BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	))))	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders.	))))	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders.	)))	Case No. 10-344-EL-ATA
In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4921-EL-RDR

INITIAL POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
THE APPALACHIAN PEACE AND JUSTICE NETWORK
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

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November 10, 2011

TABLE OF CONTENTS

PAGE

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In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	))))	Case No. 10-2376-EL-UNC
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In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4920-EL-RDR
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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility customers, the Appalachian Peace and Justice Network ("APJN"), a not for profit organization whose members include low-income customers in southeast Ohio, and Ohio Partners for Affordable Energy ("OPAE"), an Ohio non-profit corporation with a stated purpose of advocating for affordable energy policies for low and moderate income Ohioans (collectively "Customer Parties"), submit their initial brief in the above-captioned proceedings. In these proceedings, Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP Ohio" or "Companies") seek approval of their second standard service offer ("SSO") which takes the form of an Electric Security Plan ("ESP"). The Companies have presented an ESP that differs from the ESP found in their Application, filed on January 27, 2011. The ESP plan that the Companies seek approval of is one that was formed through a stipulated agreement with a number of intervenors in these proceedings[1] – where none of the intervenors represent residential customers. The stipulating parties have asked the Public Utilities Commission of Ohio ("PUCO" or "Commission") to approve the Stipulation, and the ESP as modified by the Stipulation.

[1] Stipulation and Recommendation (September 7, 2011) ("Stipulation").

In order to approve a stipulation, the Commission must find that the stipulation meets a three-part test.[2] First, the stipulation must be the product of serious bargaining among capable, knowledgeable parties. Second, the stipulation must benefit customers and the public interest. Third, the stipulation must not violate any legal or regulatory principle. As the Customer Parties will show, the Stipulation does not meet this test, and the Distribution Investment Rider ("DIR") provision of the Stipulation does not meet statutory requirements. This DIR is a significant provision of the ESP which will allow the Companies to impose over $300 million in distribution rate increases over the term of the ESP, with a large proportion of those increases being allocated to residential customers. The Commission should reject the Stipulation. The effect of the Commission rejecting the Stipulation will be that the Companies' current ESP will continue until the Commission approves either a new ESP proposal or a market-rate offer proposal from the Companies.[3]

II. BACKGROUND

On January 27, 2011, AEP Ohio filed its second SSO application, seeking approval of the Application under R.C. 4928.143. The ESP proposed in the Application contained provisions regarding the Companies' distribution service, economic development and job retention, the alternative energy resource requirements of R.C. 4928.64, the energy efficiency requirements of R.C. 4928.66, low-income customer

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[2] *Consumers' Counsel v. Pub. Util. Comm'n*. (1992), 64 Ohio St.3d 123, 126 ("*Consumers' Counsel*").

[3] R.C. 4928.143(C)(2)(b).

assistance and other matters.[4] The Companies recognized, however, that "the primary focus of the application concerns SSO pricing issues."[5]

Approximately 28 parties were granted intervention in the ESP cases.[6] On July 25, 2011, they filed the testimony of a total of 29 witnesses either opposing or pointing out inadequacies in the Application. In addition, on August 4, 2011, the PUCO Staff filed the testimony of 16 witnesses which addressed issues in the Application that the PUCO Staff either did not support or proposed to be modified.[7]

At about the same time, the Companies, the intervenors, and PUCO Staff entered into negotiations regarding a settlement of the ESP cases. The settlement discussions also included matters that were being addressed in other cases before the PUCO: the proposed merger of CSP and OP (Case No. 10-2376-EL-UNC); the CSP and OP emergency curtailment riders (Case Nos. 10-343-EL-ATA and 10-344-EL-ATA); the Commission's review of OP and CSP capacity charges (Case No. 10-2929-EL-UNC); and the mechanism by which CSP and OP may collect deferred fuel charges (Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR).

During the course of the negotiations, it became apparent to several intervenors, including the Customer Parties, that the framework of the proposed settlement would not result in an acceptable resolution of the cases in light of the significant rate increases that would likely be imposed upon customers. These intervenors expressed their desire to no longer participate in the negotiations at various stages of the process.

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[4] See Application at 3.

[5] Id.

[6] See Entry (March 23, 2011) at 4; Entry (July 8, 2011) at 2-3.

[7] Tr. X at 1714.

On September 7, 2011, a Stipulation and Recommendation, signed by the Companies, the PUCO Staff and 18 intervenors, was docketed in these proceedings.[8] Among other things, the Stipulation did the following:

- Ostensibly removed from the Companies' ESP several non-bypassable riders that were proposed in the Application (though non-cost based generation rate increases were proposed).

- Retained the rate design proposed in the Application, with changes affecting demand-metered customers and customers in rate classes GS-2, GS-3, and GS-4. The $8.21/kw/month interruptible credit for existing interruptible customers was also retained.

- Created a shopping credit of $10/MWh for the first 1,000,000 MWh of usage per calendar year for schools in rate classes GS-1 and GS-2.

- Established a non-bypassable Generation Resource Rider ("GRR") as a placeholder rider, under which the Companies may seek to collect rate increases from customers for the undefined costs for their Turning Point solar project and their new Muskingum River 6 generating plant.

- Will allow 427 customers[9] who have waived the Provider of Last Resort ("POLR") charge and who return from shopping during the ESP period to be served at the SSO rate.

- Will impose automatic non-cost based generation rate increases upon customers over the term of the ESP targeted to provide the Companies with an average rate of $0.0245/kWh starting in January of 2012, $0.0257/kWh in January of 2013 and $0.0272/kWh from January of 2014 through May 31, 2015 based upon the billing determinants filed by the Companies in these proceedings.

- Set the return on equity threshold for the Companies' significantly excessive earnings test at 13.5%.

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[8] The dockets discussed above were consolidated "for the purpose of considering the Stipulation" by Entry dated September 16, 2011.

[9] Tr. VI at 913.

- Established a DIR based on *post-2000 investment*, with the ability to collect rate increases from customers totaling $86 million in 2012, $104 million in 2013 and $124 million in 2014 and the first five months in 2015.

- Continued the Enhanced Service Reliability Rider "as proposed" which collects 62 cents per MWh[10] for vegetation management, and established a Storm Damage Recovery mechanism with a baseline of $5 million.

- Established a set-aside of capacity (based on total kWh retail sales), with pricing based on PJM's reliability pricing model ("RPM"), that would be available to competitive retail electric service ("CRES") providers on a first-come, first-served basis as follows: 21% of AEP Ohio's total retail load in 2012, 29% in 2013 until securitization is completed when it will become 31% and 41% in 2014 through the first half of 2015.

- Established a competitive bidding process by which the Companies will meet their SSO obligations for delivery from June 1, 2015 through May 31, 2016.

- Provided $3 million annually during the ESP term for the Partnership with Ohio initiative that benefits low-income customers, so long as AEP Ohio's return on equity exceeds 10% for the prior calendar year.

- Provided $5 million annually (which shall not be collected from customers) during the ESP term for the Ohio Growth Fund initiative for the benefit of economic development, so long as AEP Ohio's return on equity exceeds 10% for the prior calendar year.[11]

The Customer Parties, having declined to sign the Stipulation, are primarily concerned that the Stipulation will increase the rates that the Companies' 1.2 million residential customers will be charged, with little or no cost justification. The premise for increasing the rates of residential consumers seems to be about venturing down the "glide path" to competition. Under the Stipulation, CSP residential customers' rates will

[10] Tr. XI at 1922.

[11] See generally Stipulation at 4-28.

increase 5.68% for winter usage and 7.89% for summer usage over the term of the ESP, while OP residential customers' rates will increase approximately 9.23% over the term of the ESP.[12] In addition, the Stipulation significantly reduces current funding levels for low-income programs at a time when customers can most use assistance in this struggling economy. Further, the Stipulation does not meet the three-prong test for stipulations in PUCO proceedings recognized by the Supreme Court of Ohio.

III. STANDARD OF REVIEW

The standard of review for considering a stipulation has been discussed in a number of Commission cases and by the Ohio Supreme Court. As the Ohio Supreme Court stated in *Duff*:

> A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.[13]

The Court in *Consumers' Counsel* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?[14]

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[12] See Tr. I at 59-60, 61.

[13] *Duff v. Pub. Util. Comm*. (1978), 56 Ohio St.2d 367.

[14] *Consumers' Counsel*, note 2 supra.

In evaluating settlements in all EDUs' ESP cases, the Commission should recognize the asymmetrical bargaining positions of the parties. As Commissioner Roberto noted in FirstEnergy's initial ESP case filed in 2008:

> When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.
>
> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully *all terms and conditions of this stipulation*.[15]

[15] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Finding and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (March 25, 2009) at 1-2 (citations omitted, emphasis added).

Commissioners Centolella and Lemmie stated similar concerns.[16] As reflected in Commissioner Roberto's opinion, the bargaining position of an electric distribution utility relative to other parties in an ESP proceeding was strengthened by the ability of the electric distribution utility to reject the results from a fully litigated SSO proceeding. This should not be overlooked.

The ultimate question to be answered is whether, in light of the record, the Stipulation is reasonable and complies with Ohio law. As the Customer Parties show, the Stipulation does not meet this standard.

In addition, the Commission must ensure that the Stipulation meets provisions of the Ohio Revised Code relevant to ESPs. Some of these provisions are discussed herein as part of the three-prong test, while others are discussed on a stand-alone basis.

IV. ARGUMENT

A. The Commission Should Reverse Evidentiary Rulings That Allowed Inappropriate Information into the Record.

The PUCO's rules allow a party to seek Commission reversal of an Attorney Examiner's ruling by, inter alia, "rais[ing] the propriety of that ruling…in its initial brief,…"[17] Throughout the course of the public evidentiary hearing in this proceeding, the Attorney Examiners made oral rulings that permitted extraneous information into the

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[16] Id., Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring (March 25, 2009) at 2 ("need to be taken into account when considering the weight to be given to this stipulation" and "The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of issues.").

[17] Ohio Adm. Code 4901-1-15(F).

record through the testimony of lay[18] and expert witnesses, despite parties' well-founded motions to strike. In particular, there were a number of rulings by the Attorney Examiners that inappropriately allowed information into the record which pertained to attempts by the Companies and the PUCO Staff to show that the DIR complies with the statutory requirements of R.C. 4928.143(B)(2).

It is these oral rulings denying motions to strike portions of the Companies' and the PUCO Staff's rebuttal testimony which the Customer Parties challenge, consistent with their right to do so under Ohio Adm. Code 4901-1-15(F).[19] Such rulings individually and taken as a whole were unreasonable[20] and prejudiced[21] the Customer Parties because the information permitted into the record was largely hearsay and, due to the rulings at issue, that information may now wrongly be relied upon by the PUCO in reaching its decision. Absent such information, the Commission could only come to the conclusion that the DIR is not permissible under the modified ESP plan proposed under the Stipulation.

