

ORIGINAL

IN THE SUPREME COURT OF OHIO

<b>OHIO POWER COMPANY,</b>	:	
	:	
<b>Appellant/ Cross-Appellee</b>	:	<b>Case No. 2012-2008</b>
	:	
<b>v.</b>	:	
	:	<b>Appeal from the Public Utilities</b>
<b>THE PUBLIC UTILITIES</b>	:	<b>Commission of Ohio</b>
<b>COMMISSION OF OHIO,</b>	:	
	:	<b>Public Utilities Commission of</b>
	:	<b>Ohio Case Nos. 11-4920-EL-RDR</b>
	:	<b>and 11-4921-EL-RDR</b>
	:	
<b>Appellee.</b>	:	

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**APPELLANT OHIO POWER COMPANY'S  
MEMORANDUM CONTRA INDUSTRIAL ENERGY USER-OHIO'S  
MOTION FOR RECONSIDERATION**

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## MEMORANDUM CONTRA MOTION FOR RECONSIDERATION

### A. INTRODUCTION

The motion for reconsideration filed by Industrial Energy Users-Ohio, Inc. (“IEU”) has no merit and should be *promptly* denied by the Court. It is readily apparent the motion is simply an attempt to cause delay.

The motion is flawed in two major areas. First, the motion does not qualify as a proper request for reconsideration as IEU raises new arguments, one of which also contradicts its prior position during merit briefing. Second, IEU’s merit arguments are based on incorrect facts. The correct application of the facts supports the Court’s ruling in this case. The Court should reject the misuse of the reconsideration process and quickly order the Commission to act on the Court’s remand to correct the Commission’s unlawful order.

#### 1. **The motion is procedurally improper as to both issues raised.**

IEU’s motion for reconsideration suffers from procedural errors that justify its rejection without the need to even consider the merit of the arguments. The motion is procedurally improper because IEU is seeking to advance new arguments that it failed to pursue in its merit brief. *City of E. Liverpool v. Columbiana County Budget Comm'n*, 116 Ohio St.3d 1201, 2007-Ohio-5505, ¶ 3, 876 N.E.2d 575. This flaw applies to both issues that IEU-Ohio has raised in its motion. In its Second Merit brief (at 23), IEU argued only that Ohio Power Company (“AEP Ohio” or “the Company”) failed to demonstrate prejudice because “it has not claimed that it would have exercised its right to withdraw from the ESP based on the [Phase-In Recovery Rider (“PIRR”)] Order's directive that AEP Ohio accrue carrying charges at a debt rate.” In its motion, it now argues affirmatively that AEP Ohio suffered no injury because it never would have withdrawn from its First ESP, even after the Commission reduced the carrying charge rate,

because it would have been worse off if it did so. As shown below, this argument has no substantive merit, but the Court need not even reach the substance because, under long-standing precedent, arguments not pressed in a party's brief cannot be trotted out as a basis for reconsideration of the Court's decision. *Id.*

The second issue raised by the motion is also procedurally improper because, while IEU now argues (at 2) that the Court erred in concluding that the Commission modified a term of AEP Ohio's First ESP "at a time that deprived AEP-Ohio of the ability to withdraw from its First ESP," IEU not only did not raise this argument in its brief, it argued directly to the contrary. In its Second Merit Brief (at 23) it argued that "the order approving or modifying and approving the PIRR application could not have occurred at a time when the AEP's right to withdraw still existed." If a party cannot raise a new argument on rehearing, it certainly should not be permitted to reverse the argument it did make and claim that the Court erred in accepting its earlier position. The concept of judicial estoppel should apply to motions for reconsiderations the same as any other pleading. While IEU's second argument has no merit, as shown below, the Court need not even reach the substance because it is not properly raised on reconsideration.

**2. The motion has no substantive merit.**

IEU presents incorrect facts in its motion in an attempt to undermine the basis of the Court's decision. First, it is indisputable as a matter of law and fact that the First ESP was not in effect when the Commission issued the PIRR Order on August 1, 2012, and modified the carrying charge rate on the fuel deferrals authorized in the First ESP. The First ESP ended, as intended, on December 31, 2011. The Commission approved AEP Ohio's Second ESP on December 14, 2011 and the tariffs were implemented on January 1, 2012. It is true that the Commission then, on rehearing, withdrew approval of the Second ESP, but it did not re-instate or

extend the First ESP as suggested by IEU. Rather, the Commission ordered AEP Ohio to file a new tariff – in effect, a “bridge” standard service offer (“Bridge SSO”) that would remain in place until a new electric security plan was authorized. This Bridge SSO is the process envisioned by R.C. 4928.143(C)(2)(b). And, as will be discussed below, the Bridge SSO differed from the First ESP in several significant respects.

