ("OCC/APJN") filed applications for rehearing seeking clarification of the Commission's order creating the 12% cap. In the January 30 Entry on Rehearing, the Commission granted rehearing and clarified that the 12% cap applies only to items that were established and approved within the Commission modified ESP and not any previously authorized riders and tariffs.[50] It granted AEP-Ohio additional time to implement systems to account for the cap. It also authorized "the deferral of any expenses associated with the rate cap pursuant to Section 4928.144, Revised Code, inclusive of carrying charges."[51] In approving the "deferral of any expenses," the Commission did not identify the incurred costs that may be deferred. Additionally, the Commission failed to address the level of carrying charges that AEP-Ohio may apply to

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[46] Opinion and Order at 70.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] January 30 Entry on Rehearing at 40.

[51] *Id.*

the deferred amounts of expenses. The Commission's January 30 Entry on Rehearing, rather than clarifying the 12% cap, fails to demonstrate that the cap is lawful and is so vague as to be unreasonable.

The Commission's authority to approve a "phase-in" of ESP rates is governed by Section 4928.144, Revised Code. That Section provides:

> 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.

While the Commission's decision to try to limit immediate rate increases by delaying and spreading those increases to other customers is understandable in light of the significant additional riders it has approved, the Commission's order fails to accomplish its intended outcome. The Commission may authorize a deferral and the creation of a deferred asset for "incurred costs" under Section 4928.144, Revised Code, but the Commission has failed to identify the costs being deferred. In fact, at this point the Commission has provided only that AEP-Ohio may defer the difference in revenue between the authorized levels with and without the cap. Thus, there is no legal basis on which to authorize the deferral.

The Commission's order also fails to comply with applicable accounting standards. By law, the Commission's authorization must provide for the creation of a regulatory asset pursuant to Generally Accepted Accounting Principles ("GAAP").

GAAP requires specific identification of the "allowable costs" that the accounting procedures will defer for future recovery to properly measure and record the expense levels that are deferred for future recovery. When such costs are deferred for future collection pursuant to a valid regulatory order, a regulatory asset is created to hold the accumulated deferred amount pending the amortization process. According to the applicable accounting requirements, the deferral and creation of a regulatory asset must be conditioned on a showing that recovery of the regulatory asset is probable because of regulatory action allowing future cost recovery.[52] AEP-Ohio, however, ended regulatory accounting for its generation function several years ago in response to changes in Ohio law that ended the Commission's authority to approve cost-based rates for generation related services.[53] Thus, under GAAP, AEP-Ohio cannot use regulatory accounting for any deferred cost associated with its competitive generation function.

Even if the order properly permitted the creation of a deferred asset (which it does not), the Commission must also determine carrying charges. Neither the Opinion and Order nor the January 30 Entry on Rehearing, however, states the level of carrying charges. Thus, the January 30 Entry on Rehearing is unreasonably vague.

The carrying charge level that should be applied is an issue that must be addressed by rehearing. As IEU-Ohio demonstrated, the use of AEP-Ohio's cost of debt is unreasonable because it is high when compared to the cost of debt available in the current market.[54] Thus, if the Commission continues to authorize a deferral of revenue in excess of the 12% cap, it must also order rehearing to set the level of the

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[52] Financial Accounting Standards Board Codification 980.

[53] IEU-Ohio Ex. 105.

[54] IEU-Ohio Ex. 129 at 12-13.

carrying charges on the deferral balance to a reasonable level below either AEP-Ohio's long or short-term cost of debt.

III. CONCLUSION

The Commission's January 30 Entry on Rehearing is unlawful and unreasonable for the reasons discussed above. The Commission should grant rehearing, reverse its authorization of the unlawful charges, and thereby bring the rates and charges contained in AEP-Ohio's default service into compliance with Ohio law.

