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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

Throughout these proceedings, Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively, "Companies") have urged the Public Utilities Commission of Ohio ("Commission") and the parties to allow them to raise rates and frustrate customer choice. Approval of the Stipulation[1] would permit the Companies to reach both of their desired outcomes. As demonstrated during the hearing and in the initial briefs submitted by Industrial Energy Users-Ohio ("IEU-Ohio") and others, the Stipulation would raise rates without justification, violate several laws and state energy policy, and fail to satisfy the most basic test for approval of an Electric Security Plan ("ESP"), that the ESP be more favorable in the aggregate than the alternative under Section 4928.142, Revised Code.

Rather than addressing the significant concerns raised by the Stipulation in regard to its unreasonable costs and unlawful provisions, the Companies and now others supporting the Stipulation ask the Commission to authorize a multi-year delay in the ability of customers to obtain the benefits of "customer choice" at a time when the benefits are most certain to help customers reduce their electric bills. Authorization of the Stipulation would then compel a flash-cut to the results of a competitive bidding process ("CBP") when prices are expected to move much higher. Ignoring the shared view of facts and predictions from the parties supporting and opposing the Stipulation regarding the effects of raising rates through irrational and anti-competitive rate designs,

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

stripping consumers of choice, creating discriminatory capacity rates, and hiding other potential costs and restrictions, the Companies and other Signatory Parties assert that customers will benefit from adoption of the Stipulation and that the ESP is a necessary first step toward a CBP. Their claims on both counts are unsupported. Based on a principled review of those claims that relies on the facts and the law, the Commission cannot approve the ESP and other changes proposed by the Stipulation.

II. THE STIPULATION'S PHANTOM, CONTINGENT, AND SPECULATIVE BENEFITS

Each of the parties supporting the Stipulation describes the Stipulation as though it will, if approved by the Commission, provide benefits to customers. A long list of claimed customer benefits is contained in the Joint Brief,[2] and the list is drawn from, to greater and lesser extent, by other parties supporting the Stipulation. But, the parties supporting the Stipulation uniformly neglect to inform the Commission that the customer benefits they attribute to the Stipulation are the regulatory equivalent of a mirage. From a distance, there appears to be something that may be useful; on closer inspection, the Commission will find that there is nothing of value.

The parties supporting the Stipulation claim that the Stipulation provides value to customers by enabling a CBP for the 2015-16 PJM Interconnection, Inc. ("PJM") delivery year and a return to the current and Commission-approved full reliance on the

[2] Joint Initial Brief of the Undersigned Signatory Parties at 131-37. The brief was filed on behalf of the Companies, Ohio Energy Group ("OEG"), Ohio Manufacturers' Association Energy Group ("OMAEG"), Duke Energy Retail Sales, LLC ("DERS"), Ohio Hospital Association ("OHA"), AEP Retail Energy Partners LLC ("AEP Retail"), the Environmental Law and Policy Center ("ELPC"), the Association of Independent Colleges and Universities of Ohio ("AICUO"), the City of Grove City, Ohio ("Grove City"), the City of Hilliard, Ohio ("Hilliard"), EnerNOC, Inc., the Ohio Environmental Council ("OEC"), Paulding Wind Farm, LLC ("Paulding"), The Kroger Company ("Kroger") and the Natural Resources Defense Council ("NRDC"). Except where required by the context, references to arguments presented in this brief are designated "the Companies" and the brief referred to as "Cos. Brief."

PJM reliability pricing model ("RPM") process to establish capacity prices payable by competitive retail electric service ("CRES") suppliers selected by customers located in the Companies' Ohio service areas. Some of these parties have said things in their briefs that directly conflict with the sworn testimony they sponsored.[3] Additionally, these parties point to other financial benefits they attribute to the Stipulation's unfounded proposal to resolve various matters in ways that might have otherwise been contested by the Companies. In the aggregate, these parties urge the Commission to rely on phantom benefits (or benefits so contingent on future happenings that they are speculative) in exchange for unjustified rate increases and provisions that will make most customers captive to the Companies' above-market standard service offer ("SSO").

The legal structure established in Chapter 4928, Revised Code, is a structure that is focused on enabling effective competition to discipline prices for competitive retail electric service, motivating suppliers to improve service quality, and inspiring innovation. It recognized that incumbent electric monopolies with a vertically-integrated business model can and have erected barriers to block the ability of this legal structure to achieve its public interest objective. It compelled structural separation,[4] something long-ago approved by the Commission for the Companies in response to their request and a

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[3] *Compare* Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 10 ("Staff Brief") (Distribution Investment Rider ("DIR") mechanism to spur distribution enhancements) *with* Tr. Vol. X at 1732-33 (Companies can recover DIR without making any new investment); *compare* Retail Energy Supply Association's Post-Hearing Brief in Support of the Stipulated Electric Security Plan Provided in the Stipulation and Recommendation Filed September 7, 2011 at 14-15 ("RESA Brief") (support for two-tiered pricing on the basis of regulatory certainty and removal of barriers to shopping) *with* Tr. Vol. IV at 536 (Companies' "cost-based" capacity proposal would violate Amended Substitute Senate Bill 221 or "SB 221"); *compare* Initial Trial Brief of Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. at 8 ("CNE Brief") (Stipulation removes barriers to shopping) *with* Tr. Vol. IV at 970-71 (capacity pricing above RPM will limit shopping).

[4] Section 4928.31(A)(2), Revised Code.

settlement adopted by the Commission.[5] It provided a ten-year-and-no-more period that began in 2001 to clear uneconomic generation-related costs ("transition costs") out of the way.[6] It specified that "… an electric utility that receives such transition revenues shall be … wholly responsible for whether it is in a competitive position after the market development period."[7]

The briefs supporting the Stipulation pretend that the changes to Chapter 4928 brought about by the 2008 enactment of SB 221 somehow fundamentally altered the mission that the General Assembly directed the Commission to undertake under Chapter 4928. They could not be more wrong. Section 4928.141, Revised Code, added to Chapter 4928 by SB 221, states:

> A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

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[5] *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Opinion and Order at 23 (Sept. 28, 2000).

[6] Sections 4928.36 to 4928.40, Revised Code.

[7] Section 4928.38, Revised Code, states:

> Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

It does not matter how carefully the Companies or other parties supporting the Stipulation avoid using the words “transition charges” or “stranded costs” to describe the generation supply rates produced by the Stipulation. Mr. Hamrock, the Companies’ main policy witness, testified that SB 221 calls for SSO prices to be set at the lower of cost or market.[8] The law, and more specifically Section 4928.39, Revised Code, tells the Commission that the portion of the SSO generation charge, if approved, which is above what is otherwise recoverable in the market is a transition charge. A stipulation, like the one submitted in these proceedings, that calls for customers to pay above-market SSO charges for default generation supply is unlawful regardless of what might happen someday in the future.

That the Companies and their trading partners[9] desire to continue to hold Ohio electric customers captive to an above-market SSO price may be understandable to some, but the Stipulation’s recommendation that the Commission authorize this outcome is unlawful and unreasonable. The days of the Companies’ transitioning to yet another business model[10] based on the flip-flopping decisions issued from American Electric Power Service Corporation’s (“AEP”) “complex matrix”[11] are over as a matter of law.

Even if the Stipulation’s above-market prices and the unjustified increases in such prices were not legally out-of-bounds, they cannot be legitimized factually by the

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[8] Tr. Vol. V at 814.

[9] Exelon’s witness provided the term “trading partner.” Tr. Vol. VI at 1056 (Cross-examination of Joseph Dominquez).

[10] Tr. Vol. V at 826 (Cross-examination of Joseph Hamrock).

[11] *Id*. at 784-85.

claims of benefits advanced by the parties supporting the Stipulation. At the heart of the Stipulation is a trade of time and customers' money for a "commitment" by the Companies to initiate a competitive bid for its SSO load in 2015-16.[12] Supposedly, the Companies' commitment would result in a faster move to a CBP than would be available under an election pursuant to Section 4928.142, Revised Code, another claimed benefit according to some of the Signatory Parties.[13] The commitment, among other things, is premised on three years of rate increases, three years of increases in distribution rates, a one-year generation rider (the "MTR") that raises up to $24 million in new revenue, three years of restrictions on the right of customers to shop, a commitment to cover lost revenue due to the termination of the AEP Pool agreement if losses exceed $50 million with no limit on customer exposure, and various commitments to support structural separation with no plan in place to allow even the vaguest understanding of what this may mean to customers of the Companies.

If the core of the deal was the commitment of the Companies to reorganize and open their SSO to competitive bidding, then the other Signatory Parties themselves struck a one-sided bargain that greatly favors the Companies. Initially, the commitment to move to a competitive bid is contingent on approvals secured through at least one Commission proceeding and two Federal Energy Regulatory Commission ("FERC") proceedings.[14] If the FERC denies either request, the Companies are relieved of any

[12] Stipulation at 11-14.

[13] See, e.g., RESA Brief at 10.

[14] Stipulation at 12 (CBP is conditioned on achieving FERC approval of corporate separation and Pool dissolution).

further obligation to proceed with the CBP.[15] Apart from a vague provision that the parties may initiate a complaint proceeding (or resort to litigation), there is no other enforcement and the Companies' rate plan is unaffected. Even a provision that seems to provide for a back-up auction is contingent on further Commission proceedings.[16] The core bargain, thus, is an essentially one-sided one: the Companies recover the higher generation-related revenue through the guarantee of the ESP, lock in the revenue by denying customers the option of going to a CRES supplier, and make no more than a contingent commitment to move to the CBP.