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[18] For example, lay witnesses Honsey and Jones were permitted to provide testimony pertaining to opinions and statements of other Stipulating parties, when they had no first-hand knowledge of such and when the information was clearly hearsay. See OCC Motion to Strike, Tr. IV at 483-490, denied Tr. IV at 490; OCC Motion to Strike, Tr. II at 1627-1630, denied Tr. II at 1631.

[19] The propriety of oral rulings made during a public hearing may be raised, notwithstanding a parties' election not to take an interlocutory appeal. OCC elected not to take an interlocutory appeal of such matters.

[20] *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (defining abuse of discretion as "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable").

[21] See for example *State v. Sorrels* (1991), 71 Ohio App.3d 162, 165 (reliance on hearsay statements in determining guilt was prejudicial, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 106 for the proposition that for error to be harmless it must play no role in the decision).

1. The Attorney Examiners inappropriately denied motions to strike portions of rebuttal testimony that used information and data contained in a stipulation as precedent despite the stipulation's prohibition of such uses (Motion to Strike Denied at Tr. XII at 1990-1991; Tr. XIII at 2373).

In two separate instances, the Attorney Examiner, over objections by OCC and others, permitted parties in this case to present testimony citing to and using the very terms of a stipulation approved by the PUCO in another proceeding.[22] In particular, Companies' Witness Hamrock and Staff Witness Baker, in their rebuttal testimony, presented information pertaining to a Stipulation entered into by the Companies, PUCO Staff, and OCC, and approved by the Commission in Case No. 09-756-EL-ESS ("09-756").[23]

Mr. Hamrock in his rebuttal testimony at page 3, lines 18-22, refers to the Commission's rulings in that proceeding where the PUCO approved reliability standards for the Companies using a customer average interruption duration index ("CAIDI") and the system average interruption frequency index ("SAIFI"). Mr. Hamrock stated that those standards "resulted from a settlement agreement between the Commission Staff, the Ohio Consumers' Counsel, and AEP Ohio."[24] Mr. Baker in his rebuttal testimony similarly testifies that OCC was involved in the reliability standard setting process and in

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[22] See Tr. XII at 1990-1991; Tr. XIII at 2373.

[23] *In the Matter of the Establishment of 4901:1-10-10(B) Minimum Reliability Performance Standards for Columbus Southern Power Company and Ohio Power Company*, Case No. 09-756-EL-ESS, Stipulation and Recommendation (July 22, 2010) ("09-756 stipulation"). That stipulation was admitted into evidence as OCC Exhibit 11. The Commission approved the stipulation without modification by Opinion and Order issued on September 8, 2010.

[24] Companies Ex. 19 at 3, lines 21-22.

fact "signed a joint stipulation recommending reliability standards for the AEP Companies."[25]

OCC moved to strike both testimonies in a timely manner at the evidentiary hearing.[26] The Attorney Examiners nonetheless denied both motions to strike.[27] The Attorney Examiner in her initial ruling with respect to Mr. Hamrock's testimony concluded that "[w]e note that the Commission respects stipulations but is considering the CAIDI and the SAIFI established in that stipulation in this case and finds it to be appropriate."[28]

As OCC explained in its Motion to Strike, the 09-756 stipulation contains the following language:

> Except for purposes of enforcement of *the terms of this Stipulation, this Stipulation, the information and data contained therein or attached, and any Commission rulings adopting it, shall not be cited as precedent in any future proceeding for or against any party* or the Commission itself. The Parties' agreement to this Stipulation in its entirety shall not be interpreted in a future proceeding before the Commission as agreement to any isolated provision of this stipulation. More specifically, no specific element or item contained in or supporting this Stipulation shall be construed or applied to attribute the results set forth in the Stipulation as the results that any party might support or seek but for this Stipulation.[29]

The "information or data" that was contained in the 09-756 stipulation included the SAIFI and the CAIDI indices that were agreed to for circuit performance of the distribution system. The "Commission ruling adopting it" refers to the PUCO's Order

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[25] Staff Ex. 5 at 5.

[26] See Tr. XII at 1980-1982 (moving to strike Rebuttal Testimony of Mr. Hamrock); Tr. XIII at 2369-2370 (moving to strike Rebuttal Testimony of Mr. Baker).

[27] Tr. XIII at 2373; Tr. XII at 1990-1991.

[28] Tr. XII at 1991. The ruling denying OCC's motion to strike the Rebuttal Testimony of Mr. Baker was not explained. Tr. XIII at 2373.

[29] OCC Ex. 11 at 2 (emphasis added).

accepting the 09-756 stipulation. This is exactly what Mr. Hamrock and Mr. Baker refer to in their rebuttal testimony. These witnesses were trying to establish in the record the information or data (the stipulation's reliability standards) and the Commission's rulings adopting it (approving the stipulation and the underlying standards). Both the PUCO Staff and the Companies cite the stipulation as precedent in this proceeding for standards developed and cite OCC's agreement to the reliability standards against OCC.

The ruling on OCC's motion to strike was unreasonable and unjustified. If this ruling is permitted to stand, the Customer Parties will be prejudiced. Moreover, allowing a PUCO-adopted stipulation to be used in violation of the terms expressly agreed to in the stipulation will have a chilling effect on the willingness of parties to enter into future negotiations. If the Commission wishes to encourage future settlements and encourage respect for terms of past settlements, it must treat a breach of the settlement as a serious matter.

The importance of using the standards and the Commission's ruling adopting the standards as precedent cannot be understated. Under R.C. 4928.143(B)(2)(h), before the Commission can approve provisions regarding distribution infrastructure and modernization, as part of an ESP, the PUCO "shall examine the reliability of the distribution system" and ensure that customers and the EDU's expectations are aligned and that the EDU is placing sufficient emphasis on and dedicating sufficient resources to the reliability of their system.

OCC Witness Duann and IEU Ohio Witnesses Bowser and Murray testified that the Commission had not examined the reliability of the distribution system, nor made the determination that the expectations of the customers and the Companies were aligned.[30] The rebuttal testimony presented by Messrs. Hamrock and Baker is the only evidence put forth by the signatory parties to suggest that R.C. 4928.143(B)(2)(h) has been complied with.

Notwithstanding the fact that there is no evidentiary proof as required under R.C. 4928.143(B)(2(h), it is important to recognize that this was an improper use of the 09-756 stipulation, despite the false protestations otherwise. Both the PUCO Staff and the Companies through their attorneys claim that they are not relying upon the content of the stipulation. For instance, Mr. Satterwhite uses his oft-favored "context" argument and claims:

> The motion to strike lines 18 to 22 [sic] simply provides context that the staff does interact. The Commission or the companies are not trying to rely on what's within the stipulation. Within the stipulation of the testimony we are not relying on the SAIFI or CAIDI or anything in there. It's simply an example of the interaction that goes on every day here at the Commission.[31]

Mr. Margard, the PUCO Staff's counsel, is also in step with the Companies' counsel, and claims that "the stipulation is not being relied upon in any manner or cited as precedent or for precedential value."[32] Rather it is being used as "an indication of the process that resulted in the reliability standards approved by the Commission."[33] But these words ring hollow.

More importantly they are inconsistent with the ruling by the Attorney Examiner that "[the Commission] is considering the CAIDI and the SAIFI established in that

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[30] See OCC Ex. 1 at 31-32; IEU-Ohio Ex. 8 at 7; IEU-Ohio Ex. 9A at 22.

[31] Tr. XII at 1983.

[32] Tr. XIII at 2372.

[33] Id.

stipulation in this case and finds it to be appropriate."[34] If the Commission was using the information for the reasons suggested by both the Companies' counsel and PUCO Staff counsel, then the CAIDI and SAIFI values agreed to would not be a necessary part of the record and would not be part of the Commission's consideration.

If the Commission "respects stipulations" as proclaimed by Attorney Examiner See,[35] then it should not sanction the use of the 09-756 stipulation under the terms ordered in this proceeding. Using the CAIDI and the SAIFI standards established in the 09-756 stipulation is a direct violation of the plain language of the stipulation agreement that was expressly agreed to by OCC, the Companies, and the PUCO Staff. And that stipulation, as a whole, was adopted by the PUCO without amendment.

Sound regulation should not discourage dispute-resolution through settlements. Litigation can be expensive and without settlements dollars may have to be diverted to pay for the time of lawyers, consultants, and staffs. These expenditures often eventually flow through to the electric bills and tax bills of Ohio citizens. Settlement may also bring about regulatory certainty that may otherwise be delayed until the termination of all litigation. Thus, because there is the potential for cost savings and regulatory certainty, the PUCO should not discourage settlements.[36]

If parties to a settlement are not assured that the terms of the settlement agreement, agreed to and eventually approved by the PUCO, will be held inviolate,

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[34] Tr. XII at 1990-1991.

[35] Id. "*We note that the Commission respects stipulations* but is considering the CAIDI and SAIFI established in that stipulation in this case and finds it to be appropriate." (Emphasis added).

[36] This is not meant to imply that every settlement is in the public interest and should be approved. For instance in the case at hand, the settlement fails to satisfy at least two of the three prong criteria. The Commission must fulfill its duty to evaluate the settlement to determine whether, among other things, it is in the public interest.

parties will not be inclined to sign onto settlements. The Attorney Examiner's ruling strikes at the very heart of the 09-756 stipulation and ignores one very essential term of that stipulation, and indeed all stipulations – the stipulation cannot be used as precedent. This will have a chilling effect on parties' willingness to enter into a settlement agreement. The Attorney Examiner's ruling should be overturned.

2. The Attorney Examiners inappropriately denied motions to strike rebuttal testimony pertaining to advice of the Companies' counsel received by Mr. Hamrock and subsequently erred in precluding cross examination on the same. (Motion to Strike denied at Tr. XII at 1990-1991, Rulings on Cross at Tr. XII at 2007-2013).

Mr. Hamrock testified, at page 3 lines 5-13, that, based on advice of counsel, there is a separate basis (R.C. 4928.143(B)(2)(d)) under the ESP statutes for approving the DIR.[37] He also testified that, under advice of counsel, other statutory provisions (R.C. 4928.143(B)(2)(h)) allow investment for distribution infrastructure.[38] Finally, he concluded that the factors required under R.C. 4928.143(B)(2)(h) were satisfied by the Stipulation and AEP Ohio.[39] On cross-examination Mr. Hamrock admitted that the underlying statutory basis presented in his testimony was based on counsel's advice and reflected that advice.[40]

OCC moved to strike the testimony of Mr. Hamrock (Tr. XII at 1971-1975) on a number of grounds. First, OCC argued that Mr. Hamrock, as a non-lawyer, was not

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[37] Companies Ex. 19 at 3.

[38] Id.

[39] Id.