Respectfully submitted,

/s/ Frank P. Darr
Samuel C. Randazzo
Frank P. Darr
Joseph Oliker
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing of the January 30, 2013 Entry on Rehearing and Memorandum in Support by Industrial Energy Users-Ohio* was served upon the following parties of record this 1st day of March 2013, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Frank P. Darr
Frank P. Darr

Matthew J. Satterwhite
Steven T. Nourse
Anne M. Vogel
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com
yalami@aep.com

Daniel R. Conway
Christen M. Moore
Porter Wright Morris & Arthur
41 S. High Street
Columbus, OH 43215
dconway@porterwright.com
cmoore@porterwright.com

ON BEHALF OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

Robert A. McMahon
Eberly McMahon LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206

Rocco D'Ascenzo
Elisabeth Watts
Duke Energy Ohio, Inc.
139 East Fourth Street - 1303-Main
Cincinnati, OH 45202
Elizabeth.watts@duke-energy.com
Rocco.d'ascenzo@duke-energy.com

ON BEHALF OF DUKE ENERGY OHIO, INC.

Amy B. Spiller
Jeanne W. Kingery
139 East Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com

Philip B. Sineneng
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Philip.Sineneng@thompsonhine.com

ON BEHALF OF DUKE ENERGY RETAIL SALES, LLC AND DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

ON BEHALF OF THE OHIO ENERGY GROUP

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

ON BEHALF OF ENERNOC, INC.

{C39854 }

Kyle L. Kern
Terry L. Etter
Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215-3485
kern@occ.state.oh.us
etter@occ.state.oh.us
grady@occ.state.oh.us

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

OH BEHALF OF OHIO HOSPITAL ASSOCIATION

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

ON BEHALF OF THE KROGER CO.

Terrence O'Donnell
Christopher Montgomery
Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com
mwarnock@bricker.com

ON BEHALF OF PAULDING WIND FARM II LLC

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F Lang
Laura C. McBride
N. Trevor Alexander
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
aehaedt@jonesday.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org

ON BEHALF OF THE APPALACHIAN PEACE AND JUSTICE NETWORK

J. Thomas Siwo
Thomas O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
tsiwo@bricker.com
tobrien@bricker.com

ON BEHALF OF OMA ENERGY GROUP

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
jejadwin@aep.com

ON BEHALF OF AEP RETAIL ENERGY PARTNERS LLC

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
smhoward@vorys.com

ON BEHALF OF PJM POWER PROVIDERS GROUP AND THE RETAIL ENERGY SUPPLY ASSOCIATION

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, PA 19406
gthomas@gtpowergroup.com

Laura Chappelle
4218 Jacob Meadows
Okemos, MI 48864
laurac@chappelleconsulting.net

ON BEHALF OF PJM POWER PROVIDERS GROUP

M. Howard Petricoff
Michael Settineri
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com
Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

ON BEHALF OF THE COMPLETE COALITION

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
callwein@williamsandmoser.com

ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL AND THE SIERRA CLUB

M. Howard Petricoff
Michael J. Settineri
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
smhoward@vorys.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC., DIRECT ENERGY SERVICES, LLC

Gary A Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@aol.com

ON BEHALF OF DOMINION RETAIL, INC.

David I. Fein
Vice President, Energy Policy – Midwest
Constellation Energy Group, Inc.
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
david.fein@constellation.com
cynthia.brady@constellation.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC.

Jeanine Amid Hummer
Thomas K. Lindsey
City of Upper Arlington
C. Todd Jones,
Christopher L. Miller,
Gregory H. Dunn
Ice Miller LLC
250 West Street
Columbus, OH 43215
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
jhummer@uaoh.net
tlindsey@uaoh.net

ON BEHALF OF THE CITY OF GROVE CITY, OHIO AND THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO, THE CITY OF UPPER ARLINGTON, THE CITY OF HILLSBORO, OHIO

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street/P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com

David M. Stahl
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com

ON BEHALF OF EXELON GENERATION COMPANY, LLC

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
kpkreider@kmklaw.com
dmeyer@kmklaw.com

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
Bentonville, AR 72716-0550
Stephen.Chriss@wal-mart.com

ON BEHALF OF WAL-MART STORES EAST, LP AND SAM'S EAST, INC.

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, OH 43212
tsantarelli@elpc.org

ON BEHALF OF THE ENVIRONMENTAL LAW & POLICY CENTER

Nolan Moser
Trent A. Dougherty
Camille Yancy
Cathryn Loucas
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
nolan@theoec.org
trent@theoec.org
camille@theoec.org
cathy@theoec.org.

