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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company For Approval of its Electric Security Plan Including Related Accounting Authority; an Amendment to its Corporate Separation Plan; and the Sale or Transfer Certain Generating Assets	Case No. 08-917-EL-SSO
and	
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan Including Related Accounting Authority; and an Amendment to its Corporate Separation Plan	Case No. 08-918-EL-SSO

REPLY BRIEF OF CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC.

JANUARY 14, 2009

TABLE OF CONTENTS

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CONSTELLATION NEWENERGY, INC.
AND
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I. *Introduction*

In accordance with the schedule issued by the Attorney Examiner in the above- styled proceeding, Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (jointly "Constellation") offer the following Reply Brief in response to the Initial Brief filed by the Columbus Southern Power Company and the Ohio Power Company (jointly "AEP"). Simply put, based on the record in the matter at bar, AEP has clearly failed to meet the statutory requirements for Commission authorization to impose a deferral (or phase-in), and has further failed to meet its statutory burden of justifying an increase in its Provider of Last Resort ("POLR") charge.

A. Deferral / Phase-In

While Section 4928.144, Revised Code allows a utility to request a deferral, the Ohio General Assembly only permits one if the Public Utilities Commission of Ohio (the "Commission") finds that the deferral meets a two-pronged test, first, that it is required to maintain rate or price stability, and second, that it is just and reasonable. AEP has offered no evidence to show that its customers need a phase-in of proposed increases in AEP's generation rates. Further, the proposed phase-in is not for all customers, but *is* available only to standard service offer ("SSO") customers. Finally, the deferral that AEP proposes to phase-in is designed to force non-SSO customers to pay the fuel costs of former SSO customers, in violation of Section 4928.02, Revised Code.

B. Proposed POLR Fee Increase

As for AEP's request to increase its POLR fee from the current level of $54 million a year to a projected level of $169 million[1] a year, the record reveals no evidence that AEP will experience increases in its cost to provide the POLR service or that AEP has any plans to enhance the current POLR service. AEP's requests that retail customers pay a projected increase of $115 million a year or some $345 million during the Electric Security Plan ("ESP") period for POLR service is based entirely on a novel theory of valuation. AEP requests that the Commission calculate the POLR fee based on a Black Scholes model's projected valuation of the POLR service as if it was a power option[2]. Senate Bill 221 did not prescribe an exact formula that must be used to calculate a POLR fee, so AEP is free to present an "option method"; however AEP bears the burden of proof[3] to establish that its option model, untried by any other

[1] AEP Exhibit 1, Testimony of David M. Roush, Exhibit DMR-5.
[2] Columbus Southern Power and Ohio Power Initial Brief, pp. 41-46.
[3] Section 4928.143 (C)(1), Revised Code.

known utility or authorized by any other jurisdiction, is not only reliable, but is just and reasonable[4].

For the legal and factual reasons detailed in Section III of this Reply Brief, it is clear that AEP has failed to meet its burden to establish its option method of pricing. Further, the great weight of the evidence in record proves that the proposed option method is unjust and unreasonable. Finally, the proposed mandatory application of POLR fee to governmental aggregation groups violates Section 4928.20 (J), Revised Code.

II. Fuel Adjustment Charge Deferrals

Section 4928.144, Revised Code establishes criteria that a utility must satisfy in requesting an order from the Commission to phase-in cost increases. If the Commission finds that a phase-in is necessary, then the Commission may authorize the utility to defer collecting authorized fees and creating a regulatory asset for subsequent collection. The portion of the statute that establishes the criteria for deferrals reads as follows:

> 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., inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. (Emphasis added)[5].

As noted in the above underlined portions of the statute, the General Assembly has provided that the decision to authorize a phase-in must come from the Commission, and to authorize a phase-in the Commission must find that a phase-in is necessary for rate or price stability for consumers. Further, the mechanics of the phase-in must meet the Commission's well-established "just and reasonable" standards.

[4] Section 4905.22, Revised Code.
[5] Section 4928.144, Revised Code.