[40] Tr. XIII at 2013.

qualified to present a legal opinion.[41] Second, OCC argued that the advice of counsel given to Mr. Hamrock is hearsay.[42] Finally, OCC advised that in an earlier discovery request,[43] when asked about the statutory basis for approval of the DIR, the Companies had only indicated R.C. 4928.143(B)(2)(h) as authority and had not relied upon R.C. 4928.143(B)(2)(d).[44] Because the Companies did not seasonably supplement their response when they learned that the response was incorrect or deficient, the Companies failed to comply with Ohio Adm. Code 4901-1-16(D)(2).[45] For this reason, OCC argued, the Companies should be estopped from presenting this alleged additional statutory basis in filed testimony. OCC's motion to strike was denied.[46]

When OCC attempted to cross-examine Mr. Hamrock specifically with respect to the advice of counsel (Tr. XII at 2006-2013), there were repeated rulings made by the Attorney Examiner that prevented OCC from conducting such cross-examination. For example, when OCC inquired into how the advice was conveyed to Mr. Hamrock, objections to OCC's cross were sustained, apparently based in part on assertion of attorney-client privilege by the Companies' attorney.[47] Attorney Examiner See in fact, indicated her disagreement with OCC's assertion that attorney client privilege had been waived by the submission of testimony and this appears to be the basis for restricting

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[41] Id. at 1971-1972.

[42] Id. at 1972-1974.

[43] OCC Ex. 9 (Companies' response to OCC INT-200, Eighth Set).

[44] Tr. XII at 1974-1975.

[45] Id.

[46] Id. at 1990.

[47] Id. at 2013.

OCC's cross-examination of Mr. Hamrock in this area.[48] This ruling was in error and contrary to Ohio law.

Ohio Rule 501 declares that privilege shall be governed by statute or principles of common law, interpreted by the courts in Ohio in "light of reason and experience." The Ohio statute on privilege is R.C. 2317.02. As interpreted by the Ohio Supreme Court, the statute "clearly enumerates the means by which a client may waive the statutory attorney-client privilege: by express consent or by voluntarily testifying on the same subject."[49] R. C. 2317.02(A)(1) explicitly states that "if the client voluntarily testifies or is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject." Here the client, the Companies, waived the privilege when they presented the advice of counsel in the filed testimony of Mr. Hamrock.

Allowing such testimony to come in, and restricting cross-examination on the basis of a privilege, causes OCC to be denied the opportunity to cross-examine both the declarant (the attorney) – whose out of court advice is now part of the record upon which the Commission will base its decision – and the witness on the stand. The effect of the hearsay rule is to require that proof of some fact at trial come from a witness with personal knowledge of the fact while testifying at trial. In this way, whether the fact is true can best be determined because the person who asserted it will be present, and their memory, perception, and honesty can be evaluated. As OCC argued at the hearing,[50] counsel's out of court statements were not made under oath and his credibility cannot be

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[48] Id. at 2008.

[49] *Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487, at ¶ 12.

[50] Tr. XII at 1973-1974.

evaluated at the hearing because Mr. Hamrock's counsel is not subject to cross-examination. The absence of an opportunity to cross-examine the source of the information makes it inherently unreliable.[51] It should not have been permitted into the record.

The effect of the dual rulings is, on one hand, to allow the lay testimony that is a legal opinion to come into the record, while at the same time, deny cross-examination intended to examine the foundations for such an opinion, because said opinions were obtained on the advice of counsel. This creates a dangerous new precedent. Any lay witness could testify by offering what is essentially a legal opinion and because they obtained that information from their attorney, they will not have to answer any probing questions that form the basis of their legal opinion. The prefatory phrase "upon the advice of counsel" will be used to shield any lay witness from probative examination. This was an error that the Commission should fix.

3. The Attorney Examiners inappropriately denied motions to strike rebuttal testimony pertaining to the results of 2009, 2010, and 2011 surveys of the Companies' customers pertaining to their reliability expectations for the future. Such testimony was hearsay and not properly within the business records or public records exception to hearsay. (Motion to strike denied at Tr. XII at 1986; Tr. XIII at 2367-2368).

Both Mr. Hamrock and Mr. Baker provided information in their testimony that conveyed AEP companies' customer survey results.[52] Mr. Hamrock testified as to the conclusions of several years' worth of surveys where customers' reliability expectations

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[51] See, e.g., *Tk-7 Corporation v. Estate of Batrbouti*, 993 F2d 722, 732 (10th Cir. 1993) ("Hearsay is normally not permitted into evidence because the absence of an opportunity to cross-examine the source of the hearsay information renders it unreliable").

[52] See Staff Ex. 5 at 4, lines 19-23; Companies' Ex. 19 at 4, lines 15-21.

were being discussed.[53] Mr. Baker provided general information that unidentified "survey results" indicated that a high percentage of AEP Ohio customers were satisfied overall with the service reliability provided. [54] It is assumed that the testimony on surveys will be used to establish that customer expectations are aligned with the distribution utility's expectations as R.C. 4928.143 requires.

OCC moved to strike such testimony from the record for both Mr. Hamrock and Mr. Baker. OCC's motion was based on the premise that the survey results amounted to hearsay. Hearsay is a statement,[55] other than one made by the declarant[56] while testifying at the trial, offered in evidence to prove the truth of the matter asserted.[57] Hearsay is generally not admissible at an evidentiary hearing.[58] Under the Ohio Rules of Evidence, there are statements which are not hearsay including prior statements by witnesses and admissions by party opponents. There are also hearsay exceptions which allow hearsay to be admitted into the record.

Here, the Companies and the PUCO Staff did not dispute the information was hearsay, but argued that it qualified as an exception to hearsay. The Companies argued the surveys fell within exception 803(6), the "business records" exception.[59] The Staff argued that the survey information qualified as an exception to hearsay under the public

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[53] Companies' Ex. 19 at 3.

[54] Staff Ex. 5 at 4.

[55] A "statement" is an oral or written assertion or non-verbal conduct of a person, if it is intended by the person as an assertion. Rule 801 (A).

[56] A declarant is a person who makes a statement. Rule 801(B).

[57] See Ohio Rules of Evidence Rule 801.

[58] See Ohio Rules of Evidence Rule 802.

[59] See Tr. XII at 1988.

records exception of Rule 803(8).[60] Attorney Examiner See denied OCC's motion to strike but provided no basis for her ruling.[61]

The ruling permitting the survey information to be included in the record was in error and caused prejudice to OCC. As explained by OCC, neither Rule 803(6) nor 803(8) provides a proper basis to include such information in the record.

Under the business records exception to hearsay, business records are accepted at face value because the rules of evidence assume they are probably accurate if a business accumulates and relies on the information as part of its regular operations and a foundation witness with knowledge or custodian can so testify. The rationale for the rule, however, does not extend to statements contained in a business record made by someone who was not part of the business.[62] Rule 803(6) and (8) are designed to permit records to be admitted, not to allow hearsay testimony regarding the content of the records not introduced. This is especially true if the witness is neither the custodian of the records nor someone qualified. Neither Mr. Hamrock nor Mr. Baker attempted to claim such status as custodians or being otherwise qualified to present such records.

And these were statements made by 500 survey respondents, not by someone who was part of the Companies' business. Moreover, documents prepared in anticipation of litigation are generally considered not within the scope of this rule because they were

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[60] Tr. XIII at 2372.

[61] Tr. XII at 1986; Tr. XIII at 2367-2368.

[62] *United States v. Vigneau*, 187 F.3d 70, 75 (1st Cir. 1999), cert. denied, 120 S.Ct. 1200 (2000) ("*Vigneau*"); *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000) ("*Santos*").

created for a purpose outside the regular operation of the business.[63] These documents containing survey results were prepared in anticipation of litigation.

In order to qualify under the public records exception to hearsay, it must be shown that the records set forth activities of the office or agency, or relate to matters observed pursuant to duty imposed by law or relate to factual findings resulting from an investigation. The survey results do not fit within these categories. They do not set forth the activities of the PUCO nor do they relate to matters the PUCO has observed. Neither are the survey results created as a result of an investigation conducted by the PUCO. More importantly, the exception to hearsay is intended to permit documents into the record, NOT hearsay testimony on the alleged contents of said documents.

Nor was there a foundation set that established that either Mr. Hamrock or Mr. Baker could appropriately testify as to the survey and the results. Neither the Companies nor the Staff attempted to present any showing that these witnesses had knowledge of the survey results; nor did the Companies or the Staff bear their burden of proving that the survey itself was sufficiently reliable.[64] It was error to allow these survey results to come into evidence. The Attorney Examiner's ruling should be overturned.

4. The Attorney Examiners inappropriately denied motions to strike rebuttal testimony pertaining to Staff's assertions that the Companies have met the reliability standards beginning in year 2010 (Motion to strike denied Tr. XIII at 2373).

Mr. Baker in his testimony on page 5, lines 10-12, presented information that the Companies have met the reliability standards imposed under the stipulation in Case No.

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[63] *Certain Underwriter at Lloyds, London v. Sinkovich*, 232 F3d 200, 205 (4th Cir. 2000) ("*Lloyds, London*").

[64] See, e.g., *Pittsburgh Press Club v. United States,* 579 F2d 751, 755-758 (3rd Cir. 1978); *Keith v. Volpe,* 858 F2d 467, 480 (9th Cir. 1988).

09-756-EL-CSS. This opinion testimony relies upon hearsay – Mr. Baker was referring to reports filed at the PUCO which contain the Companies' reporting of CAIDI and SAIFI results, as linked to the standards agreed to in the stipulation in Case No. 09-756-EL-CSS. OCC moved to strike this testimony,[65] but the Attorney Examiner denied OCC's motion to strike.

As argued at the hearing,[66] this testimony is hearsay and does not fall within the business records exception to hearsay. As explained supra, statements contained in a business record made by someone who was not part of the business are not within the exceptions to hearsay.[67] And these were statements made by 500 survey respondents, not by someone who was part of the Companies' business. Moreover, documents prepared in anticipation of litigation are generally considered not within the scope of this rule because they were created for a purpose outside the regular operation of the business.[68] These documents containing survey results were prepared in anticipation of litigation. Moreover, this testimony is linked to the reliability standards set in the stipulation in Case No. 09-756-EL-CSS. Its linkage to the stipulation makes the testimony improper as well. The Attorney Examiner's ruling was in error. It should be overturned.

B. The Stipulation Does Not Pass the Three-Prong Test.

1. Not all of the parties to the Stipulation were knowledgeable regarding the full contents of or the full effect of the Stipulation.

The evidence in this proceeding at least shows that not all of the parties that signed the Stipulation were knowledgeable regarding the full contents and effects of the

[65] Tr. XIII at 2370.

[66] Tr. XIII at 2370.

[67] *Vigneau*, note 62 supra; *Santos*, note 62 supra.

[68] *Lloyds*, *London*, note 63 supra.