Even more remarkable is the fact that the conditions on moving to a CBP, corporate separation and Pool termination have never been raised by the Companies before as a reason preventing movement to a market-based SSO. For example, the Companies, in their application for the proposed ESP, stated that they would move to a competitive bid under a market rate offer ("MRO") if they did not receive Commission approval of their ESP Application and demanded a timely decision from the Commission so as to allow that to occur before 2012.[17] Similarly, the Companies themselves proposed in 2008 to employ a competitive procurement process to secure power on a slice-of-system basis as part of their first ESP and to meet their default supply obligation.[18] The "slice-of-system" costs were proposed to be recovered as purchased

[15] *Id*. at 15.

[16] *Id*. at 16.

[17] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al*., Application at 3 (Jan. 27, 2011).

[18] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 15 (Mar. 18, 2009) ("ESP I").

power through the purchased power component of the fuel adjustment clause ("FAC"). The Commission also approved recovery of the market-based generation supply costs by the Companies to serve customers returning to the SSO as part of their continuing transition to market rates.[19] In at least one instance, the Commission actually authorized a competitive procurement process to secure generation supply for SSO service. Following the transfer of the certified territory of the Monongahela Power Company to CSP, CSP was permitted to recover purchased power costs associated with default generation supply after a competitive bid.[20]

At no time during the Companies' many and frequent uses of market-based generation supply to raise rates or the Companies' affirmative support for the use of a CBP to set default generation supply prices have the Companies asserted that these options were contingent on Pool termination, Pool termination cost recovery, structural separation or successful completion of FERC proceedings. Only when pressured to move to market-based generation supply prices that would reduce electric bills did the Companies insist that these conditions become "essential components."[21] There is, however, nothing in Ohio law, pre- or post-SB 221, that warrants the imposition of conditions on the Companies' obligation to set default generation supply prices that are market-based, or, using Mr. Hamrock's previously noted opinion, the lower of cost or market-based prices.

[19] *Id*. at 40.

[20] Tr. Vol. V at 800.

[21] Cos. Brief at 71.

The Stipulation provisions regarding capacity pricing are equally absurd. The Companies have used RPM and advocated the use of a CBP tied to reliance on RPM-based capacity pricing for themselves and other Ohio utilities.[22] There was no suggestion in pricing the MRO in the prior ESP case that anything other than the RPM-based capacity price should be considered for purposes of applying Ohio law.[23] The Staff itself endorsed the use of RPM pricing in this case.[24] Moreover, RPM is currently used to price all capacity available to CRES suppliers serving customers within the OP and CSP service areas.[25] Yet, the Stipulation supposedly provides a benefit to customers by chucking out RPM-based capacity pricing, repricing most capacity at $255 per megawatt-day, leaving only limited access to the RPM-priced capacity based on a queuing system, Appendix C, which was not defined until a day after the hearing on the Stipulation commenced.[26] In this context, describing the loss of RPM-based capacity pricing as a benefit, especially when the proposed ESP will be above market, can only be described as Orwellian "doublespeak."

Moreover, in at least one respect, the parties have committed customers to potential costs for a decision the Companies made that predated the filing of the ESP Application. As the record reflects, the Companies elected to begin the Pool termination

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[22] Tr. Vol. V at 791-801 (discussing initial and reply comments of OP and CSP in Case Nos. 07-796-EL-ATA and 07-797-EL-ATA). See *In the Matter of the Transfer of Monongahela Power Company's Certified Territory to the Columbus Southern Power Company*, Case No. 05-765-EL-ATA, Opinion and Order at 17-18 (Nov. 10, 2005).

[23] *Id*. at 812 (Companies priced MRO using RPM prices in *ESP I* case).

[24] See Staff Ex. 2.

[25] Tr. Vol. V at 842.

[26] Stipulation at 20-22 and Appendix C; Notice regarding Detailed Implementation Plan (Oct. 5, 2011).

process in December 2010, a month before the ESP Application was filed, with no Commission direction as to what costs, if any, they might be able to seek as a result of that decision.[27] Yet, to secure the promise to open the system to bidding, the parties have proposed to allow the Companies to seek whatever termination costs the Companies can demonstrate were incurred if the costs are demonstrated to exceed $50 million, and there is no ceiling to the potential exposure that customers may face.[28] Given the timing of the Companies' notification, it is readily apparent that Pool termination was going to happen anyway; it was hardly an essential component to the CBP. Paying for something the Companies were already going to undertake without that commitment should not strike the Commission as anything other than a bad deal for consumers.

There is also a material difference in the kinds of Stipulation commitments that negatively affect customers and the commitments being made by the Companies. Customers face higher rates, restricted opportunities to shop, irrational shifts in revenue responsibility, and unexplained and substantial new revenue responsibilities and then, eventually, a return to RPM-based capacity pricing at a time when energy prices are expected to be higher.[29] In contrast to the real cost to consumers, the Companies commit to file applications but are under no real penalty if those applications falter.[30] They receive new and substantial amounts of revenue for their distribution systems with

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[27] Tr. Vol. V at 692 (Cross-examination of Philip Nelson).

[28] Stipulation at 25.

[29] IEU-Ohio Brief, *passim*.

[30] See prior discussion.

no commitment to invest any new money in plant or to reduce outage time or frequency by any amount.[31] They receive additional revenue through the Market Transition Rider ("MTR"), up to $24 million, with no cost justification.[32] They claim they are reducing the commitment of customers to carry the balances of past deferred rate increases, but propose to assign the revenue responsibility to CSP customers who already paid off their phase-in deferrals and in a manner that actually increases the amount that all customers will pay by tying a delay in residential payment to support of future securitization legislation.[33]

The Signatory Parties also claim that the public benefits from empty commitments. The Companies commit to the use of Ohio shale gas, but nothing is defined in terms of jobs or economic growth.[34] Further, the use of any shale gas is associated with plans that were already underway prior to the Stipulation.[35] The Companies extract a commitment for a recovery mechanism for a solar project and a new gas plant, but hide the effects of each by not disclosing the potential costs in their assessment of the ESP versus the MRO.[36] They promise to convene various customer meetings, but make no commitments as to outcomes.[37]

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[31] Stipulation at 8-10.

[32] *Id*. at 5-6.

[33] Cos. Ex. 4 at 16.

[34] Stipulation at 19.

[35] Tr. Vol. V at 855-56.

[36] Stipulation at 6 and 19; see discussion below.

[37] Stipulation, *passim*.

In a similar vein, these empty commitments are used to support the assertion that the proposed ESP meets the statutory requirement that it be more favorable than the alternative of an MRO.[38] This assertion is a concession to the obvious reality: based on the anticipated prices over the life of the proposed ESP, the proposed ESP fails the test.[39] Even under the Companies' poorly executed version of the test, the ESP fails by over $100 million.[40] In reality, the proposed ESP fails by several times that amount.[41]

To make up for the ESP's significant quantitative failure and violation of the law, the Signatory Parties point to "qualitative" benefits such as the commitment to move to a competitive bid in 2015-16 for default SSO service, just when they project that electric prices will move much higher. So after the Commission assists in blocking "customer choice" when shopping is reducing electric bills, the Companies and other supporters of the Stipulation would make the Commission responsible for implementing the results of a CBP that – if they are correct – will significantly raise rates. And when the public discovers what the Stipulation brings them, it will be the Commission – not the Companies – that will be on the firing line.

To approve the Stipulation, the Commission's standard of review requires that the Signatory Parties demonstrate that the Stipulation as a package provides customer benefits and advances the public interest. In short, it must be shown to be a good deal

[38] See, e.g., Cos. Brief at 134.

[39] *See* IEU-Ohio Brief at 19-28.

[40] Cos. Brief at 138.

[41] IEU-Ohio Ex. 9A at 43.

for the public.[42] As discussed below, many of the commitments are plainly illegal, are unreasonable, or both. For customers, however, there are real and immediate costs if the Stipulation is adopted. This is a bad deal that the Commission cannot and, importantly, must not enable.

III. THE COMMISSION CANNOT APPROVE THE PROPOSED ESP BECAUSE IT FAILS TO SATISFY THE STATUTORY TEST.

In their initial brief, the Companies repeat the claims in Mr. Hamrock's and Mr. Allen's testimony that the Stipulation ESP has additional non-price benefits that produce, in the aggregate, price and non-price benefits totaling $880 million on a net present value basis.[43] Other Signatory Parties, including the Staff,[44] despite the testimony of its own witness, continue to assert that the test is satisfied if the qualitative benefits are considered.[45]

The Signatory Parties fail to recognize, much less rebut, evidence that demonstrates these claimed benefits are specious at best.[46] The record demonstrates that several categories of Mr. Allen's claimed benefits are overstated. Mr. Allen incorrectly calculated benefits associated with the Phase-In Recovery Rider ("PIRR") by not adjusting the amounts of deferred cost to reflect the effects of the Commission's

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[42] The Companies make some minor commitments to support community activities, but these commitments are overwhelmed by the substantial costs imposed by the Stipulation.

[43] Cos. Brief at 138.

[44] The Staff further relies on the value of the proposed capacity prices despite testimony from its own witness who would not assign any benefit to that portion of the Stipulation. Tr. Vol. X at 1751-52 (Cross-examination of Robert Fortney).

[45] Staff Brief at 20; RESA Brief at 22; Exelon Brief at 14; CNE Brief at 7.

[46] IEU-Ohio Brief at 27-29.

ESP I Remand Order.[47] Mr. Allen also failed to discount the claimed benefit associated with funding for the Partnership with Ohio ("PWO") and the Ohio Growth Fund ("OGF") to recognize the contingent nature of the commitment.[48] He failed to do so notwithstanding the fact that an exhibit prepared by Mr. Allen illustrated a projected return on equity below the contingency level.[49] Moreover, the Companies fail to recognize that even the Staff states the vast majority of these claimed benefits, specifically the claimed value of discounted capacity, to be devoid of any real value.[50]

Unsubstantiated claims of benefits that were not proven or, if claimed were soundly refuted cannot support a finding that the proposed ESP is statutorily permitted or benefits consumers and the public interest. Moreover, the sum of the benefits claimed by Mr. Allen builds upon the results of an ESP versus MRO price comparison conducted by Ms. Thomas that is fatally flawed, as discussed *infra*. Thus, there is no proper foundation for the claim that the ESP is more favorable, in the aggregate, than the alternative under Section 4928.142, Revised Code.

