BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Motion to Modify the )

December 2, 2009 Opinion and Order and the ) Case No. 12-2637-GA-EXM

September 7, 2011 Second Opinion and Order in )

Case No. 08-1344-GA-EXM. )

**HESS CORPORATION’S APPLICATION FOR REHEARING**

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**HESS CORPORATION’S APPLICATION FOR REHEARING**

Hess Corporation (“Hess”), by counsel and pursuant to Section 4903.10, Ohio Rev. Code, and Rule 4901-1-35, Ohio Admin. Code, hereby requests rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio (“Commission”) in this proceeding on January 9, 2013 (“Order”). Hess requests rehearing of the Order as it relates to the Commission’s approval of the Amended Stipulation’s proposed Standard Choice Offer (“SCO”) Security Deposit, and the Monthly Variable Rate (“MVR”) allocation methodology. Specifically, Hess respectfully submits that the Commission’s Order is unlawful and unreasonable based on the following grounds:

1. **The Commission’s Order Approving the SCO Security Deposit Violates Section 4903.09, Ohio Rev. Code, Because it Fails to Set Forth the Findings of Fact and Reasoning Based Thereon. *Ideal Transp. Co. v. Pub. Util. Comm*. (1975), 42 Ohio St. 2d 195, paragraph one of the syllabus;** ***Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87.**
2. **The Commission’s Order Approving the SCO Security Deposit is Against the Manifest Weight of the Evidence (*Cleveland Elec. Illum. Co v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403), and Unlawfully Relies on the Amended Stipulation in Lieu of the Evidence of Record.** ***See In re Columbus Southern Power Co.* (2011), 129 Ohio St. 3d 46.**
3. **The Commission’s Order Approving the SCO Security Deposit Violates Columbia Gas of Ohio’s Code of Conduct and Section 4929.02, Ohio Rev. Code, Because it Unduly Discriminates Against SCO Suppliers and SCO Customers.**
4. **The Commission’s Order Unreasonably Requires a Minimum MVR Allocation of One Percent to Each MVR Supplier.**
5. **Rehearing Should be Granted to Clarify Certain Aspects of the MVR Allocation Methodology.**

Wherefore, for the reasons more fully set forth in the accompanying Memorandum in Support, Hess respectfully requests that the Commission grant rehearing of its Order and, specifically:

* Reject the $0.06/Mcf SCO Security Deposit; or alternatively, make the $0.06/Mcf SCO Security Deposit refundable and return to SCO suppliers, with interest, all balances not used for purposes of SCO supplier default during the course of the SCO Program Year.
* Adopt a 0.5 Percent MVR Allocation Threshold Consistent with this Application for Rehearing.
* Clarify Certain Aspects of the MVR Allocation Methodology Consistent with this Application for Rehearing.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

1. ***INTRODUCTION***

On November 27, 2012, Columbia Gas of Ohio, Inc. (“Columbia”), Ohio Gas Marketers Group (“OGMG”), Retail Energy Supply Association (“RESA”), Dominion Retail, Inc., Commission Staff, and the Ohio Consumers’ Counsel (collectively, the “Stipulating Parties”) filed an amended stipulation (“Amended Stipulation”) in this proceeding that, if adopted, would institute significant program changes to Columbia’s Standard Choice Offer (“SCO”) program. The Amended Stipulation, among other things, provides that only SCO suppliers, and not Choice suppliers, will be required to provide Columbia with a new cash “deposit,” ostensibly to provide a “liquid account” to help protect Columbia against supplier default. Jt. Ex. 1, at 4. However, if no SCO supplier default occurred during the Program Year, the “deposit” would not be returned to the supplier; rather, it would be credited to the Choice/SCO Supplier Reconciliation Rider (“CSRR”) to remedy what OGMG/RESA alleges to be the subsidization of SCO service by all customers. Jt. Ex. 1, at 4, OGMG/RESA Exhibit 3, at 22. Neither Columbia nor the other Signatory Parties performed a cost analysis to determine the appropriate level of the deposit (if any), or the level of subsidization of SCO service. Tr. II, at 41, Tr. III., at 215; OGMG/RESA Post Hearing Brief, at 29. Rather, the level was a “negotiated amount” agreed to by the Signatory Parties in the amount of $0.06/Mcf of the annual delivery requirements for the SCO Program Year of the tranches won by that SCO supplier. Jt. Ex. 1, at 4; Tr. II, at 41-42. In its January 9, 2013, Opinion and Order (“Order”), the Commission approved the SCO security deposit as proposed in the Amended Stipulation.

Because the SCO security charge is not returned to SCO suppliers if there is no SCO supplier default during the SCO Program Year, the charge is not a deposit, but actually a tax on SCO suppliers. As Hess Corporation (“Hess”) explained in detail during the proceeding, the SCO security charge is nothing more than an administrative mechanism designed to artificially bolster the competitive position of Choice suppliers compared with the SCO price. If approved, SCO suppliers will have to build this $0.06 per Mcf charge into their SCO bids each year because they will be unable to recover it at the end of the Program Year. Choice suppliers, on the other hand, will not be assessed this charge and will not need to account for the charge in their offers to Choice customers. Such a construct would unduly advantage Choice suppliers’ offers making them more competitive to Choice-eligible customers vis-à-vis SCO supply. Hess Ex. 1, at 19-20.

Further, since SCO suppliers will be forced to increase their SCO bids by $0.06 per Mcf, the proposed SCO security charge would penalize SCO customers by subjecting them to higher prices. Even though SCO customers will be paying all costs associated with the SCO security charge (via the SCO clearing price), the unused funds will be returned to all customers (i.e., SCO and Choice customers). Thus, only a portion of the unused funds will be returning to SCO customers. As a result, SCO customers would be unduly disadvantaged compared to Choice customers. Hess Ex. 1, at 20.