Stipulation. For example, the Companies point to the cities of Hilliard and Grove City as signing on behalf of their residential customers.[69] Yet the primary force behind Grove City – and presumably Hilliard[70] – agreeing to the Stipulation apparently was to garner improvements to its street lighting.[71] Grove City – and presumably Hilliard – did not perform its own independent analysis of the Stipulation's effect on residential customers.[72] Instead, Grove City – and presumably Hilliard – relied primarily on analysis provided by the Companies and a few other parties,[73] none of which specifically represented residential customers. Further, the cities have no authority to represent anyone beyond their respective city limits.

In addition, many of the signatory parties presented the testimony of lay witnesses, rather than expert witnesses. These lay witnesses were often focused on the parochial interest of the signatory party, and were not conversant in the broad-ranging effects of the Stipulation.[74] Further, some relied on the "instant analysis" of Wall Street analysts – published the day that or the day after the Stipulation was signed – whose opinions were apparently fashioned after speaking only with AEP personnel and whose opinions were accompanied by numerous disclaimers regarding the accuracy of the information presented and the financial relationships between AEP and the authors'

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[69] AEP Ex. 1 at 5.

[70] Hilliard did not file testimony in support of the Stipulation.

[71] See Tr. IV at 496-498. See also Exelon Ex. 1 at 7.

[72] See Tr. IV at 519.

[73] Id. at 508-509.

[74] See id. at 492-494, 518-519. See also Paulding Wind Farm II Ex. 1 at 2, lines 26-28; EnerNOC Ex. 1 at 5.

companies.[75] The Commission should give very little weight, if any, to the testimony of such parties.

Further, a significant part of the Stipulation was not available to the signatory parties when the Stipulation was signed. Appendix C, which detailed how the RPM set-aside for CRES providers would function, was incomplete when the Stipulation was presented to the signatory parties for their signatures.[76] This is a key element of the Stipulation because it governs the "glide path" to competition that is the cornerstone of the Stipulation. Yet the signatory parties had only a general idea about the contents of this essential part of the Stipulation. This raises questions regarding whether those signatory parties who were not directly involved in compiling Appendix C were aware of all the ramifications of this element of the Stipulation.

The evidence in this proceeding raises questions about whether the parties to the Stipulation were knowledgeable as to the full effects of the Stipulation on residential customers. The Stipulation does not pass this portion of the three-prong test.

2. The Stipulation harms residential customers and has little real public interest benefit.

a. The Stipulation harms residential customers through the rate design and the reduction of funding for low-income programs.

The signatory parties have failed to show that the Stipulation benefits customers. When discussing the effect of the Stipulation on residential customers, the signatory parties focus exclusively on comparing the rate design in the Stipulation to the rate design

[75] See Tr. VI at 1016-1034.

[76] See id. at 908 ("I believe after the stipulation was filed there was a working session that we hosted to finalize Appendix C.").

contained in the original Application.[77] The signatory parties' argument boils down to this: the rate design in the Stipulation is not as bad for residential customers as the rate design in the Application.

Such a comparison is misguided. The three-prong test for stipulations requires a showing that the stipulation *benefits* customers, not that the stipulation is *less harmful* than some other plan.

The proper comparison should be between the rates included in the Stipulation and the current rates. When compared to the rates in effect on August 30, 2011, the rates the Companies propose to charge through the Stipulation would harm residential customers. Over the term of the ESP, the Stipulation would raise the rates CSP charges its residential customers by 5.68% for winter usage and 7.89% for summer usage, based on 1,000 kWh of usage per month.[78] The rates OP charges its residential customers who use 1,000 kWh a month would increase by 9.23% over the term of the ESP.[79]

When the rates proposed in the Stipulation are compared to present rates – the appropriate comparison to make when evaluating the effect of the Stipulation – the harm to residential customers is obvious. Rather than benefiting the Companies' residential customers, the Stipulation raises the rates they would pay for electric service by 5.68% to 9.23%, thus harming residential customers.

In addition to the rate increases discussed above, the Stipulation harms low-income residential by reducing the funding available for low-income programs. R.C.

[77] See, e.g., Grove City Ex. 1 at [2] ("The generation rates agreed to by the Companies are lower than those rates proposed in their SSO application"); OHA Ex. 1 at 2 ("the total increase represented by the Stipulation is considerably smaller than the increase sought by AEP in its application in this case").

[78] See Tr. I at 59-60.

[79] See id. at 61.

4928.02 establishes the policies of the State as they relate to the provision of electric services. In addition to the important policy at R.C. 4928.02(A) to ensure the availability to consumers of "adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service," another equally important state policy is contained in subsection (L) of that statute. Subsection L of R.C. 4928.02 states the policy that at-risk populations (i.e., low income customers) be protected. The Companies' witness Hamrock agreed that low-income customers fall within the definition of at-risk populations.[80]

The Commission has previously acted to protect at-risk low-income customers of the Companies. In the last AEP Ohio SSO cases, the Commission found that the Companies' shareholders should fund the Partnership with Ohio ("PWO") initiative at a minimum of $15 million over the three-year ESP period, with all of the funds going to low-income, at-risk customer programs.[81] Thus, under the current ESP from 2009 through 2011, the Companies provide $5 million a year for low-income programs.[82]

In the Stipulation in the instant cases, the Companies agreed to "continued support" for low-income customer programs but at a reduced level of only $3 million per year and contingent on an earnings threshold to allow for the funding.[83] In short, the Companies are proposing to spend $2 million less per year than in the current ESP. In addition, that lesser amount is not guaranteed, as AEP Ohio's obligation is contingent on the Companies reaching a certain rate of return on equity. If the Companies do not reach

[80] Tr. VI at 938.

[81] Case Nos. 08-917-EL-SSO, et al., Opinion and Order (March 18, 2009) ("AEP ESP 1 Order") at 48.

[82] Tr. VI at 930-931.

[83] Id. at 931.

the threshold return, they could choose not to fund the PWO at all.[84] If the Companies do not attain the return during any of the years of the new ESP period, the Companies would have no obligation to fund the PWO under the Stipulation.[85] No such contingency existed in the prior ESP period.

When the Companies originally filed their Application in these cases, they proposed to fund the PWO at $6 million per year over a 29-month plan term.[86] Mr. Hamrock tried to explain the decreased amount with the following rationale: "[S]o this was one of the compromises in the overall settlement agreement a longer-term plan and $3 million per year over that term of that plan."[87] Consequently, the amount now committed in the stipulation is cut in half when compared to the Companies' Application.[88] The amount that the Companies agreed under the Stipulation to fund is also contingent on meeting a specified return on equity.[89]

If the Commission approves the Stipulation (which the Customer Parties do not recommend), in order to ensure the policy of the state of Ohio[90] to protect at-risk populations, the Companies should be ordered to provide funding for the PWO program as the Companies originally proposed in their Application. This would require that funding be at the level of $6 million annually for the term of the ESP for the benefit of low-income customers. The PWO funding is more critical than ever, as the recession drags on and unemployment remains high, in order to maintain bill payment assistance

[84] Id. at 932.

[85] Id. at 933.

[86] Id.

[87] Id.

[88] Id. at 934.

[89] Id. at 931.

[90] R.C. 4928.06 requires that the PUCO ensure the policy specified in R.C. 4928.02 is effectuated.

programs such as the current Neighbor to Neighbor program. It makes no sense for the Companies to claim that this level of funding is now unavailable when the Companies originally proposed $6 million annually in their applications. Nor does the addition of the contingency make sense given the Companies' original proposal contained no such contingency. To explain these changes as being "one more example in the overall compromise in the settlement," which was Mr. Hamrock's response when he again was asked why the PWO was cut in half, provides no rationale or clarity whatsoever in understanding why the Companies chose to penalize low-income customers.[91]

Another issue concerning low-income, at-risk customers is the design of the use of the PWO funds. When the Commission ordered the Companies to fund PWO, the Commission also directed the Companies to consult with the Staff of the Commission to administer the program.[92] For the next ESP period, the Companies are also proposing to work with the PUCO Staff to direct the funds to the best use during the plan period.[93] However, no low-income advocates or representatives will be able to participate in the process because the process is closed to non-signatory parties, which include OPAE and APJN. In addition, <u>none</u> of the $3 million annual funding in the stipulation is committed to bill payment assistance for low-income customers as under the current plan.[94] Under the Stipulation, the Companies merely agree to work with the PUCO Staff to design the use of the $3 million in the next plan period.

[91] Id. at 934.

[92] AEP ESP 1 Order at 48.

[93] Tr. VI at 936.

[94] Id. at 937.

If the Commission approves the Stipulation (which the Customer Parties do not recommend), in addition to ordering the Companies to fund the PWO program at $6 million per year for the term of the ESP, the Commission should also order the Companies to work with low-income representatives to design plans to effectively target the $6 million per year for the next three years. The fact that no low-income representatives signed the stipulation should not be used to foreclose their participation in the design of programs.

Finally, another opportunity for the Commission to protect low-income at-risk populations is to provide some assistance to customers on the Percentage of Income Payment Plan ("PIPP"). The Stipulation contains no provision specifically directed for the benefit of PIPP customers. Other electric distribution utilities in Ohio provide discounted rates to PIPP customers.[95] One method that can be used is to allow for a CRES provider to serve the PIPP customers at a discounted rate and to set aside the necessary RPM capacity for the PIPP customer load. The fact that there is no provision in the Stipulation for PIPP customers and no discount as other utilities provide means that the stipulation does not conform to the policy of the state of Ohio to protect low-income, at-risk customers. If the Commission approves the Stipulation (which the Customer Parties do not recommend), the Commission should protect PIPP customers and order the Companies to provide a discount to PIPP customers.

[95] Id. at 935.

b. The Companies' quantification of the Stipulation's public interest benefit does not withstand scrutiny.

Although the Companies have quantified various aspects of the Stipulation in order to show benefit to the public, an examination of these aspects of the Stipulation reveals that they have little real benefit to the public interest. The cornerstone of the Stipulation is the set-aside of capacity at RPM-based rates for purchase by CRES providers, the so-called "glide path" to market-based rates.[96] The benefit here, however, is largely ethereal.

First, the plan would make available to CRES providers 21% of AEP Ohio's capacity at RPM-based rates in 2012, either 29% or 31% in 2013 (depending on whether the securitization legislation discussed in the Stipulation is passed) and 41% in 2014. All shopping in excess of the RPM-priced set aside limits will be priced at the $255/MW-Day capacity rate. The RPM prices for capacity are $116.15/MW-Day for 2011/2012, $16.46/MW-Day for 2012/2013 and $27.73/MW-Day for 2013/2014.[97] Thus, the RPM set-aside rates during the first three years of the proposed ESP term are considerably lower than the $255/MW-Day capacity charge contained in the Stipulation. This is important because the lower RPM rates supposedly will help to ensure that a broad spectrum of the Companies' customers will be able to shop for their electricity supply.[98]

The set-aside for 2012, however, has already been surpassed. Existing shopping has exceeded 21% of the Companies' capacity.[99] Thus, any new shopping for 2012

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[96] See Constellation Ex. 1 at 9.