A. The Methodology Utilized by Ms. Thomas in Her ESP versus MRO Analysis is Flawed.

The Companies recite the methodology utilized by Ms. Thomas to perform her ESP versus MRO analysis.[51] During her cross-examination and through her updated

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[47] Tr. Vol. III at 429-30.

[48] Tr. Vol. II at 422.

[49] Cos. Ex. 4, Ex. WAA-5 at page 6 (For calendar year 2012, Mr. Allen projected a return on equity of 7.71% excluding off-system sales, which is below the contingency level of 10% in Sections IV.u and IV.v of the Stipulation.).

[50] Tr. Vol. X at 1751-52 (Cross-examination of Robert Fortney).

[51] Cos. Brief at 139-42.

exhibits, Ms. Thomas conceded that her ESP versus MRO analysis showed the ESP price higher on average than an MRO by $.71 per MWh. Moreover, as demonstrated in Mr. Murray's testimony, Ms. Thomas made numerous erroneous assumptions in her analysis that effectively understate the amount by which the proposed ESP fails the ESP versus MRO test.[52]

B. The Claimed Qualitative Benefit of the Stipulation ESP Does Not Exist.

A number of parties claim that the early transition to market is a benefit of the Stipulation.[53] These claims do not comport with the evidence in these proceedings. The CBP reflected in the Stipulation is contingent upon future events that may not happen. The CBP will only occur if the Companies separate their generation assets and the AEP Pool agreement is terminated before the first auction is scheduled to be held.[54] If FERC does not accept the Companies' Pool termination or corporate separation request, the Companies are relieved of their obligation to conduct a competitive bid. Thus, this claimed benefit is subject to regulatory uncertainty and the claimed benefit should be afforded no weight.

Additionally, as acknowledged by the Companies and Exelon Generation Company, LLC ("Exelon"), to the extent that the Companies propose a subsequent ESP

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[52] IEU-Ohio Brief at 21-27.

[53] Cos. Brief at 145; RESA Brief at 9-13; CNE Brief at 7-8; Exelon Generation Company, LLC's Initial Post-Hearing Brief in Support of the Stipulated Electric Security Plan Provided in the Stipulation and Recommendation Filed September 7, 2011 at 6 ("Exelon Brief"); Staff Brief at 5. Curiously, Staff appears to reverse course on this conclusion when it later states "[i]mplementing an auction-based SSO <u>could potentially create a fully competitive rate into the future.</u>" Staff Brief at 9 (emphasis added) (footnotes omitted).

[54] Stipulation, Article IV.t; *see also* Tr. Vol. X at 1762.

to take effect at the end of the Stipulation ESP, the subsequent ESP is not required to contain a CBP.[55] Under Ohio law, if the Commission modifies the subsequent ESP to include a CBP, the Companies can veto the Commission's modified ESP. Thus, there is no certainty that the Stipulation will actually result in a full transition to a CBP.

The Companies cite other benefits claimed in the testimony of Staff witness Fortney regarding the construction of a new natural gas-fired generating facility and the use of shale gas.[56] The Staff also argues that the qualitative benefits identified by Mr. Fortney allow the ESP to overcome the failed MRO price test.[57] The Companies' and Staff's selective citations to the record fail to recognize that during his cross-examination, Mr. Fortney conceded these benefits are speculative and may never occur.[58]

In yet another break from reality, the Companies claim the elimination of provider of last resort ("POLR") charges is a Stipulation benefit, notwithstanding the Commission's ESP I Remand Order which directed the Companies to remove all POLR charges from current rates.[59] The Staff makes a similar claim.[60] The Companies suggest that the Commission pretend POLR charges exist because the Commission previously determined they were lawful (a conclusion the Ohio Supreme Court did not

[55] IEU-Ohio Ex. 9A at 7-8.

[56] Cos. Brief at 145-46.

[57] Staff Brief at 20.

[58] Tr. Vol. X at 1762-63.

[59] Cos. Brief at 146.

[60] Staff Brief at 6.

agree with), and then count the elimination of POLR charges as a benefit.[61] Of course, under this standard of review, no ESP could ever fail the MRO comparison test since an ESP proponent could simply create an unending list of imaginary woes and their associated costs and then pretend eliminating these imaginary woes counts as a benefit.

The Companies also claim that under an MRO, future environmental costs would be explicitly recovered from customers, whereas the Stipulation ESP has no such explicit recovery mechanism.[62] The Companies conveniently ignore the fact that it is advocating that forecasting the results of future changes in costs for things such as environmental and fuel costs is not required when performing the ESP versus MRO analysis.[63] In other words, the Companies believe the Commission should count the impact of forecasted changes in costs when it favorably affects the ESP versus MRO comparison, but the Commission should turn a blind eye when the results move in the other direction.

C. It is Not Appropriate to Use Stipulation Capacity Prices as the Basis for Competitive Benchmark Prices.

The Companies argue that Mr. Schnitzer's and Mr. Murray's objections to the use of the Stipulation capacity price as a component of the competitive benchmark price is without basis.[64] The Companies assert that "[t]he Stipulation's capacity pricing, once adopted by the Commission, will establish the appropriate charges for use of AEP

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[61] *Id.*

[62] Cos. Brief at 146.

[63] *Id*. at 148.

[64] *Id*. at 151.

Ohio's capacity, both for the purpose of sales to CRES providers and for purposes of **estimating the wholesale cost of capacity used by competitive bidders** that would seek to provide generation service for the competitively bid portion of the hypothetical MRO."[65] The claim that the Commission is required to use the Stipulation capacity price as the basis for competitive benchmark prices fails for several reasons.

As the Companies concede in their argument, under an MRO, the capacity costs charged to competitive bidders are wholesale rates. A wholesale rate is subject to the jurisdiction of FERC and is not subject to the state compensation mechanism in PJM's tariff. Mr. Murray provided un-rebutted testimony to explain how capacity prices to wholesale bidders would be established under an MRO scenario and why the state compensation mechanism was inapplicable.[66]

Additionally, the Companies' argument fails to recognize that under an MRO scenario, the Stipulation would not exist in the first place. The Stipulation has been presented to the Commission for the purpose of establishing prices under an ESP. In the MRO scenario, the Stipulation ESP does not establish prices for the MRO. Thus, even assuming, *arguendo*, that capacity prices charged to CRES suppliers are a reasonable proxy for the estimated capacity prices that wholesale bidders would factor into their offers,[67] the controlling capacity price would remain at RPM until such time as another capacity price was lawfully approved by the appropriate regulatory authority.

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[65] *Id*. (emphasis added).

[66] IEU-Ohio Ex. 9A at 35-37.

[67] For the reasons discussed in Mr. Murray's testimony, Stipulation capacity prices charged to CRES suppliers would not be a reasonable proxy for wholesale capacity costs. *Id*. at 37-38.

Since the results of those pending proceedings are uncertain and RPM is the current known and only authorized rate, the only logical capacity prices to reflect in estimated competitive benchmark prices under the MRO scenario are RPM prices.

The Companies' final argument that the Stipulation capacity price is a negotiated rate and that is what Mr. Murray recommends in his testimony at page 37 substantially mischaracterizes his testimony. Mr. Murray testified that bidders would not be willing to pay the $255 per megawatt-day price for capacity because the price is significantly higher than prevailing market prices for capacity.[68] Mr. Murray also provided evidence that RPM capacity prices were representative of capacity prices resulting from bilaterally negotiated prices, including capacity sales made by the Companies.[69] For all of these reasons, the Companies' arguments that the Stipulation capacity price should be used as an estimate of the capacity that wholesale bidders would reflect in their offer prices are without merit.

D. FirstEnergy Auction Prices are a Valid Proxy for AEP Expected Market Prices.

The Companies argue that FirstEnergy auction prices relied upon by Mr. Murray in his analysis of ESP versus MRO results are not a valid proxy for AEP's expected market prices. The Companies first argue that FirstEnergy's auction prices are not an appropriate proxy because the FirstEnergy auction prices are for a different delivery period than the term of the Stipulation ESP.[70] This argument lacks merit as Mr. Murray

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[68] *Id*. at 38.

[69] IEU-Ohio Ex. 9B at 34-35.

[70] Cos. Brief at 153.

used the FirstEnergy auction results only to estimate MRO prices for like delivery periods.[71] For the period of June 2014 through May 2015, Mr. Murray adopted the market price estimate of $72.32 per MWh contained within the testimony of Ms. Thomas.[72] For the June 2015 through May 2016 delivery period, Mr. Murray held the estimated market price constant at $72.32 per MWh to be conservative.[73]

Relying upon the rebuttal testimony of Ms. Thomas, the Companies next argue that the movement in simple swap prices between the date of the first FirstEnergy auction (October 2010)[74] and the date of the second FirstEnergy auction (January 2011)[75] shows that simple swap prices have moved over time and, therefore, the FirstEnergy auction prices cannot be relied upon.[76] This argument fails for two reasons. First, the movement in simple swap prices between October 2010 and January 2011 is irrelevant. Although Mr. Murray presented the results of both FirstEnergy auctions in his testimony, he used only the price of $57.47 per MWh in his analysis, which was the price for 16 tranches for delivery between June 2011 and May 2014 in the January auction.[77] He adopted this price to be conservative, as it was the highest price from the January auction.[78] He also adopted this price, recognizing that prices in the January

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[71] IEU-Ohio Ex. 9A at 38-39.

[72] *Id.* at 39.

[73] *Id.*

[74] *Id*. at 32.