In the Order, the Commission noted that “it has taken reasonable and carefully measured steps toward the provision of commodity supplies via the fully-competitive market envisioned in Section 4929.02, Revised Code.” Order, at 45. Yet, the approval of the Amended Stipulation’s SCO security charge represents a significant step backward in the Commission’s mission. The existence of the charge violates the most fundamental of competitive market principles by taxing only one subset of competitors and purposefully creating an unleveled playing field in the market. If it approves the SCO security charge, the Commission will be endorsing an unprecedented market interference for no legitimate reason other than to “tip the scales” in the Choice suppliers’ favor. Artificially inflating the SCO price just to make retail suppliers’ offerings more competitive on a cost basis is clearly inconsistent with prevailing state policy to “achieve effective competition” in Ohio’s retail natural gas market, in violation of Section 4929.02(A)(7), Ohio Rev. Code.

Hess is pleased that the Commission adopted, in large part, Hess’ proposed Monthly Variable Rate (“MVR”) allocation methodology. However, Hess believes that the one percent minimum allocation is unworkable and further seeks rehearing in order for the Commission to clarify various aspects of the methodology.

Pursuant to Section 4903.10, Ohio Rev. Code, Hess files this Application for Rehearing of the Commission’s Order on the following grounds:

1. ***GROUNDS FOR HEARING***

**A.** **The Commission’s Order Approving the SCO Security Deposit Violates Section 4903.09, Ohio Rev. Code, Because it Fails to Set Forth the Findings of Fact and Reasoning Based Thereon. *Ideal Transp. Co. v. Pub. Util. Comm*. (1975), 42 Ohio St. 2d 195, paragraph one of the syllabus; *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87.**

In quasi-judicial cases such as this, the Commission is required to make a complete record of the proceedings, including a transcript of all testimony and exhibits, and to make findings of fact and written opinions setting forth the reasons for the decisions arrived at, based upon said findings of fact. *See* Section 4903.09, Ohio Revised Code; *Ideal Transp. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 195, paragraph one of the syllabus (“Where an opinion and order of the Public Utilities Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the commission’s opinion and order were based, such order fails to comply with the requirements of R.C. 4309.09, and is, therefore, unlawful.”); Accord: *Tongren v. Pub. Util. Comm*. (1999), 85 Ohio St. 3d 87 (“*Tongren*”).

In its Order, after merely reciting the parties’ arguments (Order, at 12-15), the Commission approved the SCO Security Deposit without making findings of fact or detailing its reasoning, providing only the following conclusory remarks:

Upon consideration of the arguments raised by the parties, the Commission finds that the proposed SCO security requirement provision set forth in the amended stipulation is reasonable. The Commission finds the ***arguments*** presented by OGMG/RESA to be ***persuasive***. Furthermore, we ***recognize the importance*** of ensuring that there are adequate liquid accounts available, in the event of a default. The point that, to date, there has been no supplier default in Columbia's service territory is not reason enough to ignore the need to ensure that, if such an event happens in the future, customers are protected and the public interest is preserved. We also agree that the transfer of any remaining funds to the CSRR ***is acceptable*** and a ***reasonable compromise***. (Order, at 15, emphasis supplied.)

 As discussed further below, the issues presented for the Commission’s consideration with respect to the SCO Security Deposit proposal were: (1) the necessity for the additional cash deposit, considering that the Second Revised Program Outline already provides Columbia with the authority to require a cash deposit of SCO suppliers;[[1]](#footnote-1) (2) the lack of record support for the level of the deposit;[[2]](#footnote-2) and (3) the discriminatory nature of the deposit.[[3]](#footnote-3) The Commission made no findings of fact nor provided reasoning based thereon in arriving at its decision to approve the SCO Security Deposit. Specifically, as to the first issue, without making findings or providing reasoning that additional authority to impose a cash deposit was necessary, the Order merely “recognize[d] the importance of ensuring that there are adequate liquid assets available.” Order, at 15. As to the second issue, without making findings or providing reasoning as to the reasonable level of the deposit, the Order noted only that it found OGMG/RESA’s “arguments” to be “persuasive.” Id. Finally, as to the third issue, rather than providing findings and reasoning as to why it is not discriminatory to flow remaining SCO Security Deposit sums through the CSRR, the Commission merely found that “the transfer of any remaining funds to the CSRR is acceptable and a reasonable compromise.” Id.

To pass muster under Section 4903.09, Ohio Rev. Code, the Commission must make findings related to the contested issues before it, and provide the reasoning based on such findings in reaching its conclusions. The Order is woefully deficient in meeting this standard. On rehearing, the Commission must comply with Section 4903.09, Ohio Rev. Code, or Hess’ right to prosecute an appeal to the Ohio Supreme Court will be unlawfully prejudiced. See *Tongren, supra*. Indeed, the Order’s lack of compliance with the statute thus far has prejudiced Hess’ ability to prosecute this application for rehearing as it is unclear under what facts and reasoning the Commission reached its decision.

**B. The Commission’s Order Approving the SCO Security Deposit is Against the Manifest Weight of the Evidence (*Cleveland Elec. Illum. Co v. Pub. Util. Comm.* (1975), 42 OHIO ST. 2d 403), and Unlawfully Relies on the Amended Stipulation in Lieu of the Evidence of Record.** ***In re Columbus Southern Power Co. (2011)*, 129 Ohio St. 3d 46.**

 At hearing, Columbia and OGMG/RESA each supported the SCO Security Deposit; but, based upon different rationale. Columbia supported the deposit based upon its supposed need for “a liquid account to meet supply default expenses incurred by Columbia.” Columbia Ex. 6, at 8. OGMG/RESA supported the deposit to remedy what it alleges to be the subsidization of SCO service by all customers. OGMG/RESA Exhibit 3, at 22. However, neither conducted a cost analysis to determine the costs Columbia may incur in the event of default, nor the level of subsidization of SCO service, if any. Tr. II., at 41; Tr. III, at 215; OGMG/RESA Post Hearing Brief, at 29. Instead, each agreed to support the $0.06/Mcf SCO Security Deposit as a “negotiated” price as a part of the stipulation package. Tr. II, at 41-42; Joint Ex. 1, at 4.