As noted in their Initial Brief[6], AEP proposes to phase-in its Fuel Adjustment Charges ("FAC") such that only that portion of the FAC that can be added to the rates so that SSO customers have charges which in the aggregate do not exceed a 15% increase will be charged initially[7]. The remainder of the FAC revenues, which are exclusively made up of generation cost[8], will be deferred until 2012 and then charged back to all customers with carrying costs via a non by-passable deferred fuel rider during the years 2012-2018[9].

A. AEP Has Failed To Demonstrate That The Requested Deferral Is Necessary For Rate And Price Stability

As noted in the statutory language quoted above, AEP must first prove that the requested phase-in is "necessary" for rate or price stability for consumers. One would expect that AEP would present surveys, requests, customer pleas and other information showing that a price spike caused by its requested increase is of such a magnitude that customers both want and need a phase-in in order to prevent economic damage. No such evidence exists in the record. In fact, AEP in its Initial Brief notes that its Virginia affiliated utility had a 42% increase, and that level of increase did not require a phase-in[10]. Staff of the Commission ("Staff") and the Office of the Consumers' Counsel ("OCC") both strongly oppose the requested phase-in. Staff Witness Cahaan opposes any deferral or "levelizing" outside of the ESP period[11]. The same recommendation is made by OCC witness Smith, who found little value in the deferral, especially when compared with the $461 million dollars worth of carrying charges the planned phase-in would create.

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[6] Initial Post Hearing Brief, Columbus Southern Power and Ohio Power, pp. 51-56.
[7] Id. at p. 51.
[8] See Initial Brief of Constellation NewEnergy and Constellation Energy Commodities Group, pp. 6-13.
[9] Initial Post Hearing Brief of Columbus Southern Power and Ohio Power, pp.51-52.
[10] Initial Brief of Columbus Southern Power and Ohio Power, p. 51.
[11] Staff Exhibit 10, Direct Prepared Testimony of Richard Cahaan, p. 5.

When weighing the question of whether a phase-in is necessary for rate stability, the Commission must consider the financial burden of the carrying charges. AEP's proposal is not for a voluntary deferral – it requires a mandatory deferral. In essence, all standard service customers will be buying a portion of their generation on credit. Constellation Witness Fein, whose experience with deferrals extends to several open access states, testified that in Maryland and Illinois, when residential customers were given the chance to either buy generation on credit and pay the associated interest charges or pay as you go, less than ten percent (10%) selected the deferral and interest option[12].

The only justification for the deferral offered by AEP is the testimony of Mr. Baker, who indicates that the deferral will "levelize" the impact in a manner that makes sense"[13]. Examination of the "levelizing" argument shows that it fails both factually and legally. Looking first at the facts, in order to "levelize" the cost of electric service as proposed by Mr. Baker, the cost of electric service in the future would have to be going down to a degree such that by transferring part of today's cost of service cost to tomorrow a "level" charge is achieved. If the price of electric service is not going down during the deferral collection period, then the deferral only postpones the price spike to the end of the ESP period. A deferral in those circumstances would, in fact, intensify the spike in 2012 when not only will the FAC reflect the true underlying costs, but customers will start making the deferral payments. Mr. Baker was asked whether the price of power was going down in the post ESP period, and he responded that he did not know[14]. Thus, there is no evidence in the record that the proposed deferral will levelize the price of the standard service and there is a good chance that it will actually "de-levelize" the standard service

[12] Constellation Exhibit 2, Direct Prepared Testimony of David I. Fein, p. 14.
[13] Initial Brief of Columbus Southern Power and Ohio Power, p. 51; also see AEP Exhibit 2b, Direct Prepared Testimony of Craig Baker, p. 20.
[14] Tr. XI, 32, Mr. Baker indicated that if he know were power prices were going in the future he would not be sitting here on the stand.

offer price by causing a spike in 2012 when the standard service customers will be charged the full FAC charges plus the first installment of FAC deferral.

This brings us to the legal evaluation. Once again, the statutory criteria to authorize a deferral is price and rate stability. Looking at all of the charges in the aggregate, if all the phase-in does is push today's price spike off three years and then magnifies the increase by adding carrying charges, the statutory criteria is not fulfilled. Further, as noted in the underlined portion of Section 4928.144, Revised Code, the Commission must consider "price" and "rate" stability for "consumers". The legal implication of the General Assembly's choice of those words is significant. Note that the statute does not address phasing in the cost of just the standard service offer or seek stability only for the standard service customers. Instead, the phase-in is to bring stability for consumers – a term designed to include all tariff service customers. Thus, the proposed phase-in must be evaluated on its impact on all customers rather than just the standard service customers.