[97] See Staff Ex. 2 at 5. See also FES Ex. 3 at 21.

[98] AEP Ex. 4 at 14.

[99] See Tr. VI at 918-919.

would be priced at the much higher $255/MW-Day capacity charge contained in the Stipulation. This would serve to deter customers from shopping.[100]

Second, the lower RPM-based capacity rate is available on a first-come, first-served basis. Beginning in 2012, none of the lower-priced set-aside capacity has been reserved for any customer class.[101] Thus, CRES providers will likely be in a race to lay claim to the lower-priced capacity that becomes available each year. Such a race will likely be won by those CRES providers whose customers are most savvy when it comes to shopping for electricity, i.e., large commercial customers. Residential customers will be left behind. This is especially true for those residential customers who participate in governmental aggregation, because of the lengthy ballot process involved in approving governmental aggregation.

Third, the $255/MW-Day price set in the Stipulation for capacity beyond the RPM-based set-aside will constrain customers' shopping from CRES suppliers. As FES witness Schnitzer testified, the lower priced, RPM-based set-aside capacity allows CRES providers to cover their market costs to serve, thus providing "a savings opportunity for customers who switch to CRES providers."[102] But the $255/MW-Day price in the Stipulation – which would be charged CRES providers once the RPM-based set aside capacity has been exhausted – will provide "little opportunity for customers to shop with a CRES provider" because "[t]he bypassable generation charges are below the costs that

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[100] See FES Ex. 3 at 36-37.

[101] The Stipulation did provide for the RPM-priced capacity to be "initially allocated on a pro rata basis among the residential, commercial and the industrial classes based upon projected kWh consumption for a period of approximately 4 months after the filing of the Stipulation." Stipulation at 22. But since the Stipulation was filed in September and there has been no decision regarding the Stipulation's approval, it seems that this class-based set aside of RPM-priced capacity is meaningless.

[102] FES Ex. 3 at 36.

a CRES supplier will incur when faced with paying AEP Ohio's above-market $255 per MW-day capacity charge."[103]

The Companies have admitted that the limitations on the availability of lower-cost, RPM-based capacity will constrain shopping. As FES witness Banks testified:

> Richard Munczinski, AEP's Senior VP for Regulatory Services, admitted that: "***Over those [shopping cap] percentages, if you want to shop, you pay the full cost of $255 per megawatt day. So the thought and the theory is that the shopping will be constrained to the discounted RPM price***." He also stated that AEP Ohio "should see no more shopping than the 20%, 30%, 40% levels that are included in the stipulation."[104]

S.B. 221 was designed to promote shopping for electricity by residential customers.[105] The limitations in the Stipulation's program for making capacity available at lower-priced RPM-based rates run counter to these goals.[106] The Stipulation thus is not in the public interest, and the Commission should reject the Stipulation.

3. The settlement package contained in the Stipulation violates important regulatory principles and practices.

a. MRO vs. ESP comparison.

In order to approve an ESP application, the Commission must find that the ESP, "including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate" compared to a market

[103] Id.

[104] FES Ex. 1 at 36 (footnotes omitted), citing AEP Conference Call to Announce Stipulation, Final Transcript, Sept. 7, 2011 (emphasis in original testimony, which added emphasis to cited material). The Companies admitted that Mr. Munczinski made the statements. See id., Exhibits TCB-8 and TCB-9.

[105] See, e.g., R.C. 4928.02(B) and (C).

[106] Although R.C. 4928.143(B)(2)(d) allows ESPs to include provisions limiting customer shopping, the limitations contained in the Stipulation unreasonably constrain customer choice.

rate offer ("MRO").[107] The Stipulation, however, is not more favorable in the aggregate than a MRO, and thus violates R.C. 4928.143(C)(1).

In conducting its ESP versus MRO comparison, AEP Ohio looked at three areas: a comparison of the ESP pricing to the expected results from an MRO; an evaluation of other, "non-price benefits" that supposedly result from the ESP but would not be available under the MRO option; and benefits that the Companies claim to be not readily quantified but are of "significant value."[108] An examination of the Companies' analysis of each area, however, shows that the ESP contained in the Stipulation is not more favorable in the aggregate to a MRO.

First, when the POLR charges are removed from present rates, as the Attorney Examiners directed the Companies to do, the result is that the ESP price is less favorable than a MRO price. Ms. Thomas's calculation shows that the ESP price is $0.71/MWh more that the MRO price.[109] This means that the present value of the ESP price for non-shopping customers is a negative $108 million.[110]

This is supported by the testimony of PUCO Staff witness Fortney. In his prefiled testimony in support of the Stipulation, Mr. Fortney agreed that the Stipulation's ESP rate was "slightly more favorable" than a blended MRO rate.[111] Mr. Fortney, however, changed his testimony on cross-examination.

In making his original calculations, Mr. Fortney's blended MRO rate ("a proportionate blending of that market rate with the generation service price equal to the

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[107] R.C. 4928.143(C)(1).

[108] See Companies' Ex. 8 at 25-26.

[109] Companies' Ex. 5 at Revised 17.

[110] See Companies' Ex. 8 at Revised 28.

[111] Staff Ex. 4 at 6.

utility's most recent standard service offer which can be adjusted by the Commission for known and measurable changes (including fuel) in that most recent standard service offer"[112]) included a POLR charge of $0.00307/kWh.[113] That charge, however, was removed under the Remand Order in the Companies' first ESP case.[114] When questioned at hearing, Mr. Fortney agreed that removing the POLR charge from the blended MRO rate would cause the ESP to fail the MRO test:

> Q. And so that if we looked at the three years that you made calculations for and we eliminated the POLR charge from the current ESP portion of the MRO price, the ultimate result of your calculations would be that the ESP would cost more than the MRO to the tune of 276 million or $276.6 million, correct?
>
> A. That's what my calculation shows also, yes.
>
> Q. So in terms of that portion of the MRO versus ESP test, the ESP would fail, correct?
>
> A. It would fail my quantitative analysis, yes.[115]

Thus, when the POLR charge is removed, the MRO rate is more favorable than the ESP rate.

Second, many of the "non-price benefits" identified by the Companies are questionable. Such alleged benefits include a reduced carrying cost on the unamortized balance of deferred fuel costs to be recovered during 2012 through 2018 through the Phase-In Recovery Rider ("PIRR"), discounting the price of capacity to be provided to CRES providers during the ESP in order to encourage shopping and the Companies'

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[112] Id. at 4.

[113] Id.

[114] Case No. 08-917-EL-SSO et al., Order on Remand (October 3, 2011) ("Remand Order") at 37.

[115] Tr. X at 1696-1697.

commitment to provide funding for the Partnership with Ohio and the Ohio Growth Fund.[116] AEP Ohio witness Allen quantified these benefits at about $1 billion.[117]

FES witness Lesser, however, refuted Mr. Allen's quantification of the "non-price benefits" of the Stipulation. Mr. Lesser stated that

> Mr. Allen's calculation is based on a strawman comparison, because it presumes that AEP Ohio is entitled to charge the full embedded cost rate that AEP has advanced for its capacity resources. Thus, he concludes that ratepayers "benefit" by not having to pay AEP's claimed full embedded cost.[118]

Mr. Lesser also pointed out several flaws in Mr. Allen's calculations, chiefly that in determining the value of the ESP Mr. Allen calculated the difference between Ms. Thomas's over-inflated "market price" capacity cost of $355.72/MW-Day and her RPM-based "market price."[119] As Mr. Lesser noted, "Charging less than $355.72/MW-day for capacity can only be a benefit of the Stipulation if shopping customers would have had to pay this amount under an MRO, which is not a reasonable assumption."[120] By using more reasonable assumptions, Mr. Lesser concluded that the "non-price benefits" identified by Mr. Allen would not save the Companies' customers $1 billion, but rather would **cost** the Companies' customers $1.27 billion.[121]

In addition, the Companies' contributions to PWO and the Ohio Growth Fund in any given year are contingent upon the Companies achieving a 10% rate of return for the

[116] See Companies' Ex. 8 at 27.

[117] See id. at Revised 28.

[118] FES Ex. 2 at 9.

[119] Id.

[120] Id. at 10.

[121] Id. at 11.

prior calendar. Thus, the benefits the Companies claim that will be derived from these contributions might not be achieved.

Third, the Companies considered benefits that they claim to be not readily quantified but are of "significant value."[122] These benefits included an earlier transition to market under the ESP than a MRO, removal of POLR charges, allowing shopping customers who have waived POLR charges to return to the Companies at SSO rates, the Companies' commitment to consider a distribution decoupling mechanism and alternative customer-sited generation resources, the absence of a collection mechanism for environmental costs, generation rate certainty through the fixed base generation rate and the Companies' alleged exposure to the risk of cost increases.[123] Any supposed value the Companies have assigned to these aspects of the Stipulation is highly subjective and is diminished by other factors associated with them.

Although the ESP contains a competitive bidding process ("CBP") that is designed to move the Companies to an auction system in 2015, rather then the five-year transition provided under the MRO statute,[124] this transition to market is based on FERC approval of the Companies' corporate separation and pool termination plans. Under the Stipulation, if FERC "denies AEP Ohio's application for corporate separation *and/or* Pool modification/termination requests in their entirety such that corporate separation is not permitted,"[125] then "AEP Ohio from that point forward will be relieved of its

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[122] See id.

[123] See id. at Revised 29.

[124] R.C. 4928.142(D).

[125] Stipulation at 15 (emphasis added).

obligation to conduct additional auctions required under this Stipulation…."[126] If that occurs, the only recourse available to the signatory parties is their recommendation that the Commission "commence a proceeding to consider appropriate modifications to this Stipulation such as an increase in the RPM-priced capacity set asides…."[127] Such a proceeding would be time-consuming, and would thus narrow the gap between the transition period in the Stipulation and the statutory transition period.

The removal of the POLR rider from the ESP is of no value. Both the Supreme Court of Ohio and the Commission have determined that the Companies' basis for POLR charges lacks evidentiary support.[128] The Companies propounded the same basis for the POLR rider in the Application as they did in before the Court and in the Remand Proceeding.[129] There is no reason to believe the Companies would have been any more successful in this proceeding than they were in the two previous proceedings.

Similarly, allowing shopping customers who have waived POLR charges to return to the Companies at SSO rates is of no value to the 427 customers who waived POLR. Customers who shopped avoided POLR charges that had no basis to exist in the first place. To require them to return at market-based rates would have been unreasonable and unfair.

The Companies' commitment to consider a distribution decoupling mechanism and alternative customer-sited generation resources is tenuous, and thus has little

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[126] Id.

[127] Id.