ON BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL

Robert Korandovich
KOREnergy
P.O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

ON BEHALF OF KORENERGY

Douglas G. Bonner
Emma F. Hand
Keith C. Nusbaum
Clinton A. Vince
Daniel D. Barnowski
James Rubin
Thomas Millar
SNR Denton US LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
doug.bonner@snrdenton.com
emma.hand@snrdenton.com
keith.nusbaum@snrdenton.com
clinton.vince@snrdenton.com
daniel.barnowski@snrdenton.con
james.rubin@snrdenton.com
thomas.millar@snrdenton.com

Arthur Beeman
SNR Denton US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
arthur.beeman@snrdenton.com

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

ON BEHALF OF HESS CORPORATION

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Jacqueline Lake Roberts,
Counsel of Record
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

ON BEHALF OF CPOWER, INC., VIRIDITY ENERGY, INC., ENERGYCONNECT INC., COMVERGE INC., ENERWISE GLOBAL TECHNOLOGIES, INC., AND ENERGY CURTAILMENT SPECIALISTS, INC.

Benita Kahn
Lija Kaleps-Clark
Vorys Sater, Seymour and Pease LLC
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
bakahn@vorys.com
lkalepsclark@vorys.com

ON BEHALF OF OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

Mark A. Whitt
Whitt Sturtevant LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whit@whitt-sturtevant.com

Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, OH 43016
mswhite@igsenergy.com

ON BEHALF OF INTERSTATE GAS SUPPLY, INC.

Dane Stinson
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215

ON BEHALF OF THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE OHIO SCHOOL BOARDS ASSOCIATION, THE OHIO SCHOOLS COUNCIL AND THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS

Chad A. Endsley
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218-2383
cendsley@ofbf.org.

ON BEHALF OF THE OHIO FARM BUREAU FEDERATION

Brian P. Barger
Brady, Coyle & Schmidt, LTD
4052 Holland-Sylvania Rd.
Toledo, OH 43623
bpbarger@bcslawyers.com

ON BEHALF OF THE OHIO CONSTRUCTION MATERIALS COALITION

Richard Mason
Ohio Restaurant Association
1525 Bethel Road, Suite 201
Columbus, OH 43320
mason@ohiorestaurant.org.

ON BEHALF OF OHIO RESTAURANT ASSOCIATION

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Judi.sobecki@dplinc.com
Randall.griffin@dplinc.com

ON BEHALF OF THE DAYTON POWER AND LIGHT COMPANY

Sara Reich Bruce
Ohio Automobile Dealers Association
655 Metro Place South, Suite 270
Dublin, OH 43017
sbruce@oada.com

ON BEHALF OF THE OHIO AUTOMOBILE DEALERS ASSOCIATION

Joseph M. Clark
Direct Energy Services LLC
And Direct Energy Business LLC
21 East State Street, Suite 1900
Columbus, OH 43215
joseph.clark@directenergy.com

ON BEHALF OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

Todd M. Williams
Williams Allwein and Moser, LLC
Two Maritime Plaza-Third Floor
Toledo, OH 43604
toddm@wamenergylaw.com

ON BEHALF OF THE OHIO BUSINESS COUNCIL FOR A CLEAN ECONOMY

Matthew R. Cox
Matthew Cox Law, Ltd.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

ON BEHALF OF THE COUNCIL OF SMALLER ENTERPRISES (COSE)

Stephanie M. Chmiel
Michael L. Dillard
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Stephanie.Chmiel@ThompsonHine.com
Michael.Dillard@ThompsonHine.com

ON BEHALF OF BORDER ENERGY ELECTRIC SERVICES, INC.

Randy J. Hart
Rob Remington
David J. Michalski
200 Public Square, Suite 2800
Cleveland, OH 44114-2316
rhart@hahnlaw.com
rrremington@hahnlaw.com
djmichalski@hahnlaw.com

ON BEHALF OF SUMMIT ETHANOL, LLC AND FOSTORIA ETHANOL, LLC

Robert Burke
Braith Kelly
Competitive Power Ventures, Inc.
8403 Colesville Road, Ste. 915
Silver Spring, MD 20910
rburke@cpv.com
bkelly@cpv.com

Larry F. Eisenstat
(Counsel of Record)
Richard Lehfeldt
Robert L. Kinder, Jr.
Dickstein Shapiro LLP
1825 Eye St. NW
Washington, DC 20006
eisenstatl@dicksteinshapiro.com
lehfeldtr@dicksteinshapiro.com
kinderr@dicksteinshapiro.com

ON BEHALF OF CPV POWER DEVELOPMENT, INC.

