**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals | ) ) ) ) | Case No. 10-2376-EL-UNC |
| 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<br>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<br>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 |

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## JOINT REPLY BRIEF OF THE UNDERSIGNED SIGNATORY PARTIES

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Filed: November 18, 2011

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# JOINT REPLY BRIEF OF THE UNDERSIGNED SIGNATORY PARTIES

## I. SUMMARY OF ARGUMENT

The Signatory Parties have demonstrated that the Stipulation satisfies the applicable three-part test for contested settlements and that the proposed ESP passes the aggregate market rate offer test. Regarding the first prong of the test, neither the Commission's rules nor its precedents adopting contested settlements require each party to be an expert on all issues involved in the case, as the opposing parties claim. Further, even though FES claims the Stipulation is based on exclusionary negotiations, the evidence of record shows that the settlement process was inclusive and it was FES that decided the framework did not provide a basis for it to continue negotiating. The impressive array of Signatory Parties and diverse interests represented, as well as the reasonable compromise reached in the agreement, should leave no doubt that the Stipulation is the result of serious bargaining among capable, knowledgeable parties.

The thrust of the briefing by all parties relates to the second prong as to whether the Stipulation violates any important regulatory principle or practice. What is revealed through the briefing is that the opposing parties merely disagree with the results reached in the Stipulation. Here are a few highlights of the major arguments.

IEU and OCC quarrel with the base generation rate design and revenue allocation as being neither cost-based nor market-based. Similarly, IEU objects to the automatic rate adjustments even though the ESP statute clearly authorizes automatic rate adjustments. This perspective fails to recognize the hybrid form of regulation under SB 221 that rates do not need to be strictly cost-based or market-based. That said, AEP Ohio witness Roush demonstrated that the proposed generation rates operate to eliminate historical cost subsidies and align remarkably well with market rates. Ormet launches an unwarranted attack on the Load Factor Provision (LFP), given that the LFP is designed to stimulate economic development and retain rate benefits for high load factor customers below 250 MW peak monthly demand. Contrary to the opposing views, the record demonstrates that the Stipulation's generation rates are reasonable and will serve customers well as a transition to the auction-based SSO rates in mid-2015.

The record supports the establishment of the distribution investment rider (DIR) supported by the Signatory Parties in the Stipulation. The DIR, supported by either R.C. 4928.143(B)(2)(d) or (h), will allow the Companies to invest much needed capital in the distribution infrastructure and ensure that the level of customer expectations currently being met continue to be met and position the Companies to also meet the increased expectations of customers in the future. Opposing parties' attempts to characterize the DIR as anything else other than a mechanism to invest in the distribution system are baseless. The record indicates the need to move the Companies investment to a proactive system, similar to the successful vegetation management program approved previously by the Commission, and approval of the DIR will allow the company to take that step to address the aging infrastructure described in the record.

FES and IEU also attack the pre-auction transition period of the proposed ESP, arguing that the corporate separation plan should be delayed for more debate while the auction should be conducted sooner. They argue for immediate and complete provision of RPM-priced capacity, even falsely suggesting that the Commission has already decided the capacity issue (even though the Commission only established an "interim" capacity rate and had scheduled a process for deciding the case in 2011, which schedule was suspended in order to consider the Stipulation). FES's and IEU's positions fail to acknowledge the complex restructuring that AEP Ohio will undertake, including amendment or termination of the longstanding AEP Generation Pool, and they also ignore the fact that AEP Ohio is currently an FRR entity and cannot be an RPM entity in the PJM market until mid-2015. The Stipulation provides for an aggressive schedule to complete the transformation of AEP Ohio and achieve a fully competitive auction-based SSO *in half the time it would take to do so under an MRO*.

FES manufactures a "dire need" to continue and expand RPM-priced capacity to serve impending opt-out aggregation programs. Based on the campaign of community resolutions docketed regarding this topic, it would appear that FES has been making promises for delivery of RPM-priced capacity from AEP Ohio that it cannot necessarily deliver. And FES's effort is not about successfully completing aggregation in general but is focused only on opt-out aggregation. Opt-in aggregation has always been available, not only before the Stipulation was signed on September 7, 2011, but it was feasible to pursue even if it was not initiated until after the Stipulation was filed. It would be an easy matter to pass a simple resolution after September 7, 2011 and sign a contract to implement opt-in aggregation – with weeks or months to spare – in order to lock up the available RPM-priced capacity (which was more than enough to serve all of the load represented in the November ballot initiatives). There is no reason the Commission needs to implement extreme measures such as modifying or rejecting the Stipulation in order to guarantee success for opt-out aggregation – especially given that the General Assembly has expressed a clear preference for opt-in aggregation. The Commission should be concerned with implementing *customer choice, not government choice*. As shown below, the RPM-priced capacity set aside is designed to continue to preserve and expand customer choice during the pre-auction period of the ESP term and has already served to significantly accelerate shopping in AEP Ohio's territory (even while it remains pending for approval before the Commission).

Absent adoption of the Stipulation's capacity charge resolution, the Federal-State conflict that is currently staged in pending FERC and PUCO proceedings on this issue will clash and a host of litigation will ensue. By contrast, the Stipulation fully and finally resolves the capacity charge issue. As such, these aspects of the Stipulation are reasonable and do not violate any important regulatory principle or practice.

Regarding the third prong of the test, FES and IEU do not directly address the third prong of the three-part test, as even they cannot credibly deny that the Stipulation contains substantial benefits that advance the public interest. For its part, the OCC/APJN brief simply argues that there is not enough benefit, attempting to "negotiate on brief" primarily advocating that even more shareholder funding be committed to low-income customers. There are substantial benefits for residential customers in the package deal struck in the Stipulation and the third prong is easily satisfied.

In Section III of the Joint Reply Brief, Signatory Parties reinforce their showing that the aggregate MRO test is satisfied. As demonstrated below, the opposing parties improperly apply the MRO test in ways that conflict with the Commission's precedent and misapprehend the terms of the proposed ESP. Both the quantified benefits of the Stipulation and the substantial qualitative benefits more than offset the minor difference in the price test component – clearly demonstrating that the proposed ESP is more favorable in the aggregate than the expected results under an MRO.

Finally, Signatory Parties demonstrate that IEU's motion to dismiss is without merit (Section IV) and OCC/APJN's challenge of the Attorney Examiner's evidentiary rulings is misguided (Section V).

For efficiency, the Signatory Parties have organized their reply brief arguments under the same primary headings as was done in their initial Joint Brief. Where the opposing parties' arguments were already anticipated and fully addressed, the Signatory Parties simply refer back to particular pages from their initial Joint Brief in lieu of repeating the same arguments. Any lack of emphasis or failure to address specific points in opposing parties' briefs should not be interpreted as acquiescence in those arguments, but should be attributed to a prioritized focus on the primary disputed issues within the expedited period of time allowed for reply briefs.

# II. THE STIPULATION AND RECOMMENDATION SATISFIES THE COMMISSION'S THREE-PART STANDARD FOR REVIEWING AND APPROVING CONTESTED STIPULATIONS.

## A. The Stipulation Is The Result Of Serious Bargaining Among Capable, Knowledgeable Parties.

IEU makes four arguments in support of their claim that the Stipulation is not the product of serious bargaining: (i) that Signatory Parties have not adequately reconciled each of their original litigation positions to the Stipulation outcomes, especially regarding the MRO test, (ii) that parties have different views about hypothetical examples under the Pool Modification Rider (PMR) and whether the Company must utilize a Competitive Bidding Process (CBP) in the future post-May 2016 SSO filing, (iii) that certain Signatory Parties did not know that the RPM-priced capacity set-aside had been fully awarded for any customer class, and (iv) that the settlement might be tainted because certain parties were "excluded from negotiations leading up to the execution of the Stipulation." (IEU Brief at 68-72.) None of IEU's arguments in this regard have any merit.

OCC and APJN[1] argue that not all of the Signatory Parties were knowledgeable regarding the full contents of the Stipulation. The only points made in support of this argument are that: (i) the primary focus of Grove City (and, without any record basis "presumably" Hilliard) was regarding street lighting and they assessed the remainder of the Stipulation based on information provided by other parties, (ii) the Commission should give little weight to some of the lay witnesses supporting the Stipulation because they were often focused on parochial interests, and (iii) some Signatory Parties had limited knowledge about Appendix C of the Stipulation. (OCC/APJN Brief at 22-24.) As shown below, even if these diffuse assertions are accurate (which they are not), they do not undercut the conclusion that the first prong of the three-part test is satisfied.

FES makes three claims in support of its argument that the Stipulation is the result of "exclusionary settlement negotiations and limited analysis." (FES Brief at 138-148.) First, FES wrongly claims that AEP Ohio excluded residential customer groups from final negotiations and argues that this produced an unreasonable result. Second, FES falsely claims that it was excluded from negotiations and this is important because none of the CRES parties that supported the Stipulation are "a significant or imminent competitive force" like FES. (*Id.* at 143.) Finally, FES repeats the misguided claims of IEU witness Murray that Signatory Parties conducted "little analysis" prior to signing the Stipulation. (*Id.* at 145-148.)

[1] While the combined brief was initially filed by OCC, OPAE and APJN, OPAE withdrew from the proceedings on November 16, 2011 indicating that it no longer takes a position for or against the Stipulation. Accordingly, this brief will now be referred to as the OCC/APJN Brief.

The arguments regarding the first prong can be divided into two categories involving the "capable, knowledgeable parties" component and the negotiation process component. However, the scope and standard of the first prong of the test must be briefly reviewed prior to addressing those arguments. IEU – as it did in testimony – misstates the first prong of the three-part test on brief (at 72) as being whether the Stipulation is the product of knowledgeable and capable parties "that set about to produce a reasonable compromise of contested issues based on the facts and the law." IEU's attempt to add the quoted language has no basis in Commission precedent and, through such language, wrongly expands the first prong by judging the substantive adequacy of the settlement – which is something the second and third prongs of the test are designed to do. While it will not be repeated here, the Signatory Parties' Joint Brief demonstrated that the Commission's prior decisions applying the three-part test have not used the first prong to measure the substantive adequacy of a settlement or to impose an added component of proof like that reflected in the extra language included by IEU. (Joint Brief at 27-29.) Rather, the first prong reviews the negotiation process and the general knowledge and experience of signatory parties.

**1. The Signatory Parties are capable, knowledgeable parties.**

With regard to IEU's first argument (at 68-69) that Signatory Parties have not adequately reconciled each of their original litigation positions to the Stipulation outcomes, this is an example of where IEU seeks to improperly judge the substantive results of the Stipulation under the first prong. The Commission applies the second and third prongs to measure the substantive adequacy of the settlement terms. The three-part test evaluates the Stipulation as a *product* of serious bargaining, which results are typically not justified through a series of explained adjustments to parties' litigation positions or testimony. This is especially true where (as here) the Stipulation constitutes a complex package of terms and conditions.

In any event, individual Signatory Parties must judge for themselves whether a settlement resolves their concerns and whether their own litigation position is likely to prevail – no party is required to demonstrate to IEU's (or another party's) satisfaction that the settlement works to reasonably resolve that party's own interests.[2] The Commission's intervention standard to be granted participation in a case does not require that a party be knowledgeable about every party's interest in the proceeding. The rule on intervention, O.A.C. 4901-1-11, is based in having a real and substantial interest in the proceeding, not being a subject matter expert on every issue in every proceeding. If IEU's position is correct it would effectively block a potentially large group of parties granted intervention under the Commission's rules from participating in settlement discussionss – frustrating the settlement process and one of the indicators of the Commission's mission statement of resolving disputes. If litigation positions had to be explicitly squared with settlement outcomes, there would never be settlements; compromise always means changing your position and agreeing to something different than your litigation position. Rather, the Commission reviews the result of negotiations based on the three-part test. Insofar as IEU's argument (at 68-69) and FES's similar argument quoting IEU witness Murray (at 145-146) are

[2] IEU also blatantly mischaracterizes the analysis conducted by parties. For example, IEU claims that the OMA Energy Group ("OMAEG"), among others, simply pointed to Staff and AEP Ohio testimony when questioned about the analysis conducted to determine whether the ESP, as modified by the Stipulation, would be more favorable than an MRO. IEU Initial Brief at 69, referencing Mr. Murray's unsupported testimony, IEU Ex. 9A at 6-7. In fact, the OMAEG provided extensive responses to IEU discovery demonstrating its independent analysis and even attaching an independently derived spreadsheet representing its analysis of the ESP/MRO test. For IEU to assert that there was no independent analysis is a blatant mischaracterization of the facts, at best.

based on the premise that each party must conduct an MRO test before signing a settlement, the Joint Brief already fully rebutted that misguided notion. (*See* Joint Brief at 29-31.)

IEU's second argument (at 69-71), that parties have different views about hypothetical examples under the PMR and whether the Company must utilize a CBP in the future post-2016 SSO filing, does nothing to advance IEU's position. Issues relating to the next SSO are not part of this case and are the subject of future Commission proceedings. While the Stipulation does not address the next SSO or affirmatively require an auction-based SSO, there are limited choices once corporate separation occurs (and corporate separation is a premise of the entire Stipulation). Likewise, IEU's illustration, that two parties may have a different view regarding implementation of the PMR in the context of a hypothetical example that may or may not materialize in the future, is of no significance. Rather, it is also a matter for resolution in a future Commission proceeding, should there even be a need for a PMR. The Commission commonly addresses such matters in implementing not only settlement terms but also in applying language from its own orders in litigated cases. Neither circumstance, however, is relevant to whether the Stipulation was the product of serious negotiation among capable knowledgeable parties.

IEU's third argument (at 71), that certain Signatory Parties did not know that the RPM-priced capacity set-aside had been fully awarded for any customer class, fails to support its position. FES makes a similar claim (at 146-148) that the Signatory Parties did not receive the draft Appendix C far enough in advance of the Stipulation's execution and that the Signatory Parties had not adequately studied the effect of the Stipulation on shopping. What IEU and FES fail to acknowledge is that there is no evidence in the record to suggest that any party, including AEP Ohio, knew the status of shopping at the time the Stipulation was signed. In fact, AEP Ohio witness Allen testified that customer shopping levels and their relationship to the *pro rata* allocation of RPM set-aside as of the time the Stipulation was filed were not known by the Company until September 23, 2011. (AEP Ohio Ex. 20A at 7.) Similarly, there is no way to definitively determine the effect of the Stipulation on shopping. IEU's and FES's revelations exposing a lack of knowledge about things that are unknown to everyone cannot be relevant to the first prong of the three-part test.

Regarding the OCC/APJN's first point referenced above, showing that a party's "primary focus" is on a certain topic has no bearing on whether, as a general matter, that party is knowledgeable or capable for purposes of the first prong of the three-part test. Further, the OCC/APJN brief explicitly and summarily presumes without any basis in the record that the statements made about Grove City also apply to City of Hilliard. Regardless, the first prong in unaffected by whether Grove City and/or Hilliard was primarily focused on street lighting. No individual party needs to be all-knowing about every resolution or implication involved with a settlement, in order for the first prong of the test to be satisfied. Notwithstanding the opposing parties' self-styled proclamations of categorical expertise and knowledge, no individual party – including any of them – is omniscient about all things connected to the Stipulation. Nor is any party required to be under the first prong. OCC and APJN dedicate the majority of their initial brief on the issues related to the distribution investment rider. Clearly, OCC/APJN is focused largely on one issue, but I do not think they would view themselves as unknowledgeable parties.

Moreover, even if one were to presume to accept the notion that one or more Signatory Parties were not capable or knowledgeable (a proposition with which the Signatory Parties strongly disagree), that would not negate fulfillment of the first prong of the three-part test which measures whether the Stipulation itself is *the result of* serious bargaining among capable, knowledgeable parties.[3] Satisfaction of the first prong is not defeated where one or even a few of the Signatory Parties are not knowledgeable about some of the issues in the Stipulation. As long as most or many of the Signatory Parties are capable, knowledgeable parties, the first prong would be satisfied because the Stipulation remains *the product of* serious negotiations among capable, knowledgeable parties – even if some individual Signatory Parties were not capable or knowledgeable about particular issues. While that situation does not necessarily apply in this case, the Commission should nonetheless clarify that the opposing parties are misapplying the first prong.

**2. The settlement negotiation process was not exclusionary.**

Finally, IEU and FES raise objections about the settlement process. IEU's passing argument (at 71), that the settlement might be tainted and unreasonable because certain knowledgeable parties were excluded from negotiations leading up to the execution of the Stipulation, is both factually and legally flawed. FES's similar claim (at 138-144), though a bit more detailed, is equally flawed. Through the strategic decision of both IEU and FES to place their *first prong* arguments *last* in their briefs (even though it is awkward and out of sequence to do so), it would appear that even they acknowledge it is their weakest argument. In any case, the Signatory Parties submit that these contrived objections about the settlement process are without merit and only serve to cloud the real issues in the case.

[3] The real intent of this prong of the three-part test is to protect individual customers from signing settlements with utilities that are much more sophisticated and knowledgeable about utility issues that may be against their interests. It is to ensure that parties to a settlement are represented by counsel who are capable of understanding the issues and impacts of a settlement and who engage in serious negotiations where a compromise is reached. That is clearly the case here.

In support, IEU briefly asserts that the alleged exclusion of certain knowledgeable parties raises a concern that the settlement process was tainted and unreasonable. Perhaps an additional reason that IEU only briefly mentions this argument in passing is that its own witness, Mr. Murray, affirmatively agreed that during the settlement negotiations, IEU stated that the settlement framework did not provide a basis for moving forward with further discussions on that basis. (Tr. IX at 1847-1848, 1854.) The OCC/APJN Brief also portrays the participation by opposing parties in the settlement negotiation process as such:

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

(OCC/APJN Brief at 3 (emphasis added).) This statement is accurate and is consistent with the testimony of AEP Ohio witness Hamrock (as discussed on pages 21-22 of the Joint Brief), the testimony of IEU witness Murray (cited above) and OCC's discovery admissions in the record that it no longer intended to be involved in negotiations (AEP Ohio Ex. 17). Thus, all of the Signatory Parties and all of the opposing parties except for FES agree factually that intervenors indicated that the proposed settlement framework was unacceptable and repeatedly expressed their desire to no longer participate in the negotiations based on that settlement framework.

Nevertheless, FES plods forward with a two-tiered attack in this regard claiming that: (a) AEP Ohio improperly excluded residential customer groups from final negotiations and argues that this produced a result that harms customers, citing *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229 (1996); and (b) FES was excluded from negotiations and this is really important because none of the CRES parties that supported the Stipulation are "a significant or imminent competitive force" like FES. (*Id.* at 143.) These arguments lack support in the record, minimize the involvement of competitive suppliers that did sign the Stipulation and involve a misapplication of law.

FES's transparent attempt to defend residential customer interests is not supported by the record or by the residential customer advocates. As referenced above, the OCC/APJN brief directly admitted that opposing intervenors (including the residential advocates themselves) determined that the settlement framework was not the basis for a settlement in their view and expressed their desire to no longer participate in the discussions around that settlement framework. Thus, FES's attempt to bootstrap these claims for these residential advocates is foreclosed by the residential advocates' own statements on brief.[4] FES's argument is also ironic given that settlement of the recent FirstEnergy SSO cases was approved by the Commission even though the statutory residential advocate, OCC, opposed the Stipulation in that case. (Case No. 10-388-EL-SSO, August 25, 2010 Opinion and Order at 24.) In any case, after briefly giving lip service to residential concerns (at 139), FES quickly returned (at 140) to champion its main concern of boosting profit margins through below-cost access to AEP Ohio's capacity resources.

Regarding the false assertion that FES was improperly excluded from the negotiation, the Signatory Parties already demonstrated in detail why FES witness Banks' assertion is not supported by the manifest weight of the record. (Joint Brief at 23-26.) There is no need to repeat that demonstration here since nothing in FES's brief overcomes the substantial evidence supporting the Signatory Parties' position on this point. Even if the Commission were to find that Mr. Banks' lone statement somehow reflects enough veracity to override the manifest weight of the record, any exclusion of FES cannot be held up as a legal flaw in the negotiation

[4] FES's argument is also ironic given that settlement of the recent FirstEnergy SSO cases was approved by the Commission even though the statutory residential advocate, OCC, opposed the Stipulation in that case. (Case No. 10-388-EL-SSO, August 25, 2010 Opinion and Order at 24.)

process based on the *Time Warner* case.  No class of customers was excluded since the other CRES intervenors participated in the negotiations and they all support the Stipulation.

Though FES styles itself as being the only “imminent competitive force” among CRES intervenors (page 143), such puffery does not change the law or the facts.  The Supreme Court has held that, even where a party is excluded from settlement discussions, a stipulation nonetheless satisfies the first prong of the Commission’s test for stipulations so long as the exclusion was not directed at “an entire customer class.”  *Constellation NewEnergy v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, 535-36.  Here, FES is not part of a customer class at all.  But to the extent the language in the Time Warner decision is read to encompass interest groups generally, other CRES providers, the interest group to which FES belongs, were present for settlement negotiations and became Signatory Parties to the Stipulation.  Further, as previously discussed in Signatory Parties’ initial brief (at 25-26), neither FES nor any other party (including the Company) has a right to attend all settlement meetings, particularly after that party has indicated they are no longer interested in settlement on the same terms everyone else is using to finalize the settlement.  This is particularly true where (as here) FES actually removed itself after having participated in most of the negotiations.

In sum, the fact that FES did not participate in settlement discussions after August 30, 2011 does not prevent the Commission’s approval of the Stipulation and Recommendation.