[128] *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St.3d 512; Remand Order at 22-24.

[129] See Application, Thomas Testimony at 18.

practical value. Because the Companies are only required to *consider* such measures, there is no guarantee that either will come to fruition.[130]

There is also no value in the absence of a collection mechanism for environmental costs in the Stipulation. The mechanism that was contained in the Application would have needed Commission approval before being implemented, which was not a certainty. In addition, there is nothing in the Stipulation preventing the Companies from seeking to collect environmental costs from customers in another proceeding.

Any value that may be attributed to the generation rate certainty through the fixed base generation rate is diminished – or even eliminated – by the non-cost based base generation rate increases allowed through the Stipulation. Residential customers receive no benefit in knowing that their rates will increase from five to nine percent over the next three years, even though the cost for the Companies to serve them might not increase and may even decline. There is no value in increasing the rates customers pay for generation, when the primary purpose for the increase is to provide the Companies with a guaranteed average annual base generation rate that will assist them in the "glide path" to competition.

Finally, the Companies' alleged exposure to the risk of cost increases adds little value to the Stipulation. Because fuel prices cannot be accurately predicted,[131] the Companies' largest risk of cost increases is likely attributable to fuel. Under the Stipulation, "[t]he current FAC mechanism continues through May 31, 2015."[132] Thus,

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[130] The same is true regarding the Companies' agreement to "discuss" a reduction in the $10 switching fee associated with enrollment with a CRES provider.

[131] See Tr. V at 853-856.

[132] Stipulation at 8.

the Companies can continue to collect fuel cost increases from customers. Any "exposure" to the risk of cost increases for the Companies is small.

As shown above, the ESP outlined in the Stipulation is not more favorable in the aggregate than a MRO, considering all other terms and conditions. The Stipulation thus violates the important regulatory principles (in the form of Ohio law) found in R.C. 4928.143(C)(1).

b. Reasonably Priced Service.

The Stipulation violates regulatory principles designed to ensure that electric service in Ohio is reasonably priced. R.C. 4928.02(A) makes it a state policy in Ohio to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service…." R.C. 4905.22 requires the Commission to set public utility service rates that are just and reasonable. The Companies' rates established in the Stipulation have not been shown to be just and reasonable.

The base generation rates are not cost-based or even market-based. Instead, they merely provide the Companies with an average annual base generation rate that was agreed upon by the signatory parties. The signatory parties have not justified the reasonableness of the rates. Instead, the signatory parties have only compared the rates in the Stipulation to the rates the Companies proposed in the original Application.[133] The most that can be said about the base generation rates proposed in the Stipulation is that the *may* be less unreasonable than the rates proposed in the original Application. That, however, does not make them reasonable for purposes of R.C. 4928.02(A) and 4905.22.

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[133] See, e.g., Grove City Ex. 1 at [2]; OHA Ex. 1 at 2.

In addition, other rate elements such as the DIR and the PIRR unreasonably increase the rates that the Companies' customers would pay under the Stipulation. As discussed below, the DIR amount contained in the Stipulation – $314 million over the term of the ESP – is unreasonable and unlawful.[134] Regarding the PIRR, the Stipulation would allow the Companies to collect phase-in deferrals equally from OP and CSP customers. But as IEU witness Murray noted, CSP's phase-in deferrals have already been collected from its customers, so that CSP has a zero phase-in deferral balance.[135] Thus, the only phase-in deferrals remaining – amounting to $628 million – are from OP. Collection of OP's phase-in deferrals from CSP's customers, as allowed by the Stipulation through the PIRR, is unreasonable. This also violates the regulatory principle that customers who are part of a governmental aggregation shall be responsible only for the portion of a phase-in rate that is proportionate to the benefits they receive as a group.[136]

c. Distribution Investment Rider.

In Paragraph 1 n. of the Stipulation and Recommendation[137] a "Distribution Investment Rider (DIR)" is established. The DIR is "effective January 2012" and is "based on post-2000 investment."[138] The DIR has a carrying charge rate of approximately 20%.[139] The net capital additions incurred that may be recognized under the DIR will reflect gross plant in service incurred *post-2000* adjusted for growth in

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[134] See IEU Ex. 9 at 22-23.

[135] Id. at 21-22.

[136] R.C. 4928.20(I).

[137] Joint Ex. 1.

[138] Id. at 9.

[139] Tr. III at 303-306.

accumulated depreciation.[140] The DIR is to be adjusted quarterly and subject to an annual audit in which the DIR investments are to be reviewed for prudence.[141] The annual revenues collected under the DIR are capped at $86 million in 2012; $104 million in 2013; and $124 million in 2014 and the first five months of 2015.[142] The stipulating parties agree that no proceeding will be commenced by the signatory parties or commenced by the PUCO which would allow the base distribution rates to be adjusted and go into effect prior to June 1, 2015.[143]

The standard of review for considering the reasonableness of a stipulation between two or more parties has been discussed in many prior Commission proceedings.[144] The ultimate question to be answered is whether, in light of the record, the stipulation is reasonable and complies with Ohio law.

In considering the reasonableness of a settlement, the Commission has used a three prong standard of review which includes the criterion "does the settlement package violate any important regulatory principle or practice?" As discussed below, including the unaltered distribution investment rider as part of the electric security plan will cause the settlement package to violate important regulatory principles and practices. This is sufficient reason in and of itself to reject the Stipulation. At the very least, if the PUCO

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[140] Joint Ex. 1 at 9.

[141] Id.

[142] For any year the Companies' spending would produce revenue in excess of that year's cap, the overage is to be recovered in the following cap period, subject to that period's cap. For any year where the revenue collected under the DIR is less than the annual cap allowance, then the difference between the revenue collected and the cap is to be applied to increase the level of the subsequent year's cap. Id. at 10.

[143] Id.

[144] See for example *Cleveland Electric Illuminating Co.* Case No. 88-170-El-AIR (Jan. 31, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985).

determines to adopt the Stipulation, it must drastically amend the DIR to bring it into compliance with regulatory practices, principles, and the law of the State of Ohio.

i. The DIR violates important regulatory principles and practices when it permits double recovery of a return on distribution investment.

OCC Witness Duann identified problems related to the DIR provisions in the Stipulation.[145] One of the most troublesome problems was the potential under the DIR to allow double recovery of a return earned on and of the capital investment that is subject to the rider. Mr. Duann testified[146] that the pending distribution cases, Case Nos. 11-351-EL-AIR and 11-352-EL-AIR, allow AEP Ohio the opportunity to collect a return on and of the incremental net plant in service post 2000 through date certain (August 31, 2010).[147] The DIR provisions in the Stipulation provide another opportunity for AEP Ohio to earn a return on and of the very same distribution investments, subject to a prudency review. FES Witness Lesser also submitted testimony which concluded that, under the Stipulation, AEP Ohio would be double recovering post 2000 costs through the date certain, given its distribution filing.[148]

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[145] OCC Ex. 1 at 30. Mr. Duann noted that the other problems with the DIR were that the ROE of 10.5% is not supported by the record and is much higher than the ROE recommended by the Staff in the pending distribution case. Mr. Duann also testified that AEP had not shown a compelling need for the distribution investments and that the Commission had not examined the reliability of the distribution system. Mr. Duann testified that an accelerated cost recovery mechanism such as the DIR should only be approved if there is a clear showing of the benefits of allowing such accelerated recovery. Id. at 30-32.

[146] Id. at 31.

[147] Tr. III at 315-317 (Administrative notice was taken of the application (including the date certain) filed in Case No. 11-352-EL-AIR; subsequently at Tr. III at 319, administrative notice was taken of the application filed in Case No. 11-351-EL-AIR).

[148] FES Ex. 2 at 49.

Seemingly both the PUCO Staff and the Companies are aware of this issue[149] and yet neither they nor other signatory parties will commit to amend the DIR proposed *in this proceeding*[150] to address the potential double recovery. Mr. Allen's assertion that the DIR will not allow AEP Ohio to double recover costs[151] is misleading. On cross-examination, Mr. Allen admitted that if the DIR is approved in this case, without modification, a revenue credit in the distribution case would be appropriate.[152] The only reason a revenue credit would be needed is because the recovery is occurring somewhere else[153] – hence, Mr. Allen must begrudgingly admit there is a potential for double recovery.

That double recovery of costs, including a return on and of investment, is inconsistent with sound regulatory practices and principles is well recognized and indisputable. The PUCO has ruled on countless occasions that double recovery will not and cannot be permitted.[154] Companies such as AEP Ohio are given the opportunity,

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[149] See Tr. III at 326-327; Tr. X at 1733-1735. Representatives of some signatory parties are also aware of this problem. See Tr. VII at 1325-1326.

[150] Tr. XII at 2142-2143.

[151] Company Ex. 20B at 5.

[152] Tr. XII at 2055.

[153] Tr. XII at 2055-2056.

[154] See e.g. *In the Matter of the Application of Pike Natural Gas Company for Authority to Amend Certain Revisions of its Tariffs*, Case No. 85-1335-GA-ATA, Finding and Order (Dec. 17, 1985) (denying tariff changes to implement a disconnect charge because the costs were currently being recovered in base rates and implementation of a new tariff without base rate adjustments would result in double recovery of costs); *In the Matter of the Application of Lake Buckhorn Utilities Inc. for Authority to Increase and Adjust Its Rates and Charges*, Case No. 86-519-WW-AEM, Opinion and Order at 14 (Feb. 10, 1987) (denying separate expenses for equipment rental when costs were already accounted for in repair and maintenance expenses on the basis that this would lead to double recovery); *In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of Its Filed Schedules Fixing Rates and Charges for Electric Services,* Case No. 86-2025-EL-AIR, Opinion and Order at 172 (Dec. 16, 1987) (Companies not entitled to double recovery of costs associated with PIPP*); In the Matter of the Applications of Columbia Gas of Ohio, Inc. to Establish Uniform Rates*, Case Nos. 89-616-GA-AIR et al , Opinion and Order at 119 (Apr. 5, 1990) (denied utility opportunity for additional recovery of excise taxes because it would amount to double recovery from the utility's ratepayers).

under R.C. 4909.15, to earn a return on and of investment in distribution plant. There is no double opportunity to do so at the expense of the Companies' customers. As FES Witness Lesser testified "[c]learly, such double recovery is incompatible with basic rate regulation."[155]

As of the writing of this brief, there is nothing in this record, including in the Stipulation,[156] that prevents double recovery of the distribution investment. Nor have the Companies offered an amendment to the Stipulation to address this issue. Nor is there any agreement in the distribution cases to fix this problem. Apart from the scant testimony of Witness Andrea Moore in the distribution cases that suggests a revenue credit in the distribution case may be appropriate,[157] the Commission is left with nothing in the record of this case to remedy the problem.