The AEP requested deferral is not universal; only SSO customers get the benefit of the deferral. However, when the time comes to pay the FAC deferral back, the non-SSO customers will have to make equal FAC deferral repayments as the SSO customers. Excluding the non-SSO customer from the benefit of the deferral in 2009-2011, then including them for the payment of the deferral, destabilizes the price that these shopping customers will face for electric service. Those who seek to purchase their own generation[15], engage in distributive generation[16], or merely invest in conservation, are being asked to pay more. Further, they will be making their shopping or conservation investments comparing against artificially low SSO generation prices

[15] Customers who purchase generation for a Competitive Retail Electric Supplier.

[16] Columbus Southern Power and Ohio Power offers supplemental power, back up power and maintenance power to customers who have distributive generation. See Companies' Exhibit 1, Direct Testimony of David M. Roush, Exhibit DMR-9, pp. 91-100 and Exhibit DMR-10, pp. 89-98.

in 2009-2011. This will be followed by artificially high distribution rates when non standard service offer customers are required to subsidize the generation fuel they did use in years 2012-2018. In sum, AEP choice to defer costs only for the SSO customers, but make all customers pay for that deferral will destabilize the rates and prices for shopping customers, customers investing in conservation, and customers with distributive generation.

B. The Deferral As Designed Results In Undue Discrimination, Is Anti-Competitive, And Violates The State Energy's Policy

The portion of Section 4928.144, Revised Code quoted above requires that any deferral authorized by the Commission be just and reasonable. It is unjust to administer a utility tariff service in a manner which violates a section of the Ohio Revised Code[17]. It is unreasonable to charge a customer for a service they do not take[18]. AEP's decision to structure its phase-in such that only the FAC costs are deferred and subsequently all customers pay the delayed FAC charges, violates Section 4928.02(H), Revised Code[19]. That statute, which is part of the State Energy Policy, forbids utilities from collecting for generation costs though a nonby-passable charge. AEP may in its Reply Brief claim that the language in Section 4928.144, Revised Code which says that a deferral collection is to be non-by-passable means that the statute authorizes a non-by-passable fuel charge. However, such an interpretation would violate the basic rule of statutory construction which requires that when two statutes can be read so that they do not conflict, that is the interpretation that must be applied[20]." In the matter at bar, that means that all phase-in deferral charges can be made non-by-passable, but only if the deferrals themselves are

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[17] See Cleveland, C.C. & St. L. Ry Co., etal v. Mills Bros., 101 Ohio St. 173, 128 N.E. 81 (1920).
[18] See Williams v. PUC 49 Ohio St. 2d 256 (1977) in which the Supreme Court of Ohio upheld the Commission charging directory assistance only to those who used the service to avoid undue discrimination.
[19] See Initial Brief of Constellation NewEnergy and Constellation Energy Commodities Group, p. 10 for a more complete discussion of Section 4928.02(H), Revised Code.
[20] See Mecca for Fair Govt. v. Mecca Twp. Bd. of Trustees (1997), 123 Ohio App. 3d 610, at 615 citing San Diego v. Elavsky (1979), 58 Ohio St. 2d 81, 86, 12 O.O. 3d 88, 91, 388 N.E. 1229, 1232-1233.

structured so that they are not unduly discriminatory, anti-competitive, or violate the other provisions of the State Energy Policy, including collecting fuel charges via a utility charge.