Second, the Court correctly found that the PIRR Order indeed had a prejudicial effect on AEP Ohio. IEU’s suggestion that the deprivation of AEP Ohio’s statutory right to withdraw its First ESP as a result of an unacceptable Commission modification is a harmless violation of law is astounding. The loss of a statutory right, with or without a resulting economic loss is a cognizable injury that warrants reversal of a Commission order. But in addition, since the beginning of the deferral recovery period commencing in September 2012, AEP Ohio has been prevented from recovering carrying charges at the rate specifically authorized in its First ESP, even though the recovery of the deferral with the specified carrying charge was an integral part of the balance struck in the First ESP. This under-recovery of the authorized carrying charges exposed AEP Ohio to a significant economic injury, one the Court found – and IEU concedes – can be quantified at approximately \$130 million. See, Decision at ¶ 2; IEU Motion at 13,19.

Third, IEU’s theory is, in part, that AEP Ohio was not prejudiced by the after-the-fact reduction in the carrying charges because it could have exercised its right to terminate and withdraw the First ESP on August 1, 2012, when the Commission issued the decision below and when IEU-Ohio contends the First ESP was still in effect. IEU also argues, alternatively, that AEP Ohio cannot demonstrate that it was prejudiced by the Commission’s decision because it would have been worse off if it had withdrawn from the First ESP back in March 2009,

(assuming the Commission modified the carrying charge rate at that time). IEU's arguments are based on a faulty premise and make no sense.

IEU argues that had AEP Ohio withdrawn on August 1, 2012, it necessarily would have been worse off because it would have terminated its right to collect the \$642 million deferral balance. For the sake of this argument IEU assumes that deferred costs due to AEP Ohio would not still be due to the Company. This argument is faulty because AEP Ohio would be entitled to recover the deferral balance independent of the specific ESP in effect. Even as part of the Bridge SSO period the Commission instructed AEP Ohio to incorporate increases and decreases in fuel in its rates and could have required the balance of unrecovered fuel costs from the First ESP period to be recovered if it had truly been issued as a replacement for the First ESP, which it was not. It is absurd to argue that the Commission can defer up to \$642 million in actual costs and then make an 11<sup>th</sup> hour change in an ESP to force a utility either to accept a dramatic change in the promised carrying cost on a deferral or to withdraw from the ESP and surrender the deferral altogether. IEU's assumption of how the statute and Commission process works is not based in reality.

IEU also argues that the Company has the burden of demonstrating, on remand, that it would not have been worse off had the Commission imposed the lower carrying charge rate at the time it modified and approved the First ESP (in 2009) and had AEP Ohio withdrawn its First ESP application as a result. IEU then asserts that AEP Ohio necessarily would have been worse off because the rates, terms and conditions of its Rate Stabilization Plan, (the standard service offer in effect prior to the First ESP which began in 2009) would have been re-imposed and continued without change for the duration of the First ESP period, 2009-2011. (Motion at 8-9, 15.) IEU's argument is not a result contemplated by R.C. 4928.143(C)(2)(b). That statute

provides that if the electric distribution utility withdraws an ESP application, there will be a bridge standard service offer that continues the utility's most recent standard service offer, with expected increases or decreases in fuel costs, "until a subsequent offer is authorized." Thus, IEU's premise that had AEP Ohio withdrawn its First ESP application, it would have been limited to collecting the Rate Stabilization Plan rates for another three years is flat-out wrong.