Jack D'Aurora
The Behal Law Group LLC
501 South High Street
Columbus, OH 43215
jdaurora@behallaw.com

ON BEHALF OF THE UNIVERSITY OF TOLEDO

Roger P. Sugarman
Kegler, Brown, Hill &Ritter
65 East State Street, Suite 1800
Columbus, OH 43215
rsugarman@keglerbrown.com

ON BEHALF OF NFIB/OHIO

William Wright
Werner Margard
Thomas Lindgren
John H. Jones
Assistant Attorneys' General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
william.wright@puc.state.oh.us

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Jon Tauber
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINERS

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/1/2013 11:00:44 AM

in

Case No(s). 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

Summary: Application for Rehearing of the Jan. 30, 2013 Entry on Rehearing and Memorandum in Support by Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio

4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

Effective Date: 10-26-1953

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 AssemblyFile 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 AssemblyFile 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 AssemblyFile No.127,HB 487, §101.01, eff. 6/11/2012.

Effective Date: 09-01-2000; 09-16-2004

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

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7/17/2013

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 AssemblyFile No.43,SB 162, §1, eff. 9/13/2010.

Effective Date: 09-29-1997

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 AssemblyFile No.125,SB 315, §101.01, eff. 9/10/2012.

Amended by 128th General AssemblyFile No.47,SB 181, §1, eff. 9/13/2010.

Amended by 128th General AssemblyFile No.48,SB 232, §1, eff. 6/17/2010.

Amended by 128th General AssemblyFile 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 AssemblyFile 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

4928.05 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.

(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

4928.14 Failure of supplier to provide service.

The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(A) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(B) The supplier is no longer capable of providing the service.

(C) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(D) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

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

4928.20 Local aggregation of retail electric loads - limitations.

(A) The legislative authority of a municipal corporation may adopt an ordinance, or the board of township trustees of a township or the board of county commissioners of a county may adopt a resolution, under which, on or after the starting date of competitive retail electric service, it may aggregate in accordance with this section the retail electrical loads located, respectively, within the municipal corporation, township, or unincorporated area of the county and, for that purpose, may enter into service agreements to facilitate for those loads the sale and purchase of electricity. The legislative authority or board also may exercise such authority jointly with any other such legislative authority or board. For customers that are not mercantile customers, an ordinance or resolution under this division shall specify whether the aggregation will occur only with the prior, affirmative consent of each person owning, occupying, controlling, or using an electric load center proposed to be aggregated or will occur automatically for all such persons pursuant to the opt-out requirements of division (D) of this section. The aggregation of mercantile customers shall occur only with the prior, affirmative consent of each such person owning, occupying, controlling, or using an electric load center proposed to be aggregated. Nothing in this division, however, authorizes the aggregation of the retail electric loads of an electric load center, as defined in section 4933.81 of the Revised Code, that is located in the certified territory of a nonprofit electric supplier under sections 4933.81 to 4933.90 of the Revised Code or an electric load center served by transmission or distribution facilities of a municipal electric utility.

(B) If an ordinance or resolution adopted under division (A) of this section specifies that aggregation of customers that are not mercantile customers will occur automatically as described in that division, the ordinance or resolution shall direct the board of elections to submit the question of the authority to aggregate to the electors of the respective municipal corporation, township, or unincorporated area of a county at a special election on the day of the next primary or general election in the municipal corporation, township, or county. The legislative authority or board shall certify a copy of the ordinance or resolution to the board of elections not less than ninety days before the day of the special election. No ordinance or resolution adopted under division (A) of this section that provides for an election under this division shall take effect unless approved by a majority of the electors voting upon the ordinance or resolution at the election held pursuant to this division.