The purpose of a phase-in is to achieve price and rate stability. If the Commission decides that a mandatory phase-in is necessary, then the mechanics of such a phase-in must not be unduly discriminatory and must follow the dictates of the State Energy Policy. In the matter at bar, this could be easily accomplished by making the discount in the ESP period available to everyone if everyone was going to pay the deferral collection rider,[21] or by limiting the subsequent FAC deferral collection to just those tariff customers that received the discount.[22]

In the matter at bar, there is no factual dispute over whether the FAC is a generation expense[23] or that customers who shop during the ESP period will receive no benefit from the proposed deferral of FAC charges[24]. AEP could have deferred a portion of its distribution charges in order to keep overall rates low. Doing such would not discriminate between shopping and non-shopping customers, nor would it penalize conservation. Mr. Baker was asked on cross-examination why AEP did not defer distribution costs as opposed to just FAC charges, to which he indicated that AEP simply did not study deferring distribution costs[25]. As the Applicant, it is AEP's responsibility to present a deferral plan that just and reasonable, which AEP has failed to do. On its face, it is unjust and unreasonable to charge customers for a service they do not receive. Finally, as discussed in more detail in Constellation's Initial Brief, AEP's decision to design a deferral where only AEP's competitive generation cost are discounted, and the revenue used for the discounts is paid in part by customers that take their power supply from competitive

[21] Constellation Exhibit 2, Direct Prepared Testimony of David I. Fein, p. 13.
[22] This would not require a Section 4928.144, Revised Code deferral and would simply be accomplished via the FAC.
[23] TR. IX, 25.
[24] Id, 33.
[25] Id., 35.

retail electric suppliers, is highly anti- competitive and in direct conflict with Section 4928.02 (D), Revised Code which directs the Commission to:

> Ensure diversity of electricity supplies and suppliers, by giving consumers the effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities. (Emphasis added)

Clearly, if a utility can construct a barrier whereby consumers can only select supplies or suppliers other than the standard service if they first agree to pay a portion a portion of the utility's standard service fuel and purchased power costs; then the utility has denied customers choice. Thus the law requires that the Commission reject the portion of the Application which would permit AEP to charge non-standard service customers generation costs.

III. The POLR Increases Are Not Supported By Law Or Fact

A. Criteria For Pricing POLR Service.

In their Initial Brief, AEP claims that in accordance with Section 4928.141(A), Revised Code, it must establish a standard service offer in which all retail customers have the right to shop and the right to subsequently return to the SSO[26]. This obligation to always provide generation service is what AEP calls its POLR[27]. AEP does not cite any statutory or administrative rule authority which would dictate the criteria for pricing the POLR service, and as such feel at liberty to propose any rate design they feel has merit. The POLR pricing model AEP requests is based neither on cost of service principles for utility service as is established in Section 4909.18, Revised Code nor market rate pricing such as that established in Section 4928.142, Revised Code.

Instead, AEP relies upon an option model as the basis for its POPLR charge as outlined in the testimony of Mr. Baker. Mr. Baker supports the option model using a three step

[26] Initial Brief of Columbus Southern Power and Ohio Power, p. 41.
[27] Id.

syllogism. First, Mr. Baker analogizes the POLR service to a power option held by the customer. In financial terms the customers' rights are equivalent to a series of options on power[28]. Second, Mr. Baker states that a customer can switch from the SSO to a competitive retail supplier ("CRES") or from a CRES back to the SSO based on the relative price of power[29]. Ergo, Mr. Baker concludes that the value of a power option with a strike price of the POLR service is the value of the POLR service to the customer. Mr. Baker's syllogism is not backed up by the testimony of independent experts, examples of other utilities, or published studies which have been subject to peer review. AEP then declares that the Black-Scholes model, an options model developed in the 1970's for options trading[30], should be employed to calculate the value and thus the fee for POLR service.

Constellation agrees with AEP to the extent that customers are free to shop, and that electric distribution utilities pursuant to Sections 4928.14 and 4928.141(A), Revised Code must provide a POLR service. At this point, Constellation strongly disagrees with AEP's vision regarding the pricing and nature of its' POLR service obligation. Constellation notes that because the POLR is a utility service that pricing of the POLR must meet the "just and reasonable" standard established for all utility services under Section 4928.22, Revised Code. In addition, as the Commission stated in its FirstEnergy ESP decision Opinion and Order 08-935-EL-SSO (Dec. 19, 2008) p.8, "the Energy Policy provisions of Section 4928.02, Revised Code must also be applied when evaluating an ESP application under Section 4928.143, Revised Code." In the FirstEnergy decision cited above, the Commission turned down a request for a

[28] Initial Brief of Columbus Southern Power and Ohio Power, p. 43.
[29] Id. The Initial Brief quotes Mr. Baker as testifying that "Rational customers will exercise their rights to change providers when the economic benefits are apparent".
[30] AEP Exhibit 12.

significant increase in a POLR type fee which would be non-by-passable in part on the grounds that the proposed POLR would violate the State Energy Policy[31].

