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

RETAIL ENERGY SUPPLY ASSOCIATION'S
REPLY BRIEF IN SUPPORT OF THE
STIPULATED ELECTRIC SECURITY PLAN PROVIDED IN THE
STIPULATION AND RECOMMENDATION FILED SEPTEMBER 7, 2011

November 18, 2011

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I. INTRODUCTION

RESA hereby submits this reply brief in response to certain issues raised by FES, IEU, APJN and OCC (collectively, the "Opponents") to the Stipulation. In essence, the Opponents do not object to the four following major changes accomplished by the Stipulation, namely: 1) the public procurement of the energy and capacity for the standard service; 2) the transition to RPM-based capacity pricing for CRES providers; 3) AEP Ohio's proposed participation in the PJM Base Residual Auction; and 4) enhancement of the data provided to the CRES providers and removal of certain retail shopping barriers. The Opponents seemingly oppose the Stipulation because it does not achieve these four goals quickly enough.

As a Reply Brief, the focus of this pleading will be to point out the differences between the Opponents and RESA on key points raised by the Opponents. For purposes of the Commission's Opinion and Order, however, it is important to note at the outset where the Signatory Parties to the Stipulation and Opponents agree; all parties desire to transition to competitive wholesale and retail markets. Perhaps the Opponents could prevail in litigation at the Commission and before the FERC to obtain RPM pricing for capacity. Perhaps the Opponents could succeed in future litigation and convince the Commission that it can require AEP Ohio to set an ESP rate by conducting a wholesale auction rather than by calculating the cost items detailed in Section 4928.143, Revised Code. In sum, perhaps the Opponents can achieve through litigation all the changes achieved in the Stipulation, but such an outcome through litigation is far from certain. A more likely result is that litigation would take more than 41 months and produce inconsistent outcomes and unintended consequences. The stipulated ESP achieves the desired transition to competitive wholesale and retail markets through a plan that the utility, the Commission Staff and 18 intervenors believe is workable and realistic. Thus,

the Commission should approve the Stipulation, a comprehensive plan that fulfills the mutual goals of all intervenors in a reasonable time frame.

II. IEU's Motion to Dismiss and OCC/APJN's Motions to Strike Should Be Denied.

At the close of AEP Ohio's case, IEU orally moved to dismiss the Application and the Stipulation.[1] The Attorney Examiner took this motion under advisement.[2] IEU has reiterated this motion to dismiss in its Initial Brief.[3] IEU's motion to dismiss is based primarily on AEP Ohio's alleged failures to comply with the Commission's rules and statutory provisions in filing the Stipulation, as well as "fundamental burden of proof failures."[4] A review of the thousands of pages of the Application, testimony and transcript reveal this claim to be meritless. Further, this motion is inappropriate at this stage in the proceeding—after all the evidence has been submitted and the initial briefs filed, and the parties have attended over three weeks worth of hearings—the record should be judged not dismissed and process rescheduled. Thus, the Commission should deny this motion to dismiss, weigh the evidence presented and rule on the merits.

As part of its Initial Brief, the OCC/APJN has renewed a number of motions to strike that were asserted, and denied, during the hearing.[5] These claims are also meritless. No harm or prejudice is demonstrated in the OCC/APJN's motions to strike. Unlike cases that are tried before a jury, the evidence in this case is tried and considered by knowledgeable and experienced Hearing Examiners and the Commission. The Bench and the Commission are more than capable and competent to give the contested evidence the weight it deserves. The motions to strike should be denied.

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[1] Tr. Vol. VI, p. 956.
[2] Tr. Vol. VI, p. 961.
[3] IEU Initial Brief, p. 7.
[4] *Id.*
[5] OCC/APJN Initial Brief, pp. 8-22.