[75] *Id.*

[76] Cos. Brief at 153-154.

[77] IEU-Ohio Ex. 9A at 38.

[78] *Id.* at 38-39.

2011 auction had moved higher than prices in the October 2010 auction.[79] Thus, bids from the January 2011 auction would fully reflect the movement in simple swap prices since October 2010.

Second, any argument about the movement in simple swap prices and their likely effect on auction prices if an auction were held today can be put aside by observing the results from the latest FirstEnergy competitive bid, held shortly before the close of the evidentiary record. As demonstrated by the auction manager's report filed on October 26, 2011 in Case No. 10-1284-EL-UNC, the most recent FirstEnergy auction, held on October 25, 2011, resulted in a clearing price of $52.83 per MWh for delivery of power between June 2012 and May 2014.[80] Thus, contrary to what the Companies would like to pretend, in the real world electricity prices for delivery during the term of the ESP have declined since January 2011. Thus, if these real world results were incorporated into the ESP versus MRO analysis conducted by Mr. Murray, the ESP would fail the more favorable in the aggregate test by an even larger margin than what is reflected in Mr. Murray's testimony.

Also, relying upon the rebuttal testimony of Ms. Thomas, the Companies argue that three adjustments – basis, alternative energy requirements, and losses – can explain much of the difference between Ms. Thomas' administratively-estimated market

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[79] *Id.* at 38.

[80] During the evidentiary hearing, administrative notice of the auction manager's report was taken. Tr. Vol. XIII at 2340.

prices and the real world results of the FirstEnergy auctions.[81] None of these claims has merit.

First, the basis adjustment Ms. Thomas claims is necessary relies upon data from 2009 and 2010. This reflects a period of time when FirstEnergy was a member of the Midwest Independent Transmission System Operator ("MISO").[82] FirstEnergy is now a member of PJM. Ms. Thomas presented no evidence that these historical basis differentials are representative of basis today, given FirstEnergy's change in regional transmission organization ("RTO") membership. Moreover, testimony from Staff witness Johnson, representing a Signatory Party supporting the Stipulation, concluded that the historical basis differential between FirstEnergy and AEP was statistically insignificant.[83] Second, the argument that an alternative energy adjustment is necessary ignores the fact that Mr. Murray made just such an adjustment in his testimony.[84] In fact, the average alternative energy requirement adjustment made by Mr. Murray is significantly higher than the $0.69 per MWh adjustment recommended by Ms. Thomas for January 2012 through May 2014.[85] Finally, Ms. Thomas testified that the FirstEnergy auction results must be adjusted upward to reflect losses. However, Ms. Thomas' unsubstantiated claims in this regard are contrary to the evidence in these proceedings.

[81] Cos. Brief at 154-156.

[82] Tr. Vol. XIII at 2328-29.

[83] Staff Ex. 3 at 11-13.

[84] IEU-Ohio Ex. 9A at 39-40.

[85] IEU-Ohio Ex. 10 at line 29. It is disingenuous for the Companies to argue on brief that Mr. Murray's estimated market price was flawed for failing to adjust for alternative energy requirements. During her cross-examination, Ms. Thomas agreed with Mr. Murray's alternative energy adjustment. Tr. Vol. XIII at 2329.

The record demonstrates that the product subject to competitive bid in the FirstEnergy auction requires bidders to assume responsibility for all transmission and distribution losses.[86]

Finally, all of the Companies' arguments that the FirstEnergy auction prices relied upon by Mr. Murray are not a suitable proxy for AEP market prices ignore the fact that Mr. Murray did not rely exclusively upon the auction results in his analysis.[87] Mr. Murray benchmarked the auction results against real world electricity supply offers being made to Ohio customers, including offers from the Company's affiliate, AEP Retail Energy and the bilateral market-based capacity sales undertaken by the Companies. These real world results were relied upon by Mr. Murray to support his conclusion that the FirstEnergy auction results were a reasonable estimate of likely market prices during the initial years of an MRO and that Ms. Thomas' administratively-determined prices were unreasonable and excessive. Mr. Murray also presented evidence that AEP was a willing participant in the FirstEnergy auction and, therefore, the clearing prices reflected market prices acceptable to the Companies.[88]

E. The Final Year of the ESP Must Be Considered in the ESP versus MRO Analysis.

The Companies argue that it is not necessary to include the June 2015 through May 2016 delivery period in the ESP versus MRO analysis.[89] The Companies state that

[86] Tr. Vol. XI at 1901-04 (Cross-examination of Kevin Murray).

[87] IEU-Ohio Ex. 9A at 30-32.

[88] IEU-Ohio Ex. 9A at 30.

[89] Cos. Brief at 157.

contrary to Mr. Murray's argument, it is not appropriate to use any weighting of legacy generation rates for the auction year because 100% of the load will be subject to competitive bid.[90] The Companies argue this approach is consistent with the Commission's decision in Case No. 10-388-EL-SSO.

As noted in IEU-Ohio's brief, Case No. 10-388-EL-SSO, which involved an ESP for FirstEnergy's electric distribution utilities ("EDU"), is inapplicable to the present proceedings with respect to this issue due to the fact that the Companies owned generating facilities at the time Section 4928.142, Revised Code, was enacted. The FirstEnergy EDUs, the subject of the ESP under consideration in Case No. 10-388-EL-SSO, did not own electric generation facilities at the time Section 4928.142, Revised Code, was enacted.[91] Thus, the statutory requirements that require blending under an MRO for the Companies do not attach to the FirstEnergy EDUs, as discussed in IEU-Ohio's brief.[92]

Further, the Companies contradict themselves numerous times on the blending requirements under an MRO. For purposes of the ESP versus MRO analysis, the Companies argue no blending is required during the fifth year.[93] The Companies, however, also argue that one of the benefits of the ESP is that it provides a substantially-earlier transition to fully market-based prices than an MRO, conceding the

[90] *Id.*

[91] IEU-Ohio Brief at 24-26.

[92] *Id*. at 24-26.

[93] Ms. Thomas' opinions on that issue were contradicted by Mr. Nelson, who testified that an MRO would result in a six to ten-year transition period. Tr. Vol. XII at 226 (Cross-examination of Philip Nelson).

statutorily mandated minimum five-year blending requirement.[94] They repeat this claim in their brief on page 145, citing the testimony of Mr. Hamrock. They also state on page 123 of their brief that "[e]ven an MRO option under SB 221 involves an additional transition period of 6-10 years before a full market price is charged for the standard service offer." Other parties supporting the Stipulation also acknowledge that an initial MRO would require blending over a minimum period of five years.[95] The Companies cannot have it both ways.

The question of whether a shorter blending period than five years in an initial MRO is statutorily permitted has, moreover, been decided by the Commission.[96] Mr. Murray correctly and appropriately modeled the last year of the MRO in his analysis, blending the expected results of a competitive bid with the legacy ESP price.

F. The Generation Resource Rider ("GRR") and Other Placeholder Riders Must be Considered in the ESP versus MRO Analysis.

The Companies argue that it is not necessary to consider the GRR and the Pool Modification or Termination Rider ("PMTR") in the ESP versus MRO analysis because there are no present charges to be included in either rider.[97] The Companies, citing Ms. Thomas' testimony, also claim that because the GRR would be a non-bypassable

[94] Cos. Brief at 138.

[95] Exelon Brief at 2; RESA Brief at 10; CNE Brief at 7; Staff Brief at 11.

[96] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer, Electric Generation Accounting Modifications and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 23 (February 23, 2011) ("*Duke SSO*").

[97] Cos. Brief at 159-60.

charge, it has no impact on the outcome of an MRO price test.[98] Finally, they assert that the GRR cost estimates used by Mr. Murray are speculative.[99]

The Companies' first argument that the GRR and PMTR can be ignored because there are presently no charges under either rider elevates form over substance. The Companies make the claim, without statutory support, that because the actual amount of future costs of the GRR and PMTR will be established in other proceedings, the Commission is free to ignore the expected cost of the riders in its evaluation of the ESP. In evaluating an ESP, however, the Commission is statutorily bound to consider "all other terms and conditions" of the ESP.[100] All other terms necessarily must include the future expected cost of the rider under the ESP.

The Companies' next argument that the GRR is a non-bypassable charge and therefore has no impact on the ESP versus MRO analysis ignores the reality that there is no statutory authority for such a non-bypassable charge under an MRO. The Companies' claim that the GRR estimates used by Mr. Murray are speculative is also without merit. Mr. Murray's estimated GRR costs reflect estimates provided by the Companies' witnesses in these proceedings.[101] Finally, the Companies ignore and do not address in their brief the fact that Mr. Fortney, testifying on behalf of the Staff in

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[98] *Id.*

[99] *Id.* at 161.

[100] Section 4928.143(C)(1), Revised Code.

[101] IEU-Ohio Ex. 9A at 41.

support of the Stipulation, also testified that the costs of the GRR should be recognized only under an ESP and not an MRO.[102]

G. The Costs of the Distribution Investment Rider ("DIR"), gridSMART, and the Storm Damage Recovery Mechanism Must be Considered in the ESP versus MRO Analysis.

The Companies argue that it is not necessary to consider the costs of the DIR, gridSMART, and the Storm Damage Recovery Mechanism.[103] They readily concede that the costs to be recovered through these riders are distribution related costs rather than generation related costs.[104] They assert that, under an MRO, the Companies would recover the costs to be collected through these riders through an increase in base distribution rates.[105]

Whether the Companies could or could not recover the costs to be recovered through these riders as a result of a base distribution case is a matter of speculation. Mr. Murray's analysis reflects what is required by law. Under an MRO, rates are established to provide generation service and it is not permissible to utilize an MRO application to establish non-generation related rates.[106] Thus, the costs associated with these riders must be excluded from the expected cost of an MRO.

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[102] Staff Ex. 4, Attachment A.