## B. The Stipulation Does Not Violate Any Important Regulatory Principle or Practice.

### 1. *ESP II*, Case Nos. 11-346/348-EL-SSO and 11-349/350-EL-AAM

#### a) The Generation Rate provisions of the Stipulation do not violate any important regulatory principles or policies because those provisions are reasonable as supported by evidence of record.

### 1) Rate design and revenue allocation

IEU argues (at 30-31) that the Stipulation implements "illegal and unreasonable changes in rate design and revenue responsibility." In particular, IEU disputes (at 30-32) that the Stipulation's base generation rate design is rationally connected to either market or cost and asserts (at 31) that the rates "defy any cost-based explanation." Similarly, OCC/APJN argue in passing that the generation service is not reasonably priced under the Stipulation because the "base generation rates are not cost-based or even market-based." (OCC/APJN Brief at 39.) FES also argues (at 113) that the base generation rates are "neither cost-based nor market-based." These arguments on brief are similar to the claims made through the testimony of IEU witness Murray and OCC witness Dr. Duann and, as such, were largely addressed in Signatory Parties' Joint Brief. (Joint Brief at 34-40.)

As a threshold matter, however, IEU's notion of "illegal rate design" is a misnomer, given that rate design is largely discretionary to the Commission and the Supreme Court affords "wide discretion" to the Commission on matters relating to rate design. *Columbus Southern Power Co. v. Public Util. Comm*. (1993), 67 Ohio St. 3d 535, 540. *See also* *Dayton v. Pub. Util. Comm*. (1962), 174 Ohio St. 160, 162 (Our function is not to weigh the evidence or to choose between alternative, fairly debatable rate structures. That would be to interfere with the jurisdiction and competence of the commission and to assume powers which this court is not suited to exercise.) Upon closer review of IEU's arguments, the reality is that IEU merely disputes the wisdom of implementing the Stipulation's rate design. But rate design and revenue allocation is a matter for the Commission's discretion, not IEU's; thus, adopting the Stipulation's rate design is permissible and lawful. And the Signatory Parties also demonstrated why doing so is also reasonable.

The opposing parties fail to acknowledge that generation rates are no longer required to be strictly cost-based (as they were prior to enactment of SB 3) or strictly market-based (as they were under SB 3); instead, SB 221 incorporates a hybrid system of cost-based and non-cost-based rate adjustments that, as a package are subject to the aggregate market rate offer test. After the Market Development Period created by SB 3, customers had the choice of purchasing generation service from a competitive supplier or from their EDU at market-based rates. Under SB 221 customers retained the right of choice, but under an ESP, an EDU is precluded from charging market rates.

The result of this "hybrid" form of regulation is that when market prices are below ESP rates, customers can be expected to switch from the EDU to the competitive generation provider, leaving the EDU with surplus energy to sell into a depressed market. When the market rebounds, however, and market prices exceed ESP rates, customers can be expected to return to the EDU and its lower ESP rates. In any case, the Commission's approval of an ESP under SB 221 is not based on the cost, though individual rate adjustments can certainly relate to particular costs. Rather, the Commission is required to approve, or modify, the ESP if the plan is more favorable in the aggregate as compared to the expected results that would otherwise apply under a Market Rate Option. (R.C. 4928.143(C)(1).)

By contrast, traditional ratemaking is concerned with establishing rates that are cost justified and with matching the expected expenses to the time period of revenues authorized. The complaint by IEU and OCC/APJN that the Stipulation's generation rate re-design and automatic generation rate increases are not cost-based ignores the fundamental changes adopted both as part of SB 221 and the prior electric restructuring law, SB 3. The entirety of R.C. Chapter 4909 (including the prescriptive ratemaking formula found in R.C. 4909.15) does not apply when setting ESP rates under R.C. 4928.143. The opposing parties' objections are inappropriately engrained in traditional ratemaking, which is simply not applicable to SSO generation rates.

Notwithstanding that SSO generation rates are not required to have a cost-based structure or relationship, the Stipulation's generation rate do have a reasonable basis in cost. Mr. Roush's rebuttal Exhibit DMR-R1 shows that the historical level of cross-subsidization among the tariff classes that existed at the time of CSP's and OPCo's last base rate cases aligns remarkably well with the Stipulation's changes in generation rates. (*Id*. at 3.) For example, CSP residential customers were receiving a $0.0081/kWh subsidy after the last base rate case and would receive a $0.0083/kWh increase in 2012 under the Stipulation. (*Id*. at Exhibit DMR-R1.) While the GS-4 customer rate changes do not line up as well, they are reasonable and reflect a charge to partially eliminate a prior subsidy they received; whereas, the commercial and small industrial customers who were funding the subsidies for years finally received a reduction to *partially* eliminate the subsidy they funded through above-cost rates. Regarding large industrial customers, OPCo GS-4 customers that had received a subsidy for many years of $0.0009/kWh will receive an increase of $0.0020/kWh, while CSP GS-4 customers that had received a subsidy for many years of $0.0017/kWh will receive an increase of $0.0067/kWh. Of course, under the General Assembly's design, the ultimate check on the reasonableness of specific generation rates is the customer's right to shop.

AEP Ohio witness Roush also explained the second major reason why generation rates needed to be re-designed prior to mid-2015 when all generation rates will be based on a competitive auction. As can be seen in Exhibit DMR-R2, the Stipulation rate relationships are significantly better aligned with FirstEnergy's RIDER GEN (and thus market based pricing) than are AEP Ohio's generation service rates before the ESP Stipulation. (AEP Ohio Ex. 22 at 3.) The Stipulation's generation rate design (including any impact on shopping) is reasonable and refutes the spurious suggestion by IEU (at 31-32) that the Stipulation's generation rates represent AEP Ohio's "attempt to restrict choice by customers" and result in "negative effects on shopping" and the similar claim by FES (at 114) that the proposed generation rates represent "an attempt to foreclose market competition." Using a rational market-based rate structure cannot, by definition, have unreasonable impact on shopping. By the same token, eliminating subsidies promotes competition and does not harm legitimate competition – but it does end the high-margin arbitrage of CRES providers serving commercial customers that currently have SSO rates well above both market and cost. Thus, the Stipulation's generation rate structure reinforces rational, economic shopping and is fair to customers.

Does FES expect the Commission to believe that it, as a competitor, just happens to dislike the reduction of commercial and industrial rates based on public-minded concerns about fair rate design? Wal-Mart, OEG, Kroger and OMAEG, all of whom represent large commercial and industrial customers, understand the reasonableness of the generation rate design and support the Stipulation. FES even attacks the Stipulation's shopping credits to schools that will promote additional shopping, suggesting (at 116) that those customers do not generate high enough profit margins and are less desirable than other commercial customers. Again, the AICUO is a party in these proceedings representing the interests of real schools and supports the Stipulation. The anti-competitive claims conjured by FES and IEU are based on rhetoric – not on the facts or the law – and should be rejected.

### 2) Automatic base generation rate increases

IEU also attacks the automatic annual adjustments to base generation rates (at 34) as being "arbitrary" and complains that the automatic rate changes (at 35) "lack any cost justification." Noticeably absent is IEU's standard objection that the rate adjustment lacks a basis in the ESP statute. That is because the ESP statute explicitly grants the Commission without qualification the ability to approve automatic rate changes under R.C. 4928.143(B)(2)(e). IEU's objection simply confirms that IEU does not like this statute – but that is no basis upon which to reject or modify the Stipulation.

### 3) Market Transition Rider

FES argues (at 115) that there is no justification for the MTR, that it unfairly subsidizes certain customer classes and (at 132) that the MTR is not necessary for stabilizing or providing certainty in retail generation rates. IEU also unfairly disparages the MTR (at 32-33) as being designed to "mitigate the damage caused by the proposed rate design and revenue distribution." These general arguments are without merit, as the MTR has already been demonstrated to be lawful and reasonable by the Signatory Parties – especially relative to its purpose and effect of stabilizing rates through the pre-auction period of the ESP term. (Joint Brief at 35-40.)

IEU also argues that the MTR "standing alone has no basis in law" and being nonbypassable "operates effectively as a distribution charge," the result being to collect generation-related charges "as if they were distribution or transmission charges, a violation of state policy." (IEU Brief at 33 citing Ohio *Consumers Counsel v. Pub. Util. Comm*. (2007), 114 Ohio St.3d 340.) IEU's circular argument is a flawed syllogism (MTR is generation-related; the nonbypassable aspect of the charge makes it "distribution"; can't have a distribution charge for a generation service; therefore, the MTR charge is unlawful). IEU's reliance on the *Consumers Counsel* case here is misplaced. In that case, the Commission itself had improperly included a generation-related charge in a distribution tariff and the Court (while fully affirming the charge itself) merely found that the charge needed to be relocated into a generation tariff. (*Consumers Counsel*, 114 Ohio St.3d at 346.) More to the point, the Court reversed the Commission's conclusion that a generation-related charge should be considered as a distribution charge, merely because it was nonbypassable. (*Id*. at 345.) Thus, the opinion cited by IEU definitively undercuts the purpose for which IEU attempts to use it. Further, IEU recently made the same argument (that the generation-related POLR charge is considered a distribution charge merely because it is nonbypassable) in the *ESP I* remand proceeding and the Commission rejected it citing the *Consumers Counsel* case from the Supreme Court of Ohio as support. (October 3, 2011 Remand Order at 18.) The IEU's argument should again be rejected.

Saying the MTR is effectively a distribution charge just because it is nonbypassable makes no sense. The charge is still a generation-related charge. Division (B)(2)(d) of the ESP statute provides authority for the Commission to adopt the MTR. As Mr. Roush demonstrated (AEP Ohio Ex. 22 at 5-6), the effect of the MTR is to stabilize rates while moving toward a market-based structure during the period prior to the auction-based SSO. In short, the MTR is lawful and reasonable and does not violate any important regulatory principle or practice.

#### 4) Load Factor Provision

##### i. The limitation on the applicability of the Load Factor Provision does not unduly or unreasonably prejudice or disadvantage Ormet.

Ormet's argument that the 250 MW peak monthly load limitation on the applicability of the Load Factor Provision ("LFP Limitation") unduly prejudices or disadvantages Ormet in violation of Ohio law and precedent is incorrect and should be rejected by the Commission.[5]

Ormet states that "the same service for similarly situated customers should be priced equally."[6] But Ormet is not "similarly situated" compared to AEP Ohio's other high load factor customers.[7] The price of Ormet's electric service is set pursuant to a unique arrangement with variable pricing tied to the worldwide price of aluminum, not AEP Ohio's standard offer rates, distinguishing Ormet from other customers.[8] Under its unique arrangement, Ormet received a ratepayer subsidy of $60 million each year in 2010 and 2011, and is eligible to receive additional ratepayer subsidies of $54 million in 2012, $44 million in 2013, $34 million in 2014, $24 million in 2015, and $14 million in 2016.[9] Consequently, Ormet could receive a subsidy of up to $290 million from other customers from 2010-2016.[10] And, as discussed in detail in the Signatory Parties' Joint Brief, Ormet has a long history of being treated as a unique customer with a series

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[5] Ormet Brief at 8.
[6] Ormet Brief at 9; See also Ormet Brief at 20-21.
[7] R.C. 4905.33 prohibits discriminatory pricing for "like and contemporaneous service" rendered "under substantially the same circumstances and conditions." "If the utility services rendered to customers are different or if they are rendered under different circumstances or conditions, differences in the prices charged and collected are not proscribed by R.C. 4905.33." *Weiss v. Pub. Util. Comm*. (2000), 90 Ohio St. 3d 15, 16.
[8] Signatory Parties' Brief at 46 (citing *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC); Ormet Brief at 4-5.
[9] Ormet Brief at 12.
[10] $60 + $60 +$54 + $44 + $34 + $24 + $14 = $290 million.

of special arrangements for its power service.[11] Ormet has never been on a standard rate and has never been "similarly situated" to other customers.

Further, Ormet is not "similarly situated" to other AEP Ohio customers due to Ormet's size, the level of its energy consumption, and its exemption from the kilowatt hour tax. This exemption from contributing to state and local government funding saves Ormet close to ten million dollars per year.[12] And Ormet itself states that it "has a peak demand of approximately 520 MW, and that its very large size makes Ormet unique."[13] These factors easily distinguish Ormet from other AEP Ohio customers to whom the LFP applies. Thus, Ormet is not "similarly situated" to other AEP Ohio customers. The same distinctions undermine Ormet's arguments that it "shares all of the characteristics of large industrial customers that warrant the implementation of the LFP."[14] Accordingly, it is not unduly discriminatory for Ormet to be treated differently under the Stipulation in this proceeding.

With the LFP Limitation, Ormet says that the Stipulation rates "are unjust and unreasonable for customers like Ormet."[15] Ormet has it backwards. Providing the LFP to Ormet would make the rates for each and every other business customer on Rates GS 2, GS 3, and GS 4 unjust and unreasonable by increasing their costs by $62.8 million.[16] In other words, granting Ormet's request would cost all of the other business customers served by AEP Ohio $62.8 million. This includes each and every member of OEG, Ohio Hospital Association, Association of Independent Colleges, Kroger and OMA, all of which are signatories to the Stipulation. Ormet's position would also damage all members of IEU, even though IEU is not a signatory

[11] Signatory Parties' Brief at 43-47.
[12] See R.C 5727.81 (setting out kilowatt hour tax rates).
[13] Ormet Brief at 17.
[14] Ormet Brief at 10.
[15] Ormet Brief at 9.
[16] Signatory Parties' Brief at 49 (citing OEG Ex. 1 at 7).

party. Ormet points to witness testimony that the LFP helps protect high load factor customers from cost shifting under the Stipulation, arguing that Ormet should have such protection.[17] However, because of its approved reasonable arrangement tied to the world-wide price of aluminum that provides Ormet with economic stability and viability, Ormet is already in a unique position compared to other high load factors customers. Contrary to Ormet's arguments, the LFP Limitation does not represent a "collateral attack" on a previous Commission order.[18] The LFP Limitation was not designed to undermine a previous Commission order, but instead was intended to promote economic development and rate stability during Ohio's transition to market.[19] Its impact on the Ormet reasonable arrangement is merely incidental to its intended purpose.

Ormet notes that three high load factor customers of AEP Ohio have reasonable arrangements and are not excluded by the LFP Limitation.[20] But the LFP applies to those customers because of their monthly peak load and is not based upon whether they take service under a reasonable arrangement. The LFP Limitation does not distinguish between customers based upon which customers have reasonable arrangements, but instead merely sets a peak monthly load limit of 250 MW. Thus, the distinction that effectively excludes Ormet is the 250 MW peak monthly load limit in the LFP, which is based upon the fact that inclusion of the very largest customers in the LFP could costs all GS 2, GS 3, and GS 4 customers approximately $62.8 million.[21] The fact that Ormet has operated under a series of unique arrangements over the last half century is not the reason that Ormet is effectively excluded from the LFP, although it

[17] Ormet Brief at 9.
[18] Ormet Brief at 13.
[19] Signatory Parties' Brief at 48 (citing OEG Ex. 1 at 6 and OMAEG Ex. 1 at 4).
[20] Ormet Brief at 13.
[21] Signatory Parties' Brief at 49 (citing OEG Ex. 1 at 7 and OMAEG Ex. 1 at 3).

does reinforce the point that it is not unduly discriminatory to treat Ormet as unique in this proceeding. And Ormet's unique arrangement is distinguishable from the reasonable arrangements of the other three high load factor customers, which are tied to AEP Ohio's otherwise applicable tariff rate rather than the worldwide price of aluminum.

Additionally, Ormet appears to argue that other companies should not receive benefits similar to a reasonable arrangement without meeting the requirements of a typical reasonable arrangement case.[22] But the LFP and the LFP Limitation were part of a package of agreements carefully negotiated in the Stipulation. And Stipulations are typically reviewed by the Commission for reasonableness based on three criteria.[23] Ormet's implication that it would be improper to approve the LFP Limitation without further demonstration similar to reasonable arrangement cases would lead to the addition of extra criteria beyond the Commission's typical legal standard for stipulations.

Ormet claims that its high load factor and peak demand are not actual or measurable differences in furnishing of service that warrant Ormet's effective exclusion from the LFP.[24] But, as Signatory Parties' have noted,[25] the application of the LFP to the very largest customers in AEP Ohio's territory has a negative effect on all of the GS 2, GS 3, and GS 4 customers, costing such customers $62.8 million.[26] This rate increase is counter to the LFP's intended purpose of promoting economic development and rate stability. And Ormet's load factor and peak demand have assisted it in securing unique arrangements for its electric service and exemption from the kilowatt hour tax that other customers have not enjoyed. Thus, Ormet's

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[22] Ormet Brief at 14.
[23] Ormet Brief at 6-7 (citing *Constellation NewEnergy, Inc. v. Pub. Util. Comm. of Ohio* (2004), 104 Ohio St. 3d 530, 532).
[24] Ormet Brief at 15-20.
[25] Signatory Parties' Brief at 48-49 (citing OEG Ex. 1 at 6 and OMAEG Ex. 1 at 3).
[26] OEG Ex. 1 at 7.

energy consumption is relevant to the reasonableness of the LFP Limitation and justifies Ormet's exclusion from the LFP.

The LFP Limitation does not unduly or unreasonably prejudice or disadvantage Ormet. For the last half century, Ormet has been treated as a unique AEP Ohio customer. Ormet should not be permitted to receive all the benefits of its unique customer status while avoiding any of the associated burdens. Moreover, the inclusion of very large customers in the LFP would skew the intended purpose of the LFP to the detriment of all other businesses served by AEP Ohio. Accordingly, the Commission should uphold the LFP Limitation.

**ii. The LFP limitation does not violate any other important regulatory principles or practices.**

Ormet claims that the LFP Limitation violates the regulatory principle of cost causation.[27] Likewise, Ormet argues that the LFP Limitation shifts costs to Ormet.[28] The purpose of the LFP is to promote economic development and provide rate stability to high load factor customers during AEP Ohio's transition to market.[29] Ormet's approved reasonable arrangement, which is tied to the world-wide price of aluminum not AEP Ohio's standard offer rates, already promotes economic development as well as rate stability for Ormet. Other high load factor customers also should be protected during AEP Ohio's transition to market. The Commission must balance the principle of cost causation with other important regulatory principles, including economic development and rate stability. The LFP provides a reasonable balance.

Further, citing a reasonable arrangement statute, Ormet claims that the LFP Limitation violates the statutory mandate of fostering economic development.[30] Ormet misrepresents the

[27] Ormet Brief at 22.
[28] Ormet Brief at 14.
[29] OEG Ex. 1 at 6; OMAEG Ex. 1 at 4.
[30] Ormet Brief at 23 (citing 4905.31).

impact of the LFP Limitation. Although the LFP Limitation does not necessarily encourage economic development for AEP Ohio customers with a peak monthly load over 250 MW, it does promote economic development for all other high load factor customers on the AEP Ohio system.[31] The LFP provides rate stability and affordability that can help retain large customers that are critical to Ohio's economy and provide quality jobs in this state.[32] Thus, the LFP Limitation does promote economic development with regard to high load factor customers with peak monthly load of 250 MW or less.

Ormet also argues that the LFP Limitation violates the principles of energy efficiency.[33] OEG witness Baron testified that "[t]he LFP also encourages energy efficiency and peak demand reduction by rewarding the efficient use of generation resources."[34] Again, although the LFP Limitation may not encourage customers with a peak monthly load over 250 MW to engage in energy efficiency, it will encourage all other high load factor AEP Ohio customers. Though less universally applicable than Ormet may desire, the LFP does encourage energy efficiency and peak demand reduction by a number of AEP Ohio customers.

The Commission should also reject Ormet's argument that approval of the LFP is not within the public interest because approving the LFP Limitation would "set a precedent that the largest users on the system have less need and/or right to protection under the law."[35] Ormet's unfair characterization ignores the fact that the intent of the LFP Limitation is to promote economic development and provide rate stability to large customers, not to punish Ormet. Ormet's self-serving position would reward it with a $62.8 million windfall on top of its already

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[31] OEG Ex. 1 at 6; OMAEG Ex. 1 at 4.
[32] OEG Ex. 1 at 6-7.
[33] Ormet Brief at 24.
[34] OEG Ex. 1 at 7.
[35] Ormet Brief at 25.

heavily subsidized rate at the expense of all other businesses served by AEP Ohio. Further, as Ormet's long history of PUCO-approved unique arrangements demonstrates, the Commission provides substantial protection to the largest users on the system. Thus, approval of the LFP Limitation is not contrary to the public interest.

#### iii. The Commission should not eliminate or substantially modify the LFP Limitation.

Ormet advocates that the Commission modify the LFP, suggesting that the Commission could allow "each customer to include the first 250 MW of its monthly peak load in the LFP."[36] The Commission should not adopt Ormet's proposed approach. The inclusion of 250 MW of Ormet's monthly peak load in the LFP would still substantially skew the intended results of the LFP. The effect would still increase the rates paid by other AEP Ohio customers by more than $30 million.[37] Although half of the windfall that Ormet would receive if the LFP applied to Ormet, this amount still represents a significant windfall to Ormet. And Ormet' position would severely punish all of the members of OEG, Ohio Hospital Association, Association of Independent Colleges, Kroger and OMA, all of which are signatories to the Stipulation.