Nor does IEU's asserted need to consider an alternative day-one withdrawal theory make any practical sense. No one can know what would have happened if the Commission had authorized carrying charges on the fuel deferrals at the rate of long-term debt back in March 2009 and AEP Ohio had elected to withdraw and terminate the First ESP. According to R.C. 4928.143(C)(2), if an electric utility rejects a modified ESP, it may propose a new SSO plan and a temporary Bridge SSO is established while the newly-proposed replacement plan is considered by the Commission. The Bridge SSO, reflecting the provisions of AEP Ohio's Rate Stabilization Plan might have been in place for a month, two months or longer. AEP Ohio at any time could have submitted a new ESP application, for example, that: (1) eliminated the deferral voluntarily proposed by AEP Ohio in its original application and allowed AEP Ohio to recover all its fuel costs as they were incurred during the remainder of the ESP period, (2) proposed a significantly shortened deferral recovery period to compensate for the reduction in the carrying charge rate, or (3) proposed an entirely different rate structure, which the Commission could have approved, based on its finding that the revenues AEP Ohio was seeking to collect were just and reasonable, even though rates would increase. One can only speculate about what might have happened, had the Commission ordered carrying charges to be calculated using the lower long-term-debt rate when it approved the First ESP, but there can be no speculation as to what actually did happen.

The Commission after the end of the First ESP wrongfully modified the previously-approved carrying charge rate to the detriment of AEP Ohio.

**B. LAW AND ARGUMENT**

**1. The reconsideration process may not be invoked to raise a new theory not pursued during merit briefing.**

The reconsideration process is intended to be invoked under this Court's rule to "correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 82 Ohio St. 3d 539, 541, 697 N.E.2d 181 (1998). It is not to be used to reargue the merits of the case. *State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St.3d 379, 381, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 9. Nor is the reconsideration process to be used to make a new argument that the party neglected to raise during merit briefing. *City of E. Liverpool v. Columbiana County Budget Comm'n* well illustrates this latter point.

In that case the City of East Liverpool argued in its motion for reconsideration that the Court had not addressed an equal protection argument it had presented in its brief. The Court disagreed, noting that it had directly held that there was a rational basis for distinguishing between the largest city in a county and other subdivisions. Perhaps anticipating that it was guilty of re-arguing the claim, the City raised a new theory in support of its equal protection argument. The Court summarily rejected this "new argument," stating:

In its briefs, East Liverpool argued that the distinction between the largest city and other subdivisions lacked a rational basis; now East Liverpool appears to argue that a rational basis is not sufficient because the measure at issue is an exclusion, rather than one that merely gives a different weight to a particular subdivision's vote. East Liverpool never pressed this argument in its briefs, and under our precedent it is therefore "deemed to be abandoned." *Household Finance Corp. v. Porterfield* (1970), 24 Ohio St.2d 39, 46, 263 N.E.2d 243.

*Id.* at 116 Ohio St.3d at 1201-02, ¶ 3.

IEU misuses the process in the same way here. With respect to its first argument that the Court's opinion is in error because AEP Ohio was not prejudiced by the PIRR Order, IEU made only the tersest comment on brief. The sum and substance of its argument appears at page 23 of its Second Merit Brief as follows:

AEP-Ohio has not claimed that it would have exercised its right to withdraw from the ESP based on the PIRR Order's directive that AEP-Ohio accrue carrying charges at a debt rate. Therefore, even if the Commission violated AEP-Ohio's right to withdraw from the ESP, AEP-Ohio has failed to demonstrate prejudice from the Commission's action. *Meyers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302-304 (1992); *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392 at ¶ 45-46 (2012).

In its motion for reconsideration, IEU now spins an argument over nine pages of its brief (at 7-15) as to why AEP Ohio would be worse off had it exercised its right to withdraw its ESP application in March 2009 or at some later point before the end of the First ESP period. Separate and apart from the lack of substantive merit to this argument (addressed below), the motion for reconsideration should be denied because IEU never brought this argument to the Court's attention in its merit brief.

An equally egregious misuse of the Court's reconsideration process is IEU's second argument that the Court's opinion "incorrectly concludes that the Commission's modification came at a time that deprived AEP Ohio of the ability to withdraw from its First ESP" because "[t]he Commission's modification was ordered on August 1, 2012, and the First ESP's rates remained in effective until August 31, 2012." Motion for Reconsideration at 2; see also Motion at 15-16. In its Second Merit Brief at page 23 IEU stated the opposite fact to the Court. It stated at page 23 that "as a practical matter, the ESP I Order contemplated that the PIRR Application would be filed at the end of the ESP; thus, the order approving or modifying and approving the PIRR Application could not have occurred at a time when AEP Ohio's right to withdraw still existed."