One part of the testimony that OCC/APJN believes should be stricken is worth noting, because it crystallizes the differences between the arguments raised by the Opponents and the supporters to the Stipulation. OCC/APJN believes the Commission should dismiss the testimony of Grove City witness Mr. Honsey,[6] because Mr. Honsey did not have a working knowledge of rate making or all the acronyms in this proceeding.[7] Mr. Honsey is a city administrator for Grove City and in that position, develops and carries out policy directives for all departments and employees in Grove City. Mr. Honsey demonstrated that he knows the challenges of putting big scale plans in effect.[8] Mr. Honsey was asked whether he would prefer the competitive bid process ("CBP") to be placed into effect immediately—as favored by the Opponents instead of on June of 2015.[9] He answered not necessarily—for while it was important to plan aggressively, often one should act conservatively.[10] Mr. Honsey noted that unintended consequences may result by putting together a "leap-before-you-look" plan to move to a CBP immediately.[11] That difference in approach summarizes the central issue between the Opponents and the supporters of the Stipulation. The Opponents urge the Commission to act now and effectuate a sea change in the manner in which AEP Ohio provides capacity and energy. The supporters urge the Commission to accomplish this major change through a negotiated plan over 41 months. Not only should Mr. Honsey's testimony not be stricken, it should be cited as another reason to accept the Stipulation. The Stipulation presents a methodical plan designed to address the foreseeable implementation problems AEP Ohio will encounter changing over to a competitive

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[6] OCC/APJN Initial Brief, pp. 8-9, n.18.
[7] *Id.* The OCC/APJN also asserts that the testimony of Mr. Honsey demonstrates that Grove City was not a "knowledgeable" party under the first prong of the Commission's test for approving a Stipulation. *Id.* at pp. 22-24. IEU asserts a similar argument. IEU Initial Brief, p. 70.
[8] Direct Testimony, 2; cite Tr. For discussion
[9] Tr. Vol. IV, pp. 517-18.
[10] *Id.*
[11] *Id.*

market. This coordinated effort is worth the 41 months it will take to implement this significant change.

III. The Opponents Argue That The Stipulation Was Not the Result of Serious Bargaining Among Knowledgeable, Capable Parties.

a. A Party to the Stipulation is not required to take a position on all issues in order to be considered "knowledgeable" and "capable".

IEU and OCC/APJN argue that the Stipulation was not the product of knowledgeable and capable parties because the Signatory Parties focused on their own "parochial" interests in signing and supporting the Stipulation.[12] OCC/APJN even goes so far as to argue that certain supporting testimony should be rejected on the basis that the party offering the testimony had only a limited interest in the proceeding.[13] IEU essentially argues that since certain parties focused only on specific issues and did not conduct a full analysis of all issues the Stipulation was not the result of serious bargaining.[14]

These conclusions misconstrue the value of parties' interventions in Commission proceedings and, if accepted, would establish a dangerous precedent. The standard for intervention in a Commission proceeding is:

> "The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties."[15]

This standard requires that an intervening party have a "real and substantial" interest that is not being fully represented by another party, but in no way conditions an intervenor's participation

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[12] IEU Initial Brief, pp. 68-72; OCC/APJN Initial Brief, pp. 22-24. OCC/APJN states that "lay" witness testimony presented by certain signatory parties "were often focused on the parochial interest of the signatory party, and were not conversant in the broad-ranging effects of the Stipulation." *Id.* at p. 23.
[13] OCC/APJN Initial Brief, p. 22-24.
[14] IEU Initial Brief, pp. 68-72.
[15] Rule 4901-1-11, Ohio Administrative Code. The Rule amplifies Section 4903.221, Revised Code.

in Stipulations on the intervenor taking positions on all issues. Thus the Rule directly contradicts OCC/APJN and IEU's position that an intervenor's support for the Stipulation must be contingent on the intervenor reviewing all issues raised. Aside from the lack of legal support for this position, it also is poor policy for the Commission to restrict its consideration of a Stipulation to just the positions of parties that opine on everything. The Commission is better served having parties focus primarily on the issues and subjects in which they have the best knowledge and the most interest.

As for the OCC/APJN's position that an intervenor's testimony should be struck or discounted if the intervenor has an interest in the subject matter, that position also conflicts with the above cited statute explicitly conditioning intervention on a parochial or individual interest. Interestingly, if the criterion for presenting testimony was that it could only be admitted if there was no parochial interest, then the Commission could only consider Staff's testimony in evaluating this Stipulation, because Commission Staff represents the public.[16]

Thus, because the parties represent their own individual interests in negotiating and supporting the Stipulation, they are not required to present evidence on every aspect of the Stipulation in order for their participation in the proceedings to be considered "knowledgeable" or "capable" in accordance with the Commission's standard for approval of a stipulation. First, it is the burden of the Companies to present this evidence, not the individual parties.[17] To require each individual party that supports or considers a stipulation to conduct their own analysis of each statutory aspect of a stipulation would preclude the participation of numerous parties to Commission proceedings.