The Stipulation was carefully negotiated and represented substantial compromise among the parties. The Commission should not upset the delicate balance that the Signatory Parties' have carefully crafted. Adoption of Ormet's position would be a material change that penalizes many of the signatories to the Stipulation. Such a significant change to the Stipulation could cause the Signatory Parties to no longer support the Stipulation. Accordingly, the Commission should approve the LFP and the Stipulation as filed by the parties and should reject Ormet's suggested revision.

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[36] Ormet Brief at 26.
[37] 250 MW/520 MW of Ormet peak load = 48%. 48% of $62.8 million = $30 million.

**b) The Generation Resource Rider is reasonable and does not violate any important regulatory principles or practices. [Par. IV.1.d and 2.d]**

IEU and FES challenge adoption of the Generation Resource Rider (GRR) as a placeholder with an initial rate of zero. While FES acknowledges that division (B)(2)(b), (c) and (d) provide the legal basis for approval of the GRR, it maintains (at 131-133, 136-137) that there is no record evidence to suggest that the GRR meet the requirements of R.C. 4928.143(B)(2)(b), (c) or (d). In classic hyperbole fashion, FES ominously predicts (at 135) that approval of the GRR even as a placeholder will "cast a cloud of uncertainty over competitive markets." IEU more narrowly contends (at 47) that division (B)(2)(c) applies but there must be a showing of: (i) "need" for the involved generating facility, (ii) that it was sourced through competitive bids, and (iii) that it has been dedicated to Ohio customers. While IEU and FES may not agree with the General Assembly's decision to allow for recovery of EDU-owned or operated generation facilities, that option was clearly provided for through the enactment of SB 221.

As discussed in the Signatory Parties' Joint Brief (at 49-52), any charges approved under the GRR necessarily will comply with R.C. 4928.143(B)(2)(b) and (c), as determined by the Commission. The testimonies of AEP Ohio witnesses Hamrock and Allen showed that the GRR was necessary and beneficial in pursuing the Ohio shale gas development in connection with MR 6 and for a large solar development in Ohio in connection with the Turning Point project, in addition to the testimony of OEG witness Baron supported use of the GRR as a "cost hedge" against market rates in order to promote rate stability. All parties reserved their rights to debate and argue those issues in future proceedings under the GRR (while the "need" question relating to Turning Point is already pending in Case Nos. 10-501-EL-FOR et al.). As such, the GRR is reasonable and does not violate any important regulatory principles or practices.

Next, IEU challenges the GRR as a "placeholder" rider, arguing (at 46, 48-49) that placeholder riders are not authorized under the ESP statute's "laundry list" of permissible charges. FES seems to accept that a placeholder rider can be adopted but indicates (at 133) that approval of the GRR as a placeholder does not excuse the need for the rider to comply with R.C. 4928.143(B)(2). Contrary to IEU's suggestion, it is permissible under the ESP statute for the Commission to establish the GRR placeholder as part of approving 2012-May 2016 ESP, with an initial rate of zero. Moreover, as an empty rider, neither IEU nor FES would have the ability to appeal and challenge adoption of a placeholder GRR given that there would be no concrete harm to their interests; rather, like everyone else, IEU and FES would have to wait until such time, if any, that a future decision by the Commission authorizes a non-zero rate for inclusion in the GRR. In any case, it cannot be disputed that the Commission has an established practice of approving placeholder riders as part of an ESP – and has done so previously for AEP Ohio, Duke Energy-Ohio and the FirstEnergy operating companies.

In AEP Ohio's *ESP I* cases, The Commission's March 30, 2009 Entry in Case Nos. 08-917 and 08-918-EL-SSO approved the Company's Compliance Tariffs filed on March 23, 2009. Those tariffs included the Economic Development Rider with a zero (0) value and an Energy Efficiency and Peak Demand Reduction Rider with a value of zero (0). In addition, the Environmental Investment Carrying Charge Rider was approved in the March 18, 2009 Opinion and Order but a rate was not reflected in tariffs until September 2010.

Similarly, in Duke Energy-Ohio's initial ESP case (Case No. 08-920-EL-SSO, et al.), the Commission also approved at least one placeholder rider. As part of the ESP, the Commission approved Rider DR-IM, a distribution rider designed to permit Duke to raise revenue to maintain distribution system reliability and to purchase and deploy SmartGRID technology. Rider DR-IM was approved to be initially set at zero and subject to annual, second-quarter adjustments. *Id*. at 17.

Finally, in FirstEnergy's first ESP case (Case No. 08-935-EL-SSO), the Commission approved Rider FTE, designed to allow FE to recover costs associated with alternative/renewable energy requirements (other than those required by SB 221), new taxes, and new environmental law or interpretations of existing environmental laws to the extent such costs exceeded $50 million during the ESP and were related to FE's generation assets. (December 19, 2008 Opinion and Order at 31.) Staff agreed with FE that the rider should be funded at $0 and used as a placeholder in the event costs exceeded the $50 million threshold. *Id*. The Commission agreed with Staff's recommendation. *Id*.

Adopting the GRR with an initial rate of zero is reasonable and does not violate any important regulatory principle or practice.

**c) The SEET threshold provision is reasonable and does not violate any important regulatory principles or practices. [Par.IV.1.g]**

This aspect of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. As such, the Signatory Parties stand on their Joint Brief (at 52-53) in support of this provision.

**d) The gridSMART®, PEV, Green Power Portfolio and ESR riders are reasonable and do not violate any important regulatory principles or practices. [Par. IV. 1. h, i, k and o]**

This aspect of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. As such, the Signatory Parties stand on their Joint Brief in support of this provision.

#### e) The Timber Road REPA is prudent and should be approved. [Par. IV.1.j]

IEU asserts (at 63-64) that a one-time up front prudence review of the Timber Road renewable energy purchase agreement (REPA) violates O.A.C. 4901:1-35-09(C). As pointed out in the post-hearing brief of the Signatory Parties including AEP Ohio, the IEU argument misapplies the Commission rule. (*See* Joint Brief at 60-61.)

The approval of the Timber REPA does not violate Commission rules. The review performed under O.A.C. 4901:1-35-09(C) refers to the quarterly updates and the fuel adjustment clause audit as it will relate to Timber Road. IEU argues that the rule requires an annual review in which the Company must demonstrate that the costs of the REPA are prudently incurred. (IEU Brief at 65.) The actual language of the rule states "the prudence of the costs incurred and recovered through quarterly adjustments shall be reviewed." This simply refers to the fuel adjustment clause audit that will examine whether the quarterly audit properly applied the adjustments in line with the enabling order justifying the costs, in this case the Timber Road REPA presented for approval. The fuel audit rule at O.A.C. 4901:1-35-09 is intended to examine the prudence of the costs incurred under a fuel contract once it is approved, and not the prudence of the underlying contract, in this case the Timber Road REPA, itself.[38]

IEU's reading of the rule would void out the twenty (20) year term of the contract and erase the benefit of the bargain reached. As AEP Ohio witness Simmons testified, "[t]he 20-year agreement, which is also the expected life of the technology, allows renewable energy resource providers to secure long-term financing, thereby amortizing the cost of their projects over a

[38] IEU's argument includes the indication of a future prudence approval of the shale gas prudence reviews for the cost of shale gas contracts for the existing AEP Ohio gas units under Stipulation Paragraph IV.2.a.2 (at page 20). Those contracts if offered will stand on their own at that time and are not at issue in this proceeding.

longer period.  Such financing has the effect of reducing the upfront costs and allows for a more economically levelized price over the term of the contract.  The 20-year term also provides price certainty for AEP Ohio's customers."  (AEP Ohio Ex. 1 at 11.)   These are the terms of the contract that allowed for the price reached in the contract.  IEU's reading of the rule should be denied because it provides no certainty for an underlying contract and would frustrate the development of long-term renewable agreements.  A rule that puts the prudence of the base renewable contract in question each year would change the terms of the bargain reached.

The Stipulation term related to the Timber Road prudence approval does not violate O.A.C. 4901:1-35-09.  In fact the Commission approval sought is an important first step in defining the scope of the costs that will be reviewed to ensure they were incurred in accordance with the contract approval made by the Commission in this case and provide for the inclusion of renewable energy sources in the utility generation mix.  The Commission should deny IEU's argument and approve the upfront prudence of the Timber Road REPA as requested by the Signatory Parties.

**f) The Fuel Adjustment Clause and the Alternative Energy Rider are reasonable and do not violate any important regulatory principles or practices.  [Par. IV.1.l and m]**

This aspect of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice.  As such, the Signatory Parties stand on their Joint Brief (at 62-63) in support of this provision.

**g) The Distribution Investment Recovery rider is reasonable and does not violate any important regulatory principles or practices. [Par. IV.1.n]**

Other than attacks on the performance of the Attorney Examiners in the case, OCC/APJN dedicates the thrust of its post-hearing brief on the distribution investment rider (DIR).

OCC/APJN provide conclusory statements by its counsel in the brief rather than evidence of record to attack the evidence provided by the Commission Staff and AEP Ohio in the record. OCC/APJN also specifically ignore the answers provided to its counsel's questions and development of the issues in the record, instead relying on its initial vision provided in its prefiled testimony. Ultimately, the Commission makes its decisions based upon the evidence of record and the only evidence of record in these proceedings support the approval of the DIR under at least two different statutory provisions for the benefit of the distribution system and customers.

**1) OCC/APJN and IEU's argument that the DIR violates important regulatory principles and practices by permitting double recovery of a return on distribution investment ignores the evidence of record.**

OCC/APJN, FES, and IEU assert that the DIR mechanism permits a double recovery of a return on distribution investment. (OCC/APJN Brief at 42-44; FES Brief at 33; IEU Brief at 55-56.) The crux of the argument is that the Stipulation in this case allows for recovery associated with distribution investment for plant in service post 2000, while at the same time a pending distribution rate case also allows recovery of distribution investment for that same period until August 31, 2010, the date certain in that case. Despite testimony by AEP Ohio that such an action will not happen and the recognition of the inter-relatedness of the two cases, the Non-Signatory parties continue to assert some nefarious intention of AEP Ohio to attain a double recovery between the two cases. That is not the case.

AEP Ohio witnesses verified that the intention is not to recover funds associated with this distribution investment twice between the two cases and that the matter can be adjusted in the distribution cases to the extent there is any showing of excess recovery due to the establishment of the DIR in the present cases. On cross examination, AEP Ohio witness Allen clarified the intent to recover the funds once and pointed counsel for OCC to language in the Stipulation he stated "conveyed the company's intent that we'd only seek recovery once. But there's been testimony filed in the distribution case that states that those companies are only seeking to recover these dollars once and that's included in my testimony here as well." (Tr. at 2142-2143.) The matter is established – AEP Ohio intends to only recover the associated investment in one proceeding.

This agreement from AEP Ohio that it does not intend to recover the associated costs in both the distribution cases filed and these standard service offer cases does not satisfy OCC/APJN or IEU, but should provide the Commission with confidence that the issue is identified and that the Company is not intending to seek any level of double recovery. Despite OCC/APJN's attempts to characterize the testimony of the AEP Ohio witness as "begrudgingly admitting there is a potential for double recovery" and IEU's characterization of that testimony as an unsupported conclusion, AEP Ohio makes no attempt to support recovery of the costs in both dockets and provides testimony that it has expressed that point in both these dockets and the distribution case dockets. (Tr. at 2142-2143.) OCC/APJN's concern on this matter is unfounded. FES also recognizes the commitment made by the Company but still reserves the concern that double recovery could exist. (IEU Brief at 33.) The commitment to not recover the associated costs in both cases alleviates any concern for violating any regulatory principles or practices.

The attempt to support a violation of regulatory principles or practices based upon the issues in unresolved and pending distribution cases are also inappropriate and should be rejected. OCC/APJN argue that the potential exists for double recovery and raises a concern that nothing prevents double recovery of the distribution investment. Unfortunately the facts get in the way of OCC/APJN's attempt to discredit the DIR mechanism. First, as highlighted above AEP Ohio has already agreed that it should not collect the same distribution revenues in both cases and filed testimony in both sets of cases to express as much. Second, the distribution cases referenced by OCC/APJN have not gone to hearing yet and are still open for deliberation and record development. OCC/APJN treat the argument as if the distribution revenues included in the rate case were approved and approval of the ESP would violate that previous Commission decision. In reality as the Commission can recognize by its own docket, the distribution cases are not yet resolved, the evidentiary hearings have not been held, and there is nothing to compare the proposal in this case to a final Commission order in another case. Third, the Commission is a highly knowledgeable body that is in capable of managing its own docket. If the Commission reaches a decision in these proceedings that could have an impact on other proceedings, the Commission has the ability to weigh the impact of the cases upon each other. That fact is even clearer in two cases where the utility witnesses point out the commonality between the issues and recognize the need to have the matters addressed in both cases.[39]

The Commission should recognize the record evidence dealing with this non-issue and decline to entertain OCC/APJN's argument in opposition to the DIR. Despite Company statements that the double recovery will not occur and the Commission's ability to manage its dockets to ensure that fact, OCC/APJN continue to raise the argument. OCC/APJN's unwillingness to accept evidence of record and the power of the Commission should not lead the Commission to entertain this strained argument. The Commission should find the DIR as part of the overall Stipulation does not violate any regulatory principles or practices.

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39 The fact that Mr. Allen was questioned on evidence in the distribution cases dealing with how to avoid the asserted double recovery should provide the Commission with a basis to recognize developments in the 11-351 et. al cases that deal with this issue as part of its decision in this case.

**2) OCC/APJN's argument that the DIR violates important regulatory principles and practices because it provides the Company with significant rate increases that are in excess of the cost of providing distribution service is based upon a false premise and should be rejected.**

OCC/APJN and IEU also argue that the DIR violates important regulatory principles and practices because the associated rate increase is excessive in relation to a cost of service analysis and will result in unreasonably priced electric service. (OCC/APJN Brief at 44-45; IEU Brief at 56.) As support for this argument OCC/APJN and IEU rely almost exclusively on the pending distribution rate cases for AEP Ohio. Again, this reliance upon the distribution cases is misguided and ignores the settlement filed in these proceedings.

OCC/APJN and IEU mistakenly rely upon the distribution rates cases still pending before the Commission as a means to assert the request for the DIR violates regulatory practices and principles. In the present cases, the Signatory Parties agreed to establish a DIR mechanism to approve a carrying cost as allowed under R.C. 4928.143(B)(2)(d) or (h) as part of an electric service plan. The distribution cases filed at the Commission are filed under R.C. 4909.18 and 4909.19 and are based on traditional ratemaking principles. It is important to recognize that even if the two statutes were comparable that the distribution cases are still in a preliminary stage with the Staff Report subject to objections and a hearing challenging the positions taken. Mixing the two statutory sections, ignoring the request or authority under which each is being considered, and relying upon an incomplete process is an inappropriate request by OCC/APJN and IEU and should be denied by the Commission.

The concern that the rate is excessive also ignores two other important elements of the provision in the Stipulation -- the DIR recovery caps and the distribution case stay out provisions. Recovery of costs associated with distribution investment is capped in each year of the ESP. That does not mean that spending is capped. The Signatory Parties agreed to cap the amount of recovery the DIR could provide each year with the associated investment. The Signatory Parties also negotiated another significant term in this section of the Stipulation. Under this provision, AEP Ohio is not able to file a distribution rate case that would take effect prior to June 1, 2015. Both the cap on what can be recovered and the delay in future base rate relief are valuable elements of the stipulation that contribute to reasonably priced retail electric service under R.C. 4928.02(B). The Commission should find the DIR as part of the overall Stipulation does not violate any regulatory principles or practices.

**3) OCC/APJN's argument that the DIR does not comply with R.C. 4928.143(B)(2)(h) ignores the evidence of record and should be denied.**

**i. The record contains sufficient information to permit the Commission to authorize the DIR as part of the ESP.**

OCC/APJN and IEU incorrectly assert that the record fails to support a Commission finding that the DIR is justified under R.C. 4928.143(B)(2)(h).[40] (OCC/APJN Brief at 46-50; IEU Brief at 51-54.) OCC/APJN inappropriately deviates from the language of the statute in an attempt to expand the statutory criteria as well as relies upon a discussion of Staff's unsponsored testimony not offered into the record that focused on the application filed by the Company, as opposed to the Staff testimony filed supporting the DIR and the Stipulation as a whole. OCC/APJN also again fail to recognize the actual evidence of record, instead asserting its conclusory arguments as facts for the Commission to base its decisions. IEU attacks the testimony of a Staff witness that did not testify on the DIR in an attempt to say the statutory criteria was not met in the record. (IEU Brief at 52-53.)

[40] See the Signatory Parties' arguments on this point in the Joint Brief at 64-70.

The Non-Signatory parties rely upon evidence not in the record or assert testimony not intended to support the DIR as the critical record support for the DIR's statutory basis. OCC/APJN inappropriately cites to the testimony of Staff member Doris McCarter as if she testified in the proceeding. (OCC/APJN Brief at 47-48.) Ms. McCarter had filed testimony prior to the Stipulation being reached, but that testimony was not offered into evidence as the Staff subsequently entered into the Stipulation and offered witnesses in support of the settlement as compared to its previous litigation position criticizing the Company's filed Application. Staff witness Fortney responded to questions from OCC/APJN's counsel that attempted to have counsel read portions of Ms. McCarter's unsupported testimony into the record. OCC/APJN treats Mr. Fortney's statements that he was somewhat familiar with what Ms. McCarter had filed as unquestioned truth of the matters asserted and proof of problems with the DIR.

While the Attorney Examiner provided OCC's counsel some leeway on questioning based on Ms. McCarter's testimony, the Examiner, in response to an objection, did provide OCC/APJN counsel with a warning on the appropriateness of the questions. Specifically, Examiner See instructed counsel for OCC, "[y]ou can explore that, but be very careful about putting Ms. McCarter's previously filed testimony in the record. (Tr. X at 1730.) Yet a closer look at the main paragraph on page 47 of OCC/APJN's post-hearing brief seeks to put Ms. McCarter's unsponsored testimony into the record and rely upon it to attack the DIR.[41] The Commission should not reward OCC/APJN for running afoul of the leeway provided by the Examiner in this area and discount the attempts by OCC to misuse the unsponsored testimony of Staff member McCarter. Another witness being familiar with words that another witness said in

[41] The unsponsored testimony of Staff member McCarter is also relied upon again on page 48 and is inappropriately asked to be relied upon as a reason to reject the DIR as part of the Stipulation.

unsponsored testimony is a far cry from evidence of record for the Commission to rely upon in reaching a decision.

OCC/APJN's request for the Commission to rely upon the unsponsored testimony of Staff member McCarter is improper and denies AEP Ohio due process. The responses from Staff witness Fortney only provided his understanding of topics Ms. McCarter included in her testimony concerning the application filed by AEP Ohio. AEP Ohio did not have an opportunity to cross-examine Ms. McCarter and test those theories.[42] There was not even any foundation established that Mr. Fortney would have any reason to understand the specific motivations or work performed by Ms. McCarter in her creation of her unsponsored testimony concerning the initial application. Reliance upon the unsponsored testimony as a matter of fact would be inappropriate and violate AEP Ohio's due process rights if unsponsored testimony were allowed to be used against the Company. Moreover the Staff ultimately signed the present Stipulation and supports this very mechanism OCC/APJN seeks to attack. The Staff's position on this point and all points in the Stipulation is evidenced by its signature on the agreement.

OCC/APJN attempt to invoke the Commission's decision in the previous ESP decision as well to undermine the DIR. Clearly that was a different case with a different request and should not be relied upon here for the DIR mechanism. The Commission need not lend any weight to the unsponsored testimony relied upon by OCC/APJN and instead take notice that regardless of any Staff member's initial view of an individual element of the application, that the Commission Staff later signed the Stipulation that considered all the provisions together. Any attempt to put

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[42] Interestingly, the Staff Section Chief in the Reliability and Service Analysis Division was provided by the Staff on rebuttal and could have provided a clearer picture of AEP Ohio's reliability programs and what information is provided to the Staff, but OCC limited its questions in this area to Mr. Fortney who does not work in the areas of reliability and service quality performance like Mr. Baker does for the Commission.

words in the mouth of the Staff after the fact is inappropriate and the Staff's support of the Stipulation weighs more heavily than previous unsponsored testimony that did not face scrutiny on the stand.

IEU argues that the record is lacking a reliability study and cites to the testimony of Staff witness Hecker and Robert Fortney as proof of this fact. (IEU Brief at 52.) Mr. Hecker did in fact testify that he had not performed a reliability study, but left out of IEU's argument is the fact that the purpose of Mr. Hecker's testimony was to support the storm damage recovery mechanism not the basis of the DIR. (Tr. IX at 1656.) The Staff offered witness Baker to support the DIR, not Hecker or Fortney. Mr. Fortney answered questions that were being asked about unsponsored testimony of another Commission employee and cannot be relied upon for the truth of what Ms. McCarter did or did not do. Again Mr. Fortney did not provide testimony on the basis of the DIR – that was left to Staff witness Baker. IEU's attempt to shift the focus of Staff's testimony to witnesses not offered or witnesses covering other issues should not be relied upon by the Commission to consider the basis of the DIR in this Stipulation.