Accordingly, separate and apart from the lack of substantive merit to its second argument (addressed below), IEU's motion should be rejected because it is not just making up a new argument, it is urging that the Court should now adopt a conclusion that IEU previously said could not be true. The Court should not condone this kind of gamesmanship but rather should find IEU estopped from making the argument at all. "The doctrine of judicial estoppel 'forbids a party "from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding."'" *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 330, 2007-Ohio-6442, 879 N.E.2d 174 (quoting *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (C.A.6, 1998), quoting *Teledyne Industries, Inc. v. Natl. Labor Relations Bd.*, 911 F.2d 1214, 1217 (C.A.6, 1990), quoting *Reynolds v. Commr. of Internal Revenue*), 861 F.2d 469, 472-473. (C.A.6, 1988)). The purpose of the doctrine is to "preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.'" *Id.*, quoting *Teledyne* at 1218. That is precisely what IEU is doing here. It previously represented to the Court, through counsel, that the PIRR Order could not have been issued at a time when AEP Ohio still had a right to withdraw from the First ESP. The Court accepted this fact. Now IEU claims the Court erred in its conclusion in order to delay the issuance of the mandate and the implementation of the Court's opinion on remand. That is gamesmanship of the most egregious type.

**2. The Court correctly stated that the Commission modified the First ESP after it had expired.**

IEU's argument that AEP Ohio had the right to withdraw and terminate its First ESP at the time the Commission issued its PIRR Order on August 1, 2012 is contrary to the law and the facts. The First ESP was authorized to be in place from January 1, 2009 through December 31, 2011. *In the Matter of the Application of Columbus Southern Power Company [and Ohio*

*Power] for Approval of an Electric Security Plan*, Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, Finding and Order (March 18, 2009) at 13. On December 14, 2011, the Commission modified and approved a stipulation resolving, among other cases, AEP Ohio's application for a new ESP to commence January 1, 2012. *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, 11-348-EL-SSO. On December 22, 2011 AEP Ohio filed its compliance tariffs to become effective on January 1, 2012. *Id.*, Compliance filing available at: <http://dis.puc.state.oh.us/TiffToPDF/A1001001A11L22B62232J84128.pdf>. Accordingly, as scheduled, the First ESP terminated on December 31, 2011. On rehearing, however, the Commission rejected the stipulation it had previously approved and terminated the second ESP application, ending the almost two month term of the Second ESP implemented on January 1, 2012. *Id.*, Entry on Rehearing (February 23, 2012), p. 12.

The Commission's reversal of its approval of the Second ESP application through that Entry on Rehearing triggered R.C. 4928.143(C)(2)(b), which provides:

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.

Noteworthy is the fact that the statutory process triggered by the Commission's termination of an ESP application does not reinstate and extend the prior rate order; rather, it requires the Commission to issue a new rate order that: 1) continues the terms, conditions and provisions of the utility's prior standard service offer; 2) provides for increases or decreases in fuel costs from

those contained in the prior offer; and 3) remains in effect only until a subsequent standard service offer is authorized. The statute envisions a new order incorporating the elements of the most recent SSO along with other factors to create a new Bridge SSO.

The Commission followed the statutory process in this case and, as part of its Entry on Rehearing issued a *new rate order*; it did not reinstate or extend its First ESP Order or the tariffs in effect under that order. Rather, it directed AEP Ohio:

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

Case No. 11-346-EL-SSO, Entry on Rehearing (February 23, 2012), p. 12. It ordered AEP Ohio to submit compliance tariffs consistent with its order; it did not reinstate the tariffs as they existed under the expired First ESP. And, it is apparent from the face of the order to implement this Bridge SSO that the order modified the rates established in the First ESP to reflect subsequent credits and the application of capacity charges approved after the First ESP was in place. This February 23, 2012 Order establishing the bridge period, as subsequently clarified and modified, was the order that was in effect on August 1, 2012, when the Commission modified the carrying cost rate in its PIRR Order. It was this Bridge SSO that filled the gap between the First ESP, which terminated on December 31, 2011 and the second implementation of the Second ESP, which became effective on September 1, 2012. The First ESP ended on January 1, 2012.

The facts and law fully support the Court's conclusion that the Commission modified a term of the First ESP after it had terminated. IEU as well as the Commission conceded this point during merit briefing. See IEU Merit Brief at 23; Commission Merit Brief at 2 (noting that the

Commission went about the business of establishing the deferral mechanism only after the First ESP ended). It is not a proper or meritorious issue for reconsideration. AEP Ohio could not have exercised its right to withdraw from the First ESP in August 2012 because, as the Court correctly noted, that plan already had been terminated.