1. ***Any Finding that Columbia Needs the SCO Security Deposit as a Liquid Account is Unlawful, Unreasonable, and Against the Manifest Weight of the Evidence, as Columbia Already has the Authority to Impose Cash Security Deposits on SCO Suppliers. Second Revised Program Outline (Columbia Ex. 2, at 16-20).***

Although Columbia claims that it needs the SCO Supplier Deposit to provide it with a liquid account to meet SCO supplier default expenses, the evidence of records clearly shows that Columbia already possesses this authority. Under Columbia’s Second Revised Program Outline filed in this proceeding, Columbia always has been authorized to conduct pre-auction credit evaluations of all SCO bidders, and retains the right to make alternative credit arrangements with an SCO supplier should Columbia deem it necessary (Columbia Ex. 2, at 16-20) (including requiring a guarantee, irrevocable letter of credit ***or a refundable cash deposit*** in appropriate circumstances). Columbia Ex. 2, at 18. As Hess witness Magnini testified, the current credit arrangements that the Second Revised Program Outline provides Columbia, including the ability to impose cash deposits on SCO suppliers, obviates the need for the proposed deposit. Hess Ex. 1, at 18. Any finding that Columbia needs the ability to impose a cash security deposit on SCO suppliers, an ability it already has, is unreasonable, unlawful and against the manifest weight of the evidence. *Cleveland Elec. Illum. Co v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403.

Indeed, the fact that Columbia already possesses the ability to require a ***refundable*** cash security deposit of SCO suppliers makes the request for approval of the ***non-refundable*** cash SCO Security Deposit in this proceeding nothing more than a pre-text to impose a fee, not supported by the evidence, on SCO suppliers, allegedly to remedy OGMG/RESA’s unsupported allegations that SCO services are improperly subsidized.

1. ***Any Finding that the $.06/Mcf SCO Security Deposit is Required to Remedy the Subsidization of SCO Service is Unlawful, Unreasonable, and Against the Manifest Weight of the Evidence, as the Evidence of Record Does Not Support the Level of the Charge, if Any.***

 As stated previously, OGMG/RESA supports the SCO Security Deposit to remedy what it alleges to be the subsidization of SCO service by all customers. Specifically, OGMG/RESA proposes that any remaining balance of the deposit at the end of the Program Year be passed through the CSRR to all customers. Thus, the Signatory Parties have inexorably linked the ability to remedy the alleged subsidization of SCO service to approval of the proposed SCO Security Deposit. Once the Commission disapproves the deposit as unnecessary to meet supplier default expenses, as respectfully required under the above analysis, the Commission’s inquiry must come to an end, because no evidence of record supports a stand-alone fee to be charged SCO suppliers to remedy OGMG/RESA’s allegations of subsidization. Moreover, once the Commission disapproves the deposit, it need not consider the remaining issues discussed below, which show that the level of the deposit is not supported by the manifest weight of the evidence and that the deposit unduly discriminates against SCO suppliers.

 Assuming, arguendo, that the Commission determines that Columbia needs additional authority, beyond what it already has, to require a cash deposit of SCO suppliers, the evidence of record does not support the level of the charge.[[4]](#footnote-4) OGMG/RESA was the only Signatory Party to attempt to justify the level of the Security Deposit, and did so on the basis of the alleged subsidies that all customers provide to SCO service. OGMG/RESA reasoned that subsidies are being provided for the costs associated with Columbia’s educational programs, a Columbia-staffed consumers’ call center, Choice suppliers’ compliance with the Commission’s rules, and Columbia’s costs associated with the annual SCO auctions. OGMG/RESA Ex. 3, at 17-18, 20.

As threshold matters, it must be noted that Columbia witness Brown admitted on cross examination that Choice customers (and Choice suppliers) also benefit from Columbia’s educational programs (Tr. II, at 59-61),[[5]](#footnote-5) and OGMG/RESA witness Parisi admitted that Choice customers also benefit from the Columbia-staffed call center. Tr. III, at 233. Because benefits are provided to SCO and Choice customers alike, any allegations that the services are subsidized as to SCO customers or their suppliers are meritless.

Regardless, OGMG/RESA (nor any other party) provided any evidence as to the amount of the alleged subsidies provided through offering the educational programs, staffing the call center, or complying with Commission rules. Indeed, the parties admit they performed no cost studies at all. See, e.g., OGMG/RESA Post Hearing Brief, at 29. The only evidence on the record as to alleged subsidization was obtained through cross-examination and showed that Columbia incurred only $70,000 in costs to conduct the most recent SCO auction. Ohio Partners for Affordable Energy (“OPAE”) Ex. 2, at 24; Tr. III, at 132-133. The SCO security charge is estimated to collect approximately $4.8 million per year. Hess Ex. 1, at 19. Considering this glaring imbalance between what Columbia would collect through the SCO security charge ($4.8 million per year) and the evidence of Columbia’s SCO-related costs ($70,000 per year), any finding that the $0.06/Mcf charge is reasonable would be against the manifest weight of the evidence. Such a finding would be more egregious considering that Columbia has committed to provide for the benefit of Choice suppliers up to $1.7 million in additional programming and billing enhancements. Tr. III, at 217-218; Columbia Ex. 5, at 4.

Because neither the need for, nor the level of, the SCO Security Deposit is supported by the manifest weight of the record, the Commission must grant rehearing and reject the deposit. *Cleveland Elec. Illum. Co v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, paragraph 3 of the syllabus (“A finding of the Public Utilities Commission which in manifestly against the weight of the evidence is unreasonable and unlawful. (*Cleveland v. Pub. Util. Comm*., 3 Ohio St. 2d 82, approved and followed.”))