[103] Cos. Brief at 161.

[104] *Id.* at 161-162.

[105] *Id.* at 162.

[106] *Duke SSO*, Opinion and Order at 74-75.

IV. RATE INCREASES AND REVENUE RESPONSIBILITY

As demonstrated in the initial brief of IEU-Ohio,[107] the proposed rate increases and generation rate design violate several state policies and lack any cost or market-based justification. The attempt to "fix" the rate increases and rate design problems through the MTR and Load Factor Provision ("LFP") result in a further rate increase (as a result of the MTR) and further frustrate consumer choice.[108] Thus, the Stipulation illegally and unreasonably proposes to allow the Companies to increase rates automatically through an altered rate design.

A. Rate Increases

The initial briefs of the parties supporting the Stipulation do not address the legal problems presented by the rate increases. The Companies reiterate their testimony, but do not address the criticism of the rates offered by IEU-Ohio.[109] The Staff offers that the proposed rates support the goal of rate stability, but fails to explain how increases in rates make those rates "stable."[110] In doing so, the Staff again ignores its own testimony indicating that the Staff opposes rate increases without cost justification.[111] The CRES suppliers ignore the rate increases completely. Taken together, the initial briefs of the parties supporting the Stipulation reflect their unsanctionable preference for making Ohio's legal requirements bypassable.

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[107] IEU-Ohio Brief at 29-37.

[108] *Id*. at 32-43.

[109] Cos. Brief at 35-37.

[110] Staff Brief at 7.

[111] Tr. Vol. X at 1716-17 and 1719.

In their initial brief, the Companies do not explain what justifies the increases in rates other than to say that Section 4928.143(B)(2)(d), Revised Code, authorizes automatic rate increases and that generation rates do not have to be cost-based.[112] The Companies do not provide a citation to the record to support these increases, but instead attack the Office of the Ohio Consumers' Counsel's ("OCC") witness.[113] The lack of citation is significant. This Commission refused to allow the Companies to impose automatic base generation increases without a cost justification in the Companies' first ESP.[114] Thus, the Commission would have to reject its policy of not permitting these Companies to automatically increase base generation rates without a cost justification if it authorizes this part of the Stipulation.

While the Companies do not offer any cost justification for the increases, they and several of the other Signatory Parties suggest that rate increases in place of non-bypassable riders nonetheless satisfy the statutory requirement for approval of the rate increases under Section 4928.143(B)(2)(d), Revised Code.[115] That section, however, requires that there be a showing that the affected charges "would have the effect of stabilizing or providing certainty regarding retail electric service."[116] "Retail electric service" is a statutorily defined term that means "any service involved in supplying or arranging for the supply of electricity to ultimate customers in this state, from the point of

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[112] Cos. Brief at 37.

[113] *Id*. at 37-38.

[114] *In the Matter of the Application of Columbus Southern Power Co. for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al*., Opinion and Order at 30 (March 18, 2009).

[115] Cos. Brief at 37; CNE Brief at 7, 8, 12; Exelon Brief at 13-14; RESA Brief at 5, 16; Staff Brief at 7.

[116] Section 4928.143(B)(2)(d), Revised Code.

generation to the point of consumption."[117] There is nothing in the record or the briefs that suggests that reducing the number of riders relative to some number that may have been proposed but not justified and increasing rates in place of those riders does anything to assure that customers have a stable and certain retail electric service.

In summary, the Stipulation proposes illegal and unreasonable rate increases. The Companies failed to provide any cost basis for the increases in violation of Commission precedent and policy. They also failed to demonstrate that the statutory requirements of Section 4928.143(B)(2)(d), Revised Code, the section the Companies use to justify the automatic increases, are satisfied.

B. Rate Design and Revenue Responsibility

In its initial brief, IEU-Ohio noted that the Companies had not presented a legal and reasonable proposal for redesigning rates and shifting revenue responsibility. Instead, the Stipulation created inter- and intra-class shifts of revenue responsibility based on an unreasonable use of Ms. Thomas' faulty attempt to administratively determine prices. In their initial brief, the Companies simply repeated their initial testimony saying that the proposed rate structure and redistribution of revenue responsibility will eliminate cross-subsidies, account for the effects of the merger, and promote a transition to market rates.[118] Similarly, they restate their testimony that the MTR and the LFP moderate the rate shifts.[119]

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[117] Section 4928.01(A)(27), Revised Code.

[118] Cos. Brief at 35-40.

[119] *Id.* at 36.

The Companies have not offered any support for the claim that the resulting rates would reflect market rates, and in fact the Companies' justification is not supported by the sponsor of the proposed rates, Mr. Roush. In his rebuttal testimony, Mr. Roush offered the following:

> Q. . . . Now although your testimony is that market price relationships were used to develop the total generation prices, is it fair to say that these prices—let's say the 2012 prices under the stipulation—are not at market levels?
>
> A. It's fair to say I don't know what market levels are. I'm using the market price relationships only.
>
> Q. And the total generation prices will not be at market levels by 2015 potentially; it that also fair to say?
>
> A. It's fair to say I don't know because I don't know what market price levels will be in 2015.[120]

In the end, the proposed rate design and revenue distribution rests on the administratively-determined prices used by Ms. Thomas, and these prices were shown to bear no relationship to real market prices or cost.[121]

A further justification offered by the Companies for the so-called "market-like" design is a comparison to the results of the FirstEnergy CBP.[122] As noted previously, however, reliance on the results of the stipulation in the FirstEnergy cases is an improper use of the Stipulation.[123] On a more practical level, the SSO prices set in the

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[120] Tr. Vol. XIII at 2302-03.

[121] As Mr. Murray pointed out, there are multiple proxies based on real markets that the Companies might have used to establish market-based prices. IEU-Ohio Ex. 9A at 30-32. The administratively-determined rates themselves have no relation to market rates. *Id*. at 20-22.

[122] Cos. Brief at 39.

[123] *See* IEU-Ohio Brief at 31 n.91.

FirstEnergy cases come without any limitations on shopping and any negative rate design or revenue distribution consequences are bypassable.

An alternative justification the Companies offer for the redesign of rates is that it will eliminate cross-subsidies,[124] but the Companies offer no cost-based analysis of current rate relationships to support this claim. The obvious defect with the Companies' argument is revealed by the Companies' need to "fix" the problem created by the proposed revenue distribution and rate design by proposing the MTR and the LFP.

Moreover, the MTR is itself illegal and unreasonable. The MTR generates additional revenue ($24 million) without cost justification, is not authorized by statute, and is a non-bypassable generation charge that will negatively affect "customer choice."[125]

Finally, the Companies' arguments regarding the proposed revenue distribution and rate design fail to address the fact that it is one more part of the Companies' effort to limit "customer choice." As explained by IEU-Ohio and even some of the parties supporting the Stipulation, the proposed rate design and revenue distribution lowers rates for those customers that are more likely to leave the Companies' default service and raises rates for those customers less likely to leave.[126] Foreclosing customer choice by applying an unreasonable and illegal revenue distribution and rate design is not something the Commission can or should authorize.

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[124] Cos. Brief at 39.

[125] IEU-Ohio Brief at 32-33.

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

V. THE CAPACITY SET-ASIDES AND TWO-TIERED PRICING STIFLE CUSTOMER CHOICE.

As is evident by the amount of the Companies' brief devoted to defending Article IV.2 of the Stipulation, the provisions establishing shopping caps, capacity charges, and Commission and FERC proceedings are material provisions of the Stipulation.[127] The Stipulation, however, proposes to resolve this "central issue" in ways that are unreasonable and illegal as detailed by IEU-Ohio, FirstEnergy Solutions ("FES"), and OCC.

As IEU-Ohio demonstrated in its direct case and initial brief, the two-tiered capacity price violates state law and policy.[128] Initially, it frustrates customer choice. For those customers that are not lucky enough to be near the front of the queue proposed to be created by the Stipulation and Appendix C of the Stipulation, CRES suppliers will have to pay $255 per megawatt-day for capacity. As the evidence shows, CRES suppliers will be precluded from making offers to any customers at the higher capacity price because "headroom" will be exhausted by the higher capacity price. The Companies, in a moment of clarity, agree.[129] CRES suppliers agree and, in some cases, continue to agree after they signed the Stipulation.[130] Those parties opposing the Stipulation agree that headroom will be eliminated and also demonstrate why retail

[127] Cos. Brief at 87 ("a central issue"); CNE Brief at 10-11; Exelon Brief at 8; Staff Brief at 9-10; RESA Brief at 14.

[128] This paragraph is a summary of the argument and citations found in IEU-Ohio's Brief at 38-43.

[129] FES Ex. 1, TCB 8 and 9.

[130] Tr. Vol. IV at 542-43 (Cross-examination of Teresa Ringenbach); Tr. Vol. VI at 971 (Cross-examination of David Fein).

price offers would not be made at the higher capacity price.[131] The only evidence to the contrary was the incredible assertion by the Companies in rebuttal that CRES suppliers would offer capacity at a loss or on a guess that a customer would someday be able to secure RPM-priced capacity.[132] Thus, there is very little disagreement, and no credible disagreement, that the two-tiered pricing structure will restrict shopping at the very time the Companies will be raising SSO rates further above market.

Additionally, the method used to accomplish this restriction rests on a discriminatory price structure. State law is clear that undue price discrimination is a violation of both statute and state energy policy. The Stipulation, nonetheless, proposes to price capacity at two levels: RPM for the lucky few; $255 per megawatt-day for the unlucky balance. The only difference between the lucky and unlucky is where and when they may have stepped into the queue. Moreover, the process for prioritizing customers is confusing and arbitrary.[133] Thus, adopting these portions of the Stipulation will result in rates for similarly-situated customers or CRES suppliers that are not comparable and nondiscriminatory, a direct violation of substantive provisions of both Ohio utility law and the state energy policy.[134]

As with so many of the other issues discussed by the Companies and parties supporting the Stipulation, there is little offered in the way of a response to arguments made by IEU-Ohio and others that demonstrate that Article IV.4 would, if approved,

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[131] FES Ex. 3 at 34-36; IEU-Ohio Ex. 9A at 17.