**3. AEP Ohio was clearly prejudiced by the Commission's modification of the carrying charge rate and loss of its statutory right to withdraw the First ESP application.**

IEU's alternative argument for reconsideration is likewise without merit. IEU argues that the Court should not have reversed the Commission's order because AEP Ohio was not prejudiced by the loss of its right to withdraw its First ESP. Its theory is wrong for several reasons.

First, IEU misstates the rule of law governing the reversal of Commission orders by suggesting that the injury must be tied to the reason why the order is unlawful rather than the effect of the order itself. The rule of law looks to the effect of the order, rather than the reason why it is unlawful, to determine if there has been an injury. "It is well settled that this court will not reverse an order of the commission unless the party seeking reversal shows that it has been or will be *harmed or prejudiced by the order.*" *Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, 139 Ohio St.3d 284, 2014-Ohio-1532, 11 N.E.2d 1126, ¶ 19 (emphasis added) (*citing Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949), paragraph six of the syllabus; *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980), syllabus; *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302, 1992 Ohio 135, 595 N.E.2d 873 (1992); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 12.) *See also Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 31 ("while the commission abuses its discretion if it renders an

opinion on an issue without record support . . . we will not reverse a commission order unless the party seeking reversal demonstrates the prejudicial effect of the order.”)

Second, in this instance, it is indisputable that AEP Ohio suffered cognizable injury. It suffered the loss of its right to have timely exercised its right to withdraw the First ESP as a result of the Commission’s post-plan reduction of the carrying charge rate from that proposed in the First ESP application and approved by the Commission in 2009. While IEU is dismissive of this loss as meaningless, the loss of a legal right itself is sufficient injury or prejudice to warrant judicial review and correction. *See, e.g., Meade v. Plummer*, 344 F. Supp. 2d 569, 572 (E.D. Mich. 2004) (“[A] deprivation of First Amendment rights standing alone is a cognizable injury.”) (quoting *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999)). The deprivation of a legal right is prejudicial even though the injured party cannot prove he would have been better off had he been afforded his legal right. *See, e.g. Lacey v. Laird*, 166 Ohio St. 12, 15, 139 N.E.2d 25 (1956) (“Even though a surgical operation is beneficial or harmless, it is, in the absence of a proper consent to the operation, a technical assault and battery for which the patient may recover damages . . .”). By way of further example, a public employee terminated without due process is injured, and entitled to redress, even if it is more likely than not that he would have been terminated after a pre-termination due process hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). A candidate for public office wrongfully denied a place on the ballot need not show he would be the winner in order to have the election board’s order overturned. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). A company wrongfully denied permission to drill for oil and gas need not prove it would have received revenue from the sale of oil and gas in excess of its cost of drilling in order to obtain a reversal of the denial. *State ex rel. Morrison v. Beck Energy Corp.*, No. 2013-0465,

2015-Ohio-485 (Feb. 17, 2015). For the same reason, an electric utility deprived of its right to terminate an electric security plan based on unacceptable Commission modifications need not prove that it would have bettered its position had it terminated the plan in order to have the Commission's unlawful order overturned. The denial of the legal right is sufficient prejudice to warrant reversal of the order.

Third, it was foreseeable and is indisputable that AEP Ohio would suffer actual economic harm as a result of the PIRR Order's several-years-later modification of the carrying charge rate in addition to the harm resulting from the loss of its right to terminate the First ESP. There is no dispute that the difference between recovery of carrying charges using the weighted average cost of capital and recovery of carrying charges using the long-term debt rate results in a \$130 million loss to the Company. *See* IEU Second Merit Brief at 19 (noting the Commission's modification of the interest factor reduced AEP Ohio's compensation by \$130 million).

Fourth, IEU's argument that AEP Ohio would necessarily have been worse off if it had withdrawn the First ESP is based on a faulty premise and sheer speculation. IEU's argument assumes that the necessary consequence of AEP Ohio's withdrawal of the First ESP, had the Commission used the long-debt rate rather than the weighted average cost of capital to establish the carrying charge on the deferral when it approved that plan, would be that the rate plan in effect prior to the First ESP – its 2006 Rate Stabilization Plan – would have been reinstated and would have remained in effect through August 2012. There is simply no basis for that assumption. As noted above, while the withdrawal of an electric security plan triggers the continuation of the terms and conditions of the utility's most recent standard service offer "until a subsequent offer is authorized," R.C. 4928.143(C)(2)(b), nothing prevents the utility from quickly submitting, and promptly gaining approval of, another ESP application with entirely new