***3. In Approving the SCO Security Deposit, the Order Unlawfully Relies on the Amended Stipulation in Lieu of the Evidence of Record.******In re Columbus Southern Power Co. (2011), 129 Ohio St. 3d 46.***

As stated above, the Signatory Parties presented no evidence of record to support the level of the SCO Security Deposit or the subsidies allegedly provided to SCO service. Instead, OGMG/RESA witness Parisi testified that while the $0.06/Mcf security deposit would not cover the cost of default and subsidization of SCO service, it nevertheless was a “reasonable compromise.” He stated:

\*\*\* the resulting $0.06 SCO supplier fee is a reasonable compromise resulting from the serious and well thought out bargaining that occurred ***by the parties signing the Stipulation***, and as such OGMG and RESA support the fee and the disposition of the fee. ***If the issues were fully litigated***, the time, energy and resources spent would be significant and for purposes of this Stipulation, the result is reasonable on consideration of those items.[[6]](#footnote-6)

OGMG/RESA Ex. 3, at 19-20 (emphasis supplied). It is apparently based on this testimony that the Order concludes that, “We also agree that the transfer of any remaining funds to the CSRR is acceptable and ***a reasonable compromise***.” Order, at 15 (emphasis supplied). Thus, the Order adopted the SCO Security Deposit based upon the Signatory Parties’ negotiated price, as admitted by Columbia witness Brown (Tr. II, at 41-42), rather than the evidence of record as to what the level of the deposit should be.

As the Commission is aware, the Ohio Supreme Court has recently reiterated the Commission’s responsibilities when reviewing a contested stipulation like the one at issue in the instant case. *See In re Columbus Southern Power Co.* (2011), 129 Ohio St. 3d 46, 49-50. The Supreme Court provided that “[w]hen the commission reviews a contested stipulation, the requirement of evidentiary support remains operative.” Id. at 49. It is clear that the Commission “must determine, *from the evidence*, what is just and reasonable.” Id., citing *Consumers’ Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 126 (emphasis in original). The *Columbus Southern Power Co.* Court emphasized the paramount importance of evidentiary support finding that “stipulations are considered merely as recommendations to the commission and, while entitled to substantial weight, they must be supported by the evidence of record to withstand [appellate] scrutiny. [citations omitted.] The agreement of *some* parties is no substitute for the many procedural protections reinforced by the evidentiary-support requirement.” Id*.* at 50 (internal citations omitted).

Pursuant to *Columbus Southern Power Co.*, the Commission cannot merely defer to the price stipulated by the Signatory Parties. By doing so, the Commission shields the underlying justification for, and level of, the SCO Security Deposit from scrutiny by the non-signatory parties such as Hess, which has chosen to litigate the charge. Reliance on the “negotiated amount” of the deposit is prejudicial to Hess and unlawful.[[7]](#footnote-7)

**C. The Commission’s Order Approving the SCO Security Deposit Violates Columbia Gas of Ohio’s Code of Conduct and Section 4929.02, Ohio Rev. Code, Because it Unduly Discriminates Against SCO Suppliers AND SCO CUSTOMERS.**

Section 4929.04(E)(2), Ohio Rev. Code, requires that any exemption order issued under Section 4929.04(A) must prescribe a code of conduct that governs the company’s adherence to the state policy specified in Section 4929.02, Ohio Rev. Code. Columbia sought approval of its code of conduct in its exemption proceeding, Case No. 08-1344-GA-EXM, and based its code of conduct on the requirements of Section 4905.35, Ohio Rev. Code.[[8]](#footnote-8) See Case No. 08-1334-GA-EXM, Application Exhibit V, Proposed Separation Plan and Code of Conduct. The Commission approved the code of conduct by its order issued in 08-1344 on December 2, 2009, and the code is now contained in Columbia’s Tariff PUCO No. 2, Section VII, First Revised Sheet No. 22, et seq. Paragraph 22.1(3) of those tariff provisions provides:

[Columbia] may not, through a tariff provision or otherwise, give any Retail Natural Gas Supplier or Governmental Aggregator or any Retail Natural Gas Supplier’s or Governmental Aggregator’s customers preferences in matters, rates, information, or charges relating to transportation service including, but not limited to, scheduling, balancing, metering, storage, Backup Service or curtailment policy…

Hess witness Magnani testified that the SCO Security Deposit is unduly discriminatory to SCO suppliers. He testified that if approved, SCO suppliers would have to build the $0.06 per Mcf charge into their SCO bids each year because they would be unable to recover it at the end of the program year. Choice suppliers, on the other hand, would not be assessed this charge and would not need to account for the charge in their offers to Choice customers, providing them with the undue advantage by making Choice suppliers’ offers more competitive to Choice-eligible customers vis-à-vis SCO supply. Hess Ex. 1, at 19-20.

He further testified that since SCO suppliers would be forced to increase their SCO bids by $0.06 per Mcf, the proposed SCO security charge would penalize SCO customers by subjecting them to higher prices. Even though SCO customers would be paying all costs associated with the SCO security charge (via the SCO clearing price), the unused funds would be returned to all customers (i.e*.*, SCO and Choice customers) through CSRR rider. Thus, only a portion of the unused funds would be returned to SCO customers. Hess Ex. 1, at 20. As a result, SCO customers would be unduly disadvantaged compared to Choice customers.

Clearly, the SCO Security deposit provides undue preferences to Choice Suppliers and customers, and undue disadvantages to SCO suppliers and their customers in violation of Columbia’s tariffed code of conduct and the pro-competitive policies of Section 4929.02, Ohio Rev. Code, which the code of conduct is designed to enforce. Specifically, approval of the SCO Security Deposit violates Sections 4929.02(A)(1), (2), (3), (7), and (8).