Currently, both Ohio Power and Columbus Southern Power charge a nonby-passable POLR fee. The current POLR fee established in Case No. 04-169-EL-UNC entitles a customer who shops to return to the SSO at the SSO price then being offered. The POLR fees vary by operating company and service tariff class, but center around the modest charge of one mil per kWh[32]. Thus, the total paid in POLR fees by customers today for both AEP operating companies is just $54 million a year. Applying the Black Scholes option model with modifications, AEP projects the POLR fee at $169 million[33] per year. To sustain such an increase, AEP has the burden[34] of establishing that: 1) that financially a POLR service is in essence an option; and 2) that the Black Scholes model is a fair and accurate method of pricing such an option. In addition, AEP has taken the position that the POLR should not be by-passable even for governmental aggregation, which is in conflict with the provisions of Senate Bill 221.

B. The Record Does Not Establish That The POLR Service Is Analogous To An Option

The entire basis for the proposition that a POLR fee is a generation option rests on Mr. Baker's testimony which presents the concept as a matter of logic. Thus, the record in the matter at bar is completely devoid of any empirical data to support the use of an option model. The kind of empirical data that one would expect to see to establish the premise that the POLR services should be priced based on option prices would be actual data from jurisdictions or companies that use an option model for pricing POLR service. The record reveals that both AEP Witness

[31] The POLR type fee was called the Minimum Default Service rider. See In Re FirstEnergy, Case No. 08-935-EL-SSO, Opinion and Order, December 19, 2008, pp. 26-28.
[32] AEP Exhibit 1, Direct Prepared Testimony of David Roush, DMR Ex. 9, p. 133 and DMR Ex. 10, p. 134.
[33] AEP Exhibit 1, Direct Prepared Testimony of David Roush, Exhibit DMR-5.
[34] Section 4928.143 (C) (1), Revised Code.

Baker[35] and OCC witness Medine[36] testified that they knew of no other utility or regulatory commission that uses an option model to price POLR service. Similarly, none of the other 32 expert witnesses testified about comparable pricing by another utility using option pricing for POLR service. Since it appears that AEP is going to be the first utility in country to price a POLR service based on option values, AEP must provide studies and the testimony of independent economists which verify that a POLR service is the financial equivalent of a series of power options in order to sustain a request to charge customers hundreds of millions of dollars based on that premise.

Not only was Mr. Baker's testimony that a POLR service is the financial equivalent of a series of power options not supported with empirical data, it was successfully challenged by several of the expert witnesses as to its theoretical basis. Staff witness Cahaan[37] and OCC witness Medine[38] both pointed out that while it is relatively easy to know when an option is "in the money" the same kind of price transparency is not always available for generation contracts. The Schools[39] witness Mr. Frye testified that AEP's Black Scholes model assumed that customers would trade as soon as the strike price was reached; however, a retail customer's right to leave the CRES supplier will be controlled by the supply contract it has with its CRES. Similarly, a customer on SSO may not be able to leave even if better prices are available in the market because of AEP's minimum stay tariff provisions[40]. In sum, credible challenges have been presented to Mr. Baker's syllogism that the value of the POLR service is the financial

[35] Tr. XI, 224-226.
[36] OCC Exhibit 11, Direct Prepared Testimony of Emily Medine, p. 17.
[37] Staff Exhibit 10, Direct Prepared Testimony of Richard Cahaan, p. 7.
[38] OCC Exhibit 11, Direct Prepared Testimony of Emily Medine, p. 16.
[39] The Direct Prepared Testimony of Mark R. Frye, designated as Schools' Exhibit 1, was sponsored by the Ohio Association of School Business Officials, the Ohio School Boards Association and the Buckeye Association of School Administrators.
[40] Schools' Exhibit 1, Direct Prepared Testimony of Mark Frye, p. 8.

equivalent of an option. Thus, the Commission should find that AEP has not met its burden as to the basic premise for using an option model to price POLR utility service.