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[16] If a global interest is what is needed to present testimony, then it should be noted that the Staff *did* sign the Stipulation.

[17] Section 4928.143(C)(1), Revised Code. "The burden of proof in the proceeding shall be on the electric distribution utility."

IV. The Opponents argue the Stipulation Violates Important Principles or Policies and Does Not Benefit Ratepayers or the Public Interest.

a. The opposing parties address the "in the aggregate test", and assert that the Stipulation is not more favorable in the aggregate than the expected results under an MRO.

The Opponents focus in large part on the quantitative price test as a basis for this conclusion.[18] As RESA noted in its initial brief, the Commission should consider the "in the aggregate test" to be a subjective reasonableness test, which requires weighing all the factors.[19] A highly speculative and imprecise price test cannot be determinative of the outcome of this case.

The "quantitative" rate analysis does not contain any value for the restructuring accomplished by the Stipulation. Under the Stipulation, in 41 months AEP Ohio will procure its energy and capacity from the competitive wholesale market for standard service, not only using the regional Base Residual Auction to set the capacity price, but also placing its Ohio legacy generation in PJM. The Stipulation will also cure numerous barriers to shopping such as the notice provisions, minimum stay and information to CRES providers. Finally, the Stipulation contains a variety of positive grants and contributions.

b. The parties ascribe no value to these "qualitative" benefits for which the Staff and the Signatory Parties believe make the Stipulated ESP—as opposed the ESP application—more favorable than an MRO in the aggregate.

IEU focuses on the fact that some of these other benefits are "highly subjective." [20] Again, the "in the aggregate test" is by nature a "highly subjective" test. Thus, IEU's assertion that other benefits are "difficult, if not impossible, to economically value,"[21] is immaterial.

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[18] IEU Initial Brief, pp. 19-27; FES Initial Brief, pp. 7-42; OCC/APJN Initial Brief, pp. 32-34.
[19] RESA Initial Brief, pp. 17-24.
[20] IEU Initial Brief, p. 36.
[21] *Id.* at p. 28.

These benefits do not need to be economically valued in order to be recognized under the "in the aggregate test."

The Opponents assert that because all customers currently receive RPM pricing, receiving RPM pricing in segments until 2015 with 100% thereafter provides no advantage.[22] FES also argues that regulatory certainty does not outweigh the higher prices of the Stipulation.[23] These arguments ignore the key fact that the capacity price for the ESP II period will be very much an open question, both at the Commission and at the FERC. The Commission's Entry on December 8, 2010 in Case No. 10-2929-EL-UNC establishing the current capacity pricing did not proclaim any statutory right to RPM pricing, but instead set the matter for future proceedings and led to AEP Ohio filing a request for a capacity charge of $355 per megawatt day.[24] As FES witness Mr. Banks acknowledged, the capacity rate is set at PJM capacity price only during the pendency of the Commission review.[25]

The Stipulation provides tremendous value by resolving the substantial uncertainty of who will set the RPM capacity price and at what level. The Stipulation requires AEP Ohio to withdraw its request for pricing capacity at the AEP Ohio legacy cost at FERC and dismisses the Capacity Charge Case docketed at Case No. 10-2929-EL-UNC. The Opponents believe that they may prevail in all these capacity proceedings, but have also admitted it is possible they will fail.[26] Further, even if the Opponents were to ultimately prevail, the legal proceedings with possible appeals could result in substantial delays and produce inconsistent outcomes or create

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[22] IEU Initial Brief, pp. 27-28; FES Initial Brief, p. 47; OCC/APJN Initial Brief, p. 35.
[23] FES Initial Brief, p. 78.
[24] *See 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.
[25] Tr. Vol. VII, pp. 1233-37
[26] *See* Testimony of FES witness Mr. Shanker noting that more than one capacity pricing is legally permissible. Tr. Vol. VI, p. 1140.

new issues that have unintended consequences. This result is particularly true if there is an unfavorable ruling from the FERC.