 Obviously aware of its code of conduct provisions, and the Ohio Supreme Court’s precedent construing Section 4905.35, Ohio Rev. Code,[[9]](#footnote-9) Columbia attempted, through pre-filed testimony, to pre-empt any arguments that the SCO Security Deposit would be unduly discriminatory. In this vein, Columbia witness Brown testified that requiring the deposit only of SCO suppliers is not unduly discriminatory because Choice and SCO Supplier pose very different risks to Columbia. Specifically, he claimed that (1) the risk, and potential costs, of default by an SCO supplier is significantly greater, and (2) the risk of default by an SCO supplier is more immediate. Columbia Ex. 6, at 8-9. Neither of these assertions is supported by the evidence of record.

1. ***The Risk, or Potential Costs, of Default is Not Significantly Greater for SCO Suppliers.***

The record shows that the risk of default by an SCO supplier is not significantly greater than Choice suppliers. Indeed, Columbia witness Brown testified on cross examination that no Standard Service Offer (“SSO”) or SCO suppliers in Columbia’s service territory have defaulted while, on the other hand, some small, and one extremely large (Enron Corporation) Choice suppliers have defaulted on their customer contracts. Tr. II, at 55-56, 84-87. See also Tr. III, at 232.

Nor does the record support that the potential costs of an SCO supplier default are significantly greater than for a Choice supplier. As shown previously, Columbia performed no cost studies or analyses to estimate the costs it would incur as a result of an SCO supplier default. Hess Ex. 1, at 19; Tr. II, at 41. Columbia’s claim that it would incur significantly greater costs by an SCO supplier default than a Choice supplier default simply is not supported by the record and must be rejected. Moreover, at least one Choice supplier already is serving more load than SCO suppliers serving four tranches, demonstrating that the costs of a Choice supplier default is greater than SCO suppliers – a prospect that only increases as shopping increases in Columbia’s service territory and Choice supply outgrows the SCO. OPAE Ex. 2, at 28-29. Finally, default of the very large supplier, Enron Corporation, would support that the cost of an SCO supplier default would not be greater.

1. ***The Risk of a Default by an SCO Supplier is Not More Immediate than the Risk of Default by a Choice Supplier.***

 Columbia argues that the risk associated with an SCO supplier default is more immediate because Columbia would be tasked with supplying customers in the event of an SCO supplier default, while SCO suppliers would be tasked with supplying customers in the event of a Choice supplier default. Columbia Ex. 6, at 9. The evidence on the record completely contradicts Columbia’s argument. The Second Revised Program Outline calls for Columbia to supply ***all*** customers (Choice and SCO) if a supplier that has SCO and Choice load defaults. Columbia Ex. 2, at 20-21; Tr. II, at 57-59.

As such, the unrebutted evidence on the record demonstrates that there is no substantive basis for Columbia’s claims that there are more immediate and greater risks of an SCO supplier default which warrant the SCO security charge’s discriminatory application. In fact, the record clearly demonstrates the opposite to be true. Therefore, if adopted as proposed, the SCO security charge would be unduly discriminatory to SCO suppliers and SCO customers and, therefore, unlawful because it violates Columbia’s Code of Conduct and the state policies contained in Section 4929.02, Ohio Rev. Code.

**D. The Commission’s Order Unreasonably Requires a Minimum MVR Allocation of One Percent to Each MVR Supplier.**

In the Order, the Commission set forth an initial allocation methodology to be applied to Choice-eligible non-residential customers who, upon Columbia’s exit have not selected a Choice supplier. Order, at 36. The Commission, in finding Hess’ initial allocation proposal to be “most persuasive and reasonable,” ordered that the “initial allocation would be done on a proportional basis, as compared to the MVR supplier’s Choice enrollment at the time of allocation, including a supplier’s average historical SSO and SCO tranche ownership of residential customers.” Id. The Commission included an additional requirement that, “[f]or the initial allocation, a minimum of one percent shall be assigned to an MVR supplier with equal to, or less than, one percent Choice enrollment.” Id.

Hess believes that the Commission’s one percent minimum rule was rooted in an effort to ease the administrative burden on Columbia at the time of exit in assigning a very small amount of customers to those MVR suppliers with a very low percentage share of the non-residential Choice market. However, such a requirement is unreasonable because it undermines the contributions of those MVR suppliers that drove the market to the 70% exit trigger and who have more than a one percent share of the non-residential Choice market. More specifically, under the Commission’s one percent minimum allocation rule, even if a MVR supplier has only one Choice customer, it will be assigned a one percent share of the MVR allocation at exit. Such a result unreasonably dilutes the other MVR suppliers who have more than one percent of the market.

Additionally, the Commission’s one percent minimum rule is unreasonable because the requirement could prove to be impractical to implement. If there are over 100 MVR suppliers at the time of exit (which is entirely possible as the Choice market continues to develop and shopping approaches 70%), Columbia could not allocate each MVR supplier a one percent allocation as required by the Commission’s rule. Moreover, the one percent minimum rule could invite gaming by certain MVR suppliers. For instance, there is nothing to prohibit an MVR supplier from, prior to exit, assigning one customer to a series of separately-licensed CRNGS supplier affiliates. Per the Commission’s rule, each affiliate would be assigned a one percent allocation. Such a result clearly is clearly inconsistent with the spirit of the Commission’s Order on MVR allocation – namely, to incent MVR suppliers to continue to invest in the market and to reward the MVR suppliers for the proportional contributions they each made to reach the 70% exit trigger.

As such, Hess recommends that the Commission, on rehearing, reject the one percent minimum rule and, instead, implement a 0.5 percent allocation threshold. If an MVR supplier has less than 0.5 percent of the non-residential Choice market at exit, it will not be allocated a share of the non-shopping customers. If an MVR supplier has 0.5 percent or more of the non-residential Choice market at exit, then the MVR supplier will be allocated non-shopping customers based on its actual market share. Hess’ alternative strikes the appropriate balance between creating a simplified MVR allocation methodology that is relatively easy for Columbia to implement, while still creating the appropriate incentive for Choice suppliers to continue to invest in the Columbia Choice market and recognizing each MVR supplier’s proportional contribution to reaching the exit trigger.