terms, conditions and provisions that is equally or more beneficial in the aggregate than the plan that was withdrawn. Likewise, even while the Bridge SSO is in place, the utility is able to recover any expected increases in fuel costs, which in this case would have entitled AEP Ohio to recover its actual fuel costs during the bridge period, rather than having those costs deferred at all. Thus, there is simply no basis for IEU's claim that the Court should affirm the Commission's unlawful order because AEP Ohio would have been "worse-off" if it exercised its right to withdraw the First ESP. That is sheer speculation.

And, for the same reason, IEU's alternative suggestion – that the Court revise its remand order and instruct the Commission to keep the unlawful PIRR Order in place unless it can be shown the compensation AEP Ohio has received under the First ESP, including the amount yet to be received through the modified PIRR, is less than it would have received if it had withdrawn from the First ESP – is nothing short of ridiculous. There is no way to make any such comparison because there is no way to know what would have happened if the Commission had set the carrying charge using the long-term debt rate during the recovery period and AEP Ohio had elected to withdraw the First ESP.

**4. IEU's "raw injustice" argument has been rejected by this Court.**

The Court has already seen and addressed IEU's attempts to dismantle the First ESP by seeking to claw back revenues it believes the Company unjustly earned through the collection of POLR revenues and a short-term retroactive rate increase at the beginning of the First ESP period, subsequently disallowed. IEU previously attempted to claw back these revenues through a reduction in the deferral balance and it now seeks to accomplish the same result through a reduction in the authorized carrying charges. In February 2014, the Court rejected IEU's argument that the deferred fuel amount was derived from "unlawful POLR charges," and should

be reduced downward in like amount. *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.2d 863, ¶ 52. In doing so, it reaffirmed that throughout the First ESP AEP Ohio collected the rates and charges it was authorized to collect by the Commission's order and authorized to retain by the existing law. In doing so it also recognized that the deferrals authorized in the First ESP and now being recovered through the PIRR were proposed by the Company and authorized by the Commission to benefit the ratepayers, not to create a windfall for the Company. *Id.* at ¶ 46.

The truth of the matter is that throughout the First ESP AEP Ohio charged and collected only what it was authorized to charge and collect. IEU's assertion that AEP Ohio was overcompensated and unjustly enriched by the First ESP should end here once and for all. Throughout the First ESP, and now through the Second ESP, and into the Third ESP, there remains the assurance built into the law – the SEET analysis set forth in R.C. 4928.143(F) – that AEP Ohio will not be overcompensated by significantly excessive earnings, but rather should it experience significantly excessive earnings in any year of an electric security plan, those earnings will be returned to ratepayers or otherwise used to fund capital projects that benefit ratepayers. Under no circumstances are such earnings retained by AEP Ohio and returned to its shareholder. The General Assembly created the justness standard to be applied, and it was faithfully applied throughout the First ESP. The numbers IEU throws out throughout its motion are large, but the provision of electric generation service in the AEP Ohio service territory is a costly undertaking with risks for which AEP Ohio is entitled to be fairly compensated. And even though this Court found certain components of the First ESP not justified by the Commission's reasoning, those issues have been decided and finally concluded. And none of the revenues

associated with those components resulted in the Company retaining significantly excessive earnings as defined by the General Assembly.

**C. CONCLUSION**

The Court should promptly deny the motion for reconsideration. The motion has no merit, and relies on inaccurate facts in an attempt to persuade the Court to change its decision. AEP Ohio respectfully requests the Court to deny the motion for reconsideration and issue the mandate directing the Commission to take immediate corrective action on remand.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

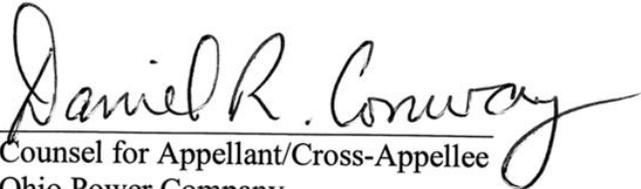
The undersigned counsel certifies that the Ohio Power Company's Memorandum Contra IEU's Motion for Reconsideration was served by First-Class U.S. Mail upon the counsel for all parties to this appeal on this 19th day of June, 2015.

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