For this reason, the Commission should properly reject the Stipulation. At the very least, the PUCO should, if it approves the Stipulation (which the Customer Parties do not recommend), modify the DIR in this case so that it only permits investment post date certain, as the basis for the yearly distribution investment caps. However, this "fix" alone will not save the DIR due to numerous other defects, as discussed below.

ii. The DIR violates important regulatory principles and practices when it provides the Companies with significant rate increases that are in excess of the cost of providing distribution service and will result in electric service that is not reasonably priced.

[155] FES Ex. 2 at 49-50.

[156] Tr. XII at 2142-2143 (Mr. Allen indicated the DIR language in the Stipulation conveyed an intent not to seek double recovery, but a review of the language clearly restricts exclusions from the DIR to riders, not base rate recovery, which is being sought in the distribution rate cases).

[157] Tr. XII at 2052-2056; IEU Ex. 15 at 14.

The DIR imposes a distribution rate increase of $314 million over the term of the ESP. This increase appears to be dramatically in excess of increases warranted under a cost-based analysis.[158] For instance, in their cost-based filing for a distribution increase, the Companies requested a distribution increase of $93.8 million on a combined basis. Notwithstanding the Companies' requests, the PUCO Staff issued Staff Reports in the distribution cases recommending a combined AEP Ohio distribution rate increase of less than $30 million annually.[159]

IEU Ohio Witness Murray testified that it is an important principle that a utility not be given an opportunity to charge customers rates that are demonstrably excessive.[160] Given that the Staff Reports issued in the pending distribution cases have recommended a combined AEP Ohio distribution rate increase of less than $30 million annually,[161] a distribution rate increase of $314 million over the term of the ESP is unwarranted and not consistent with cost of service principles.[162] Such a rate increase would likely impose excessive and unreasonable rate increases on the Companies' customers.[163] This conflicts with the policy of the state of Ohio as enumerated in R.C. 4928.02(A), which requires the PUCO to ensure the availability of "reasonably priced" retail electric service.

[158] IEU Ex. 9A at 22-23.

[159] Id. at 23.

[160] Id. at 22.

[161] Id.

[162] Id. at 23.

[163] Id.

C. The Distribution Investment Rider Does Not Comply with the Provisions of R.C. 4928.143(B)(2)(h) and Therefore Cannot Be Included as a Provision in the Companies' Modified Electric Security Plan Presented in the Stipulation.

Not only must the Stipulation be shown to be reasonable as determined in relation to the three-prong test, but the provisions of the Stipulation must comply with provisions of the Revised Code, including R.C. 4928.143. The Ohio Supreme Court recently determined that if a provision of an electric security plan does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized by statute.[164] While the Companies argue that the distribution investment rider is authorized under R.C. 4928.143(B)(2)(h), as discussed below, the Companies have failed to bear the burden[165] of proving such.

1. The Commission must examine the reliability of the Companies' distribution system before allowing the DIR to be a provision under the electric security plan. There is insufficient information in the record to permit the Commission to do so and so the PUCO may not authorize the DIR as part of the ESP.

The Companies maintain that the DIR is permissible under R.C. 4928.143(B)(2)(h). Under this statute, an electric security plan may include provisions "regarding the utility's distribution service" "including … provisions regarding distribution infrastructure and modernization incentives." The statute goes on to set the parameters of such inclusion, requiring "[a]s part of its determination as to whether to allow … any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and

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[164] See *In re: Application of Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶ 32.

[165] Under R.C. 4928.143(C)(1), the burden of proving the ESP is lawful and complies with the statute is placed upon the electric distribution utility.

ensure that customers' and the electric distributions utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system." The Commission has noted that the intent of this provision could not have been to provide a "blank check" to electric utilities.[166]

The PUCO Staff, on August 4, 2011, filed testimony recommending that the Commission not adopt the distribution investment rider proposed as part of the Companies' electric security plan for numerous reasons.[167] PUCO Staff Witness McCarter filed testimony opposing the DIR in the earlier stage of this proceeding, but was not called to the stand by the Staff to support the Stipulation. Mr. Fortney, however, was familiar with the testimony of Ms. McCarter and confirmed that Ms McCarter concluded that the Companies had not demonstrated a need for the rider.[168] Ms. McCarter also submitted written testimony indicating that the Companies had not developed a specific analysis of what assets would be replaced under the Companies' original ESP.[169] Ms. McCarter also submitted written testimony that the Companies had not indicated any tangible improvements to reliability performance associated with the rider.[170]

Notwithstanding the PUCO Staff's original rejection of the rider, the Staff turned around and on September 7, 2011 signed a Stipulation that contained a rider. The Staff's

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[166] AEP ESP 1 Order at 32.

[167] Tr. X at 1722-1725.

[168] See also OCC Ex. 1 at 31 (testifying that AEP Ohio has shown no compelling need for such investment).

[169] Tr. X at 1725-1826; see also Companies' Ex. 19 at 4, lines 11-12.

[170] Tr. X at 1730.

willingness to sign onto a stipulation with a DIR came even though there was little (if any) information provided by the Companies to address the Staff's concerns as raised in the testimony of Staff Witness McCarter.[171] Staff's abrupt change in position should raise concerns with the Commission, especially given the unequivocal rejection of the DIR by Staff, less than a month earlier.[172]

Ms. McCarter's testimony was well founded, targeted, and can be relied upon as a reason to reject the DIR as part of the Stipulation. As IEU Witness Bowser testified, the DIR recommended in the Stipulation suffers from the same problems that caused Staff Witness McCarter to recommend that the DIR proposed in the Companies' ESP application not be approved.[173]

Ms. McCarter's filed testimony is, moreover, consistent with the position of the Staff in the Companies' last ESP. There Staff recommended against distribution rate increases pertaining to the Companies' efforts to maintain and enhance reliability because the Companies had not identified specific investments and could not project any reliability improvement expected as a result of the distribution investment.[174] Both these flaws are present in the DIR proposed as part of the Stipulation.

In a last ditch effort to cure these and other flaws of the Stipulation, both the Staff and the Companies filed rebuttal testimony.[175] This testimony was intended to address Mr. Duann's and IEU Witnesses Murray's and Bowser's criticism of the DIR, including

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[171] See id. at 1724-1731.

[172] Id. at 1724-1725.

[173] IEU Ohio Ex. 8 at 6-7.

[174] Tr. XIII at 2374-2375.

[175] See Staff Ex. 5, Rebuttal testimony of Baker; Companies' Exs. 19, 20, Rebuttal testimony of Hamrock and Allen.

the statutory criticism: that the Commission had not examined the reliability of AEP's distribution system in this proceeding and had not ensured an alignment of the expectations of customers and the utility. But the Companies' and the PUCO Staff's efforts in rebuttal testimony to fill the statutory gaps are too little, too late.

Merely citing to CAIDI and SAIFI standards related to past performance (2009-2010)[176] and the Companies' reporting that it meets such standards[177] falls short. There has been no examination of the reliability of the Companies *in this case*. OCC Witness Duann[178] as well as IEU Ohio Witnesses Bowser and Murray[179] all came to this same conclusion.

And yet, the statute requires such an examination prior to allowing its inclusion in the ESP. Linkage between the examination in the ESP and the approval of investment as part of the ESP is logical and necessary. The Commission, in rejecting the Companies' request in the last ESP case for set increases to annual distribution rates, noted the need to examine the full distribution system, the reliability of such system, and customers' expectations, as well as whether the programs proposed by the Companies are truly incremental to its current investment.[180] All of this could and should have been done here, in this proceeding, but it was not.

Moreover to the extent that the distribution investment under the DIR is to be future investment (as opposed to past investment), the fact that AEP Ohio met reliability standards in the past is not necessarily indicative of meeting reliability standards in the

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[176] See Staff Ex. 5 at 5; Companies' Ex. 19 at 3.

[177] See Staff Ex. 5 at 5.

[178] OCC Ex. 1 at 31.

[179] IEU Ex. 8 at 7; IEU Ex. 9A at 22.

[180] AEP ESP 1 Order at 32.

future. Whether the Companies will meet such standards during the term of the ESP may be influenced, in part, by future distribution investment. That information could not possibly be provided, however, because the Companies have not determined what plants or assets they will replace under the DIR.[181] Neither have the Companies proposed to link the investment to targeted improvement in reliability, despite Mr. Fortney's admonition that the PUCO Staff would not object to the Commission modifying the Stipulation to accomplish such a result.[182]

The fact of the matter is that the DIR really isn't premised upon the need for distribution investment or reliability. Rather the gist of the DIR is to allow the Companies to collect carrying charges without investing one additional dollar for reliability.[183] This may explain why the signatory parties have not identified projects and have not provided a tie-in to reliability standards associated with the distribution "investment."

2. The Commission must ensure that the expectations of the Companies and the customers are aligned. There is insufficient information in the record to permit the Commission to do so and so the PUCO may not authorize the DIR as part of the ESP.

Part of the reliability analysis that must be done to comply with R.C. 4928.143(B)(2)(h) is that the Commission must ensure that the expectations of the Companies and the customers are aligned. The Companies attempted to prove this part of the statute by relying upon survey results presented in Mr. Hamrock's rebuttal

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[181] Tr. XII at 2033; OCC Ex. 4; Companies' Ex. 19 at 4.

[182] Tr. X at 1730-1731.

[183] Id. at 1732-1733.

testimony.[184] The Staff attempted to prove this by arguing that the Companies' past successful performance against the reliability standards shows that the customers' reliability expectations are in alignment.[185] Both these attempts to fabricate statutory compliance should be rejected.

The Companies' attempt to contrive statutory compliance weighs heavily upon customer surveys it conducted in 2009-2011. These surveys (with 500 residential respondents and 300 commercial respondents[186]) presumably measure customers' expectations pertaining to reliability over the next five years. Mr. Hamrock reports that in 2009 the survey results indicated that 16% of residential customers and 19% of commercial customers believe their future reliability expectations will increase over the next five years (2009-2014).[187] Mr. Hamrock reports these expectations are rising in 2010 and 2011.[188] According to Mr. Hamrock, AEP Ohio surmises that customers will expect improved reliability. He opines that investment in the distribution infrastructure is needed to maintain current levels of reliability and better align the Companies' resources with the expectations of customers into the future. This additional DIR investment is "needed" above and beyond the approximately $140 million contained in current distribution rates that already provides for replacement of aging and deteriorating infrastructure.[189]

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[184] Companies' Ex.19 at 4.

[185] Staff Ex. 5 at 5.

[186] See Tr. XII at 2016.

[187] Companies' Ex.19 at 4-5.

[188] Id.

[189] Tr. XII at 2030.