**E. Rehearing Should be Granted to Clarify Certain Aspects of the MVR Allocation Methodology.**

In the Order, the Commission was clear that it was adopting Hess’ proposed initial MVR allocation methodology, which would allocate non-shopping customers at the non-residential exit to MVR suppliers based on each supplier’s proportional market share of Choice-eligible, non-residential customers, including MVR suppliers’ average historical SSO and SCO tranche ownership. Order, at 36. While the Order was definitive in the overall approach to be used by Columbia, there are several important implementation details that the Commission should clarify on rehearing.

1. ***To Determine an MVR Supplier’s Proportional Market Share at the Non-residential Exit, the Supplier’s Allocation Should be Calculated Based on its Market Share of Non-Residential Shopping Customers.***

In its review of the various MVR allocation methodologies, the Commission correctly summarized the three methodologies advocated in this proceeding as “a proportional allocation based on Choice customer market share only [Option 1]; a proportional allocation based on the market share of all nonresidential Choice eligible customers, including a supplier's average historical SSO and SCO tranche ownership [Option 2]; and a rotational allocation, under which customers are equally and randomly assigned to each CRNGS provider [Option 3].” Order, at 36. Hess advocated for Option 2. Ultimately, the Commission found that the “proposal submitted by Hess regarding the initial allocation to be the most persuasive and reasonable.” Id. In the Order, the Commission went on to set forth some “guiding principles” of the initial allocation methodology, including:

(1) The initial allocation will be done on a proportional basis, as compared to the MVR supplier's Choice enrollment at the time of allocation, including a supplier's average historical SSO and SCO tranche ownership for nonresidential customers.

(2) A supplier's average historical SSO and SCO tranche ownership for nonresidential customers shall be measured as of the date of this order going forward.

(3) For the initial allocation, a minimum of one percent shall be assigned to an MVR supplier with equal to, or less than, one percent Choice enrollment. Id.

In summarizing the three proposals, the Commission correctly noted that the Hess proposal was premised on a “proportional allocation based on the market share of *all nonresidential Choice eligible customers.*” Id. (emphasis added). Later in the Order, in laying out the guiding principles of the initial MVR allocation, the Commission provided that Columbia should allocate customers on a “proportional basis, as compared to the MVR supplier’s Choice enrollment…for nonresidential customers.” Id. The two provisions are consistent, however, in the interest of efficiency, we respectfully request that the Commission, on rehearing, clarify its ruling and specifically establish that a MVR supplier’s proportional market share be calculated based on its market share of non-residential, Choice-eligible customers. As explained above, Hess’ interpretation is entirely consistent with the Order and recognizes the contributions of each MVR supplier’s (SCO and Choice suppliers) toward reaching the 70% non-residential exit trigger.

Any other market share calculation would undermine and inappropriately dilute a non-residential supplier’s contributions to the market. For instance, Hess anticipates other parties (mainly, the residential-focused suppliers participating in this proceeding, IGS and Direct (“Residential Suppliers”)) to argue that the Commission should calculate a Choice supplier’s proportional market share based on its market share of Choice-eligible customers, which includes residential and non-residential customers. The Residential Suppliers’ argument, while predictable given their business model, is completely without merit. If the proportional market share calculation for the initial non-residential MVR allocation took into account a Choice supplier’s residential and non-residential market share, those Choice suppliers with a greater market share of residential customers would clearly benefit as compared to those Choice suppliers with a greater market share of non-residential customers because they would inappropriately dilute a nonresidential-focused supplier’s MVR allocation. Not only is such a calculation contrary to the Order and the Amended Stipulation,[[10]](#footnote-10) but it also completely undermines the spirit of an MVR allocation premised on proportional market share.

As the Commission is aware, a Choice supplier that is focused on non-residential customers must make distinct investments and develop unique products to stay competitive in that market. These investments (including sales and marketing investments) and products (more complex variable- and fixed-priced products) are typically different than those aimed at residential customers. See Hess Ex. 1, at 6. When a non-residential supplier procures customers, it is making a contribution toward reaching the 70% exit trigger which, as the Commission has recognized in its ruling, should be incorporated in that supplier’s initial MVR allocation. By endorsing the Residential Suppliers’ formula, the Commission would be minimizing the non-residential suppliers’ contributions toward reaching the 70% exit trigger.

Furthermore, the Residential Suppliers’ formula is inequitable and will ultimately disincent non-residential suppliers from continuing to invest in the market. For instance, Hess’ small commercial-focused affiliate, Hess Small Business Services, LLC (“HSBS”) recently launched service in Columbia’s service territory. HSBS is currently focused in acquiring new non-residential, Choice-eligible customers only and has tailored all of their investments and products to market to these customers. Hess Ex. 1, at 1-2. With the Commission’s Order, HSBS has an added incentive to procure as many non-residential customers as possible as it knows that it will be allocated additional non-shopping customers based upon its proportional market share at the time of exit. However, the Residential Suppliers’ model will completely nullify the added incentive to HSBS to make additional investments and create new innovative products simply because it does not target residential customers. In fact, rather than adapt its entire business model, the Residential Suppliers’ model could serve to persuade a non-residential supplier to focus on other service territories. Disincenting non-residential suppliers from continuing to participate in Columbia’s Choice market will only harm non-residential customers by unnecessarily removing market participants and limiting their options. Such a result clearly runs afoul of the Order. For these reasons, the Commission should clarify the Order, on rehearing, to explicitly provide that a MVR supplier’s proportional market share be calculated based on its market share of non-residential, Choice-eligible customers.