OCC/APJN and IEU then ignore the validity of the record support for the DIR provided by Staff witness Baker and AEP Ohio witness Hamrock characterizing it as too little, too late. (OCC/APJN Brief at 49; IEU Brief at 52.) Mr. Baker's testimony was permitted as proper rebuttal and was admitted into the record; it has evidentiary weight as it would if submitted in the original testimony. OCC/APJN also attempts to minimize the Company's and Staff's references to the docket establishing the CAIDI and SAIFI standards and argues there has been no examination of reliability in this case for the Commission to rely upon. (*Id.*) OCC/APJN even invokes language from AEP Ohio's last ESP and asserts that the Commission rejected the concept in the last case noting the need to examine the full distribution system, the reliability of such system, and customer expectations and the incremental nature of the request. (*Id.*)

OCC/APJN's attempts to minimize the actual testimony in the record in support of the DIR are not persuasive. In fact, the only evidence in the record on these matters was provided by the Staff and AEP Ohio. OCC/APJN and IEU offered no evidence to the contrary for the Commission to rely upon. The Non-Signatory parties provide nothing other than conclusory statements that the utility failed to meet its burden on the elements of the criteria outlined in R.C. 4928.143(B)(2)(h). OCC/APJN's minimizing of the Commission Staff's daily interaction with utilities fails to appreciate the daily interaction between the Commission Staff's and the Company. AEP Ohio witness Hamrock testified that the Commission is constantly monitoring reporting and reliability functions and enforcing administrative code rules in the area. (OCC/APJN Brief at 3.)

Beyond the day-to-day review of AEP Ohio's distribution system by the Staff, OCC/APJN's and IEU's concerns related to the use of the CAIDI and SAIFI standards shows its lack of understanding of the Commission's oversight and involvement in the reliability matters of the utility. Staff witness Baker testified to the process followed under O.A.C. 4901:1-10-10(B)(2) that set the reliability standards that involved historical performance, system design, technological advancements, service area geography, customer perception surveys and other relevant factors. (Staff Ex. 5 at 4.) The Commission rule requires consideration of all these matters and ensures that the Staff and any party that intervenes in the cases setting the standards will deal with these areas to set the proper standards to be applied in the future.

Any argument that recognition of the Commission approved standards is barred by the fact that it was reached by a settlement, even though prior to that the Company filed an application and followed the public process ignores the fact that the Commission acted to set the standards. The argument that the final number used to establish the standards were set as part of a settlement ignores the point of the reference to the case. Regardless of the outcome of the process to set the standards, the point is that an application was filed and the system was reviewed. It does not violate any settlement agreement's disclaimer that a CAIDI and SAIFI standard is in existence and whether AEP Ohio meets that goal can be viewed by some as portraying whether the Company is staying up to date on its reliability issues. Any other view would fail to recognize that the standards exist at all and would make them unenforceable or non-existent. The reference to the standards is not to incorporate the view of any party to the settlement in that case, but to cite to the Commission required standard that resulted from a case that analyzed the elements the Non-Signatory parties assert is required to be reviewed by the Commission in this proceeding. The Signatory Parties are simply pointing out that public process occurred and it is an example of the type of ongoing review the Commission Staff has over the distribution system.

IEU raises an argument that the ESP application fails to include a detailed infrastructure plan as required under O.A.C. 4901:1-35-03(C)(9)(g). (IEU Br. at 54.) The rule cited by IEU involves items that are to be included in an application for an electric security plan. As noted throughout the case no longer is a review of the application filed or the testimony filed by AEP witness Thomas Kirkpatrick on the DIR in the initial phase of the case dealing with the application. This portion of the proceeding is evaluating the Stipulation reached by multiple parties to the litigation. Those parties agreed that a system that required a yearly prudence review of the actions taken under the DIR would provide the ongoing oversight needed to explore the investment in the distribution system. IEU bases its argument on a rule that applies only to applications and not settlement documents, and the review of the projects outlined in the non-applicable rule is still satisfied by the Stipulation reached by the Signatory Parties.

OCC/APJN's argument that the Commission previously rejected a similar request in the previous electric security plan ignores the development of the Commission's rules. OCC/APJN argues that the Commission previously rejected a similar request after noting the need to examine the full distribution system, the reliability, customer expectations, and programs proposed by the utility. (OCC/APJN Brief at 49.) Ironically, the elements OCC/APJN seek to apply as a new standard for review are the same elements included in the administrative code section that establishes the reliability standards. That rule change, to incorporate those requirements, was effective on June 29, 2009, over three months after the decision in the original ESP that OCC/APJN cites for precedent in rejecting the DIR. That means the existing standards did take those matters into account and have been reviewed by the Commission pursuant to the administrative code. As testified to by Staff witness Baker, it is the opinion of the Commission Staff that participation in setting and the performance in meeting the service standards satisfies the criteria of R.C. 4928.143(B)(2)(h).

Even without the Commission's review under the reliability standards rule, the record supports AEP Ohio's plan to invest in the distribution and determine the most efficient use of the resources. In his rebuttal testimony AEP Ohio President Joseph Hamrock testified before the Commission that aging infrastructure is a primary cause of outages and approval of the DIR will allow the Company to address reliability by proactively analyzing programs including pole inspections, underground diagnostics, and detection of deteriorated equipment. (AEP Ex. 19 at 4; Tr. XII at 2005-2006.) On cross-examination, Mr. Hamrock also testified to the new proactive approach being planned for asset replacement by saying,

> We at AEP Ohio anticipate under the DIR program, the programs enabled by the DIR, the opportunity to accelerate replacement of key assets that improve reliability such as station circuit breakers, reclosers, pole inspection programs, underground cable replacement programs. So many of those programs that are in place today could be accelerated under this proactive approach.

(Tr. XII at 1992.) OCC/APJN's assertion that the facts are "too little too late" is off base as the evidence offered at the hearing supports the actual statutory standard for approval of the DIR mechanism including AEP Ohio's plans to change the way it operates and the plan to address aging assets. The fact that OCC/APJN does not agree with the facts supported by Mr. Hamrock and Staff witness Baker in testimony supporting DIR does not negate the evidence provided. OCC/APJN is second guessing the Staff's ongoing review of the reliability of the Company and the Staff witness charged with overseeing that effort without any evidence to call his or the Staff's efforts into question. OCC/APJN's argument that there is insufficient evidence in the record to support the DIR under R.C. 4928.143(B)(2)(h) should be denied and the mechanism agreed to by the Signatory Parties approved with the balance of the agreed Stipulation.

**ii. The record supports a finding by the Commission that the expectations of the Company and the customers are aligned.**

OCC/APJN and IEU incorrectly argue that there is insufficient data in the record on customer expectations to permit the Commission to authorize the DIR. (OCC/APJN Brief at 50-54; IEU Brief at 53-54.) AEP Ohio witness Hamrock testified to the customer survey results that are performed quarterly dealing with customer reliability expectations over the next five years. (Ex. 19 at 4.) As Mr. Hamrock testified, those survey results show an increase in expectations for service reliability of 16%, 20%, and 20% for residential customers and 19%, 19%, and 21% for commercial customers in the 2009, 2010 and 2011 collective surveys respectively. (*Id.*) It should also be pointed out that O.A.C. Rule 4901:1-10-10(B)(4)(a) requires that customer surveys be utilized to determine customer expectations when setting reliability standards. The Commission by rule has already codified a method by which utilities can determine customer expectations and that has been utilized and offered into evidence in this proceeding. The Commission Staff witness Baker also referenced the customer surveys and testified that it showed customers were satisfied with the overall service reliability provided by AEP Ohio. (Staff Ex. 5 at 4.)

IEU offers its criticism of the fact that Staff witness Hecker testified that he did not perform any assessment of the alignment of customer and Company expectations. (IEU Brief at 53.) Again, it should be no surprise that Mr. Hecker did not perform this analysis to support the DIR because he was testifying in support of the storm reserve mechanism. (Tr. IX at 1656.) IEU's attempt to use the testimony of a witness that did not testify to the area under consideration is inappropriate and should not be relied upon by the Commission.

OCC/APJN and IEU argue that the customer surveys do not support the DIR because it establishes that a majority of customers are satisfied with AEP Ohio's service and therefore nothing new is needed. (OCC/APJN Brief at 52; IEU Brief at 53-54..) AEP Ohio appreciates OCC/APJN and IEU's position that it is doing a good job and satisfying its customers' expectations on service, but their praise for AEP Ohio's current operations ignores the point of the request for the DIR. As indicated above AEP Ohio is facing an increasing number of failure rates on its aging equipment. (AEP Ex. 19 at 4.) AEP witness Hamrock testified that the Company is focused on providing reliable service as a cornerstone of its business. (*Id.*) Part of that responsibility involves identifying issues like aging infrastructure and developing a plan to get ahead of the issue. Surely OCC/APJN would have a different view if AEP Ohio waited for everything to fail before developing a plan to replace its aging infrastructure. The DIR involves prudent planning by the utilities to ensure that level of customer expectation is maintained while still ensuring the Company is positioned to meet the needs of those with increased expectations as well. AEP Ohio witness Hamrock testified to this point at the hearing stating, "[a]s indicated in my testimony, the DIR programs would be essential to maintaining the current level of reliability as well as to improve reliability in the future." (Tr. XII at 2043.) AEP is seeking to proactively address an issue and prevent future problems with reliability. OCC/APJN's argument that everything looks good and there is no reason to prepare for tomorrow is short-sighted and should be rejected by the Commission. The DIR is needed to ensure AEP Ohio meets customer expectations whether that is to maintain the current level of service being provided or for those customers AEP Ohio has identified as expecting a greater level of reliability. The important point is that AEP Ohio has documented those customer expectations and sought the DIR mechanism as a way to maintain and meet those future expectations in line with R.C. 4928.143(B)(2)(h).

**4) The record supports the purpose and reasonableness of the DIR.**

OCC/APJN mistakenly takes issue with the need for the DIR mechanism arguing that it is not necessary to ensure reliable and efficient service. (OCC/APJN Brief at 54-56.) IEU argues that any recovery would be excessive. (IEU Brief at 56.) OCC/APJN supports its argument by continuing its assertion that the Company could forego any future investment and collect money from the rider. OCC/APJN also appears to misunderstand the nature of the DIR by asserting that the rider allows a high carrying cost on the investment (asserting it to be 20%). (OCC/APJN Brief at 55.) OCC/APJN again improperly relies on the testimony of Staff employee McCarter's unsponsored testimony and relies on OCC/APJN witness Duann's statement that the Company has not shown a compelling need. (*Id.*) IEU again references its preferences for what should or should not be included in the DIR but does not establish that the mechanism agreed to by the Signatory Parties violates any regulatory principles.[43] (IEU Brief at 57.)

As discussed throughout this section of the reply brief the DIR is needed to address customer expectations and replace the aging infrastructure of the Company in a new proactive manner similar to the successful Commission approved vegetation management program. AEP Ohio witness Hamrock stated in testimony and on the stand the importance and need of the DIR. (AEP Ex. 19 at 4; Tr. XII at 1992, 2005-2006.)[44] AEP Ohio witness Allen addressed the misguided insinuation that the Company would not invest further dollars on cross-examination with counsel for OCC/APJN. Mr. Allen pointed out that any recovery would be from investment made by the Company so regardless of the recovery it would be for investment on the system, but specifically on the hypothetical that the Company would not spend another dollar on distribution infrastructure Mr. Allen pointed out that the Company has reliability requirements that would ensure investment continues. (Tr. III at 311-312.) The "what if' argument raised by OCC/APJN further offends the work done by the Company to ensure reliable service for its customers and the work done by the Commission and its Staff to oversee the action of the utilities it regulates. The DIR will be subject to a prudence review and the Commission will have full notice of the application of the mechanism. The fact that the Company could recover justified carrying costs on the large investments already made on the distribution system is a

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43 The preferences raised by IEU concerning the DIR approval are dealt with in more detail on pages 66-68.

44 OCC/APJN included footnote 206 on page 55 of its brief attempting to deny any reliance upon Mr. Kirkpatrick's testimony from the previous portion of the case because it was unsponsored. Leaving aside the irony of OCC/APJN's reliance on the unsponsored testimony of Staff employee McCarter throughout its brief. Mr. Hamrock testified to the fact that Mr. Kirkpatrick's testimony was in the public record when the parties signed the Stipulation in response to the argument that the Signatory Parties were without knowledge of the purpose or need of the DIR. (Tr. XII at 2039.) The motions to strike this response were denied at the hearing.

perfectly justified regulatory practice, but the argument that this somehow should undermine the approval of the DIR or that it would cause AEP Ohio to stop investment in its distribution system is out of touch with reality and should not even be considered as a valid argument by the Commission.

Furthermore, OCC/APJN's assertion that the DIR would include a 20% carrying cost highlights OCC/APJN's lack of understanding of the DIR. OCC/APJN's position ignores the explanation provided by AEP Ohio witness Allen when crossed by OCC/APJN counsel where he walked through the makeup of the DIR mechanism and indicated the carrying charge included in the DIR consisted of property tax, depreciation, commercial activity tax and other elements that together makeup the 20% figure being used by OCC/APJN. (Tr. III at 303-307, see also AEP Ex. 4 at Exhibit WAA-2.) IEU understands the carrying charge being considered as part of the DIR is 10.5% not the 20% that OCC/APJN asserts. (IEU Brief at 57.) OCC/APJN mixes its terms and tries to incorporate its argument against the DIR overall as a carrying cost versus the carrying charge that incorporated in the cost. The Commission should take notice of OCC/APJN's misunderstanding of the basis of the DIR and deny its arguments seeking to attack the basis of the DIR. The ultimate level of the DIR collection is a reasonable mechanism authorized by the R.C. 4928 and agreed to by the Signatory Parties as part of the overall Stipulation in these cases. The Non-Signatory parties have provided nothing more than uninformed arguments and no evidence that the Commission should grant their arguments.

IEU raises the argument that no benefit is derived for the customers from the authorization of the DIR. (IEU Brief at 58.) IEU even asserts that the lack of a commitment to improve the quality of service or investment is unlawful and unreasonable. (*Id.*) Again this is another example of the Non-Signatory parties not recognizing the work done by the Commission and it Staff. As discussed above, the Commission issued rules requiring a public filing to establish reliability standards. O.A.C. 4901:1-10-10. In that rule the Commission outlines a number of factors that must be considered as part of that process to incorporate the functions of the utility and its surroundings in setting those standards. As indicated by parties in the record AEP Ohio is set to reset those standards in 2012. If there is a reliability impact as a result of the DIR the Commission can ensure it is recognized at that time. But as the testimony of AEP Ohio witness Hamrock shows above a portion of the DIR is intended to address the existing aging infrastructure to maintain the level of expectations of its customers.

Ultimately the Signatory Parties, including the Commission Staff that OCC/APJN attempts to portray as opposing the DIR all support the establishment of the DIR. The evidence of record supports the need and utility of the mechanism. The Non-Signatory Parties offer misguided arguments that do not prove that the Stipulation offered to the Commission violates any regulatory practice of principle. The Commission should deny OCC/APJN's and IEU's arguments and approve the Signatory Parties' Stipulation including the DIR.

**5) The record supports a Commission finding supporting the DIR under R.C. 4928.143(B)(2)(d).**

OCC/APJN and IEU argue that the Signatory Parties have not supported the use of the portion of R.C. 4928.143(B)(2)(d) authorizing carrying costs as a statutory basis for the DIR. (OCC/APJN Brief at 56-58; IEU Brief at 51.) OCC/APJN asserts that the Company provided this as a late legal argument made through a witness on rebuttal. OCC/APJN and IEU both argue that the record does not show that the carrying costs will have the effect of stabilizing or providing certainty regarding retail electric service. (*Id.*)

Again OCC/APJN appears unwilling to accept the testimony and responses on cross-examination explaining the stabilizing impact of the investment enabled by the DIR on maintaining service reliability and meeting increased customer expectations. As indicated above, the DIR will change the way AEP Ohio approaches its distribution infrastructure to a proactive approach to address the aging infrastructure that is the primary cause of customer outages. Any assertion that the record is missing evidence on the stabilizing effect of the DIR on certainty for service is simply ignoring the record.

It is also unconvincing that OCC/APJN would argue that reliance upon R.C. 4928.143(B)(2)(d) would be a new found theory for the Company. It is the Commission that will ultimately decide the basis for the Stipulation and not the Company. The Commission is not limited to the legal basis asserted by litigants in a case. As pointed out by OCC/APJN, the Commission did utilize this section of the statute in its recent Remand Order to approve carrying costs for in the previous ESP. (OCC/APJN Brief at 57.) The Commission should not treat OCC/APJN's argument as a barrier to its decision making discretion on any issue including statutory authority for the DIR.

The evidence of record supporting the importance of the DIR mechanism, the fact that over twenty (20) Signatory Parties support the mechanism, and the need recognized by the Company to change its operations and address the needs of the system to stabilize electric service reliability provide the basis for a Commission finding in favor of the DIR based on R.C. 4928.143(B)(2)(d).

#### h) The Provisions for Corporate Separation and Generation Pool Dissolution or Amendment are reasonable and do not violate any important regulatory principles or practices. [Par. IV.1.q, t, and IV.5]

The basic framework of, and many of the individual provisions within, the Stipulation are premised upon completion of full structural corporate separation by AEP Ohio. Under the Stipulation, AEP Ohio agreed, upon receiving a final order from this Commission authorizing full legal corporate separation, to provide notice to PJM that it intends to participate in the RPM Base Residual Auction for delivery year 2015-2016. (Par. IV.1.q.) Divestiture of generation assets from the electric distribution utility, in turn, causes AEP Ohio to force an amendment or dissolution of the 1951 vintage AEP Interconnection Agreement, commonly referred to as the "AEP Generation Pool" or simply as the "Pool." The provisions for corporate separation and Pool modification are essential components of the restructuring needed for AEP Ohio to transition from a regulated ESP plan to an auction-based SSO. Completion of these steps is necessary for commencement of the SSO auction for delivery beginning in mid-2015. These restructuring provisions are reasonable, are supported by evidence in the record and do not violate any important regulatory principle or practice.

**1) Corporate Separation**

IEU argues (at 66-67) that AEP Ohio has failed to: (1) provide the terms and conditions of any sale or transfer, (2) demonstrate the effect any sale or transfer would have on SSO prices, (3) address the public interest, and (4) state the market value of the assets. IEU's arguments provide no substantive objection or basis to oppose corporate separation. AEP Ohio's separate application to amend its corporate separation plan and for approval to transfer generation assets is pending before the Commission in Case No. 11-5333-EL-UNC. Contrary to IEU's claim, AEP Ohio has already specifically addressed each of these four items.

As to IEU's first complaint, AEP Ohio specifically asked in its September 30, 2011 Application in the 11-5333 docket that the Commission approve the transfer of the generation assets and contractual entitlements referenced in Exhibit PJN-1. Application also requested that the described amendments to OPCo's corporate separation plan to reflect full structural corporate separation and the merger of CSP into OPCo be approved.

Regarding item two (the effect on SSO prices), the ESP rates are known and established through the transition period until mid-2015 when generation rates will be determined based on a competitive bidding process going forward. In other words, the impact on ratepayers of generation divestiture will be established through adoption of the Stipulation and fully implementing the requirements of R.C. 4928.17 – not by developing all of the details for implementing structural separation.

The public interest associated with adoption of the Stipulation (IEU's third complaint), including the need to implement corporate separation in achieving the resulting auction-based SSO, has been well established in the record.

As to IEU's grievance for not getting market valuation about the generation assets, AEP Ohio does not have such information and the 11-5333 Application requested, to the extent necessary, that the Commission grant a waiver of Ohio Admin. Code Rule 4901:l-37-09(C)(4); these same requests were made in the testimony of AEP Ohio witness Nelson in these proceedings (AEP Ex. 7 at Exhibit PJN-1 and in the 11-5333 Application.) In short, the Commission has the key information it needs to approve the substance of AEP Ohio's corporate separation proposal and fully implement the purpose of R.C. 4928.17.

Because the proposed asset transfer of AEP Ohio's generation assets will alter the jurisdiction of the Commission over those generation assets, a non-statutory hearing is triggered under Ohio Admin. Code 4901:1-37-09(D). On October 18, 2011, AEP Ohio and others filed a joint motion for a waiver of this non-statutory hearing requirement. Under Rule 4901:1-37-02(C), the Commission may waive any requirement of Chapter 37 for good cause shown. At issue in deciding the hearing waiver request is whether the Commission stays on track to complete this implementation proceeding in an expedient and efficient manner in sync with the

Stipulation case. If the waiver request is not granted, AEP Ohio asked in the alternative for an expedited hearing schedule that synchronizes with the schedule for decision of the Stipulation case. This would help the Commission consider the substance of AEP Ohio's corporate separation proposal during the same time period it considers adopting the Stipulation, in order to fully preserve the benefits of the Stipulation – particularly the election to terminate AEP Ohio's status as an FRR entity in PJM.

Regarding the waiver of the requirement for submitting fair market value information, AEP Ohio sought this waiver in its September 30, 2011 application so that the generation assets can be transferred at net book value, not fair market value. No memoranda contra were filed within 15 days under Ohio Admin. Rule 4901:1-12(B). In any case, AEP Ohio's waiver should be granted and IEU's comments regarding fair market value requirement should be ignored, so that the assets are transferred at net book value – in the same manner as was done by FirstEnergy and that is being proposed for Duke Energy-Ohio.

IEU also contends (at 67) that approval of the corporate separation plan as proposed would prevent IEU's ability to file objections to the plan as required by R.C. 4928.17(B). This argument is without merit, as IEU has had ample opportunity to provide its objections in this proceeding and will further get to participate as an intervenor in the 11-5333 docket. IEU provides no substantive argument or concern about corporate separation – but merely attempts to throw up procedural roadblocks and inject delay without cause.