(C) Upon the applicable requisite authority under divisions (A) and (B) of this section, the legislative authority or board shall develop a plan of operation and governance for the aggregation program so authorized. Before adopting a plan under this division, the legislative authority or board shall hold at least two public hearings on the plan. Before the first hearing, the legislative authority or board shall publish notice of the hearings once a week for two consecutive weeks in a newspaper of general circulation in the jurisdiction or as provided in section 7.16 of the Revised Code. The notice shall summarize the plan and state the date, time, and location of each hearing.

(D) No legislative authority or board, pursuant to an ordinance or resolution under divisions (A) and (B) of this section that provides for automatic aggregation of customers that are not mercantile customers as described in division (A) of this section, shall aggregate the electrical load of any electric load center located within its jurisdiction unless it in advance clearly discloses to the person owning, occupying, controlling, or using the load center that the person will be enrolled automatically in the aggregation program and will remain so enrolled unless the person affirmatively elects by a stated procedure not to be so enrolled. The disclosure shall state prominently the rates, charges, and other terms and conditions of enrollment. The stated procedure shall allow any person enrolled in the aggregation program the opportunity to opt out of the program every three years, without paying a switching fee. Any such person

that opts out before the commencement of the aggregation program pursuant to the stated procedure shall default to the standard service offer provided under section 4928.14 or division (D) of section 4928.35 of the Revised Code until the person chooses an alternative supplier.

(E)

(1) With respect to a governmental aggregation for a municipal corporation that is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.41 of the Revised Code.

(2) With respect to a governmental aggregation for a township or the unincorporated area of a county, which aggregation is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.40 of the Revised Code, except that:

(a) The petitions shall be filed, respectively, with the township fiscal officer or the board of county commissioners, who shall perform those duties imposed under those sections upon the city auditor or village clerk.

(b) The petitions shall contain the signatures of not less than ten per cent of the total number of electors in, respectively, the township or the unincorporated area of the county who voted for the office of governor at the preceding general election for that office in that area.

(F) A governmental aggregator under division (A) of this section is not a public utility engaging in the wholesale purchase and resale of electricity, and provision of the aggregated service is not a wholesale utility transaction. A governmental aggregator shall be subject to supervision and regulation by the public utilities commission only to the extent of any competitive retail electric service it provides and commission authority under this chapter.

(G) This section does not apply in the case of a municipal corporation that supplies such aggregated service to electric load centers to which its municipal electric utility also supplies a noncompetitive retail electric service through transmission or distribution facilities the utility singly or jointly owns or operates.

(H) A governmental aggregator shall not include in its aggregation the accounts of any of the following:

(1) A customer that has opted out of the aggregation;

(2) A customer in contract with a certified electric services company;

(3) A customer that has a special contract with an electric distribution utility;

(4) A customer that is not located within the governmental aggregator's governmental boundaries;

(5) Subject to division (C) of section 4928.21 of the Revised Code, a customer who appears on the "do not aggregate" list maintained under that section.

(I) Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits, as determined by the commission, that electric load centers within the jurisdiction of the governmental aggregation as a group receive. The proportionate surcharge so established shall apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge shall apply. Nothing in this

section shall result in less than full recovery by an electric distribution utility of any surcharge authorized under section 4928.144 of the Revised Code. Nothing in this section shall result in less than the full and timely imposition, charging, collection, and adjustment by an electric distribution utility, its assignee, or any collection agent, of the phase-in-recovery charges authorized pursuant to a final financing order issued pursuant to sections 4928.23 to 4928.2318 of the Revised Code.

(J) On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(d) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section. Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom competitive retail electric generation service is provided by another supplier under the governmental aggregation for the standby service. Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer. Such market price shall include, but not be limited to, capacity and energy charges; all charges associated with the provision of that power supply through the regional transmission organization, including, but not limited to, transmission, ancillary services, congestion, and settlement and administrative charges; and all other costs incurred by the utility that are associated with the procurement, provision, and administration of that power supply, as such costs may be approved by the commission. The period of time during which the market price and alternative energy resource amount shall be so assessed on the consumer shall be from the time the consumer so returns to the electric distribution utility until the expiration of the electric security plan. However, if that period of time is expected to be more than two years, the commission may reduce the time period to a period of not less than two years.

(K) The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charges that relate to any cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

Amended by 129th General AssemblyFile No.61,HB 364, §1, eff. 3/22/2012.