The great value of the Stipulation is that it is a comprehensive plan which ensures all current shopping customers will continue to receive RPM pricing, as they expected when they entered into CRES contracts. During the transition period, the Stipulation establishes the cost at $255 per megawatt day enabling customers to know the capacity rate and provides RPM pricing to a growing percentage each year until reaching 100% in 2015.[27]

i. <u>The transition to CBP occurs faster than is possible under an MRO</u>.

FES also fails to recognize that the Stipulation transitions AEP Ohio to procuring energy and capacity via a CBP faster than is possible under an MRO. FES claims the transition could occur in as little as two years under the MRO due to the Duke decision.[28] FES made a similar claim in the Duke MRO proceeding, however, and did not prevail.[29] On the contrary, it is clear that for an initial MRO at least a five year plan must be filed, which under the statute may be extended for up to ten years.[30] An MRO plan could be shortened to less than five years only after the original MRO plan and first year was over and would be subjected to litigation.[31] At best, shorter length would depend on the Commission's conclusion that the percentages must be "in order to mitigate or reduce the effect of the SSO price change that would otherwise occur."[32] Thus, in comparison to the MRO, the agreed upon 41 month transition provides greater certainty, and allows for a quicker transition.

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[27] Stipulation, ¶IV(2)(b)(3).
[28] FES Initial Brief, p. 79.
[29] *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer*, Case No. 102586-EL-SSO, Opinion and Order, February 23, 2011, pp. 19-23.
[30] *Id.* at p. 23 citing Sections 4928.142(D),(E), Revised Code.
[31] *Id.* at pp. 25-26.
[32] *Id.*

ii. FES and IEU dismiss the benefits of the certainty established by the $255 per megawatt day phase-in of capacity.

FES dismisses AEP Ohio's increase in capacity price as unfounded, asserting that AEP Ohio has never received above-RPM capacity rates and RPM pricing is better for policy reasons.[33] FES also notes that RESA originally took the position that RPM-based capacity pricing is the correct approach.[34] RESA does not deny that this was in fact its litigation position, and as a matter of policy supports RPM pricing for all capacity provided to CRES providers. However, the Stipulation is, by its very nature, a compromise and AEP Ohio feels strongly that it is entitled to $355 per megawatt day. The Stipulation acknowledges that a party's signature of support for the Stipulation is not the adoption of every position in the Stipulation.[35] Further, the Stipulation has no precedential value at the Commission.[36] Without the Stipulation, there is the risk that AEP Ohio could be granted something other than RPM pricing, not only for future customers, but for customers who signed up for shopping before the application in ESP II was even filed. As noted by Exelon witness Mr. Dominguez, certainty is important to CRES providers in making service offers, and valuable certainty is what this Stipulation provides.[37]

In sum, RESA agrees that PRM pricing is favorable. Because of that, RESA supports the Stipulation, which eliminates uncertainty and secures 100% RPM pricing over a 41 month period, with a glide path of yearly percentage RPM pricing increases.

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[33] FES Initial Brief, pp. 43-61.
[34] *Id.* at p. 45.
[35] Stipulation, ¶VI.
[36] *Id.*
[37] See redirect examination of Exelon witness Mr. Dominguez, Tr. Vol. VI, pp. 1013–15.

c. *The Opponents criticize the pace and detail provided by the Stipulation's transition to market and fail to recognize the Stipulation as a well thought out and enforceable transition process.*

FES criticizes AEP Ohio for not moving to a fully competitive market more quickly.[38] IEU and FES both complain that the Stipulation permits AEP Ohio too many ways to get out of its commitment.[39] As noted above, not a single party to this Stipulation has opposed the move to competitive markets, and in fact, most of the parties fully support this move. The Stipulation is, to the fullest extent possible, a comprehensive integrated agreement which not only recognizes the importance of AEP Ohio's transition to competitive markets, but also recognizes the inherent limitations and complications of this transition.