For its part, FES mundanely characterizes the Stipulation's corporate separation proposal (at 126) as requiring AEP Ohio "to only do what it already is required to do under Ohio law" and complains that it is late in coming. Going even further, FES (at 127) urges the Commission to order that AEP Ohio "be immediately required to abide by Ohio law and to separate its competitive generation assets from its noncompetitive distribution assets…"[45] Thus, one would expect FES to support procedural efficiency and avoid an unnecessary hearing and delay. But it does not.

Rather, FES lobbies (at 127) for ongoing Commission oversight to ensure that the new AEP Genco "does not receive a windfall." This windfall theory is directly contrary to FES's main thesis in this case that the cost of AEP Ohio's generation is above market. The windfall argument is not only based on an unsupported presumption of high market value but is also premised on the misguided notion that customers have an ownership interest in the generation assets and would be entitled to such a hypothetical gain. The windfall theory is further explained (at 127-129) as an improper above-market revenue stream based on collection of capacity charges from CRES providers. There is no avoiding that FES's arguments are conflicting.

FES's opposition to net book value transfer is doubly disingenuous because it is presently advocating that Duke Energy-Ohio transfer its assets at net book value. There is no requirement that generation assets be transferred at market value and there is no reason why AEP Ohio should not be permitted to transfer its assets at net book value – especially given that the underlying concern is speculative and without record support.

In order to fully adopt Paragraph IV.1.q without modification and fulfill the Signatory Parties' intent in conveying substantive approval to AEP Ohio for structural corporate separation, the only matters left for consideration and decision in the 11-5333 case, if any, are the details concerning how specific provisions in the corporate separation plan are redlined or

[45] It is worth noting that FES's arguments regarding when AEP Ohio should have transitioned to market by functionally separating into separate corporations are disingenuous given that the Commission encouraged Ohio's EDUs to not functionally separate and that no other Ohio EDU has functionally separated with the exception of the FirstEnergy operating companies and FES's witness Banks could not even identify when that happened. (Tr. Vol. VII at 1190-1193.)

amended so as to reflect the Commission's substantive approval of structural separation in this case. If the Commission is to leave any aspect of substantive approval to the 11-5333 case, it should process the case expeditiously and decide it contemporaneous to the decision adopting the Stipulation.

**2) AEP Generation Pool Modification or Termination**

AEP Ohio witness Nelson provided details about the background and operation of the Pool in his testimony. (AEP Ohio Ex. 7 at 16-21.) Under the Pool, the AEP East operating Companies' generation resources effectively operate in companion on an integrated basis, utilizing the strengths of diversity to offset inherent risks associated with operating as smaller individual companies in PJM. (*Id*. at 18.) Because the Pool is a FERC-approved agreement, the amendment or dissolution of the Pool is a FERC-jurisdictional matter – a proceeding in which the Commission and other Ohio stakeholders are likely to actively participate. Thus, as part of the Stipulation, the Signatory Parties agreed to establish a Pool Modification Rider (PMR) at a zero rate level, in order to preserve AEP Ohio's ability to seek recovery of the before/after impact of the Pool change if it is material (*i.e*., more than $50 million).

IEU attacks the PMR (at 58-60) as being unlawful and inappropriate as a placeholder rider. FES raises similar objections (at 131-132). Of course, the nature of the Pool has always been to stabilize rates for Ohio ratepayers, and AEP Ohio believes division (B)(2)(d) of the ESP statute supports recovery of Pool costs during the ESP term. In any case, as with their objections to the GRR, these arguments are not ripe and should be addressed if, and only if, AEP Ohio pursues recovery of any pool modification impact.

**i) The auction-based SSO incorporating a competitive bidding process determined, in part, by a stakeholder process is reasonable and does not violate any important regulatory principle or practice. [Par. IV.1.r]**

The auction-based SSO proposal of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. However, FES argues (at 91-94) that the auction should be implemented immediately. The FES demand for an immediate auction-based SSO is premised on an unsupported and false notion (at 89-90) that AEP Ohio is anti-competitive and wants to impede wholesale competition.[46] Ordering an immediate auction-based SSO is not only unrealistic and impractical, but the proposal lacks a factual and legal basis. All of the other parties realize that a short transition period is needed to allow AEP Ohio to restructure prior to fully achieving the goal of an auction-based SSO. Signatory Parties have already defended the reasonable basis supporting the pre-auction transition on brief, in order to restructure AEP Ohio's business model by implementing structural corporate separation and amend the AEP Pool – these undertakings are substantial and cannot be

[46] FES appears to assert some type of conspiracy theory on behalf of the AEP Corporate leadership concerning shopping in the State of Ohio. FES fails to acknowledge that the AEP corporate management team serves as the parent to both the regulated and competitive arms of AEP. As such, the comments it provides investors include the global AEP corporation outlook not just the Ohio operating companies. Ironically, FES is similarly situated. FES witness Banks acknowledged during cross examination that FirstEnergy Corp. also has an executive counsel that oversees the activities of FirstEnergy affiliates, including FES and regulated distribution companies in areas FES operates. (Tr. VII at 1210-1212.) Statements by a corporate CEO or executive team member cannot be viewed in the manner FES is seeking to portray and such comments used inappropriately by FES should be ignored.

achieved immediately.  (Joint Brief at 75-79.)  But Signatory Parties will further respond here to FES's specific points on brief in this regard.

As a threshold matter, the position that an auction should be required immediately rests on the false notion that AEP Ohio is anti-competitive.  As a lead in to their proposal for an immediate auction, FES claims (at 89) that AEP Ohio has "a corporate policy of discouraging shopping," citing the testimony of Exelon witness Dominguez  in support of this statement.  If one actually reviews the testimony cited in the supporting transcript reference, it is revealed that Mr. Dominguez testified to a very different statement:

> I think AEP had a problem with shopping and where that shopping was based on the RPM capacity price, I believe they were losing money, and as a consequence they undertook efforts to curtail that shopping or change the capacity price that was being recovered from CRES suppliers for those customers.

(Tr. VI at 1036.)  Thus, Mr. Dominguez testified that he understood that RPM-based shopping causes financial harm to AEP Ohio and in taking action to address the RPM capacity charge, AEP Ohio is merely pursuing its business interests to avoid losing money.

In other words, AEP Ohio's corporate policy is not to undermine shopping but to avoid allowing its capital-intensive investments to be used at rates below cost by CRES providers in order to stimulate artificial, uneconomic shopping.  Similarly, FES's citation (at 89) of AEP Ohio statements suggesting that shopping would be reduced under its proposed ESP, that forecast was based on implementing the market-based generation rate re-design that, again, eliminates shopping that merely arbitrages irrational legacy rate designs and promotes efficient, economic shopping.  In reality, AEP Ohio's corporate policy is to support retail shopping and to comply with all laws and rules and there is no basis in any Commission finding or order to the contrary.  FES's smear campaign against AEP Ohio is a shameless tactic and it should not be rewarded.

FES also attempts to use historical switching rates (at 91-93) to show that "FirstEnergy Ohio utility customers are taking advantage of [the benefits of an auction-based SSO]; as of June 2011, over 70% of the FirstEnergy Ohio utilities' sales received generation service from CRES providers even with the favorable SSO price." Of course, higher shopping levels do not necessarily benefit customers, especially where higher utility rates cause the shopping. And it is well known that FirstEnergy operating companies collected the highest retail rates in Ohio for many years before finally allowing its customers to benefit from lower market rates. The difference with AEP Ohio is that its low switching rates have been driven by lower rates than the market historically – to the retail customers' great and sustained benefit. The Commission has previously recognized the occurrence of this phenomenon. At the conclusion of the five-year Market Development Period under SB 3 and based on concerns about flash cutting to higher market prices, AEP Ohio was encouraged by the Commission to submit a Rate Stabilization Plan (RSP) in lieu of implementing full market-based rates as contemplated by SB 3, based on the prospect of continuing to provide below-market retail rates through regulation.[47] Even now, retail shopping only benefits customers if CRES providers – who have refused to self-supply capacity – are permitted to commandeer AEP Ohio's capital-intensive generation resources at below-cost RPM rates. Thus, the Commission should not be enticed into a decision based on the false notion that more shopping is always better for customers.

In any case, while FES purports (at 87-88) to be altruistically looking out for the best interests of customers, it has no track record of passing savings along to customers. For

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[47] "At the outset, we will note that AEP proposed an RSP because we requested it." *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-119-EL-UNC, Opinion and Order, p. 13.

example, AEP Ohio Ex. 3 at KDP-5 shows that RPM auction-clearing price for capacity went from $182.85/MW-Day to $116.16/MW-Day in June of 2011. Did FES pass along these substantial savings to its retail customers in AEP Ohio's territory or did it simply increase its margins at AEP Ohio's expense? FES's purported reliance on promoting customer interests is merely another transparent attempt to merely seek more profits.

In further support of its quest for an immediate SSO auction, FES again attempts (at 92) to draw upon the testimony of Constellation witness Fein and Exelon witness Dominguez. But FES critically fails to acknowledge that those witnesses recognize the need for a pre-auction transition period to restructure AEP Ohio's business model. (Constellation Ex. 1 at 5; Exelon Ex. 1 at 3-7.) In particular, Exelon witness Dominguez made the following compelling point:

> Exelon would have preferred an earlier date, but *the practical problem in this case has always been a timing mismatch between the originally proposed 29-month ESP term and PJM's forward capacity market.* A properly functioning procurement design aligns competitive procurements of energy and capacity. Here, however, *the reality was that the capacity auction "ship" had sailed long before AEP Ohio even filed its ESP*.
>
> As I explained in my direct testimony, the PJM Reliability Pricing Model ("RPM") Base Residual Auctions (the competitive capacity auctions) are held three years in advance of the delivery date for the capacity. Capacity that could have been delivered during the proposed January 1, 2012 to May 31, 2014 ESP term was auctioned months - in some cases years – before AEP Ohio filed its proposed ESP plan in January 2011. AEP Ohio did not participate in those capacity auctions and, instead, filed a Fixed Resource Requirement ("FRR") plan to self-supply capacity. *Although many parties spent considerable ink in their respective testimonies explaining why PJM's competitively bid RPM capacity auctions are better than the FRR plans that AEP Ohio used, the fact remains that there is no way to go backwards in time and have AEP Ohio participate in capacity auctions that already concluded.*

(Exelon Ex. 1 at 3 (emphasis added; internal notes omitted).) Thus, arguably the most cogent factor supporting the start of an auction-based SSO in mid-2015 is to coincide with the earliest date that AEP Ohio can become an RPM entity in the PJM market.

FES argues (at 93) that "[t]here is no evidence to suggest that AEP Ohio cannot hold a CBP for its SSO load starting in 2012." FES is wrong because: (i) there is evidence that shows it is very impractical to try and pursue an SSO auction even late in 2012, and (ii) there is evidence in the record that demonstrates why it would be extremely prejudicial to AEP Ohio's financial interests to do so and, thus, unacceptable to the Company. In addition to the corporate separation and Pool proceedings that need to occur, the terms and conditions of the auction itself need to be developed. In particular, AEP Ohio witness Dr. LaCasse set forth a detailed timeline for the stakeholder process leading up to the auction, keeping in mind that the first auction for delivery beginning in mid-2015 will actually be conducted in 2013. (AEP Ohio Ex. 6 at Exhibit CL-2.) As demonstrated in that schedule, there are many tasks to be achieved and it is not practical to commence an auction immediately as FES suggests.

Perhaps the most obvious flaw with FES's recommendation for an immediate auction-based SSO is that there is no basis whatever in the ESP statute for the Commission to unilaterally order AEP Ohio to implement an auction-based SSO over the Company's objection. AEP Ohio witness Nelson testified as to the reasons why an immediate auction is not acceptable:

> First, conducting an SSO auction would have substantial impacts on the other Pool members and would expose both AEP Ohio and the other AEP-East operating companies to cost recovery risks in their respective regulated jurisdictions. Second, conducting an auction prior to corporate separation would create a financial exposure for AEP Ohio by wholly displacing the cost recovery for those generation assets that currently exists through SSO generation rates (based on the generation assets being dedicated to support retail generation service). It would also potentially remove the AEP Ohio generation from participating in the auction, due to the timing difference of the auction delivery period and the post-separation generation affiliate not yet owning the assets in order to be able to support bids into the forward auction with those generation assets.

(AEP Ohio Ex. 7 at 24.) Thus, it was understood by the Signatory Parties that AEP Ohio could not prudently establish an auction-based SSO as long as it owns generation assets, remains a member of the AEP generation Pool, and is an FRR entity in PJM.

However, AEP Ohio has agreed to fully pursue an auction-based SSO as part of the package of terms and conditions in the Stipulation. And the Stipulation's aggressive plan that achieves a fully competitive auction-based SSO much quicker than is even possible under an MRO.

**j) The provisions that improve and streamline the process for CRES providers are reasonable and do not violate any important regulatory principles. [Par. IV.1.s]**

FES argues (at 111-113) that the provisions of Paragraph IV.1.s maintain barriers to competition – even though the purpose and effect of this provision is to address and resolve perceived barriers. FES's arguments are not based on violations of Commission-approved tariffs or rules or any Commission finding that AEP Ohio has violated regulatory requirements. In reality, FES's arguments relate to its desired state of affairs, rather than any legal requirement or violation of Commission rules. FES claims (at 105) that the 12-month minimum stay "is one of the anti-competitive rules that AEP Ohio imposes" and FES desires that it be eliminated immediately. Its other primary complaint in this regard relates to a $10 switching fee approved by the Commission that FES wishes were lower or eliminated – even though it is designed to collect costs incurred by AEP Ohio in exchange for services rendered.

Contrary to FES's aspersions, AEP Ohio systematically complies with its Commission-approved tariffs and rules regarding competition and interaction with CRES providers. And neither the 12-month minimum stay nor the $10 switching fee is something that AEP Ohio unilaterally has developed or implemented. They are reflected in Commission-approved tariffs and cannot be properly characterized as anti-competitive or barriers to competition.

The minimum stay provision pre-dates AEP Ohio's Rate Stabilization Plan. When the Commission re-activated these provisions in AEP Ohio's RSP, the Commission acknowledged that the minimum stay issue "has been a lingering debate at the Commission (beyond this RSP proceeding), with negatives and positives presented on both sides of the issue." *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, March 23, 2005, Entry on Rehearing at 13. Despite proposals to abolish minimum stay requirements, the Commission more recently has refused to implement an across-the-board rule, stating that "[w]e believe that a determination on these issues is best done on a case-by-case basis in individual electric utility tariff proceedings." *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, May 6, 2009 Entry on Rehearing at 5. The Commission has explicit authority per R.C. 4928.143(B)(2)(d) to establish and modify shopping rules in the context of an ESP case.

In sum, the Commission has approved the minimum stay provisions, has refused to establish a general prohibition of such shopping rules, has determined that such matters are best addressed on a case-by-case basis, and has recognized that there are positives and negatives on both sides of the issue. CRES witnesses have specifically testified that Paragraph IV.1.s's proposed resolution of these matters is beneficial and will promote retail competition. (*See* Constellation Ex. 1 at 11-12; RESA Ex. 1 at 10-11.) As such, the agreement in Paragraph IV.1.s to address CRES concerns in the manner specified is reasonable and does not violate any important regulatory principle or practice.

**k) Shareholder funding for the Partnership With Ohio initiative is reasonable and does not violate any important regulatory principles or practices. [Par. IV.1.u]**

This aspect of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. In fact, OCC/APJN argued that the PWO funding is highly beneficial and should be expanded – a separate matter discussed in Section II.C of this Joint Reply Brief. As such, the Signatory Parties stand on their Joint Brief (at 83) in support of this provision.

**l) Shareholder funding for the Ohio Growth Fund initiative is reasonable and does not violate any important regulatory principles or practices. [Par. IV.1.v]**

This aspect of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. As such, the Signatory Parties stand on their Joint Brief (at 83) in support of this provision.

**m) The commitment to work to develop further opportunities for customer-sited resources is reasonable and does not violate any important regulatory principles or practices. [Par. IV.1.w]**

This aspect of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. As such, the Signatory Parties stand on their Joint Brief (at 84) in support of this provision.

**n) The commitment to pursue development of up to 350 MW total of combined heat & power, waste energy recovery and distributed generation resources is reasonable and does not violate any important regulatory principles or practices. [Par. IV.2.c]**

IEU (at 50) raises similar objections to this provision as it did for the GRR, objecting to the placeholder nature of this provision and the fact that it will be determined in a future

Commission proceeding. As demonstrated above in connection with the GRR discussion, IEU's objection to placeholder riders is without merit. As with the GRR, the legal and factual contours of this CHP/WER/DG provision will be established in a future proceeding and all parties reserve their rights to make any argument or objection as part of that case – after the filing is made and the issues become ripe.

The CHP/WER/DG provision in Paragraph IV.2.c of the Stipulation is reasonable and does not violate any important regulatory principle or practice.

**o) The provision to accelerate Ohio shale gas development is reasonable and does not violate any important regulatory principles or practices. [Par. IV.2.a]**

Aside from the related general challenge of the GRR by IEU and FES, this provision of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. As such, the Signatory Parties stand on their Joint Brief (at 86) in support of this provision. FES argued (at 80) that the proposed development of Ohio shale development was not a true benefit of the Stipulation – benefits under the Stipulation are discussed separately in Section II.C of this Joint Reply Brief. The Ohio shale gas provision in Paragraph IV.2.a is reasonable and does not violate any important regulatory principle or practice.

## 2. The Stipulation's Resolution of Capacity Pricing Issues is Reasonable (Case No. 10-2929-EL-UNC)

The Signatory Parties' Joint Brief (at 87-100) explains the reasonableness of the Stipulation's resolution of capacity pricing issues. The Signatory Parties demonstrated that the Stipulation's proposed resolution of the dispute regarding the appropriate pricing of capacity used by CRES providers offers a reasonable result that is one component of a package of settlement terms, negotiated at arms length.

### a) Intervenors' arguments that the Stipulation's capacity pricing is unreasonable are meritless.

AEP Ohio witness Nelson provided some valuable perspective regarding the settlement's capacity pricing. He estimated that if the capacity pricing for the set-aside load, priced at RPM levels, is blended with the $255/MW-Day Stipulation's capacity pricing of $255/MW-Day for all load above the set-aside amounts, the average capacity price for all of AEP Ohio's load would be $201/MW-Day. (AEP Ohio Ex. 21 at 6, Ex. PJN-R1.) That is more than $150/MW-Day less than the AEP Ohio embedded cost rate for capacity of $355.72/MW-Day that AEP Ohio witness Pearce supported. (AEP Ohio Ex. 3.) Moreover, the $201/MW-Day figure undoubtedly represents a conservative estimate of the average price for capacity that will be supplied to CRES providers during the ESP. That is so because it is highly unlikely that anywhere near 100% of AEP Ohio's load will shop. As a result, the average price for capacity used by CRES providers to serve shopping customers will be substantially less than $201/MW-Day.

FES (at 43-76) presents a number of arguments criticizing the Stipulation's resolution of capacity pricing issues and questioning the value of the compromise that the Stipulating Parties reached regarding that topic. FES's initial argument is that the quantification of the benefit of providing the set-aside amounts of capacity at RPM prices, pursuant to Paragraph IV.b.3 of the Stipulation, which AEP Ohio witness Allen supported, is incorrect. FES contends that there is no benefit because AEP Ohio's capacity should always be priced at RPM levels. This argument is discussed in detail, infra, in Section III.A.1. While FES believes that only RPM pricing may be used, Section D.8 of Schedule 8.1 of the PJM Reliability Assurance Agreement specifically provides an FRR Entity, such as AEP Ohio, with the option of seeking cost-based capacity pricing. As a result, AEP Ohio's position is that it has sacrificed greatly by its concession to the capacity pricing that the Stipulation requires. In short, AEP Ohio firmly believes that Mr.

Allen's assessment of the benefit of the discounted capacity is an appropriate measure of the benefit of the Stipulation's capacity pricing provision.

FES asserts (at 47-51) that the Commission already has decided the capacity pricing issue by relying upon RPM pricing to resolve issues in AEP Ohio's first ESP, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, and by including in its December 8, 2010 Entry in Case No. 10-2929-EL-UNC (the *Ohio Capacity Charge Docket*), that RPM pricing should be used on an interim basis. The Entry issued in the *Ohio Capacity Charge Docket* on August 11, 2011, setting the procedural schedule for that case, refutes the notion that capacity pricing has been resolved in favor of RPM pricing for AEP Ohio. As Finding 6, the August 11, 2011 Entry states that the purpose of the evidentiary hearing that it scheduled would be "to established an evidentiary record on a state compensation mechanism" and that "[i]nterested parties should develop an evidentiary record on the appropriate capacity *cost pricing*/recovery mechanism including, if necessary, the appropriate components of any proposed capacity *cost recovery* mechanism." (Emphasis added).

That Entry makes clear that the Commission is open to considering cost-based pricing for AEP Ohio's capacity and that it has not pre-determined that RPM pricing is "the only right price" for AEP Ohio's capacity. Nor has the litigation at FERC concluded that "the only right price" is RPM. In that regard, AEP Ohio's Section 205 FERC Application and its Section 206 FERC Complaint, through which AEP Ohio may pursue its right to seek cost-based pricing for its capacity while it is an FRR Entity, remain pending before the FERC. FES's argument that the pricing of AEP Ohio's capacity during ESP II has already been resolved in favor of RPM pricing by the Commission and the FERC is meritless.