Amended by 129th General AssemblyFile No.28,HB 153, §101.01, eff. 9/29/2011.

Amended by 128th General AssemblyFile No.29,HB 48, §1, eff. 7/2/2010.

Effective Date: 06-15-2000; 12-20-2005; 07-04-2006; 2008 SB221 07-31-2008; 2008 HB562 09-22-2008

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

4928.38 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

4928.40 Establishing transition charge for each customer class.

(A) Upon determining under section 4928.39 of the Revised Code the allowable transition costs of an electric utility authorized for collection as 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 establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided in division (A)(1)(b) of section 4928.37 of the Revised Code during a market development period for the utility, ending on such date as the commission shall reasonably prescribe. The market development period shall end on December 31, 2005, unless otherwise authorized under division (B)(2) of this section. However, the commission may set the utility's recovery of the revenue requirements associated with regulatory assets, as established pursuant to section 4928.39 of the Revised Code, to end not later than December 31, 2010. The commission shall not permit the creation or amortization of additional regulatory assets without notice and an opportunity to be heard through an evidentiary hearing and shall not increase the charge recovering such revenue requirements associated with regulatory assets. Factors the commission shall consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to, the total allowable amount of transition costs of the electric utility as determined under section 4928.39 of the Revised Code; the relevant market price for the delivered supply of electricity to customers in that customer class and, to the extent possible, in each rate schedule as determined by the commission; and such shopping incentives by customer class as are considered necessary to induce, at the minimum, a twenty per cent load switching rate by customer class halfway through the utility's market development period but not later than December 31, 2003. In no case shall the commission establish a shopping incentive in an amount exceeding the unbundled component for retail electric generation service set in the utility's approved transition plan under section 4928.33 of the Revised Code, and in no case shall the commission establish a transition charge in an amount less than zero.

(B)

(1) The commission may conduct a periodic review no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility as initially established under division (A) of this section or subsequently adjusted under this division. Any such adjustment shall be in accordance with division (A) of this section and may reflect changes in the relevant market.

(2) For purposes of this chapter, the market development period shall not end earlier than December 31, 2005, unless, upon application by an electric utility, the commission issues an order authorizing such earlier date for one or more customer classes as is specified in the order, upon a demonstration by the utility and a finding by the commission of either of the following:

(a) There is a twenty per cent switching rate of the utility's load by the customer class.

(b) Effective competition exists in the utility's certified territory.

(C) Notwithstanding any provision of this chapter, the commission shall issue an order under section 4928.33 of the Revised Code approving a transition plan for an electric utility that contains a rate reduction for residential customers of that utility, provided that the rate reduction shall not increase the rates or transition cost responsibility of any other customer class of the utility. The rate reduction shall be in effect only for such portion of the utility's market development period as the commission shall specify and shall be applied to the unbundled generation component for retail electric generation service as set in the

utility's approved transition plan under section 4928.33 of the Revised Code subject to the price cap for residential customers required under division (A)(6) of section 4928.34 of the Revised Code. The amount of the rate reduction shall be five per cent of the amount of that unbundled generation component, but shall not unduly discourage market entry by alternative suppliers seeking to serve the residential market in this state. The commission, after reasonable notice and opportunity for hearing, may terminate the rate reduction by order upon a finding that the rate reduction is unduly discouraging market entry by such alternative suppliers. No such termination of the rate reduction shall take effect prior to the midpoint of the utility's market development period.

(D) Beginning on the starting date of competitive retail electric service, 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.

(E) Notwithstanding any provision of Title XLIX [49] of the Revised Code to the contrary, any customer that receives a noncompetitive retail electric service from an electric distribution utility shall be a retail electric distribution service customer, irrespective of the voltage level at which service is taken.

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 AssemblyFile 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

4901:1-37-09 Sale or transfer of generating assets.

(A) Consistent with division (E) of section 4928.17 of the Revised Code, an electric utility shall not sell or transfer any generating asset it wholly or partly owns without prior commission approval.

(B) An electric utility may apply for commission approval to sell or transfer its generating assets by filing an application to sell or transfer.

(C) An application to sell or transfer generating assets shall, at a minimum:

(1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.

(2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.

(3) Demonstrate how the proposed sale or transfer will affect the public interest.