[132] Cos. Ex. 20A at 7-9.

[133] FES Ex. 1 at 25-31.

[134] *Id*. at 43-45.

curtail shopping through undue discrimination. Instead of addressing the legal and other problems, the briefs of the parties supporting the Stipulation assert two claims. First, several point to the availability of RPM-priced capacity once the CBP begins in June 2015.[135] Second, several parties offer that this section of the Stipulation provides regulatory certainty by resolving the outstanding litigation initiated by the Companies.[136] Neither argument, however, addresses the unreasonableness and unlawfulness of the capacity pricing scheme. As the Supreme Court has already declared, the Commission cannot approve an illegal provision because parties present an illegal provision to the Commission through a settlement.[137]

Second, the Companies argue that the set-asides are not absolute caps on shopping.[138] This argument, however, presents a difference without distinction. Whether "absolute" or not, the evidence shows that the proposed shopping caps will do exactly what Mr. Munczinski said they would: shopping over the caps will stop because it becomes uneconomical for consumers.[139]

In summary, the Commission cannot authorize the shopping caps and two-tiered capacity pricing scheme as proposed by the Stipulation. The proposal is an unreasonable and unlawful pricing scheme. It will block shopping and the customers'

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[135] CNE Brief at 10-11; Staff Brief at 9-10; RESA Brief at 9-10.

[136] *See*, e.g., Cos. Brief at 99; RESA Brief at 14.

[137] *Monongahela Power Co. v. Public Utilities Commission of Ohio*, 104 Ohio St.3d 571 (2004).

[138] Cos. Brief at 112.

[139] FES Ex. 3 at 37; IEU-Ohio Ex. 9A at 17.

ability to avoid unjustified and illegal SSO price increases because that is the purpose of the unreasonable and unlawful pricing scheme.

VI. THE CORPORATE SEPARATION AND POOL TERMINATION PROVISIONS ARE UNREASONABLE AND UNNECESSARY.

Due to the unlawful and unreasonable aspects of provisions providing for approval of corporate separation and recovery of pool termination or modification costs, the Commission should not approve them.[140]

A. The Provisions Relating to Corporate Separation Are Unlawful as They Violate Both Statutory Requirements and Commission Rules.

Since the filing of the Stipulation, the Companies have recognized the lack of authority for the Commission to act on the provision of the Stipulation authorizing structural separation and filed a separate application. That proceeding, Case No. 11-5333-EL-UNC ("11-5333"), was not consolidated with the review of the Stipulation.[141] It remains open and is the proper venue for addressing the issues presented by the request for structural separation.

The need to address corporate separation in the 11-5333 docket is demonstrated by the Stipulation's failure to address the informational requirements of the Commission's rules regarding corporate separation. Rule 4901:1-37-09(C), Ohio Administrative Code ("OAC"), requires a corporate separation application to address

[140] The Staff's Brief made one small reference to corporate separation but otherwise did not substantively address the unlawful and unreasonable nature of the corporate separation and Pool modification provisions. S*ee* Staff Brief at 6 ("A transition to complete corporate separation and full market pricing for generation services that is materially quicker than what would be possible otherwise…"). Only the Companies otherwise addressed the issues discussed in this section.

[141] Tr. Vol. V at 640.

four specific items.[142] The Companies, however, provide a minimal description for the first time and outside the record in this proceeding of the manner in which the requirements of the rule might be satisfied in a single paragraph of their initial brief.[143] There is an obvious failure in the paragraph devoted by the Companies to the rule to provide the Commission with the information required by Commission rules.

Finally, the Companies argue that it is not important that the details are expressed on the Commission record.[144] The Commission, however, is required to base its decisions on a record.[145] Failure to base its decisions on a record is a separate ground for reversal if the Commission were to act on the illegal provision regarding corporate separation contained in the Stipulation.[146]

B. The PMTR Is Illegal and Unreasonable.

As discussed in IEU-Ohio's initial brief, the Commission must also reject the PMTR.[147] The rider cannot be legally authorized under Section 4928.143(B)(2),

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[142] Rule 4901:1-37-09(C) provides:

> An application to sell or transfer generating assets shall, at a minimum:
> (1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.
> (2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.
> (3) Demonstrate how the proposed sale or transfer will affect the public interest.
> (4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.

[143] Cos. Brief at 73-74.

[144] *Id*. at 74.

[145] Section 4903.09, Revised Code.

[146] *Tongren v. Public Utilities Commission of Ohio*, 85 Ohio St.3d 87 (1999).

[147] Stipulation at 25.

Revised Code, and the structure of the rider is unreasonable in that it leaves customers exposed to unlimited claims for Pool modification or termination costs.[148]

To justify the rider, the Companies do not offer any legal authority, but instead claim that corporate separation and PMTR are "essential components" that are needed to transition from "a regulated ESP plan to an auction-based SSO."[149] As discussed previously, the suggestion that either Pool termination or a PMTR is necessary to effect a CBP is in conflict with everything the Companies have successfully argued to the Commission in the last ten years. The Companies have threatened to move to an MRO, have proposed power purchases on a slice-of-system basis under their first ESP, and recommended that all Ohio utilities move to a CBP without ever recommending that authorization of Pool modification or termination cost recovery was a necessary antecedent. The Companies have used a competitive procurement process to price generation supply for SSO customers. In fact, the Companies filed a notice of intent to dissolve the pool prior to filing the ESP Application that is the basis for the Stipulation and while they were threatening to go to an MRO.

Moreover, the PMTR is not only without legal authorization under Section 4928.143(B)(2), Revised Code, it is also unreasonable. The justifications the Companies offer for the blank check created by the rider are that the Signatory Parties agreed to it and that the Commission will be able to review the costs after-the-fact.[150] The Signatory Parties agreed to many provisions in the Stipulation that have no rhyme

[148] IEU-Ohio Brief at 58-60.

[149] Cos. Brief at 71.

[150] *Id.* at 79.

or reason; agreement is not the touchstone of reasonableness or lawfulness. If there is no legal basis for a provision to charge customers the PMTR, then a proposed PMTR cannot be rendered lawful because the direct consequence of the illegal provision will follow at a time in the future. It is the provision for recovery that is the focus of the law. There is no room for an illegal provision for future charges.

VII. SUSPENSION OF FAC REVIEWS VIOLATES STATE LAW

The Companies fail to present a proper legal argument or a reasonable basis as to why the Commission should waive its rules so as to exempt the Timber Road Renewable Energy Purchase Agreement ("REPA")[151] and shale gas contracts from annual prudence reviews.[152] The only testimony supporting the waiver for the REPA was offered by a representative of the project's owner, Paulding Wind Farm, who testified that "[c]ommission approval of the Stipulation will provide critical regulatory certainty for the Timber Road II project, and recognize long-term contracts as an essential element in the development of Ohio's advanced energy marketplace."[153] No support was offered for suspending Commission review of shale contracts.[154] This single self-serving statement does not demonstrate a compelling reason for the Commission to deviate from its rules, especially in light of the fact that the wind farm

[151] Stipulation at 7.

[152] *Id*. at 20.

[153] Paulding Wind Farm Ex. 1 at 5.

[154] The brief provides a single conclusory statement: "[C]osts under shale gas purchase contracts will only be recovered after being deemed prudent by the Commission." Cos. Brief at 87.

was completed and operational without the requested waiver of the Commission's on-going oversight.[155]

The Companies also fail to present a legal argument to explain why the Stipulation proposes that the annual review be suspended.[156] The Companies note that the REPA would be subject to the "quarterly [FAC] filings and then the annual audit."[157] By a footnote, however, the Companies reassert that "once the Commission approves the REPA for inclusion in the fuel adjustment clause, the accounting associated with the REPA would then be reviewed in the financial audit portion of the normal fuel audit."[158] This reiteration of what is proposed by the Stipulation does not explain why the suspension of the audit rule could or should be authorized.

Moreover, the Companies fail to address the reasonableness of this proposal. Certainly they failed to provide any economic rationale for suspending the audit review: the need to provide regulatory certainty did not prevent the project from being completed. Nor does the Companies' detailed explanation of who is responsible for the contracting and the process that was used provide a justification for suspending the rule.[159] This information simply does not address the fundamental question of whether the Commission can or should waive its annual review process.

[155] Tr. Vol. III at 283; Tr. Vol. I at 46.

[156] Rule 4901:1-35-09(C), OAC.

[157] Cos. Brief at 60.

[158] *Id.* at 61 n.44.

[159] *Id*. at 56-60.

Once again, the Companies have failed to demonstrate how a provision of the Stipulation complies with applicable law and is reasonable. On this record, the Commission cannot approve the provisions of the Stipulation that would limit prudence review of the REPA and shale gas contracts.

VIII. THE DISTRIBUTION INVESTMENT RIDER VIOLATES STATE LAW AND REGULATORY POLICY AND RESULTS IN ILLEGAL AND UNREASONABLE RATE INCREASES.

As noted in their initial brief, the Companies have made no demonstration that the record supports authorizing the DIR under either Section 4928.143(B)(2)(d) or (h), Revised Code.

In their initial brief, the Companies merely reiterate their rebuttal testimony. First, the Companies claim that Section 4928.143(B)(2)(d), Revised Code, authorizes the DIR because it will provide for carrying charges on distribution plant investment. There is nothing in the record, however, that demonstrates that the DIR would have the effect of stabilizing or providing certainty regarding retail electric service. In fact, such a showing cannot be made because the Companies could make no investment or improvement in distribution service and still collect the DIR.[160]

The Companies likewise fail to demonstrate that the requirements of Section 4928.143(B)(2)(h), Revised Code, have been satisfied. Staff did no analysis of the reliability of the distribution system,[161] and Staff has no idea how the DIR will impact the

[160] Tr. Vol. X at 1732-33 (Cross-examination of Robert Fortney).