Remarkably, what Mr. Hamrock did not present are the "flip side" of the survey results – in 2009, 66% of residential customers indicated their service reliability expectations would stay the same and 11% indicated that their service reliability expectations will decrease or significantly decrease over the next five years.[190] In 2009, 64% of commercial customers surveyed believed their reliability expectations will remain about the same with 14% indicating that their reliability expectations will decrease or decrease significantly.[191] And Mr. Hamrock testified that the 2010[192] and 2011[193] "flip side" results – where a clear majority of the customers voiced their opinion that their reliability needs in the next five years would either stay the same, decrease, or decrease significantly – would stay about the same as the 2009 results. Hence the majority of customers consistently (through 2009-2011) indicate that their reliability needs over the next five years will either stay the same or decrease, which appears inconsistent with the interests of the Companies to implement an enhanced[194] reliability strategy which is proactive instead of reactive in nature.[195]

While the Companies plead that distribution investment is needed to replace aging assets *to maintain* the current level of reliability,[196] it is the very same claim made by the

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[190] OCC Ex. 10; Tr. XII at 2017-2018.

[191] Id; Tr. XII at 2018.

[192] Tr. XII at 2019-2022.

[193] Tr. XII at 2024-2025.

[194] Although the Companies do not use the term "enhanced" to describe the reliability program, it appears to be similar in many respects to the enhanced reliability program Mr. Boyd testified there was a need for in the Companies' first ESP. See Tr. XII at 2001-2004. This reliability program was rejected in large part by the Commission. The Commission should similarly here determine the Companies have not made their case for distribution investment at the level of $314 million over the term of the ESP.

[195] Companies' Ex. 19 at 4.

[196] Id. at 4-5.

Companies Witness Boyd in the last ESP.[197] And that claim was appropriately rejected by the PUCO.[198] Moreover, the Companies have agreed to and met more stringent reliability standards since they became effective, beginning in year 2010.[199] This has occurred despite the fact that the Companies did not get revenue funding for their enhanced program,[200] nor did they receive any distribution increases. Thus, the current level of reliability has been maintained (and in fact increased) with only the vegetation management funds ($24 million per year) supplemented by the ongoing $140 million funding contained in current rates for replacement of aging distribution infrastructure. And the Stipulation, even with the DIR, contains distribution investment funding through the continued Enhanced Service Reliability Rider. The Commission should reject alleged logic which presses for more customer funding without the need for the funding – just as it did in the first ESP proceeding.

Similarly, the PUCO Staff's attempt to show customers' expectations are in alignment with the Companies' should be rejected as well. The Staff believes that the Companies' successful performance against the reliability standards shows that the customers' reliability expectations are in alignment.[201] This assumption is not well made. Meeting a certain reliability target does not necessarily imply there is an alignment of customer expectations. If the majority of customer expectations for reliability remain the same or are decreasing, as the survey results indicate, one would

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[197] Tr. XII at 2004-2005 "Q. So at that time its your understanding that Mr. Boyd testified that AEP Ohio would not be able to maintain its level of reliability at the current level of spending at that particular point in time, is that a fair characterization of his testimony? A. Yes, in general."

[198] ESP I Order at 32.

[199] Staff Ex. 5 at 5.

[200] Except for the vegetation management.

[201] Staff Ex. 5 at 5.

expect alignment with the Companies would lead to no increased reliability being reported under the CAIDI and SAIFI standards. And the Commission must consider whether $314 million in "reliability improvements" comes at too high a price especially when the majority of customers see their reliability needs as staying the same or decreasing over the term of the ESP.

3. The DIR, as currently structured, will not ensure reliable retail electric service under R.C. 4928.02(A), which policies must be effectuated under R.C. 4928.06. Nor have the Companies proven that the distribution investment rider is necessary to ensure reliable and efficient retail electric service.

Under R.C. 4928.02(A) the Commission must ensure, among other things, that reasonably priced and reliable retail electric service is available to consumers. Under R.C. 4928.06, the Commission "shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."[202] Thus, the Commission has a duty to ensure that the Stipulation and the individual provisions encompassed in the Stipulation enable it to ensure compliance with R.C.4928.02. Here however, including a $314 million DIR in customers' rates has not been shown to ensure reasonably priced service to the Companies' customers. In fact it will likely jeopardize the ability of customers to have reasonably priced electric service, and the DIR is not avoidable, even for those customers who shop.

Moreover, the record clearly reflects that the DIR is not necessary to ensure reliable and efficient retail electric service. First, and foremost, the distribution investment rider is most assuredly a misnomer. As PUCO Staff Witness Fortney

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[202] See, e.g., *Elyria Foundry Co. v. Pub. Util. Comm*. (2007), 114 Ohio St.3d 305, 314 where the Court ruled that portions of the rate plan approved violated R.C. 4928.02.

testified, the Companies can collect all $314 million of the rider without making an additional $1 investment to distribution.[203] This is because the rider will allow the Companies to collect an extremely high carrying cost (20% or more) on the post-2000 distribution investment. So any "necessity" for the DIR is severely undermined by the way it is structured to work – collecting carrying costs at excessive rates without a dollar of additional distribution investment.

Second, as Mr. Hamrock testified, there is already approximately $140 million in distribution rates per year associated with distribution infrastructure replacement.[204] And there are only unsubstantiated assertions in the record[205] that more funding is needed in order *to maintain* reliable service.[206] In fact, PUCO Staff Witness McCarter submitted written testimony where she concluded the Companies had not demonstrated a need for the DIR.[207] OCC Witness Duann concurred and testified that AEP Ohio has not shown a compelling need for distribution infrastructure or modernization investments.[208]

The Companies' assertions of need are more suspect given that they are unaccompanied by any specific asset replacement plan,[209] a fact not unnoticed by PUCO Staff,[210] and other intervenors including IEU Ohio.[211] Rather, Mr. Hamrock admits that

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[203] Tr. X at 1732-1733.

[204] Tr. XII at 2030-2031.

[205] See for instance Tr. XII at 2043, where Mr. Hamrock testified that the DIR programs are essential for *both* maintaining the current level of reliability and improving reliability in the future.

[206] Any reliance on Mr. Kirkpatrick's testimony (Tr. XII at 2039) for this purpose is inappropriate as Mr. Kirkpatrick's testimony was not made part of the record in this proceeding and thus was not subject to cross-examination.

[207] Tr. X. at 1725.

[208] OCC Ex. 1 at 31.

[209] Companies' Ex. 19 at 4; OCC Ex. 4.

[210] Tr. X at 1725-1726.

[211] IEU Ohio Ex. 8 at 6.

by increasing that funding and increasing the spending, *reliability can be improved*.[212] He also reiterates this distinction when he testifies that the "failure rates of equipment in AEP Ohio's distribution infrastructure continue to rise and *the level of funding is not present to improve the failure trend*."[213] But improvement in reliability is not consistent with the customers' expectations that were reported in the 2009-2011 customer surveys. To the contrary, surveyed customer expectations for the majority of residential and commercial customers show that reliability expectations will remain the same or decrease over the next five years.[214]

D. The Companies have failed to show that the Distribution Investment Rider complies with the provisions of R.C. 4928.143(B)(2)(d) and therefore, it cannot be included as a provision in the Companies' modified electric security plan presented in the Stipulation.

The Companies, in the rebuttal phase of this proceeding, seized upon a new-found theory to support the inclusion of the DIR in the Stipulation. The Companies claim that the DIR is permissible as part of an ESP under R.C. 4928.143(B)(2)(d).[215] That subsection allows an ESP to include provisions for carrying costs, provided they would have the effect of stabilizing or providing certainty regarding retail electric service.

The Companies apparently subscribe to the theory that they need not present evidence that distribution carrying costs will have the effect of stabilizing or providing

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[212] Tr. XII at 2031; Companies' Ex. 8 at 20 (Mr. Hamrock testifies that the DIR will allow "scaled increases for continued maintenance and improved reliability of AEP's distribution system infrastructure.").

[213] Companies' Ex. 19 at 4.

[214] OCC Ex. 10.

[215] See Companies' Ex. 19 at 3. OCC's motion to strike Mr. Hamrock's testimony on this, based on hearsay, failure to supplement, and lack of knowledge, was denied. That Attorney Examiner ruling is being challenged on brief.

certainty regarding retail electric service. And yet clearly the burden of proof in these proceedings rests upon them under R.C.4928.143(C)(1).

Instead of meeting their burden of proof through testimony, it is expected that the Companies will instead rely on the Commission's findings in the Remand Order[216] for support. There, however, the Commission relied upon testimony *in the record* where the Companies' witness explained how carrying charges on environmental investment had the effect of providing certainty to the Companies and their customers. Finding that the carrying charges had the effect of providing certainty to both the Companies and their customers, the Commission allowed the carrying charges to continue.[217]

Here, however there is no testimony *in the record* showing how the certainty is provided to investors and customers through the DIR carrying charge. The only thing on the record is Mr. Hamrock's testimony that his counsel has advised him that there is a basis under R.C. 4928.143(B)(2)(d) that allows for the Commission to approve the carrying charges. This is not enough.

Moreover, the types of customer benefits associated with carrying charges that the Commission identified for customers in the Remand Order are noticeably absent here. In the Remand Order, the Commission determined that the environmental investments were necessary to continue the operation of the generation units.[218] Whether the distribution investment is necessary to continue operation of the distribution system is a disputed

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[216] See Remand Order at 13-14.

[217] Id. at 14.

[218] Id.

issue in this proceeding. Staff Witness McCarter and OCC Witness Duann submitted testimony that concluded a need for such improvement had not been shown.[219]

The Remand Order specifically relied upon filed testimony by Companies and PUCO Staff witnesses that customers would benefit from the lower cost power produced by the generation units, whose lives could be extended by the environmental investments.[220] The Commission determined that the alternative to the environmental investments would be purchased power.[221] And it found that the cost of the environmental investments was below the market rate for purchased power.[222] Hence, according to the Commission, customers benefit from the carrying charges and the carrying charges have the effect of providing certainty regarding electric service.

Here there has been no such analysis. There is no record that supports the notion that customers will receive any benefits from the distribution investment.[223] This is attributable to how the DIR is structured. There is no tangible improvement to reliability that is tied to the investment. And no investment needs to be made because the Companies can merely collect carrying charges without an additional dollar in distribution investment.

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[219] OCC Ex. 1 at 31; Tr. X at 1724-1725.

[220] Remand Order at 14.

[221] Id.

[222] Id.

[223] See, e.g., OCC Ex. 1 at 32 (Witness Duann testifying that there should be a clear showing of the benefits of using an accelerated recovery mechanism such as the DIR).

V. CONCLUSION

For the reasons discussed herein, the Companies' Stipulation does not pass the three-prong test for Commission approval of stipulations and does not comport with Ohio law. The Companies' Stipulation would not result in a plan that is, as required by law, more favorable in the aggregate than a market rate plan. In fact, the Stipulation has a price tag for Ohioans that would amount to overpayments of millions of dollars over the term of the ESP. In the interest of Ohioans, the Commission should reject the Stipulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief has been served electronically upon those persons listed below this 10th day of November 2011.

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