C. The Accuracy Of The Black Scholes Model Has Not Been Proven

Assuming the Commission was to adopt the premise that an option model is an accurate method of determining the POLR fee, AEP would still have to demonstrate that its choice of the Black Scholes model and the inputs it uses for that model will accurately forecast option prices. Mr. Baker testified that the Black Scholes was a differential equation[41] and that it has five inputs for option trading that were modified to fit pricing a POLR[42]. Thus, for example instead of the market price which would be used in pricing an option, AEP substituted the MRO price it calculated in this case; and in lieu of an option's strike price the price of the standard service was substituted[43]. OCC witness Medine challenged these assumptions including the use of the LIBOR rate for the cost of money[44].

The burden is on AEP to establish that the Black Scholes model with its substitutions is an accurate projection of option prices. Once again we are left with a record in which AEP has presented a theory, not supported with empirical data or the testimony of independent experts. Similarly, the record contains no comparison of how accurate the Black Scholes model with AEP's modifications is at predicting actual puts and calls for generation. Since the Black Scholes model was not designed to price POLR service and is being adapted to do[45], and the fact that no other utility or jurisdiction uses Black Scholes for this model, AEP simply has to have more than the testimony of an in-house executive to sustain its burden. This is especially so

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[41] Tr. XI, 39.
[42] AEP Exhibit 2A, Direct Prepared Testimony of Mr. Baker, p. 32.
[43] Id.
[44] OCC Exhibit 11, Direct Prepared Testimony of Emily Medine, pp. 15-17.
[45] AEP Exhibit 12. AEP Ex. 12 recites that the purpose of the Black-Scholes Model was developed for options trading. AEP Witness Baker testifies in Exhibit 2 the substitutes that were made to the five standard Black-Scholes inputs.

when the record includes testimony from other experts which challenge key assumptions made by Mr. Baker.

D. If The POLR Service Is Priced Like An Option It Should Be By-passable.

Staff witness Cahaan testified that the POLR fee was designed to cover the risk of a customer returning to standard service from a competitive supplier[46]. If AEP is going to drastically increase the POLR fee, then witness Murphy suggested that AEP allow customers to avoid the POLR fee and return at market as was done by Duke and FirstEnergy[47]. This position was also supported by witnesses Frye for the School, Cahaan for the Staff and Mr. Fein for Constellation. Mr. Fein further pointed out that because competitive suppliers have to provide both capacity and reserve capacity to meet the needs of customers for whom they provide generation, to the degree that POLR fees have capacity and other generation expenses in them and are not by-passable, the retail customer is at risk of paying twice for certain generation expenses. Mr. Fein also points out that in other open access jurisdictions, the POLR fee is one paid by the returning customer to reflect the cost of electric power that is procured at the time when the customer returns[48].

While AEP's request that the Commission make the POLR fee non by-passable for some customers does not violate Senate Bill 221 per se, such is not the same for governmental aggregation customers. Revised Code Section 4928.20 (J), Revised Code grants governmental aggregation groups the right upon notice to avoid any standby fee so long as the governmental aggregation group commits in advance that if the governmental aggregation customers return to the SSO they shall pay market rates. Thus, even if the Commission does not increase the POLR as requested by AEP, the Commission statutorily cannot accept a tariff from Columbus Southern

[46] Tr. XIII, 29-30.
[47] IEU Exhibit 1, p. 8.
[48] Constellation Exhibit 2, p. 10.

Power or Ohio Power that does not permit governmental aggregation customers to opt out of the POLR upon a notice issued under Section 4928.20(J), Revised Code.