[161] Tr. Vol. IX at 1656; Tr. Vol. X at 1730 (Cross-examination of Robert Fortney).

reliability of the distribution system.[162] Moreover, the Companies do not know what the DIR is designed to fix.[163] Companies' witness Allen further admitted that if both the DIR and the application for an increase in distribution rates are approved without modification, double recovery will occur.[164]

Without a supporting record, there is no basis for the Commission to authorize recovery of the DIR under Section 4928.143(B)(2)(h), Revised Code. As the Commission held in the Companies' prior ESP case:

> [W]hile SB 221 may have allowed Companies to include such provisions in its ESP, **the intent could not have been to provide a 'blank check' to electric utilities**. . . . Given AEP-Ohio's proposed ESRP, **the only way to examine the full distribution system, the reliability of such system, and customers' expectations, as well as whether the programs proposed by AEP-Ohio are "enhanced" initiatives (truly incremental), is through a distribution rate case where all components of distribution rates are subject to review**. . . . As for the recovery of any costs associated with the Companies' remaining initiatives (i.e., enhanced underground cable initiative, distribution automation initiative, and enhanced overhead inspection and mitigation initiative), the **ESRP rider will not include costs for any of these programs until such time as the Commission has reviewed the programs, and associated costs**, in conjunction with the current distribution system in the context of a distribution rate case as explained above.[165]

As discussed above, there is nothing in this record to suggest that the in-depth review the Commission has previously required has been done.

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[162] Tr. Vol. XIII at 2377 (Cross-examination of Peter Baker).

[163] Tr. Vol. XII at 1995 (Cross-examination of Joseph Hamrock); Tr. Vol. X at 1724 (Cross-examination of Robert Fortney).

[164] Tr. XII at 2055 (Cross-examination of William Allen).

[165] *ESP I*, Opinion and Order at 32-34 (emphasis added).

The DIR also fails to comply with applicable regulatory practices and principles.[166] As IEU-Ohio witness Bowser noted in his direct testimony, the DIR violates regulatory practices and principles inasmuch as it would provide excessive recovery to the Companies because it reaches back to post-2000 investment.[167] Moreover, the DIR applies an excessive carrying charge[168] to a balance that includes accumulated deferred income taxes ("ADIT").[169] The only response offered by the Companies is a reference to Mr. Allen's confused testimony that the ADIT will average out.[170] Commission practice points to the correct result: proper ratemaking requires adjustment for ADIT.[171] It would violate regulatory practice and principles to allow the Companies to recover a carrying charge of over 20% through a non-bypassable rider and to apply that carrying charge to a balance that contains money that was provided to the Companies at no cost.[172]

In summary, the Companies have not satisfied the requirements of Sections 4928.143(B)(2)(d) or (h), Revised Code. Moreover, the proposed DIR violates regulatory practices and principles and results in an unreasonable rate increase.

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[166] *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 110 Ohio St.3d 394 (2006); *In the Matter of the Application of Ohio Cumberland Gas Company for an Increase in Rates and Charges*, Case No. 10-868-GA-AIR, Opinion and Order at 7 (May 19, 2011).

[167] IEU-Ohio Ex. 8 at 9-10.

[168] IEU-Ohio Ex. 8 at 7, 11.

[169] IEU-Ohio Ex. 8 at 8; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order at 14 (Aug. 25, 2010); IEU-Ohio Ex. 4.

[170] Cos. Brief at 68.

[171] IEU-Ohio Ex. 8 at 8; IEU-Ohio Ex. 4.

[172] *Id.*

IX. THE PHASE-IN RECOVERY RIDER IS UNLAWFUL AND UNREASONABLE.

Section 4928.144, Revised Code, provides that the Commission can approve a phase-in only if it is "just and reasonable." As demonstrated in IEU-Ohio's brief, the PIRR as proposed is not just and reasonable because (1) it misaligns cost responsibility and benefits by requiring CSP customers to pay charges to amortize the deferral that benefitted OP customers and after CSP customers paid off their phase-in deferral; (2) it fails to address the requirements of Section 4928.20(I), Revised Code, that require the non-bypassable charge arising from a phase-in deferral and applicable to customers in governmental aggregation programs to be proportionate to the benefit such customers derive from the phase-in; (3) it would permit an excessive PIRR charge by not reducing the carrying charge to a proper debt rate during the amortization period; and (4) it fails to adjust the balance to be amortized for ADIT.[173]

The Companies fail to address the requirements of Section 4928.20(I), Revised Code, or the broader regulatory principle that looks to align benefits with costs. Instead, they claim that CSP customers should be responsible for paying the PIRR because they will benefit from the blended fuel rates that would result from the CSP-OP merger.[174] The claim that CSP customers should be responsible for the PIRR because they would benefit from the merger's effect on the fuel clause, however, misses the point. CSP customers have already paid charges to amortize the phase-in deferrals created by the ESP I case. They did not benefit from the OP deferral and cannot be made responsible for its amortization. Pointing to effects of a merged fuel rate does not change the fact that the Stipulation is overlaid on a history in which CSP customers have already paid

[173] IEU-Ohio Brief at 60-64.

[174] Cos. Brief at 127.

for their phase-in of rate increases resulting from the ESP I case. Recommending that they pay for a second deferral, thus, would violate the regulatory principle that benefits and costs be aligned. Moreover, Section 4928.20(I), Revised Code, is a statutory barrier to the type of misalignment of costs and benefits proposed by the Stipulation.

In response to IEU-Ohio's demonstration that the PIRR carrying charge should be reduced to that being required by a BBB seven-year debt security during the amortization period, the Companies do not disagree with the fact that a lower rate is available. In fact, other than pointing to the Stipulation, the Companies offered no support for setting the rate at the embedded cost of debt. Instead, they point to the authorized carrying charge in the ESP I case (which was based on the weighted average cost of capital and which does not address the rate to be applied during the amortization period) and suggest that a move to the average debt rate demonstrated the reasonableness of the Stipulation.[175] Again, the Companies ignore the problem IEU-Ohio has identified in the Stipulation. The point of Mr. Bowser's testimony is that the carrying cost during the amortization period is substantially lower than the embedded average cost of debt, given current interest rates.[176] Whatever concession the Companies thought they were making[177] (and in fact regulatory practice is to set the carrying charge to no higher than the debt rate once amortization begins, as the

[175] Cos. Brief at 128.

[176] IEU-Ohio Ex. 8 at 15.

[177] The Companies argue that they would have been entitled to a carrying charge at the weighted average cost of capital, Cos. Brief at 128, a claim that finds no support in Commission practice.

Companies are well aware[178]), authorizing a carrying charge at the average debt rate that applies during the amortization period as proposed by the Stipulation is arbitrarily excessive and unreasonable.

Just as they fail to offer a principled reason for not adjusting the PIRR carrying charge to the proper lower level, the Companies also fail to provide a reasoned basis for failing to adjust the deferral balance for ADIT. The rationalization offered by the Companies is that they were allowed in the ESP I case to book the deferral balances without the ADIT adjustment.[179] How they booked the deferral balances, however, says nothing about the proper amounts to be recovered. Unless ADIT is removed from the deferral balance, the Companies will be permitted to recover carrying charges on an interest free loan.[180] Such a result would be unjust and unreasonable and would violate regulatory practices and principles.[181]

In summary, the PIRR proposed in the Stipulation unreasonably and unlawfully imposes costs on CSP customers and more generally customers in governmental aggregation programs[182] with no demonstration that the benefits and costs of the deferral are aligned. The Stipulation's carrying charges proposed for the amortization

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[178] Tr. Vol. VIII at 1525 (Re-direct examination of Joseph Bowser) (AEP affiliate recommends ADIT adjustment in West Virginia regulatory proceeding).

[179] Cos. Brief at 128.

[180] IEU-Ohio Ex. 4.

[181] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order at 14 (Aug. 25, 2010).

[182] Both OP and CSP customers are protected by the requirements of Section 4928.20(I), Revised Code.

period and the failure to adjust the deferral balance for ADIT are inconsistent with regulatory practice and will result in an excessive and unreasonable charge.[183] Thus, the PIRR proposed in the Stipulation is both unlawful and unreasonable.

X. THE GRR IS UNLAWFUL.

As previously discussed, the Stipulation illegally proposes the inclusion of the GRR as a placeholder for future recovery for the Turning Point and the Muskingum River 6 ("MR6") gas conversion projects. To justify the inclusion of the rider, the Companies argue that all important decisions will be postponed until such time as the Companies seek to recover costs under the rider.[184] As discussed above, postponing the arrival of the rate impacts of an illegal provision does not make the provision lawful or provide a basis for inclusion in the proposed ESP.

As IEU-Ohio demonstrated in its initial brief,[185] Section 4928.143(B)(2)(c), Revised Code, requires the Commission to make several findings before it can authorize a recovery mechanism.[186] The Companies do not dispute that they must meet the statutory requirements before collecting costs through the rider: "AEP must demonstrate how the proposed project [to be recovered through the rider] satisfies all

[183] Applying the recommendations made by IEU-Ohio would reduce the charges by nearly $70 million. Tr. Vol. III at 1481 (Direct examination of Joseph Bowser).

[184] Cos. Brief at 52.

[185] IEU-Ohio Brief at 46-47.