The Stipulation compensates for those limitations by providing a detailed plan for implementing the process. The Stipulation only recognizes two limited contingencies which could delay the move to competitive markets. The two contingencies are approval of the pool termination by the FERC and approval of the corporate separation by the Commission and the FERC. As detailed below, both of these regulatory approvals are required to go forward. The Signatory Parties alone do not have the authority to speak for the FERC or this Commission. The record is clear that the actions that can be taken, the request to terminate the pool arrangement and the request for corporate separation from the Commission, have been taken.[40]

The 41 month transition to a CBP occurs as soon as practicable for AEP Ohio. As noted in the testimony of Mr. Dominguez, and in Exelon's initial brief, there are a number of

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[38] FES Initial Brief, pp. 124-27, 91-93.
[39] FES Initial Brief, p. 126; IEU Initial Brief, pp. 28-29.
[40] See Ohio Power Company's Application for Approval of an Amendment to its Corporate Separation Plan filed September 30, 2011 in Case No. 11-5333-EL-UNC and AEP Ohio Ex. 7, p. 19 ("On December 17, 2010, AEP Ohio and other parties to the Pool provided written notice to each other of their mutual desire to terminate the existing agreement on three years notice in accordance with Article 13,2.").

circumstances that prevent AEP Ohio from moving immediately to a CBP.[41] The first capacity auction in which AEP Ohio can participate is in May 2012 for the 2015–2016 delivery years; the capacity auctions have already occurred for earlier time periods.[42] Due to AEP Ohio's FRR status, AEP Ohio was not able to commit to this earlier.[43]

An integral part of AEP Ohio's transition to a CBP is AEP Ohio's commitment to transform its business structure through divestiture of its generation assets. In order to complete this business restructuring, AEP Ohio must complete full legal corporate separation and modification or termination of its pool agreement.[44] These steps require AEP Ohio to receive approval from the Ohio Commission as well as make several filings at the FERC.[45]

Appendix B of the Stipulation establishes timelines and benchmarks for meeting the pool termination and corporate separation requirements necessary to transition to full market. As noted by Exelon witness Mr. Dominguez, AEP Ohio found these steps to market to be "...important preconditions to ensuring that competitive procurement would be economically feasible for the Company."[46] The Signatory Parties recognized these concerns and thus reached a compromise allowing for limited contingencies in the Stipulation that "strikes a fair balance between protecting... AEP Ohio's legitimate economic interests (that may arise from termination or modification of the existing Pool agreement) and the ultimate goal of transitioning to a competitive market process for establishing the SSO price."[47]

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[41] Exelon Ex. 1, pp. 3-4; Exelon Initial Brief, p. 8.
[42] Exelon Ex. 1, pp. 3-4.
[43] *Id.*
[44] AEP Ohio Ex. 7, p. 23.
[45] See Appendix B.
[46] Exelon Ex. 1, p. 6.
[47] *Id.* at p. 7.

Further, FES claims that there are no repercussions built into the Stipulation for AEP Ohio's failure to comply.[48] This is also incorrect. The Stipulation provides for the Signatory Parties to recommend a compliance investigation to consider appropriate modifications to the Stipulation in order to achieve the desired results.[49] The Stipulation also provides for continued auctions, despite AEP Ohio's inability to achieve timely corporate separation or pool modification/termination, and an automatic compliance hearing.[50]

d. FES and IEU challenge the Stipulation's Plan for Corporate Separation.

The Opposing Parties' positions on corporate separation are inconsistent and appear to serve only the purpose of obstructing approval of the Stipulation. No party to this proceeding has denied the fact that corporate separation is a necessary step to transitioning to market. However, instead of recognizing the benefit of AEP Ohio's commitment and stipulated plan to reach full corporate separation, as well as their steps to do so, the Opponents launch a series of inconsistent and unclear attack on AEP Ohio's efforts. FES contends that AEP Ohio should have completed corporate separation earlier and that it now should be completed immediately.[51] However, FES still wants a hearing and Commission oversight over the process of corporate separation.[52]

While FES argues that the Commission has "already approved corporate separation in AEP Ohio's Electric Transition Plan proceeding," IEU contends that it is inappropriate for the Commission to approve or acknowledge its approval of AEP Ohio's full legal corporate

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[48] FES Initial Brief, p. 79.
[49] Stipulation, ¶IV(1)(t).
[50] *Id.* Exelon Ex. 1, p. 7.
[51] FES Initial Brief, pp. 124-127.
[52] See FirstEnergy Solutions Corp.'s Memorandum Contra Joint Motion for Waiver filed November 2, 2011 in Case No. 11-5333-EL-UNC. FES Initial Brief, pp. 124-127.