AEP in its Initial Brief responds to the argument of several parties that it cannot have a completely nonby-passable POLR charge by citing the provision of Section 4928.14, Revised Code which states that a customer returning upon the failure of that customers' CRES provider shall return to the utility at the standard service offer[49]. AEP draws the inference from that language that there can be only one POLR rate. This argument fails because contrary to the inference AEP draws from the statutory language, the language does not appear to bar multiple pricing provisions for returning customers in a POLR tariff. The legislative history further substantiates this view for in Senate Bill 221, Section 4929.14, Revised Code was amended to read as follows (new language underlined):

> 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 [removed the word "filed"] <u>under [removed the words division (A)] sections 4928.141, 4928.142, and 4928.143 of the Revised Code</u> until the customer chooses an alternative supplier.

The additional wording replaces what may have been arguably a requirement for a single default POLR rate with generation to be priced at market as called for in division A of Section 4928.14, Revised Code. Senate Bill 221 however removed division A entirely and replaced it with the above underlined language establishing pricing of the POLR rate in accordance with the full ESP or Market Rate Offer plan. Even if there was an inference that there could only be one POLR price under Section 4928.14, Revised Code that would be overridden by the fact that Senate Bill 221 specifically provides for an alternative POLR pricing for governmental aggregation customers. Section 4928.20, Revised Code creates the right of a government aggregation group

[49] Initial Brief of Columbus Southern Power and Ohio Power, p. 48.

to avoid standby charges such as a mandatory POLR charge if a market based SSO return price is the charge for such returning customers. Thus, it is clear that the legislative intent was to not create a barrier for governmental aggregation by virtue of a POLR fee. The governmental aggregation group is free to select to pay the POLR and have POLR price protection on return, or avoid the POLR fee and take the risk.

In short, any POLR increase approved by the Commission must be just and reasonable. With no evidence of an increase in shopping, and no evidence of an increase in the cost of AEP to supply the POLR, the requested POLR increase appears to be little more than a $345 million dollar windfall to AEP. As for the option model proposal for pricing the POLR, it is a novel idea which AEP simply failed to support on the record. AEP's request to make the POLR fee non-by-passable to governmental aggregation for an aggregation group that has filed a notice under Section 4928.20 (J), Revised Code is patently illegal and must be rejected. The logic that supports making the POLR fee by-passable for government aggregation – namely the removal of potential barriers to the efficiently purchasing generation – applies equally to non-aggregated shopping customers. Thus, the Commission should make the POLR avoidable for all shopping customers.

IV. Conclusion

The record in the matter at bar is clear. AEP has not met the statutory requirement that a phase-in is needed to stabilize prices. Further, the proposed deferral mechanism is both unjust and unreasonable because it discriminates against customers who purchase non-standard service generation, is anti-competitive, and violates the state Energy Policy. Similarly, it is unreasonable to increase the POLR fee by 742% for Columbus Southern and 143% for Ohio Power[50] when no program enhancements are planned and no evidence has been presented demonstrating that the

[50] Schools' Exhibit 1, Direct Prepared Testimony of Mark Frye, p. 6.

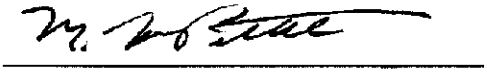
proposed cost increases are necessary to maintain the current service. Given these truths about the Application, it is not surprising that of the twenty four (24) parties other than the Applicant filing trial briefs - representing a broad range of interests including the Staff, the OCC, environmental groups, industrial trade associations, individual commercial and industrial customers - none support the phase-in or the POLR increase.

For all reasons presented in the foregoing Reply Brief and in its Initial Brief, Constellation requests that the Commission amend the Application as follows:

- **Reject** AEP's proposed FAC deferral plan
- **Reject** the proposed increase to the POLR fee.
- **Reject** AEP's proposed restrictions on retail customers' direct participation in PJM Demand Response and Interruptible programs; and
- **Approve** AEP's proposal to seek power and energy in the competitive wholesale market through an open, non-discriminatory, and transparent competitive solicitation process to meet certain needs in 2009, 2010, and 2011.

Respectfully Submitted,

CONSTELLATION NEWENERGY, INC.
CONSTELLATION ENERGY COMMODITIES GROUP, INC.

By: 

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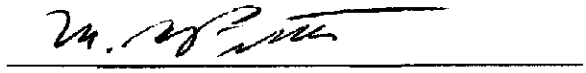
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 14th day of January, 2008 by regular U.S. mail, postage prepaid, or by electronic mail, upon the persons listed below.



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