[186] Section 4928.143(B)(2)(c), Revised Code. That section requires the EDU to demonstrate that the generating facility is competitively sourced, newly used and useful after January 1, 2009, that there is need for the facility based on resource planning projections, and that the capacity, energy, and the rate associated with the facility be dedicated to Ohio consumers. *Id.*

applicable requirements set forth in R.C. 4928.143(B)(2)."[187] Yet, the Companies encourage the Commission to ignore these statutory prerequisites by authorizing the placeholder.[188] The Commission, however, does not have that authority because an ESP may only contain provisions that are listed under Section 4928.143(B)(2), Revised Code.[189] There is no basis for including a placeholder.

The Companies also urge the approval of the GRR on the basis that it will provide the Companies with a viable hedging strategy and on the suggestion that the GRR will promote economic development and rate stability.[190] To describe a solar project as an appropriate generation hedge simply ignores the costs inherent in solar projects.[191] Any construction of MR6 remains speculative.[192] Thus, the suggestion that the GRR will operate as an effective generation hedge simply ignores the facts.

Moreover, the suggestion that the GRR may operate as a hedge does not create any authority for the Commission to authorize the rider if that authority does not exist. As demonstrated above, the Commission does not have the authority to insert a placeholder in an ESP, making irrelevant any discussion of a generation hedge.

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[187] Although the Companies do not state that the statutory requirements they must meet are those set forth in Section 4928.143(B)(2)(c), Revised Code, none of the other eight provisions of Section 4928.143(B)(2), Revised Code, is applicable to a non-bypassable generation rider.

[188] Cos. Brief at 49.

[189] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d at 520.

[190] Cos. Brief at 51.

[191] As a representative of the signatory parties indicated, the project would need to be a least cost alternative, and capacity ratings for solar projects are "not good." Tr. Vol. V. at 652-53 (Cross-examination of Peggy Claytor).

[192] Tr. Vol. V at 857-59 (Cross-examination of Joseph Hamrock).

If the Commission nonetheless approves the use of a placeholder rider, the Commission must also account for the revenue likely to be collected through the GRR in the ESP versus MRO comparison test, as discussed previously.[193] Staff witness Fortney, FES witness Schnitzer, and IEU-Ohio witness Murray all recognized that if the GRR was approved the costs associated with it must be recognized in the ESP versus MRO comparison.[194] The Companies' rationale for excluding the potential costs associated with the GRR is that it would be "speculative to estimate whether, let alone what level of, [sic] rates AEP Ohio might propose for the [GRR] during the Stipulation ESP."[195] As noted above, however, there is no legal basis for ignoring the costs that would be imposed on customers only in the ESP if the Commission authorizes the GRR; in evaluating an ESP the Commission must consider "all other terms and conditions."[196]

In summary, the Commission has no legal basis to approve the GRR. If it nonetheless decides to approve a GRR, it must recognize the GRR as a cost of the ESP so as to properly compare the proposed ESP with an MRO. The Companies' attempt to have benefit of the GRR without recognizing any cost would be both unreasonable and unlawful.

[193] IEU-Ohio Brief at 49.

[194] Staff Ex. 4, Attachment A; FES Ex. 4, Ex. MMS-2; IEU-Ohio Ex. 9A, Ex. KMM-11.

[195] Cos. Brief at 160.

[196] Section 4928.143(C)(1), Revised Code.

XI. THE STIPULATION WAS NOT THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES.

IEU-Ohio and others demonstrated in their initial briefs that the process used to reach agreement among the Signatory Parties did not satisfy the requirement that the settlement is a product of serious bargaining among capable, knowledgeable parties.[197] In support of its position, IEU-Ohio witness Murray testified at length as to the deficiencies in the process.[198] FES witness Banks also described in detail the problems FES encountered with the Companies' control of the negotiation process, including the exclusion of parties from the negotiation process and the attempt to paper over the exclusion by providing parties with a "last chance" to reopen negotiations through a "tenth hour" email that failed to contain a complete draft of the proposed final document.[199]

In response, the Companies assert that IEU-Ohio has attempted to add requirements to the review of the process of settlement that are not part of the accepted test. The Companies incorrectly argue that the "Commission has never used the first prong of the three-part test to measure the substantive results of a settlement; rather, the first prong reviews the process and the signatory parties."[200] They further argue that

[197] IEU-Ohio Brief at 68-72; OCC Brief at 22; FES Brief at 138-45.

[198] IEU-Ohio Ex. 9A at 3-9.

[199] FES Ex. 1 at 57-59.

[200] Cos. Brief at 27.

the non-Signatory Parties removed themselves from the negotiation.[201] The Companies' arguments misstate both the applicable law and the facts.

The Commission has determined that the result of the negotiation process is a factor in determining whether the process was faulty. The Commission has stated that it will consider whether the settlement was the product of an "open process, represents a comprehensive compromise of issues raised by parties with diverse interests, and presents a fair and reasonable result."[202] Clearly, the Commission should consider whether the Stipulation provides a comprehensive compromise of the issues and a fair and reasonable result by looking at the substantive results of the Stipulation as one factor.

Mr. Murray's testimony, moreover, focused on the evidence of the Signatory Parties' understanding and efforts to reach a settlement. He identified instances in which the settlement negotiations did not lead to an agreement regarding the meaning of key terms in the Stipulation. For example, the Signatory Parties did not agree about whether the Companies' next ESP will contain a CBP.[203] Given the importance to the

[201] *Id*. at 25-26. The Companies also make a remarkable claim that the execution of a Joint Defense Agreement justified excluding parties. *Id*. at 26. Given that the exclusion began apparently on August 26, 2011, *Id*. at 25, and the Joint Defense Agreement was executed on September 2, 2011, this argument is at best inconsistent with the facts. As noted below, it is also inconsistent with the process the Companies used to exclude parties who did not agree that further continuances of the hearing should be sought.

[202] *In the Matter of the Application of Duke Energy Ohio for an Adjustment to Rider AMRP Rates*, Case Nos. 08-1250-GA-UNC*, et al.*, Opinion and Order at 7 (April 29, 2009); *see also In the Matter of the Application of Duke Energy Ohio, Inc., to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for the Period of July 1, 2007, through December 31, 2008*, Case Nos. 07-975-EL-UNC, *et al.*, Opinion and Order at 8 (September 30, 2009) (emphasis added); *see also* Cos. Brief at 28.

[203] IEU-Ohio Ex. 9A at 7-8.

Signatory Parties and the Staff that the outcome of the Stipulation lead to a CBP, the lack of a common understanding is a serious concern.

Additionally, Mr. Murray noted deficiencies in the parties' efforts to analyze the effects of the Stipulation and the singular focus of some parties on issues that are tangential to the core agreement.[204] Particularly telling is the parties' reliance on the Companies and Staff to demonstrate that the proposed ESP satisfied the ESP versus MRO test.[205] The parties were committed to the analysis of the Companies and Staff, to support the Stipulation's representation that it was better than an MRO but that analysis proved otherwise.

Finally, the Companies' brief fails to mention that none of the Signatory Parties was aware that the set-aside of RPM-priced capacity had already been exhausted for some customer groups when they signed the Stipulation.[206] The lack of understanding of a key and knowable fact that was material to the agreement further demonstrates the problems inherent with the negotiation process leading to the Stipulation.

The settlement process was further tainted when the Companies excluded knowledgeable parties. The Companies' brief makes the unsubstantiated claim that IEU-Ohio "chose to stop participating in the settlement negotiations."[207] That assertion

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[204] *Id*. at 8-9.

[205] The Companies seek to introduce a spurious argument by asserting that IEU-Ohio did not calculate the effects of the proposed ESP for its members. The record demonstrates that IEU-Ohio provided tools to individual members so that they could calculate the impact of the Stipulation, if approved, upon their rates. After being given this information, the members made the decision to oppose the Stipulation. Tr. Vol. XI at 1800-02 (Cross-examination of Kevin Murray).

[206] IEU-Ohio Ex. 14.

[207] Cos. Brief at 21.

is unsupported by any citation and is contrary to the record. The record demonstrates that IEU-Ohio and others were excluded from negotiations once they indicated that the current direction of negotiations was not likely to be productive and encouraged the Commission to avoid further delay in beginning the hearing process.[208] No party ever withdrew from negotiations.

The Companies also claim that they attempted to leave the door open to the parties that were excluded, but that claim also is not supported by the record. The Companies sent a draft of the Stipulation that did not contain any appendices after 10:00 p.m. on September 6, 2011, and required parties to provide a counteroffer before 8:00 a.m. the next day.[209] When IEU-Ohio arrived at the meeting on the morning of September 7, 2011, IEU-Ohio was told to leave.[210] Under the circumstances, the Companies' "tenth hour" attempt to solicit input from the excluded parties was weak at best and belied by the exclusion of those same parties the following morning. Under these extraordinary circumstances, it is apparent that the negotiation process was tainted and unreasonable.[211]

XII. CONCLUSION

Because the customers of OP and CSP cannot expect this Stipulation to advance their interests, it is important for the Commission to exercise its authority to prevent customers from being harmed as a result of the unreasonable and unlawful

[208] FES Ex. 1 at 58.

[209] FES Ex. 1 at 58; Tr. Vol. XI at 1843-44 (Cross-examination of Kevin Murray); IEU-Ohio Ex. 9A at 3-4; IEU-Ohio\OHA Joint Ex. 1.

[210] Tr. Vol. XI at 1844-45 (Cross-examination of Kevin Murray).

[211] *Time Warner AxS v. Public Utilities Commission of Ohio*, 75 Ohio St.3d 229, 233 (1996).

terms contained in the Stipulation. If the Commission instead chooses to act on the Stipulation, it must substantially modify (and in some cases reject) portions of the Stipulation to bring it into compliance with Ohio law and state energy policy.[212] Customers and the policy of Ohio, however, would be better served if the Commission rejected the Stipulation so that the current ESP for OP and CSP could continue until a lawful and reasonable alternative is presented.

Respectfully submitted,

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[212] IEU-Ohio Brief at 72-74.

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I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 18th day of November 2011, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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