separation as part of this hearing.[53] IEU also requests full Commission oversight of the process.[54] AEP Ohio and the Signatory Parties recognize the importance of corporate separation—and AEP Ohio has committed to conducting full legal corporate separation in the Stipulation. In fact, originally the Signatory Parties filed a joint motion so that the Corporate Separation could be considered here in this forum and resolved, immediately, as requested by FES.[55] However, FES, the very party that requests immediate action, joined in a motion against consideration of corporate separation as part of this hearing.[56]

As a result, AEP Ohio filed an application for corporate separation in a separate hearing, demonstrating its clear commitment to completing corporate separation.[57] Further, in recognition of the importance of corporate separation to the success of the timely transition to competitive markets, AEP Ohio and the Signatory Parties have requested that approval of full legal corporate separation be recognized by the Commission in this hearing, so that AEP Ohio may send notice to PJM in March of 2012 of its intended participation in the next PJM RPM Base Residual Auction.[58] In order for AEP Ohio to fulfill its obligation under the Stipulation, its corporate separation issues must be resolved by March 2012. RESA requests the Bench to make the timing of the companion corporate separation proceeding be such that if the Stipulation is approved, the timing of the corporate separation approval will not interfere with AEP Ohio's commitment to transition to market.

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[53] FES Initial Brief, p. 127; IEU Initial Brief, pp. 66-68.
[54] IEU Initial Brief, pp. 66-68.
[55] *See* Joint Motion to Consolidate and Request for Expedited Treatment filed September 30, 2011 in this case docket.
[56] *See* FirstEnergy Solutions Corp.'s Memorandum in Opposition to Joint Movants' Motion to Consolidated filed October 3, 2011 in this case docket.
[57] *See* Ohio Power Company's Application for Approval of an Amendment to its Corporate Separation Plan filed September 30, 2011 in Case No. 11-5333-EL-UNC.
[58] Stipulation, ¶IV(1)(q).

e. The opposing parties also attack parts of the Stipulation as Discriminatory.

FES asserts that the two-tier capacity prices are discriminatory because it prevents new customers above the first tier of RPM percentages from shopping.[59] FES also asserts that the capacity provisions of the Stipulation discriminate between shopping and non-shopping customers because "SSO customers pay a wholly separate, unknown price for the same AEP Ohio capacity."[60] Finally, FES asserts that the date limit on the shopping credit for the GS-1 and GS2 schools is arbitrary and discriminatory.[61] According to FES and IEU, this system results in similarly situated customers paying different prices for the same service and is thus discriminatory in violation of the state's policies.[62]

While the state's Energy Policy laid out as part of Senate Bill 221 provides that the electric distribution utility shall provide comparable and nondiscriminatory electric service, the Commission, as required by the General Assembly, has upheld a policy against discriminatory rates and practices that is not limited to competitive retail electricity. In fact, Section 4905.35, Revised Code explicitly prohibits undue and unreasonable discrimination.[63] Although the meaning of "discriminatory" is not defined in Title 49, Section 4905.35 states that,

> "No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage." (emphasis added)

However, the Ohio Supreme Court has found that these statutory provisions "do not prohibit all discrimination."[64] In fact, under Section 4905.35, Revised Code the Ohio Supreme Court has noted that the statute "...does not prohibit all preferences, advantages, prejudices, or

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[59] FES Initial Brief, pp. 81-85.
[60] *Id.* at p. 83.
[61] *Id.* at p. 84.
[62] FES Initial Brief, p. 81; IEU Initial Brief, p. 45. .
[63] *See also* Sections 4905.31-34, Revised Code.
[64] *Weiss v. PUC*, 90 Ohio St. 3d 15,16 (Ohio 2000).

disadvantages—only those that are undue or unreasonable."[65] Thus, the Court has recognized that not every action by the utility that could be considered discriminatory is illegal, and if the discrimination is reasonable, it is permissible.