FES also complains (at 47-51) that the Stipulation's capacity pricing seeks to impose unreasonable price increases for AEP Ohio's capacity. FES measures the increases by comparison to RPM prices, which have declined precipitously. As explained in the Joint Initial Brief and infra in this Reply Brief, as an FRR Entity, AEP Ohio has the right to seek a cost-based rate for capacity under Section D.8 of Schedule 8.1 of the PJM Reliability Assurance Agreement. It is not limited to RPM pricing. In an environment of precipitous decline of RPM prices, it is reasonable for AEP Ohio to pursue its option, as an FRR Entity, for cost-based capacity prices.

Furthermore, FES's claim (at 49) that the Stipulation's capacity pricing, including the $255/MW-Day for capacity above the set-aside amounts, has no record support is incorrect. AEP Ohio witness Pearce provided extensive and detailed testimony that AEP Ohio's cost of capacity, based on 2010 FERC Form 1 data, is $355.72/MW-Day. In addition, he furnished information regarding margins from off-system energy sales that could be used as an offset to capacity costs that, if applied, would reduce the cost-based price for capacity from $355.72/MW-Day to $338.14/MW-Day. This evidence provides ample record support for the negotiated $255/MW-Day price that the Stipulation provides for capacity used to serve load above the RPM set-aside amounts.

FES's contention (at 50-51) that the Stipulation's capacity pricing imposes over one billion dollars of costs on AEP Ohio ratepayers and CRES providers is also without basis. This calculation simply measures the difference between below-cost RPM prices and the Stipulation's $255/MW-Day and then multiplies that difference by AEP Ohio's load in excess of the RPM set-aside levels. It measures the extent of the financial harm to AEP Ohio PRM pricing would cause rather than the "costs" to CRES providers (or retail customers) of the Stipulation's capacity pricing if all customers shopped.

At pages 51-61 of its Brief, FES provides the argument that underlies virtually every other position that it advances. FES's basic argument is that "there is only one right price for capacity: The RPM market-based price." (*Id.* at 51.) The primary error in this argument is that Schedule 8.1, Section D.8 to PJM's RAA explicitly provides otherwise. That provision allows an FRR entity, such as AEP Ohio, the option of a cost-based capacity price. An FRR Entity like AEP Ohio, unlike participants in the RPM market, must sell all of the capacity that the CRES provider requires at the specified price. As a result, the cost-based pricing option of Schedule 8.1, Section D.8, is a reasonable option for FRR entities because it provides a guard against situations, like the instant one, where precipitous declines in RPM prices leave the FRR entity unable to recover anywhere near its actual costs of providing capacity to CRES providers.

Contrary to FES's mantra-like position, in the case of an FRR Entity, there is not one right price for capacity in all circumstances. Under current circumstances, RPM–priced capacity for all of AEP Ohio's load is not the right price.

FES's next criticism (at 61-69) is that even if it were appropriate to use a cost-based approach for pricing capacity supplied to CRES providers, Dr. Pearce's calculations are incorrect. The Signatory Parties' Joint Brief (at 100-124) anticipated and refuted these arguments. However, one additional point is worth making. FES also claims (at 68-69) that Dr. Pearce's calculation of capacity costs is incorrect because his formula rate fails to include an offset for energy-related sales for resale. This is not accurate. Although Dr. Pearce does not specifically recommend that such an offset be incorporated into a cost-based rate, he did provide the calculation of how such an offset should be made, if one were inclined to do so. He calculated that, on a combined company-basis the offset for AEP Ohio would be $17.58/MW-

Day and that AEP Ohio's cost-based capacity rate (based on FERC Form 1 data for 2010) including that offset would be $338.14/MW-Day.

Next, FES contends (at 69-73) that Dr. Lesser's analysis shows that AEP Ohio's actual capacity cost is $57.35/MW-Day. The Signatory Parties' Joint Brief (at 106-108 and 118-124) described the numerous flaws in Dr. Lesser's approach to decimating AEP Ohio's capacity costs. One additional point is necessary, though. FES attempts (at 72-73) to avoid the fact that Dr. Lesser was unaware that the FERC Form 1 fuel costs recorded in Account 501 for 2010, which he used in his capacity cost calculations for AEP Ohio, did not include $130 million of deferred fuel expense. The consequences of this mistake, as was pointed out in the Signatory Parties' Joint initial Brief, at 105-106, is that it is one source of significant understatement of capacity costs. Notably FES witness Schnitzer, who made the same mistake, agreed that deferred fuel expense should be included. (Tr. VII at 1394-1396.)

FES argues, on brief, that the mistake need not be corrected. According to FES, if the error were fixed, AEP Ohio would recover deferred 2010 fuel expenses twice, once through capacity prices and again through the Phase-In Recovery Rider. FES is mistaken (again). The PIRR will recover deferred fuel expenses, including the $130 million of expense deferred in 2010 and not included in the FERC Form 1. But the purpose of correcting Dr. Lesser's (and Mr. Schnitzer's) mistake is not to recover 2010 deferred fuel expenses in charges for capacity supplied during 2012-May 2015. The 2010 fuel expense that Dr. Lesser obtained from the 2010 FERC Form 1 is used as an estimate of fuel costs during the future 2012-May 2015 period. There will not be fuel expense deferrals during the 2012-May 2015 period, so the full amount of the fuel costs during 2010, including the $130 million of deferred expenses, must be used in the determination of a cost-based energy offset to cost-based capacity calculations.

**b) The queuing process reflected in Appendix C is straightforward and reasonable.**

FES disparages Appendix C (at 104) as having "anti-competitive roots" since the initial draft of Appendix C was adapted from a procedure used to implement a Michigan law that may contain some form of limitation on retail shopping. Of course, FES would not want to acknowledge the fact that the Commission is explicitly authorized under Ohio law, R.C. 4928.143(B)(2)(d) to impose limitations on shopping in the context of an ESP; surely, FES would repeal that provision if it could – or at least label it as anticompetitive.[48] But FES does not make policy decisions for the Commission or the State of Ohio and the simple fact is that SB 221 does not mandate a purely market-based SSO. In any event, FES's disrespecting slur of Michigan law is yet another example of FES labeling anything that it does not like as being anti-competitive – regardless of whether it is the applicable rule of law. As with the other competitive issues in this proceeding, the Commission should rise above the anti-competitive hyperbole and examine the issues for what they really are.

While FES criticizes Appendix C (at 104) as being "arbitrary," the main principle under the queuing process is the inherently fair "first come, first served" rule. Rules for access to the RPM-priced capacity are necessary because the set aside is of a specified quantity that, while it is substantial, is not unlimited. Staff and other stakeholders were involved in open meetings to help develop Appendix C as attached to the September 7 Stipulation; On October 4, 2011, the implementation plan modified Appendix C and finalized in the form of Signatory Parties Exhibit 2. (Tr. III at 412, 415.) Indeed, FES was "active" a "significant participant" asking questions and providing comments during a September 19, 2011 open meeting AEP Ohio utilized to

48 See discussion of FES's position on Commission actions restricting competition in the Joint Parties Initial Brief at 114-115.

develop Appendix C and the implementation plan. (*Id*.) Further, all of the Signatory Parties – including Staff and the other CRES providers – reviewed drafts and agreed to the final version of the Appendix C implementation plan. (Tr. III at 416.) Thus, Appendix C was neither arbitrary nor unilaterally developed by AEP Ohio.

FES also criticizes (at 105) the prospect of a customer shopping only to miss out on the queue and have to return to SSO service. As AEP Ohio witness Allen testified, however, that example is unrealistic given that such a customer could easily be served at a competitive rate (based on a blending of RPM and non-RPM capacity charges) and by coming back to the SSO service would lose its RPM-priced capacity allotment for 2013-2015. (Tr. XII at 2084.) In addition, CRES providers and customers do not operate in the dark; they know where they are in the queue or how close to the capacity set aside limit they are. AEP Ohio released data on multiple occasions indicating the status of the queue and allotments broken out in detail. (OCC Ex. 5; FES Ex. 18.) Moreover, the Appendix C implementation plan provides for a tracking system to publish detailed information about the status of the queue and allotments of RPM-priced capacity. (Signatory Parties Ex. 2 at 8.) The website is expected to be completed early in 2012 and will be updated on a daily basis when the amount of actual energy allotments is greater than 90% of the set-aside limit but less than 101% of the set-aside limit. (*Id*. at 9.)

FES also complains (at 106) that load expansion by more than 10% would not be eligible for the RPM pricing. But as AEP Ohio witness Allen testified, the customer's current load plus 10% would remain as RPM-priced capacity and only the incremental increased load would be subject to the $255/MW-Day discounted rate. (Tr. III at 406.) Conversely, it would be unfair if certain customers could dramatically increase their load and soak up the available RPM-priced capacity. If such customers do undertake substantial load expansion, only the increment above existing load plus 10% would be subject to the smaller discount – so that customer's load could still be served with a very attractive blended capacity rate. Finally in this regard, FES contends (at 106) that the load expansion rule may cause gaming by moving from Group 4 or 5 up to Group 3 based on an announced load expansion. This is also wrong. As Mr. Allen made clear, there is no distinction between a group 3, 4 or 5 customer for shopping load receiving RPM-priced capacity. (Tr. III at 406-407, 460-461.)

FES witness Banks maintained in his pre-filed testimony that Appendix C would have a chilling effect on shopping based on the uncertainty of whether a customer would be awarded an allotment of RPM-priced capacity. (FES Ex. 1 at 29.) The evidence shows just the opposite – that shopping dramatically increased in response to the Stipulation being filed, even while its approval remains pending before the Commission. Just before the Stipulation was signed, total switching for AEP Ohio (including noticed and pending switches) was 14.7%.[49] As of October 14, 2011, the total switching for AEP Ohio was up to 16.9%.[50] That is a 15% increase in shopping levels in just five weeks! Such a huge increase over a short period of time does not even reflect the substantial load waiting in the queue. (See CONFIDENTIAL OCC Ex. 6.) Obviously, Mr. Banks' prediction of a chilling effect could not have been more wrong.

Predictably, FES could not complete its Appendix C discussion without casting an aspersion (at 110) that AEP Ohio cannot be trusted to implement Appendix C given its purported "antipathy to competition." As with any other activity involving implementation of rules or orders of the Commission, the Staff and the Commission will oversee AEP Ohio's

[49] As of September 7, 2011 (the date the Stipulation was filed), approximately 6,901,466 MWh was shopping (OCC Ex. 5) out of the total AEP Ohio load of 47,023,697 MWh (Joint Ex. 2 at 1), which is a total of 14.7%.

[50] As of October 14, 2011 (the date the Stipulation was filed), approximately 7,923,575 MWh was shopping (FES Ex. 18) out of the total AEP Ohio load of 47,023,697 MWh (Joint Ex. 2 at 1), which is a total of 16.9%.

implementation of the Stipulation (including Appendix C) and the Company will have to provide detailed answers and documentation relating to any issues that arise. In addition, the Appendix C implementation plan contains a detailed requirement for the Company's Audit Services Department will complete an internal audit of the 2012 RPM set-aside by April 1, 2012 and the results will be provided to the Commission Staff. (Signatory Parties Ex. 2 at 9.) Moreover, the Appendix C implementation plan provides that AEP Ohio will file reports with the Commission detailing the determination of the capacity set-aside each year. (*Id*. at 4.) FES's concerns are baseless and should be ignored.

#### c) The claim that the Stipulation's two-tiered capacity discount is discriminatory is without merit.

FES improperly attacks (at 81-85) the Stipulation's two-tiered capacity discount system as being discriminatory, alleging that the customers who cannot participate in the RPM-priced set aside levels are unlawfully prejudiced by only receiving the lower discounted rate of $255/MW-Day.[51] In support, FES argues (at 83) that there is no economic, legal or public policy basis for establishing the two levels of capacity discounts. Even assuming that the retail rate restrictions in R.C. 4905.33 and 4905.35 apply to wholesale charges such as the capacity rates, FES fails to apply or even acknowledge the proper standard under Ohio law – prohibiting only undue and unreasonable discrimination among similarly situated customers for like a contemporaneous service. When measured under this standard, FES's arguments fail. Finally in this regard, FirstEnergy operating companies have implemented a very similar capacity set aside that was adopted after the Commission found that it was lawful. FES's discrimination claim should be rejected.

[51] IEU advances a similar claim. (IEU Brief at 14-15, 43-45.)

R.C. 4905.33 prohibits discriminatory pricing for "like and contemporaneous service" rendered "under substantially the same circumstances and conditions." "If the utility services rendered to customers are different or if they are rendered under different circumstances or conditions, differences in the prices charged and collected are not proscribed by R.C. 4905.33." *Weiss v. Pub. Util. Comm*. (2000), 90 Ohio St. 3d 15, 16. Similarly, R.C. 4905.35 prohibits a utility from making or giving an "undue or unreasonable" preference or advantage or from imposing an "undue or unreasonable" prejudice or disadvantage. However, the statute "does not prohibit all preferences, advantages, prejudices, or disadvantages—only those that are undue or unreasonable." *Weiss* at 15-17. "Thus, a discriminatory classification is not prohibited if it is reasonable." *Id*. at 16. For example, if the utility services rendered to customers are different or if they are rendered under different circumstances or conditions, differences in the prices charged and collected are not proscribed by R.C. 4905.33. *Id*.

In applying these principles to a situation analogous to the Stipulation's two-tiered capacity discount system designed to preserve and expand retail shopping in AEP Ohio's service territory, the Supreme Court upheld a part of FirstEnergy's rate-stabilization plan that called for different levels of shopping credits depending on the length of the customer's contract with a competitive supplier. The shopping credits were a "deduction against [FirstEnergy's] own generation charges on the bills of customers who switch to a competitive supplier for their generation services" and were "designed to encourage customer shopping . . . ." *Consumers' Counsel*, 109 Ohio St. 3d at 336 (internal quotations omitted). For some customers, the shopping credits were "enhanced", meaning "their credit includes, in addition to the proposed generation rate, a percentage of the rate-stabilization charge." *Id*. OCC and several governmental aggregators claimed that these differing credits violated R.C. 4905.33 and R.C. 4905.35. The

Supreme Court found that "[s]ince customer qualification for these shopping credits is based upon a rational distinction, there has been no violation of . . . R.C. 4905.33, or R.C. 4905.35." *Id.*

As with the limited shopping credits involved in the *Consumers' Counsel* case, the Stipulation's first-come, first-served RPM-priced set aside is fair and reasonable. Just because the price paid by one customer is different than the price for a similar service, that does not mean it is unduly or unreasonably discriminatory. A customer who shops at an earlier time and secures the RPM-priced capacity is not in the same situation as a customer who shops later and only receives the second tier discount for capacity. Further, because the two-tiered discounts are reasonably designed to preserve and expand retail shopping in AEP Ohio's service territory, in advancement of R.C. 4928.02's policy of promoting retail competition and ensuring diversity of electric service supplies and suppliers. Even without the second tier of discount, the 21%, 29%/31% and 41% RPM-priced capacity allotments are reasonable and not unduly discriminatory.

The most direct and applicable precedent on this issue comes from the FirstEnergy ETP cases. In the FirstEnergy operating companies' ETP cases under SB 3 (Case Nos. 99-1212-EL-ETP et al.), FirstEnergy agreed to provide 1,120 MW of capacity to help stimulate retail competition in its service territories, referred to in the settlement as market support generation (MSG), on a first-come, first-served basis. (Section V.1 of the April 13, 2000 Stipulation and Recommendation.) The same settlement also provided shopping credits to certain customers in order to promote competition on a rationed basis. (*Id.* at Section V.2.) The Stipulation is signed on behalf of FirstEnergy by the current CEO, Mr. Anthony Alexander. Not only did Mr. Alexander sign the Stipulation, he testified in support of the agreement. (*See* April 26, 2000

Direct Testimony of Anthony J. Alexander.) This Stipulation was also supported by IEU. As with the above-discussed DIR issues, AEP Ohio is not citing this past Stipulation as being binding on the parties or the Commission as a precedent; rather, the Commission's adoption of the Stipulation as its order in the prior case proves that the result was not unlawful and does not violate any important regulatory principle or practice. With regard to the Stipulation's proposed 1,120 MW capacity set-aside, Mr. Alexander touted the provision as a "tangible benefit to consumers and the public" and as being designed to promote competition. (*Id*. at 6, 10-11.) In its July 19, 2000 Opinion and Order at 66, the Commission found that none of the Stipulation's provisions, including the 1,120 MW capacity set-aside, violated any important regulatory principle or practice; the Commission adopted the FirstEnergy Stipulation as its lawful order.

In light of the foregoing, FES's and IEU's present discrimination claim regarding AEP Ohio's capacity set-aside is disingenuous and without merit.

**d) FES's claim that the Stipulation would unduly burden governmental aggregation is wrong.**

FES argues (at 116-122) that the Stipulation unduly burdens governmental aggregation. Upon examination, it is clear that the General Assembly favors customer choice, not governmental choice; the Stipulation fully accommodates customer choice (including opt-in aggregation) and reasonably accommodates governmental choice (including opt-out aggregation); application of this distinction to the Stipulation is further discussed below. Upon review of FES's argument, it is easy to see that the concern that the Stipulation will unduly burden governmental aggregation is unwarranted. The Stipulation fully accommodates opt-in aggregation and reasonably accommodates opt-out aggregation.

**1) The General Assembly favors customer choice, not government choice.**

As a threshold matter, FES distorts the statutory framework of provisions relating to governmental aggregation, particularly as it relates to opt-out aggregation. FES (at 116) relies heavily on R.C. 4928.20(K) in claiming that the Commission must encourage and promote aggregation and in arguing (at 122) that special consideration and favor must be given to opt-out aggregation initiatives that were placed on the November 2011 ballot. FES witness Banks indicated that he relied on R.C. 4928.20(K) as the basis for saying that the RPM-priced set aside violates the statute. (Tr. VII at 1263.) While R.C. 4928.20(K) requires the Commission to adopt rules to encourage and promote large-scale aggregation, there are no Commission rules at issue here and none of the opposing parties cite any Commission rule regarding aggregation that is being violated by AEP Ohio or the proposed Stipulation.[52] Thus, R.C. 4928.20(K) has no application here. In any case, R.C. 4928.20(K) certainly cannot be read to promote opt-out aggregation as is being advocated by FES.

Upon review of R.C. Chapter 4928, it is obvious that the General Assembly favors *customer choice, not governmental choice*. The preference for customer choice is evident from the creation of the “Do Not Aggregate” list under R.C. 4928.21. And, as between opt-out and opt-in aggregation, the General Assembly has clearly expressed its skepticism for opt-out aggregation – through a careful and deliberate set of statutory requirements.

First, R.C. 4928.20(A) prohibits mercantile customers from being subjected to opt-out aggregation, providing that “aggregation of mercantile customers *shall occur only with the prior, affirmative consent* of each such person owning, occupying, controlling, or using an electric load

[52] FES (at 116-117) cites, in passing, an ESP filing requirement rule related to aggregation – but does not allege that AEP Ohio violated this rule. Indeed, AEP Ohio’s application in Case Nos. 11-346-EL-SSO et al. does fulfill this filing requirement. (January 27, 2011 Application at 6-7; Roush Testimony Exhibit DMR-5 and DMR-6.) In any case, the filing requirement in OAC 4901:1-35-03(C)(6) is not applicable to the Stipulation.

center proposed to be aggregated." (Emphasis added.) Second, R.C. 4928.20(B) requires that an initiative must be placed on the ballot and passed by a majority of the electors before any opt-out aggregation proposal can be pursued. Third, R.C. 4928.20(D) prohibits any opt-out governmental aggregation plan unless it "in advance clearly discloses" to customers that they "will be enrolled automatically in the aggregation program and will remain so enrolled unless the person affirmatively elects by a state procedure not to be so enrolled." Fourth, R.C. 4928.20(D) requires an opt-out aggregation program to give customers an opportunity to leave the program every three years without paying a switching fee.[53] Fifth, in order to ensure that voters can terminate an opt-out aggregation after problems develop, the General Assembly enacted R.C. 4928.20(E)(2) to make clear that an opt-out aggregation program authorized by a majority of electors is subject to referendum on a going-forward basis.

By stark contrast to all of these restrictions and prohibitions that apply to opt-out aggregation, the General Assembly has made it simple and easy to pursue a governmental aggregation that allows customers to choose to participate by opting in. The only requirement is that an ordinance be passed after notice and two public readings, per R.C. 4928.20(C). This deliberate and obvious difference in the structure in R.C. Chapter 4928 shows the General Assembly's preference for opt-in aggregation and its concerns about opt-out programs – a view that is shared by other regulators. (Tr. VII at 1275.) The Commission should bear this in mind when making decisions that relate to aggregation and not be enticed by FES's posture of wanting to promote opt-out aggregation at all costs.

**2) The Stipulation fully accommodates opt-in aggregation and reasonably accommodates opt-out aggregation.**

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[53] For example, FES witness Banks testified that exit fees could be as much as $150 for leaving the aggregation. (Tr. VII at 1261.)

FES claims (at 117-119) that governmental aggregation customers will be the lowest priority for the RPM-priced capacity and, thus will likely receive none. Until January 2012, there has been a specific residential set-aside for shopping (including aggregation shopping) that occurred during the four month period remaining in 2011 after the Stipulation was signed. (Signatory Parties Exhibit 2 at 5.) After that, "first-come, first-served" queuing applies and it is difficult for Signatory Parties to understand why that method is anything other than fair and reasonable. More importantly here, FES critically fails to distinguish between opt-in aggregation and opt-out aggregation raising its challenges. If communities followed the favored opt-in approach, there would be no time crisis for completing aggregation.