1. ***The Commission Should Explicitly State that Historical SSO and SCO Tranche Ownership Accounting Begins This SCO Program Year.***

The Order provides that “[a] supplier's average historical SSO[[11]](#footnote-11) and SCO tranche ownership for nonresidential customers shall be measured as of the date of this order going forward.” Order, at 36. The date of the Order was January 9, 2013, which is during the 2012-2013 SCO Program Year. As such, pursuant to the clear words of the Order, the SCO tranches being served by SCO suppliers during the current 2012-2013 SCO Program should be taken into account in the initial MVR allocation at the time of exit. Hess respectfully requests that the Commission, on rehearing, makes this point explicitly clear. Absent an explicit statement, Hess anticipates some stakeholders who do not support the Order’s incorporation of historical SCO tranche ownership into the initial MVR allocation formula could try to delay post-Order implementation with incorrect interpretations of the Order. Thus, Hess makes this request to proactively squash any of these efforts.

1. ***In Adopting Hess’ Initial MVR Allocation Methodology, the Commission Should Clarify that Columbia Must Use Hess’ Proposed Formula to Calculate Average Historical SCO Tranche Ownership.***

In the Order, the Commission found that the “proposal submitted by Hess regarding the initial allocation to be the most persuasive and reasonable.” Order, at 36. Along with its witness’ Direct Testimony, Hess provided a formula to calculate historical SSO/SCO tranche ownership. Hess Ex. 1, OM-2. Hess’ formula is based on dividing the number of tranches served by the SCO supplier by the total number of tranches at the time of exit. Id. Hess understands that the Order found that historical SCO tranche ownership should not revert back to the beginning of the SSO program, but, instead, must begin with the current program year. Regardless, the Commission, on rehearing, should explicitly state that Columbia must rely on Hess’ proposed formula to calculate average historical SCO tranche ownership in the initial MVR allocation methodology.

1. ***The Commission Should Clarify That If a SCO Supplier Rejects its Initial MVR Allocation, the “Rejected” Customers Should be Reallocated to the Other SCO Suppliers.***

The Commission should clarify, on rehearing, how customers will be reallocated in the event that a MVR supplier rejects its allocated share of non-shopping customers at exit. The Commission did not explicitly provide how these “rejected” customers should be reallocated in the Order. Under the Commission’s adopted approach, when the exit is triggered, Columbia will allocate those non-shopping, non-residential customers to registered MVR suppliers based on each supplier’s proportional market share, including average historical SCO tranche ownership. Order, at 36. For instance, if the exit is triggered at 70.0% shopping, the remaining 30.0% of Choice-eligible, non-residential customers that are not shopping will be allocated to MVR suppliers. 70% of those remaining customers will be allocated to Choice suppliers (based on their proportional market share) and 30% of the remaining customers will be allocated to SCO suppliers (based on their average historical SCO tranche ownership). Id. If an SCO supplier awarded an initial MVR allocation at exit chooses not to provide Choice service and rejects its customer allocation, then the rejected share should be reallocated to the remaining SCO suppliers evenly. In the Order, the Commission “acknowledge[d] that SSO/SCO suppliers have had to make and must continue to make investments in order to stay competitive in the SCO market.” Id. Pursuant to the Commission’s Order, SCO suppliers will be allocated 30% of the remaining non-shopping customers at exit. Hess’ proposed reallocation methodology is consistent with the Order by properly keeping all SCO suppliers’ allocated share within the SCO portion of the initial MVR allocation. Hess’ witness endorsed this approach (Tr. III, at 145-147) and the Commission found that the “proposal submitted by Hess regarding the initial allocation to be the most persuasive and reasonable.” Id. As such, the Commission, on rehearing, should explicitly provide that if an SCO supplier rejects its allocated share of non-shopping customers at exit, those rejected customers will be reallocated to the remaining SCO suppliers evenly.

1. ***The Commission Should Clarify that an SCO Supplier that is Awarded an MVR Allocation Will be Able to Transfer its Allocated Customers to a Properly Registered Choice CRNGS Supplier Affiliate Immediately.***

Hess respectfully requests that the Commission clarify its Order, on rehearing, to allow an SCO supplier who is awarded an MVR allocation at exit to immediately transfer its allocated share to its affiliate, so long as its affiliate is a properly-registered Choice CRNGS supplier in Columbia’s MVR program. Participation in the SCO market does not automatically mean that the supplier will actively participate, for business reasons, in Columbia’s Choice market. As such, the Commission should require Columbia to allow any SCO supplier to immediately transfer its allocated MVR share to a Choice affiliate. For instance, as Hess has previously explained, Hess Corporation serves Columbia SCO tranches, while its Choice-focused, wholly-owned subsidiary, HSBS, serves non-residential Choice customers. Hess Ex. 1, at 1-2. At exit, Hess should be allowed to transfer its allocated customers (based on its average historical SCO tranche ownership) to HSBS. Hess is by no means advocating for an SCO supplier’s ability to transfer to extend outside of an affiliate relationship. Nor is Hess advocating that the separately-registered affiliate should be allowed to avoid Commission licensing or Columbia registration requirements. Instead, Hess requests that the Commission clarify that an SCO supplier can immediately transfer its allocated share to a properly-registered affiliate. By doing so, the Commission should also make it clear that the SCO supplier will not have to *assign* the customers to its Choice supplier affiliate. With this clarification, Columbia would be prohibited from requiring the SCO supplier to comply with its tariff-mandated assignment requirements which could lead to a one to two billing cycle delay before the transfer is complete. Additionally, the Commission’s clarification should make it clear that the SCO supplier seeking to transfer its allocated share would not have to comply with the Commission’s CRNGS assignment regulations for this unique and one-time transfer of customers. Such a ruling will significantly improve the efficiency of the initial MVR allocation process and will avoid creating unnecessary administrative obstacles that will only serve to burden those SCO suppliers who, for legitimate business reasons, prefer to have separately-licensed affiliates provide Choice service.

***III. CONCLUSION***

From the foregoing grounds for rehearing, Hess has demonstrated that the SCO Security Deposit is unlawful and, thus, violates the third prong of the Commission’s standard for approving partial stipulations, which requires that the settlement package not violate any important regulatory principle or practice. See, e.g., *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm*. (1994), 68 Ohio St. 3d 559. Accordingly, the Commission must reject the stipulation, or modify it by addressing the provisions relating to the SCO Security Deposit.