In OCC v. PUCO,[66] the Ohio Supreme Court considered a similar case where FirstEnergy sought approval of a revision to its 2004 and 2005 shopping credits established as part of its Rate Stabilization Plan. The shopping credits were a deduction against FirstEnergy's bills in order to encourage shopping. However, some customer classes received certain "enhanced" credits based on a number of different factors including length of contract with the providers.[67] OCC and governmental aggregation groups intervened in the case, arguing that this disparate treatment was discrimination in violation of state law. The Court disagreed, noting that "[s]ince customer qualification for these shopping credits is based upon a rational distinction, there has been not [sic] violation of R.C. 4905.31, 4905.33, or 4905.35."[68]

In AK Steel Corp. v. PUCO,[69] the Court also considered the propriety of shopping incentives in the form of shopping credits. Specifically, the Commission granted a shopping credit that was higher for the first 20% of the load of that class that switched to an electric marketer.[70] The Court affirmed the Commission's approval of these charges despite the fact that they were claimed to be discriminatory. The Court affirmed the Commission's finding that "...although customers who take the early initiative to shop for an alternate supplier of generation will benefit from their actions, the benefit does not amount to undue preference or

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[65] *Id.* at 17.
[66] 109 Ohio St. 3d 328 (Ohio 2006).
[67] *Id.* at 336.
[68] *Id.* at 335-338.
[69] 95 Ohio St. 3d 81 (Ohio 2002).
[70] *Id.* at 86.

discrimination, because all customers will have an equal opportunity to take advantage of the shopping incentives."[71]

The discrimination that FES and IEU assert is illegal in this case is based on a rational distinction and accomplishes a reasonable purpose. Similar to AK Steel, the Stipulation allows customers to receive RPM-based capacity prices on a first-come, first-serve basis. Further, as pointed out in RESA witness Ms. Ringenbach's testimony,[72] everyone who is shopping is protected and will pay the capacity price they anticipated when they contracted for power. This same reasoning applies equally to the GS1 and GS2 schools credits.

The two-tiered system is a reasonable way to phase-in the RPM pricing and to bring AEP Ohio's service territory to a 100% market priced electricity regime. Thus, to the extent the two-tiered system could be considered discriminatory, the two-tiered system is not an "undue or unreasonable" measure.

Further, FES's other claims of unlawful discrimination are equally invalid. FES asserts that AEP Ohio's capacity charge for shopping customers is different than the charge for non-shopping customers and is thus unreasonably discriminatory. The Commission, however, has approved numerous differences between shopping and non-shopping rates and charges. Furthermore, there is nothing in the record showing that these rates are in fact discriminatory.

f. Opposing parties also attack the Stipulation as Anticompetitive.

FES and IEU argue that the two-tiered capacity pricing paradigm limits retail competition until 2015 by limiting the amount of "headroom"[73] CRES providers have when making offers to

[71] *Id.* at 87.
[72] RESA Ex. 1, pp. 7-9.
[73] "Headroom" is the net margin for the CRES supplier.

retail customers to shop.[74] FES cites the testimony of Constellation witness Mr. David Fein and RESA witness Ms. Ringenbach for the premise that higher capacity prices will limit shopping.[75]

Although both witnesses stated the two-tiered capacity prices would tend to limit shopping, neither stated they would prevent shopping above the PRM percentages or act as a "hard cap."[76] As noted by Mr. Fein, while the set-asides "potentially make it less likely or changes the economics for a customer considering shopping on the issue of price. There are other considerations that customers take into account when making a decision to shop....."[77] Mr. Fein also noted that although it may be tough to conduct retail sales the first year, the amount of RPM pricing available increases every year.[78] Further, as noted by Exelon witness Mr. Dominguez, setting the capacity prices provides clarity on what the capacity component is going to be, which will encourage investment by CRES providers.[79]

FES and IEU also focus on the number of existing shopping barriers that remain and focus on AEP Ohio's historical resistance to shopping.[80] Today under the current ESP, or if there were an MRO, under an MRO, there would be: 1) no change to the 90 day notice provisions for large customers who switch; 2) no end to the minimum stay periods; 3) no attempt to change the switching fee; and 4) no enhanced data provided to the CRES providers.

Under the Stipulation, however, the 90 day notice is eliminated in 2012, the enhanced data begins in 2012, the minimum stay ends in 2015, and the Stipulation requires discussions between AEP Ohio and the stakeholders about lowering or eliminating the switching fee.[81] If the Stipulation is rejected, all of these gains are lost. The Opponents focus only on what barriers

[74] IEU Initial Brief, p. 40; FES Initial Brief, pp. 95-100.
[75] FES Initial Brief, pp. 95-96.
[76] RESA Ex. 1, pp. 7-9; Constellation Ex. 1, pp. 7-9.
[77] Tr. Vol. VI, p. 974.
[78] Tr. Vol. VI, p. 991.
[79] Tr. Vol. VI, p. 1014.
[80] FES Initial Brief, pp. 111-113; IEU Initial Brief, pp. 2-5.
[81] Stipulation, ¶IV(1)(s).