In reality, the recent interest in opt-out aggregation programs has ostensibly been stimulated by FES. It would appear that FES has been making promises for delivery of RPM-priced capacity from AEP Ohio that it cannot necessarily deliver. To that end, the resulting "dire need" to continue and expand RPM-priced capacity is a problem that has largely been manufactured by FES. And FES's is not about successfully completing aggregation in general but is focused only on opt-out aggregation. Opt-in aggregation has always been available, not only prior to the Stipulation being signed (September 7, 2011), but was also feasible to pursue even if it was initiated after the Stipulation was filed. It would be an easy matter after September 7, 2011 to pass a resolution and sign a contract to implement opt-in aggregation – with weeks or months to spare – in order to lock up the available RPM-priced capacity.

Instead of acknowledging that opt-in aggregation could be readily pursued to utilize the existing *pro rata* residential capacity allotment, FES remains obsessed with opt-out aggregation – even though FES is aware that major regulatory concerns have been enforced by the

Pennsylvania Commission regarding FES's opt-out aggregation activity. As testified to by FES witness Banks:

> We had several petitioners object to our activity in pursuing opt-out municipal aggregation and the Commission considered those petitions and decided that at that point in time we should not further pursue opt-out municipal aggregation until such time as the Commission would complete its investigation into competitive markets in Pennsylvania….

(Tr. VII at 1275.) AEP Ohio witness Allen also testified that AEP Ohio has seen a number of customers objecting to being switched under opt-out programs – nearly 10,000 complaints so far in 2011. (Tr. XII at 2145.)

AEP Ohio is not suggesting that opt-out aggregation needs to be suspended in Ohio as it has been in neighboring Pennsylvania. But there is no reason the Commission needs to implement extreme measures such as modifying or rejecting the Stipulation, in order to guarantee success for opt-out aggregation – especially in light of the General Assembly's preference for opt-in aggregation, which was fully accommodated by the Stipulation.

Had the interested communities (or their prospective CRES suitors) not excluded to opt-in aggregation, the evidence of record shows that, even at the time when the rebuttal phase of the evidentiary hearing was conducted (a month after the Stipulation was filed), there was ample un-allotted capacity available to cover all of the aggregation load being pursued through the ballot initiatives.

> As of October 14, 2011, the residential class had 1,897,044 MWh of unallocated allotments for RPM priced capacity in 2012, enough for approximately 158,000 residential customers. The current unallocated allotments for the residential class significantly exceeds the Companies' estimate of residential load in communities with aggregation initiatives on the November ballot (approximately 1,060,000 MWh). In addition, the stipulation provides for an increase in the RPM set-aside in 2013, from 21% to 29-31%, that governmental aggregation customers could benefit from.

(AEP Ohio Ex. 20A at 12-13.) While FES (at 121-122) quarrels with the data supporting Mr. Allen's conclusion on brief, there was no evidence presented that demonstrated otherwise. As Mr. Allen testified, he believed the Company's data was correct and it has not been established that the additional communities raised by FES during cross examination are even served by AEP Ohio. (Tr. XII at 2128-2129, 2162-2163.)

FES laments (at 117) that prior to the Stipulation being signed "only two communities in AEP Ohio's service territory" have completed the aggregation process. AEP Ohio witness Allen testified in rebuttal that 25 communities are actively engaged in governmental aggregation and that aggregation activity has only increased after the Stipulation was signed. (AEP Ohio Ex. 20A at 12.) In any case, the savings being provided to these communities is largely dependent upon receiving the subsidized RPM-priced capacity. FES openly argues that it can only compete with AEP Ohio's low generation rates if it receives the RPM-priced capacity. (FES Brief at 95-100.) Thus, the merit of FES's position on governmental aggregation is lacking in the same manner that its argument in favor of 100% RPM-priced capacity.

FES also argues (at 118) that there is not enough time to complete the process for opt-out aggregation prior to January 1, 2012. Whether or not that is accurate, however, it is a quick and easy matter to pass a resolution and sign a contract to implement opt-in aggregation – it could have been done after the Stipulation was signed well in advance of the end of 2011. (Tr. XII at 2144.) However, rather than propose a narrowly-tailored remedy to address what it purports to achieve in its quest to achieve opt-out aggregation (a month or so of extra time before the pro rata allocation expires), it is telling that FES merely continues to advocate for rejection of the Stipulation and 100% RPM-priced capacity. Thus, FES is not interested in promoting customer choice through individual shopping decisions or even through opt-in aggregation programs; it is only interested in expanding its retail shopping margins by paying a below-cost rate for using AEP Ohio's capacity.

### 3. The Merger of CSP and OPCo, Case No. 10-2376-EL-UNC, Meets The Requirements of R.C. §4905.06.

This aspect of the Stipulation is not substantively challenged by the opposing parties as violating any important regulatory principle or practice. As such, the Signatory Parties stand on their Joint Brief (at 124-126) in support of this provision.

### 4. Phase In Recovery Rider, Case Nos. 11-4920/4921-EL-RDR, long term debt-only carrying cost reduces the WACC authorized by the Opinion and Order in Case Nos. 08-917/918-EL-SSO. [Par, IV. 6]

IEU argues that the merging of the two AEP Ohio territories into one and collecting the fuel deferrals remaining from OP from CSP, when CSP has no remaining fuel deferral balance, is inconsistent with regulatory principles.[54] (IEU Brief at 61.) IEU continues its argument by asserting that the design of the PIRR violates R.C. 4928.20(I) because customers of a governmental aggregation program should not pay without a determination of a benefit. (*Id*.) Finally, IEU claims that the 5.34% carrying charge proposed to be collected on the unamortized balance is excessive. (*Id*.)

IEU's argument that the structure of the PIRR violates regulatory principles ignores the testimony of record. AEP Ohio witness Roush explained in his rebuttal testimony that the PIRR is a result of the two individual companies merging as the result of another clause in the settlement. (AEP Ex. 22 at 7.) Merged companies typically inherit both the assets and liabilities

[54] OCC also dedicates part of one paragraph in its brief to these issues. (OCC/APJN at 40.)

of the other company involved in the merger. IEU criticizes AEP Ohio's use of Monongahela Power as an example because it predates the existing present statutory structure. (IEU Brief at 61.) However, the example provided in testimony by AEP Ohio witness Roush showed the result of the merger of two regulated companies. The fact that the charges and debts owed in that case are not fuel deferrals does not erase that fact that the two merged and provide a historical view on regulated mergers in Ohio and where one area paid for costs of another territory. In addition, as indicated in the Signatory Parties Joint Brief (at 127), the evidence shows that customers could benefit from reduced fuel adjustment clause costs as a result of the merger which could offset the costs of the PIRR. (AEP Ex. 22 at 7.)

IEU and OCC/APJN incorrectly assert that the design of the PIRR violates R.C. 4928.20(I). (IEU Brief at 61-62; OCC/APJN Brief at 40.) IEU focuses on the statute as if the Commission is ordering the phase-in of costs in this case. The phase in was approved in 2009 and has been building on the books of the Companies. The issue that is salient in this case is the fact that the two Companies are merging. The fact that the costs or charges are related to the previous application of R.C. 4928.144 is irrelevant for purposes of merging the companies. Besides, once the Commission determines that it is reasonable for the two operating companies to merge it can be argued that is at that time determining the benefit exists to the extent that finding is necessary.

IEU also raises its preferential view of the carrying charge the Signatory Parties should have used to balance out this part of the Stipulation that IEU did not sign. (IEU Brief at 62-63.) IEU again raises its belief that the balance of the PIRR should be reduced for accumulated deferred income tax. (*Id*.) As discussed in the Joint Parties initial brief (127-128) the 5.34% was actually a concession by the Companies in this case that had the right to collect interest at the higher WACC as a result of the 08-917-EL-SSO and 08-918-EL-SSO (ESP I) March 18, 2009 Opinion and Order. Likewise, the collection of the PIRR was established in ESP I Order and approved as proposed by the Companies – which did not include an adjustment for ADIT. (ESP I, March 18, 2009 Opinion and Order at 23.) All of IEU's arguments are arguments with the Commission's previous decision in the last ESP case. The Stipulation provisions on this matter simply involved concessions made AEP Ohio relating to a right already approved by the Commission.

#### 5. Emergency Curtailment Service Tariffs, Case Nos. 10-343/344-EL-ATA, resolution by Stipulation is reasonable and lawful [Par. IV.4]

This aspect of the Stipulation is not substantively challenged by the opposing parties and the Signatory Parties stand on their Joint Brief (129-131) in support of this provision.

### C. As a Package, The Stipulation Benefits Rate Payers And The Public Interest.

FES and IEU do not separately address whether the Stipulation benefits ratepayers and the public interest.[55] FES and IEU avoid doing so ostensibly because even they cannot credibly deny that the Stipulation contains substantial benefits that advance the public interest. Ormet does not address this key component of the three-part test at all. The Signatory Parties detailed the extensive ratepayer benefits contained in the Stipulation and demonstrated how it advances the public interest. (*See* Joint Brief at pages 131-137; Staff Brief at 5-8; Exelon Brief at 6-12; RESA Brief at 9-17; and Constellation Brief at 7-14.) These arguments will not be repeated even though they definitively address the third prong of the test.

[55] FES only addresses benefits (or the alleged lack thereof) in the context of the MRO test, not the presence of benefits under the third prong of the three-part test. (*See* FES Brief at 43-81.)

The only attempt by an opposing party to addresses the third prong of the three-part test is found in the OCC/APJN brief (at 24-32). As the only effort by an opposing party to address the third prong of the test, even OCC/APJN could not bring themselves to plausibly assert that no benefits exist under the Stipulation. Instead, they argue that the Stipulation has too "little real public interest benefit." (OCC/APJN Brief at 24-32.) For example, regarding shareholder funding of the Partnership With Ohio initiative that benefits low income customers, OCC/APJN argue that the Stipulation's commitment of $3 million per year is good but $6 million per year would be better. (*Id*. at 25-29.) Similarly, while it is good that the Stipulation commits AEP Ohio to work with Staff in directing the PWO funding, it would be even better if OCC/APJN were involved in making the funding decisions under the Stipulation – even though those organizations do not support the Stipulation. (*Id*. at 28.) Moreover, they even make specific earmarking proposals that, if hard-wired into the funding requirements for the PWO in the order where the Commission adopts the Stipulation, would enhance the benefits being conveyed in the Stipulation's PWO provisions. (*Id*. at 29.)

The transparent attempt by OCC/APJN to re-negotiate the Stipulation's PWO provisions on brief is inappropriate and should not be entertained. There is no entitlement to shareholder funding of such initiatives, no matter how worthy the recipient may be, and this is especially true when the rate relief goes down and the low demand for electricity driven by a sluggish economy further reduces the Company's available revenues. The pertinent issue on brief is whether the Stipulation provides benefits without violating any important regulatory principle or practice. More to the point, the OCC/APJN proposal to double the shareholder funding shows that they already view the PWO funding as being valuable. The benefits already exist and arise from the Stipulation – OCC/APJN simply want to make them more beneficial.

Among other features more fully described in the Signatory Parties' Joint Initial Brief (at 131-137), the Stipulation contains the following provisions that provide the most direct and obvious benefit to residential customers:

- AEP Ohio agreed to slash the previously-authorized carrying charge for AEP Ohio's substantial fuel deferrals (resulting from the Commission's decision in the ESP I cases) by more than half from 11.15% to 5.34%, to the benefit of all customers. (Par. IV.6; AEP Ohio Ex. 4 at Ex. WAA-4.)
- Collection of the Phase In Recovery Rider will be delayed by 12 months for residential customers, saving them $34.4 million in 2012 or $2.32 per month for a typical customer using 1,000 kWh per month. (Par. IV.6.B; AEP Ohio Ex. 4 at 16, Ex. WAA-4.)
- AEP Ohio agreed to forego recovery from customers of generation-related costs associated with implementing corporate separation, to the benefit of all customers. (Par. IV.1.q.)
- AEP Ohio agreed to provide shareholder funds of $3 million annually for the Partnership With Ohio initiative, to benefit residential customers. (Par. IV.1.u.)
- AEP Ohio agreed to application of a ROE threshold throughout the term of the ESP II of more than 400 basis points below the ROE threshold established by the Commission in the litigated 2009 SEET proceeding. (Par. IV.1.g.) Not only does this provide certainty and administrative ease in applying the contentious SEET provision of the ESP statute, but it operates as a highly restrictive check on AEP Ohio earnings during the ESP II term.

- AEP Ohio agreed to drop seven (7) of its controversial rider proposals as part of the settlement, including the Provider of Last Resort Charge (non-bypassable as proposed), the Environmental Investment Carrying Cost Rider (non-bypassable as proposed), the Generation NERC Compliance Cost Recovery Rider (non-bypassable as proposed), the Facility Closure Cost Recovery Rider (non-bypassable as proposed), the Carbon Sequestration Rider (non-bypassable as proposed), and the Rate Security Rider and the Emergency Curtailment Service Rider. (Par. IV.1.a and Par.IV.4.) Among others, City of Grove City witness Honsey testified in support of the benefits established through this provision. (Grove City Ex. 1 at 2.)
- By dropping non-bypassable rider proposals and establishing fixed base generation rates, the Stipulation transfers substantial risk from customers to AEP Ohio while simultaneously improving rate certainty and stability for customers. (Par. IV.1.a and f; AEP Ohio Ex. 8 at 14-15.)
- AEP Ohio has agreed to form an advisory group of interested Signatory Parties to discuss and explore a distribution rate decoupling mechanism, including rate design changes for non-demand metered customers. The decoupling advisory group will begin meeting within forty-five days after the Commission's adoption of the Stipulation. (Par. IV.1.n.)

OCC/APJN is wrong in claiming the Stipulation does not adequately benefit residential customers.

## III. THE ESP IS MORE FAVORABLE IN THE AGGREGATE AS COMPARED TO THE EXPECTED RESULTS OF AN MRO

In their Joint Initial Brief (at 137-145), the Undersigned Signatory Parties demonstrated that the Stipulation ESP, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results of an MRO. Those Signatory Parties pointed out that, in addition to a comparison of the ESP pricing to the expected MRO pricing, the assessment must include a quantification of other non-price benefits of the ESP, and a consideration of other ESP benefits that, while perhaps not easily quantified, provide significant value. FES and other opponents concede that the assessment extends beyond the pricing of the ESP to include the other terms and conditions of the ESP. However, their approach to comparing both price and non-price aspects of the ESP to the MRO alternative produces, indeed appears to be designed to produce an inaccurate and unbalanced assessment.

### A. MRO Price Test

In their Joint Initial Brief, the Signatory Parties explained (at 139-143) that the expected prices that would otherwise result under an MRO (to which the Stipulation ESP prices are compared) are determined by weighting of adjusted prices from the prior (existing) ESP and competitive market prices. AEP Ohio witness Thomas presented and supported AEP Ohio's comparison of the expected MRO prices to the Stipulation ESP prices. (*Id.*; AEP Ohio Ex. 5; AEP Ohio Ex. 5 at Ex. LJT-3; AEP Ohio Ex. 23 at Ex. LJT-R3.)

As Exhibit LJT-3 to AEP Ohio Ex. 5 (Ms. Thomas's Direct Testimony) and Exhibit LJT-R3 to AEP Ohio's Ex. 23 (Ms. Thomas's Rebuttal Testimony) show, the Stipulation ESP Price ($61.16/MWH) is slightly higher than the weighted average MRO Annual Price ($60.44/MWH) during the period of the stipulated ESP (January 2012 through May 2015) until an auction determines ESP prices (beginning in June 2015).

### 1. Capacity Pricing

FES's initial criticism is that it is improper to use the Stipulation's capacity pricing in the development of the Competitive Benchmark price used to determine the expected results of an MRO. FES contends that the only appropriate capacity price to include in the MRO is the RPM price for capacity, because it is the only "market" price. (FES Brief at 9 – 11.) FES reiterates this argument, at pages 37-38 of its Brief, where it also contends that using the Stipulation's capacity pricing is illogical; and that, instead, the only rational capacity pricing to use in an MRO context is RPM. IEU makes a similar criticism, at page 22 of its Initial Brief.

There are two basic flaws in this criticism. First, until June 2015, AEP Ohio will participate in PJM as an FRR entity. As an FRR entity, AEP Ohio self-supplies, through its own generation resources, the capacity needed to match its retail load (plus adequate reserve margins). As an FRR entity, AEP Ohio has elected not to participate in the PJM RPM auction market for purposes of meeting its load obligations through the planning year June 2014 through May 2015. (AEP Ohio Ex. 21 at 5-7.) Those elections were made as early as 2009. Consequently, not until the capacity used to support AEP Ohio's retail load is procured through the RPM market, and not until the generation resources currently owned by AEP Ohio are transferred to a competitive affiliate that has the same options to bid (or not bid) those resources into the RPM market that other competitive generation have, will it be appropriate to assert that the RPM market establishes the "market" price for the capacity provided by AEP Ohio's generation resources.

Second, as explained in Signatory Parties Joint Initial Brief, at 150-152, the Stipulation's capacity pricing, once adopted by the Commission will establish the appropriate charges for use of AEP Ohio's capacity, both for the purpose of sales to CRES providers and for the purpose of estimating the wholesale cost of capacity used by competitive bidders that would seek to provide generation service for the competitively bid portion of a hypothetical MRO up until June 2015. It would be eminently reasonable for the Commission to conclude (and, indeed, the Signatory Parties recommend that the Commission conclude) that the Stipulation's capacity pricing is appropriate for the purpose of setting the capacity component of the Competitive Benchmark price. FES's argument that it is illogical to use any capacity pricing in the benchmark other than RPM pricing simply is inaccurate. Even in a hypothetical MRO context, the Commission must make a choice regarding the capacity pricing that might result from the pending and multi-faceted capacity pricing litigation, including the *Ohio Capacity Charge* proceeding, Case No. 10-2929-EL-UNC. The Stipulation's capacity pricing provides a reasonable "handicapping" of the result of that litigation if it were to go forward to a conclusion. Consequently, the Stipulation's capacity pricing provides reasonable values for the Commission to use in its determination of expected MRO pricing.

FES's assertion that the RPM pricing for capacity is the only capacity price that may be incorporated into the Competitive Benchmark price and, thus, the only price that the Commission may use to estimate an MRO price flies in the face of Schedule 8.1, Section D. 8, of the RAA, which quite clearly allows capacity pricing for an FRR entity based on measures other than RPM pricing, and which specifically includes pricing based on the FRR entity's costs.

**2. Forecasted Fuel and Environmental Costs.**

FES also criticizes AEP Ohio and Ms. Thomas, as well as Staff Witness Fortney, for not using forecasted fuel costs in the development of the MRO Price Test. In its Initial Brief at page 36, FES recreates Ms. Thomas' Exhibit LJT-3 using its view of forecasted increases in fuels costs, based on FES Ex. 10 (Confidential), as well as including changes in other items such as the PMR and the GRR. At page 21 of its Initial Brief, FES makes a similar adjustment to Mr. Fortney's calculations.

The Signatory Parties explained, at pages 148-150 of their Joint Initial Brief, that it is not necessary, and in this case would not be appropriate, to use forecasted fuel costs in the preparation of the MRO Price Test. With regard to the lack of necessity to use forecasted fuel costs, they noted that in prior SSO cases the Commission has not required that forecasted data be incorporated in the MRO Price Test. With regard to the inappropriateness of using the forecasted fuel cost increases that FES advocates, contained in FES Ex. 10, Ms. Thomas explained that, due to anticipated increased shopping under the Stipulation, there will be less non-shopping load during the Stipulation ESP than was anticipated when the forecast reflected in FES Ex. 10 was developed. As Ms. Thomas further explained, fuel cost factors decrease when less SSO load is served (which is what will occur with increased shopping) while generation resources remain the same (which also will be the case). Accordingly, the forecasted fuel cost data of FES Ex. 10 is outdated and not a reliable estimate of future fuel costs. (See AEP Ohio Ex. 23 at 3.)[56]

However, the most significant flaw in FES's recreations of Ms. Thomas' (and Mr. Fortney's) calculations results from the results-oriented, self-serving, selectivity with which FES goes about making these arguments on brief. In particular, FES completely omits from its presentations the impact on the MRO price of increased environmental carrying costs that will be incurred during the post-2011 Stipulation ESP period.

[56] Consequently, there is no need to maintain the confidentiality of the fuel cost forecast information contained in FES Ex. 10, and the protective order previously issued to maintain that information under seal may be withdrawn.

On the one hand, incorporating increases in fuel costs in the MRO Price Test affects both the expected MRO and the Stipulation ESP prices. Although offsetting to an extent, holding all else constant, the net effect of a fuel cost increase is an increase to the Stipulation ESP price. Of course, that is the result FES seeks to achieve. On the other hand, environmental cost increases during the pre-auction period of the Stipulation ESP only increase the MRO side of the price comparison. That increases the relative benefit of the ESP pricing, all else held constant, and does not advance the result that FES prefers. Perhaps not surprisingly, although certainly disappointingly, FES includes in its presentation on brief a forecasted cost increase for fuel (albeit, for the reasons already provided, a forecast that is less likely to be accurate and reliable), while ignoring the other, more-than-offsetting, environmental cost increase.