 Hess has steadfastly opposed the adoption of the SCO security charge throughout the proceeding because (i) it will needlessly increase SCO customers’ rates; (ii) it will represent an unprecedented market interference that will have a dramatic negative impact on the competitive balance between SCO and Choice suppliers; and (iii) Columbia’s current default protections are more than sufficient to cover the very remote possibility of an SCO supplier default. However, if the Commission still believes that a liquid account to protect against SCO supplier default is necessary, the Commission should consider other alternatives that will allow Columbia to amass a liquid account, but will have much less of an impact on SCO customers and the competitive balance between SCO and Choice suppliers. Instead, Hess suggests that the Commission order that the $0.06/Mcf charge to SCO suppliers be *refundable*. If there is no SCO supplier default during the SCO Program Year, then the funds accumulated from each winning SCO supplier should be returned.[[12]](#footnote-12) Such a result would greatly decrease the financial impact of the SCO security charge on SCO customers and substantially mitigate the disruptive effect the charge has on the competitive balance between SCO and Choice suppliers.

Based upon the foregoing, Hess respectfully requests that its Application for Rehearing be granted and, specifically:

* Reject the $0.06/Mcf SCO Security Deposit; or alternatively, make the $0.06/Mcf SCO Security Deposit refundable and return to SCO suppliers, with interest, all balances not used for purposes of SCO supplier default during the course of the SCO Program Year.
* Adopt a 0.5 Percent Allocation Threshold Consistent with this Application for Rehearing.
* Clarify Certain Aspects of the MVR Allocation Methodology Consistent with this Application for Rehearing.

Respectfully submitted,

/s/ Dane Stinson**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Hess Corporation’s Application for Rehearing was served by email on the following parties of record this 8th day of February, 2013.

/s/ Dane Stinson**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 Dane Stinson

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1. See, e.g., Columbia Ex. 2, at 18; Hess Ex. 1, at 18; Hess Post Hearing Brief, at 10-11. [↑](#footnote-ref-1)
2. See, e.g., Tr. II, at 41; Tr. III, at 215; Hess Ex. 1, at 19; Hess Post Hearing Brief, at 11-12. [↑](#footnote-ref-2)
3. See, e.g., Tr. II, at 57-59; Hess Ex. 1, at 19-20; Hess Post Hearing Brief at 12-13. [↑](#footnote-ref-3)
4. In this vein, the Commission must bear in mind that, as the proponent of modifying the prior exemption order, and as the proponent of the SCO Security Deposit, the Signatory Parties bear the burden of proof on this issue. [↑](#footnote-ref-4)
5. Moreover, Columbia admits that the costs of the Choice educational programs are covered by CSRR rider to the benefit of all customers. Columbia Post Hearing Brief, at 12; Jt. Ex. 1, at 16 (paragraph 47). [↑](#footnote-ref-5)
6. The difficulty with Mr. Parisi’s testimony is that parties other than those who signed the Amended Stipulation also have an interest in this proceeding and, indeed, elected to litigate this case when their issues were not resolved. The “reasonable compromise” on the SCO Security Deposit issue was made only among the SCO and Choice suppliers “signing the Stipulation.” It is telling that Mr. Parisi’s employer, Interstate Gas Supply (“IGS”), was the only current SCO supplier to sign the stipulation (as a part of OGMG (Tr. III, at 243; Joint Ex. 2, at 1, fn. 1)). IGS is also one of the largest Choice suppliers in Ohio (Tr. III, 222) and has an interest in eliminating the SCO program since it is the lowest-cost option available to Choice-eligible customers and is, therefore, extremely difficult to compete against in the market. Hess Ex. 1, at 11; Tr. III, at 154. It is for these reasons that Ohio law requires the Commission to base its orders on the evidence of record, rather than the agreement of parties with similar interests in a partial stipulation. To do otherwise, prejudices the interests of non-signatory parties forced to litigate the case. See *Columbus Southern Power Co., infra.* [↑](#footnote-ref-6)
7. The only evidence on the record concerning SCO auction-related costs is the $70,000 fee paid to the third-party vendor to perform the auction. OPAE Ex. 2, at 24; Tr. III, at 123-133. If the Commission did, in fact, find OGMG/RESA’s justification for the SCO security charge – to offset the SCO auction-related costs – persuasive, then the Commission would be required to limit the amount Columbia could collect through the SCO security charge to $70,000 per year. [↑](#footnote-ref-7)
8. Section 4905.35(A), Ohio Rev. Code, provides:

No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage. [↑](#footnote-ref-8)
9. See, e.g., *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 109 Ohio St. 3d 328. [↑](#footnote-ref-9)
10. See Order, at 36. The Order, at 36-37, and the Amended Stipulation (Jt. Ex. 1, at 13 (paragraph 39)) provide that the allocation methodology for the non-residential exit be determined separately from the methodology for a subsequent potential residential exit. Thus, it is inherently unreasonable to include residential customers served by Choice suppliers in determining the non-residential allocation methodology. [↑](#footnote-ref-10)
11. Although the order seeks to measure tranche ownership “as of the date of the order going forward,” it continues to cite historical “SSO” tranche ownership. Effective with the 2012-2013 Program Year, Columbia transitioned from an SSO auction to SCO auction, whereby SCO suppliers are awarded tranches to serve Choice-eligible customers who have not selected a Choice supplier and non-Choice-eligible customers (e.g., Default Sales Service (“DDS”) customers). See Case No. 08-1344-GA-EXM (Opinion and Order, September 7, 2011). The Commission should clarify that the tranche ownership measured beginning January 9, 2013 (the date of the Order) will be such SCO trance ownership. [↑](#footnote-ref-11)
12. Consistent with this approach, if there is an SCO supplier default, but the SCO security charge account still has a remaining balance after Columbia recovers its costs, the remaining balance should be returned to the non-defaulting SCO suppliers on a proportional basis. [↑](#footnote-ref-12)