remain to shopping, but ignore the significant number of barriers that will be removed. As noted by Constellation witness Mr. Fein, these barriers have been in place since the opening of the market.[82] While a few barriers remain in place, this does not diminish the importance or benefits of the ones eliminated.

g. PMR/GRR and MTR aren't authorized under law

IEU and FES argue that the GRR, MTR and PMR are not justified or authorized under law. IEU argues that "placeholder" riders cannot be authorized under Section 4928.143(B)(2), Revised Code unless evidence of all the costs flowed through such riders is presented in the application or at hearing.[83] In other words, a subsequent filing cannot be made under a pricing category created as part of the application. To respond, first, it is important to understand the purpose of a "placeholder" rider. A placeholder rider is a projection of a future cost that might occur due to factors which are foreseeable now, but which may or may not occur. The placeholder merely sets up a mechanism to collect such funds should the Commission later decide that the anticipated costs did occur. The amount of the placeholder rider would also be determined at that time.[84] Thus, for example, the GRR, as a placeholder, establishes a mechanism for assessing the costs for new dedicated generation if an application is made to build the generation and AEP Ohio proves it meets all the criteria for newly dedicated generation established in Section 4928.143, Revised Code. The establishment of a placeholder rider does not authorize any rate to be charged or adjusted. It only provides a framework within the tariff should the Commission at a later time responding to a new application authorizes such a charge.

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[82] Cross examination of Constellation witness Mr. Fein, Tr. VI, p. 978 ("There are a number of items that have been on the books in [AEP Ohio's] tariffs since the opening on the marketplace.").
[83] IEU Initial Brief, pp. 46-49.
[84] Stipulation, ¶IV(1)(d).

Contrary to IEU's argument, placeholder riders are not inconsistent with recent Ohio Supreme Court rulings.[85] The Court interpreted the phrase "without limitation" in 4928.143(B)(2) to "limit *the type* of categories a plan may include...."[86] This is a limitation on the categories of costs that may be incurred and is not a limit *when* the applicant must prove those costs have been incurred in accordance with the statute. Thus, there must be a legal basis for a claim for the rider, but the specifics of that claim do not have to be predetermined before the ESP. Here, AEP Ohio's proposal for the GRR and PMR are both the "type" of cost specified under Section 4928.143(B)(2), Revised Code. The GRR clearly fits within Section 4928.143(B)(2)(c) and the PMR is a charge that "stabilizes and provides certainty" as part of AEP Ohio's transition to competitive markets in accordance with Section 4928.143(B)(2)(d).

Although AEP Ohio has not yet proposed generation that meets the statutory burdens under Section 4928.143(B)(2)(c) for cost-recovery under a non-bypassable generation rider, AEP Ohio is still required to do so as part of this proceeding.[87] The parties recognize that these costs have not been proven yet. In fact, the Signatory Parties have reserved the right to challenge any costs through these riders on that basis.[88] Thus, IEU's challenges to the rider for failing to meet statutory requirements are premature. IEU and FES also argue that these costs do not fall under one of the enumerated categories pursuant to the above opinion. The MTR is a non-bypassable rider covered by subsection (B)(2)(d) as it is required for stability and provides certainty of electric service.

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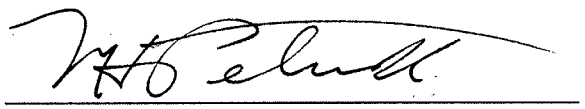
[85] IEU Initial Brief, pp. 48-49.
[86] *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 520 (Ohio 2011).
[87] Stipulation, ¶IV(1)(d).
[88] *Id.*

V. Conclusion

For the reasons presented in its Initial Trial Brief as supplemented by the arguments presented in this Reply Brief, RESA requests the Commission approve the Stipulation as filed.

Respectfully submitted,



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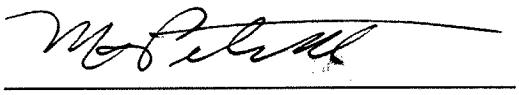
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 18th day of November, 2011 by electronic mail, upon the persons listed below.



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