(4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.

(D) Upon the filing of such application, the commission may fix a time and place for a hearing if the application appears to be unjust, unreasonable, or not in the public interest. The commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset.

(E) If, after such hearing or in the case that no hearing is required, the commission is satisfied that the sale or transfer is just, reasonable, and in the public interest, it shall issue an order approving the application to sell or transfer.

(F) Staff shall have access to all books, accounts, and/or other pertinent records maintained by the transferor and transferee as related to the application to sell or transfer generating assets and in accordance with rule 4901:1-37-07 of the Administrative Code.

Replaces: 4901:1-20-16

Effective: 04/02/2009
R.C. 119.032 review dates: 09/30/2013
Promulgated Under: 111.15
Statutory Authority: 4928.17, 4928.06
Rule Amplifies: 4928.17
Prior Effective Dates: 3/10/00, 10/23/04

U.S. Constitution - Article 1 Section 8

Article 1 - The Legislative Branch
Section 8 - Powers of Congress

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The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and Post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

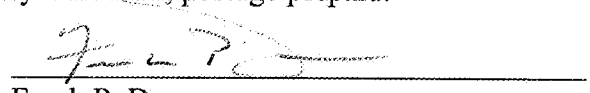
To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appendix to Merit Brief of Appellant Industrial Energy Users-Ohio* was served upon the parties of record this 12th day of August 2013 *via* electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



Frank P. Darr

Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio

William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee (Reg. No. 0017352)
John H. Jones (Reg. No. 0051913)
Assistant Attorneys General
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 6th Floor
Columbus, OH 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
william.wright@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us
john.jones@puc.state.oh.us

COUNSEL FOR APPELLEE, PUBLIC UTILITIES COMMISSION OF OHIO

Mark S. Yurick (Reg. No. 0039176)
(Counsel of Record)
Zachary D. Kravitz (Reg. No. 0084238)
TAFT STETTINIUS & HOLLISTER, LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-3413
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
myurick@taftlaw.com
zkravitz@taftlaw.com

COUNSEL FOR APPELLANT, THE KROGER CO.

Michael L. Kurtz (Reg. No. 0033350)
(Counsel of Record)
David F. Boehm (Reg. No. 0021881)
Jody M. K. Cohn (Reg. No. 0085402)
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Telephone: (513) 421-2255
Facsimile: (513) 421-2764
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
jkylercohn@bkllawfirm.com

COUNSEL FOR APPELLANT, THE OHIO ENERGY GROUP

Mark A. Hayden (Reg. No. 0081077)
(Counsel of Record)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 761-7735
Facsimile: (330) 384-3875
haydenm@firstenergygroup.com

James F. Lang (Reg. No. 0059668)
N. Trevor Alexander (Reg. No. 0080713)
CALFEE, HALTER & GRISWOLD LLP
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
jlang@calfee.com
talexander@calfee.com

David A. Kutik (Reg. No. 0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

COUNSEL FOR APPELLANT, FIRSTENERGY SOLUTIONS CORP.

Steven T. Nourse (Reg. No. 0046705)
(Counsel of Record)
Matthew J. Satterwhite (Reg. No. 0071972)
AMERICAN ELECTRIC POWER CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway (Reg. No. 0023058)
L. Bradfield Hughes (Reg. No. 0070997)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215
Telephone: (614) 227-2270
Facsimile: (614) 227-1000
dconway@porterwright.com
bhughes@porterwright.com

COUNSEL FOR APPELLEE/CROSS-APPELLANT, OHIO POWER COMPANY

Bruce J. Weston (Reg. No. 0016973)
Ohio Consumers' Counsel

Maureen R. Grady (Reg. No. 0020847)
(Counsel of Record)
Terry L. Etter (Reg. No. 0067445)
Joseph P. Serio (Reg. No. 0036959)
Assistant Consumers' Counsel
OFFICE OF THE OHIO CONSUMERS' COUNSEL
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: (614) 466-9567
Facsimile: (614) 466-9475
grady@occ.state.oh.us
etter@occ.state.oh.us.
serio@occ.state.oh.us

COUNSEL FOR APPELLANT, OFFICE OF THE OHIO CONSUMERS' COUNSEL