Ms. Thomas explained that if both forecasted cost increases (fuel and environmental) are included in the analysis, the result is an increase in the ESP Price Benefit under her MRO Price Test. (Tr. XIII at 2353-54; AEP Ohio Ex. 23 at Ex. LJT-R2.) Below is a corrected version of FES's re-creation of Ms. Thomas's Exhibit LJT-3. It includes both the forecasted fuel cost increases of FES Ex. 10 and the forecasted increased environmental costs. When both adjustments are included in the analysis, the difference between the Adjusted Stipulation ESP price ($66.49/MWH) and the weighted average MRO Annual price ($66.04) is (-.45/MWH). That represents an increase of $.25/MWH from the $-.71/MWH difference that Ms. Thomas calculated in Ex. LJT-3 to her Direct Testimony, AEP Ohio Ex. 5.

**AEP Ohio**
**Electric Security Plan**
**Stipulation Market Rate Option Test**
**Exhibit LJT-3 Using Confidential Fuel Forecast* and M. Schnitzer Average Environmental**

| | Generation Service Price | 2012<br>(1) | Jan 2013 - May 2014<br>(2) | Jun 2014 - May 2015<br>(3) | Wtd Average<br>(4) = weighted (1), (2) and (3) |
|---|---|---|---|---|---|
| 1 | 2011 Base ESP 'g' Rate | 24.05 | 23.97 | 23.97 | 23.99 |
| 2 | 2011 Fuel | 33.01 | 33.00 | 33.00 | 33.00 |
| 3 | Average Incremental Fuel | 2.99 | 5.39 | 7.65 | 5.34 |
| 4 | Incremental Environmental (a) | 0.25 | 2.28 | 4.33 | 2.28 |
| 5 | Total Generation Service Price | 60.30 | 64.64 | 68.95 | 64.61 |
| | **Expected Bid Price** | | | | |
| 6 | Competitive Benchmark - Capacity Cost | 70.53 | 74.66 | 79.85 | 74.95 |
| 7 | Shopping Benchmark Weight | 79% | 66% | 59% | |
| 8 | Competitive Benchmark - RPM | 57.16 | 58.68 | 72.32 | 62.21 |
| 9 | Shopping Benchmark Weight | 21% | 34% | 41% | |
| 10 | Expected Bid Price | 67.72 | 69.23 | 76.76 | 70.98 |
| | **MRO Pricing** | | | | |
| 11 | Generation Service Price | 60.30 | 64.64 | 68.95 | 64.61 |
| 12 | Generation Service Weight | 90% | 77% | 66% | |
| 13 | Expected Bid Price | 67.72 | 69.23 | 76.76 | 70.98 |
| 14 | Expected Bid Weight | 10% | 23% | 34% | |
| 15 | MRO Annual Price | 61.04 | 65.69 | 71.61 | 66.04 |
| | **MRO - ESP Price Comparison** | | | | |
| 16 | MRO Annual Price | 61.04 | 65.69 | 71.61 | 66.04 |
| 17 | Stipulation ESP Price (b) | 59.71 | 61.34 | 62.34 | 61.15 |
| 18 | Average Incremental Fuel | 2.99 | 5.39 | 7.65 | 5.34 |
| 19 | Adjusted Stipulation ESP Price | 62.70 | 66.73 | 69.99 | 66.49 |
| 20 | ESP Price Benefit (c) | (1.66) | (1.04) | 1.62 | (0.45) |
| | Average Incremental Fuel | | | | 5.34 |
| | Average 2011 Full Cost Fuel | | | | 33.00 |
| | Total Fuel * | | | | 38.34 |

* Matches fuel used in FES brief, page 36
(a) Excludes $0.90 included in Line 1
(b) Includes 2011 Fuel (Line 2)
(c) Does not include all ESP Benefits included in the Settlement

FES makes a related criticism, at page 24 of its Brief, that AEP Ohio's and Ms. Thomas's use of currently available simple swap energy values to determine the energy component of the Competitive Benchmark price is inconsistent with their decision not to reflect forecasted fuel costs in the MRO Price Test. This criticism is without basis. Ms. Thomas explained that the forecasted fuel values that FES advocates using are not accurate or reliable. In a balanced manner, she also did not make adjustments to reflect environmental cost increases. The use of simple swap energy values in the MRO Price Test is a different matter entirely. First, the simple swap values are not predictions of what future energy prices will be; rather, they represent the currently available prices for energy that will be provided during the future period. Second, unlike the forecasted fuel costs that FES is so eager to use in isolation, the simple swap values are accurate and reliable measures of energy component values.

### 3. Pool Modification Rider

The Pool Modification Rider (PMR) is a placeholder which currently has a zero value. It would only possibly have a non-zero value in the event that, first, pool modification costs exceed $50 million; second, AEP Ohio applies to the Commission for authority to recover such costs; and, third, after a proceeding in which all interested parties (including Signatory Parties) may challenge the amount and recovery of such costs, the Commission approves recovery of such costs. (Par. IV.5.) In short, whether the PMR will have a non-zero value during the Stipulation ESP, let alone what any non-zero value might be, is pure speculation.

None of this deterred FES witness Schnitzer, at Ex. MMS-4 to his Direct Testimony, FES Ex. 3, from developing estimates that, on the high side, the Stipulation ESP would produce $525 million of pool modification costs that would be flowed through the PMR. He further estimates that, on the low side, half that amount, or $262 million, would result from the Stipulation ESP.

(Tr. VII at 1447-1448.) Mr. Schnitzer (and FES) contend that the ESP is more costly than an MRO by $350 million to $800 million. (FES Brief at 14.) Accordingly, absent his pool modification cost projections, Mr. Schnitzer's estimate of the cost of the ESP compared to an MRO shrinks to a range of $88 ($350-$262) million to $275 ($800-$525) million. Thus, the vast bulk of Mr. Schnitzer's and, therefore, FES's quantification that the Stipulation ESP is more costly than a MRO is based on Mr. Schnitzer's speculative estimates of potential pool modification costs. However, there simply is no basis for including pool modification costs in the MRO price test because there are so many unknowns associated with the PMR, including the amount requested by the Company in any filing it may make, the effective date of any rate change associated with the filing, whether the change would be nonbypassable, and whether the Commission would ultimately approve the request.

### 4. Generation Resource Rider

FES recommends including in the MRO Price Test, as a cost of the Stipulation ESP, an estimated price for the Turning Point solar project. FES witness Schnitzer estimates that it increases the Stipulation ESP by $.12/MWH on an average weighted cost basis over the January 2012 through May 2015 period of the Stipulation ESP. (FES Ex. 3 at Ex. MMS-4; FES Brief at 26-28.) IEU witness Murray also includes a cost estimate for the Turning Point project, which he would also include in the GRR (IEU Ex. 9A at Ex. KMM-11), and IEU also urges including that amount in the GRR and, thus, in the cost of the ESP (IEU Brief at 49-50).

The Signatory Parties explained in their Joint Initial Brief, at 159-161, that the GRR provision provides AEP Ohio with a mechanism to seek recovery of costs associated with the Turning Point solar project (and the MR6 project), only if the Commission in a subsequent rider case approves a charge associated with one of those facilities. AEP Ohio witness Allen explained that there will only be a non-zero rate for the GRR after such time, if at all, that the Commission approves a project-specific charge. (AEP Ohio Ex. 4, at 3-4.) AEP Ohio witness Thomas also noted that because the GRR is a nonbypassable rider, whether it is included in the MRO price test or not has no impact on the outcome of the test. (AEP Ohio Ex. 5 at 16.) Ms. Thomas also noted that, under an MRO, AEP Ohio would still have the renewable requirement to meet for the load coming from its generation which is the 99%, 77% and 66% of load each year as shown in the MRO price test. Consequently, the output of the TPS contract is less than what is needed to meet the renewable requirement for those portions of the load and its costs would be a purchased power adjustment to prior ESP rates. Therefore the full cost of the project would be part of the MRO price as well as the Stipulation ESP price. (*Id.* at 12.) Furthermore, inclusion of TPS costs as a GRR cost of the ESP in the MRO Price Test, in the amounts that Mr. Schnitzer and Mr. Murray recommend, which equate to $.12/MWH, would have only a very minor, impact on the test in any event.

Accordingly, because its inclusion would not materially impact the outcome of the test, and because any future charge proposed under the GRR will be subject to full consideration in a later proceeding, its exclusion from AEP Ohio's MRO price test is of no consequence in evaluating the Stipulation ESP.

**5. Market Transition Rider**

The Market Transition Rider (MTR) is designed to produce a net charge of $6 million quarterly until the end of 2012 or until securitization is completed, whichever is earlier, at which time the MTR is designed to produce a net charge of zero dollars quarterly. As a result, the maximum amount of revenue that the MTR could produce is $24 million, which will result if securitization is not completed in 2012. (Par. IV.1.c (pp. 5-6.)) AEP Ohio witness Allen quantified the cost of the ESP's generation SSO pricing for non-shopping customers. Included within that quantification is the 2012 maximum possible net MTR charge of $24 million. (AEP Ohio Ex. 4 at 18.) Accordingly, Mr. Allen's quantification of the ESP Price Benefit (Cost) for non-shopping customers of -$108 million (Net Present Value) presented at Ex. WAA-6 to his Direct Testimony, AEP Ohio Ex. 4, incorporates the $24 million of net MTR charges.

FES asserts that, because AEP Ohio witness Thomas did not also include the $24 million of net MTR charges into her $/MWH comparison of ESP pricing to MRO pricing, AEP has failed to reflect the impact of the $24 million of MTR charges in the overall comparison of the cost of the ESP to the cost of an MRO. (FES Brief at 15, 15 n.40.)

FES is mistaken. As explained above, Mr. Allen quantifies the price differential that Ms. Thomas calculates and adds to it the net $24 million of MTR charges in order to develop the net present value of the ESP Price Benefit (Cost) for Non-Shopping Customers. Consequently, the $24 million of net MTR charges comprise part of the -$108 million (NPV) cost to ESP pricing that Mr. Allen presents in Ex. WAA-6 to his Direct Testimony, AEP Ohio Ex. 4.

**B. Price And Non-Price Quantifiable Net Benefits Of The ESP**

**1. Distribution Investment Rider**

FES also contends that the Distribution Investment Rider (DIR) provision of the Stipulation ESP is an additional cost of the ESP, compared to the expected result of an MRO. (FES Brief at 32-33.) AEP Ohio witness Thomas testified that it was unnecessary to include the impact of the DIR in the MRO Price Test analysis as a cost of the ESP. Ms. Thomas explained that, while the DIR would not be part of an MRO, AEP Ohio could prosecute distribution rate cases in an MRO setting that would achieve the same result as the DIR provides under the Stipulation ESP. (Tr. IV at 594.)

FES makes two arguments. The first one relies on FES witness Lesser's testimony, in which he concludes, based on his analysis of the DIR provisions in the Stipulation, that the DIR would allow AEP Ohio to double-recover plant-in-service costs. (FES Ex. 2 at 49-50.) Dr. Lesser apparently believes that AEP Ohio will recover those plant-in-service costs once through the pending distribution rate cases (Case Nos. 11-351-EL-AIR and 11-352-EL-AIR) and then a second time through the ESP's DIR. FES's second argument appears to be a repetition of the first argument, but is made without reference to Dr. Lesser.

Regardless of whether the arguments are the same or different, they are each without basis. AEP Ohio witness Allen succinctly explained that there will be no double recovery of the same plant-in-service costs through the DIR and the base distribution rates. (AEP Ohio Ex. 20A at 5.) He noted that if there were any risk of double recovery, a credit mechanism could be implemented to preclude that result. (Tr. XII at 2054-56.)

Consequently, as Ms. Thomas testified, there is no need to include the costs collected through the ESP's DIR in the comparison of the ESP to the MRO. Those costs will either be recovered once through the DIR, in the ESP setting, or once through base distribution rates, in an MRO setting. In other words, the rate impacts would be exactly offsetting under the two scenarios.

**2. Phase-In Recovery Rider**

**a) Reduced Carrying Charge Benefit**

AEP Ohio witness Allen calculated the benefit, pursuant to Par. IV.6 of the Stipulation, of reducing the carrying cost from the previously authorized weighted average cost of capital (WACC) rate (11.15%) to the much lower long-term debt rate (5.34%) is $153.4 million over the seven-year recovery period (2012-2018) and $104 million on a net present value basis. (AEP

Ohio Ex. 4 at 15-16, Ex. WAA-6.) FES contends that Mr. Allen's quantification of this benefit has not been adjusted to reflect the Commission's Order on Remand in Case Nos. 08-917-EL-SSO and 08-918-EL-SSO. In the Order on Remand, the Commission directed CSP and OPCo to reduce the amount of each company's accumulated deferred fuel expense by the amounts of Provider of Last Resort (POLR) charges collected subject to refund since June 2011. Because of that reduction to the accumulated deferred fuel expense, FES argues, the benefit of the reduced carrying cost rate for the PIRR will be less.

Only OPCo's accumulated deferred fuel expense is affected by the Order on Remand. The amount of OPCo's accumulated deferred fuel expense as of the end of 2011 has been estimated to be $624 million. (IEU Ex. 8 at 15.) The POLR charges collected since June 2011 by OPCo have been less than $25 million in total. Case No. 08-918-EL-SSO, Order on Remand at 15 (Oct. 3, 2011) (stating that the Commission approved OPCo's recovery of $54.8 million in POLR costs annually). That represents only a very small fraction (approximately 3.3%) of the total accumulated deferred fuel expense as of year end 2011. Accordingly, the impact on Mr. Allen's calculation of benefit of the reduced carrying cost rate for the PIRR is, similarly, very small. FES's criticism does not require any adjustment of Mr. Allen's PIRR benefit estimate of $104 million (NPV).

**b) Securitization Benefit**

The Signatory Parties recognized that securitizing the PIRR regulatory assets will provide an additional benefit to all customers in the form of lower carrying charges, lower even than the long-term debt rate that the Stipulation also provides. The Stipulation requires all Signatory Parties, including AEP Ohio, to support securitization for the regulatory assets associated with the PIRR. (Par. IV.6.) Absent the Stipulation, none of the Signatory Parties, including AEP

Ohio, would be obligated to support securitization. Thus, by obtaining the commitment of AEP Ohio and the other Signatory Parties to support securitization, the Stipulation provides a benefit that would not otherwise exist.

Remarkably, FES belittles this benefit. FES asserts that, because securitization is possible without the ESP Stipulation, its provision related to securitization should be given no credit as a benefit. What FES does not recognize, or perhaps willfully refuses to acknowledge, is that the Stipulation brings to bear a broad-based coalition in support of securitization. That support will increase the likelihood that securitization will be successfully implemented and that further carrying cost savings will result. That is a very real and substantial benefit. FES's argument to the contrary is wrong.

**3. Partnership With Ohio and Ohio Growth Fund**

AEP Ohio witness Allen quantified AEP Ohio's commitment to fund the Partnership With Ohio (PWO) and the Ohio Growth Fund (OGF) initiatives at $3 million per year and $5 million per year, respectively. He calculated that the net present values of the two commitments are $10 million and $17 million, respectively.

FES argues that these commitments are not meaningful because they are conditioned upon AEP Ohio achieving 10% return on equity (ROE) during the year preceeding each annual year that the gifts will be made. (FES Brief at 77-78.) The 10% ROE threshold simply provides a "stop loss" to guard against the event that the financial impacts on AEP Ohio during the term of the ESP are more adverse than expected. AEP Ohio is confident that, if the Stipulation is adopted, it will be able to manage its business so that it achieves the ROE threshold that ensures the availability and expenditure of the PWO and OGF funding.

### 4. Discounted Capacity

Mr. Allen quantified the value of AEP Ohio's commitment, in Par IV.2.b.3 of the Stipulation, to provide the set-aside amounts of capacity at RPM prices that recover AEP Ohio's costs, and showed this as a quantifiable benefit of the Stipulation. Rather, FES contends that the only "correct" price for capacity is the RPM price. Consequently, according to FES, there is no discount and, thus, no benefit to customers that results from providing the set-aside capacity at RPM prices. (FES Brief at 43-47.)

The flaw in FES's argument, again, is its presumption that RPM pricing is the only possible "correct" pricing for AEP Ohio's capacity furnished to CRES providers (and suppliers for SSO auctions). Section 8.1, Section D. 8, of the PJM Reliability Assurance Agreement specifically authorizes capacity prices for an FRR entity, such as AEP Ohio, based on the FRR entity's costs. FES's presumption that RPM pricing is the only permissible pricing for AEP Ohio's capacity is its litigation position, which AEP Ohio believes is simply wrong. AEP Ohio's position is that the embedded cost-based prices that Dr. Pearce supported provide the capacity pricing that is reasonable and which AEP Ohio is entitled to receive. (Signatory Parties Joint Initial Brief at 87-95.) Consequently, Mr. Allen's quantification of the benefit of the discounted set-aside capacity is reasonable.

It's noteworthy that, in AEP Ohio's view, Mr. Allen's quantification of the discounted capacity is likely understated. This is because Mr. Allen did not quantify the additional benefit that will result from providing to CRES providers capacity above the RPM set-aside amounts at the $255/MW-Day price, which is also substantially discounted from the embedded cost rate that Dr. Pearce supported. Although it would be more difficult to estimate the amount of capacity, beyond the RPM set-aside amounts, that will be furnished to CRES providers during the ESP at the $255/MW-Day price, the record supports the conclusion that CRES providers are purchasing capacity at the $255/MW-Day price to serve shopping load. (AEP Ohio Ex. 20B at 8-9; Tr. IV at 544; Tr. XII 2081-2082.)

### C. Qualitative Benefits Of The ESP

The Stipulation also provides many benefits, not susceptible to being readily quantified, but which are of significant value. AEP Ohio witness Hamrock explained a number of these benefits, at pages 28-30 of his Direct Testimony (AEP Ohio Ex. 8.), and they are reviewed at pages 145-147 of the Signatory Parties Joint Initial Brief. Among these benefits are: the ESP provides an earlier transition to fully market-based rates than would be possible through an MRO; AEP Ohio's commitment to a transformative capacity plan for Ohio, which promotes accelerated development of Ohio shale gas and the development of a new combined cycle power plant fueled by Ohio shale gas; elimination of POLR charges and most other nonbypassable charges; a commitment to pursue a distribution rate decoupling mechanism and alternative customer-sited generation resources; and, through fixed, non-fuel generation rates, rate certainty for customers.

FES dismisses these benefits, in particular the accelerated transition to fully market-based rates and the accelerated development of Ohio shale gas resources, as illusory or insubstantial. The great majority of stakeholders in this proceeding, including the Commission's Staff, arrived at the opposite conclusion. These benefits are real and provide significant value. The record supports, and the Commission should conclude, that they are real and substantial benefits that would not be achievable absent the Stipulation.

## IV. IEU's MOTION TO DISMISS SHOULD BE DENIED.

In its Initial Brief, IEU has moved to dismiss CSP and OPCo's ESP Application and the September 7, 2011 Stipulation. IEU argues (1) that the Company has failed to comply with R.C. 4928.141 and 4928.143 because its ESP Application and the Stipulation contemplate rates for "AEP Ohio," rather than for CSP and OPCo individually, and failed to include other information required under those statutes; and (2) that the Company has failed to meet its burden of proof to demonstrated that the ESP proposed in the Stipulation is more favorable in the aggregate as compared with the expected results of an MRO. IEU's motion is without merit and should be denied.

### A. The Stipulation And Columbus Southern Power Company's and Ohio Power Company's ESP Applications Comply With R.C. 4928.141 And 4928.143.

IEU argues that AEP Ohio's ESP Application was not made by an electric distribution utility (EDU) and, therefore, is subject to dismissal. (IEU Brief at 8-9.) IEU also argues that the Stipulation similarly fails to propose to establish an ESP for an EDU. (*Id.*) IEU claims: (1) that because "AEP Ohio" as an entity, is not an electric distribution utility, the Application and the Stipulation are improper; (2) that the proposed ESP plan does not relate to the terms of service of CSP and OPCo; (3) that the proposed provisions and charges requested under R.C. 4928.143(B)(2) do not relate specifically to the services and charges of CSP and OPCo; and (4) that the Application and Stipulation do not conform to the Commission's filing requirements. (*Id.* at 8-11.) IEU, however, ignores the actual Applications, the Stipulation and the applicable law.

#### 1. CSP and OPCo each filed proper ESP applications.

The proposed ESP is ripe for Commission review. CSP and OPCo, which, as the Commission knows, are both EDUs, filed ESP applications that include provisions relating to the supply and pricing of electric generation. CSP filed its request to establish an ESP in Case No. 11-346-EL-SSO. OPCo filed its request to establish an ESP in Case No. 11-348-EL-SSO. While the applications and the Stipulation do propose a single set of rates for CSP and OPCo, this proposal was made in recognition of the planned merger of the companies, which will occur if the Stipulation is approved as proposed or, if the merger is not approved in the Stipulation, will occur in AEP Ohio's Merger Case (Case No. 10-2376-EL-UNC). Each EDU filed a plan proposing a structure that would allow the Commission to plan ahead for and evaluate the business contingency (the merger), while still providing adequate information for the Commission regarding the individual companies if the merger is not effected. The testimony filed in support of the Stipulation similarly included information for each company.

The Commission has an interest in the efficient processing of the proceedings before it and is vested with broad discretion in the handling of its docket and cases. The Supreme Court of Ohio has recognized as much, stating, "[i]t is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St.3d 15. The Stipulation respects and advances the Commission's interest in managing its business in an orderly manner. It does so by addressing the Company's ESP in a practical manner based upon the corporate reorganization that will occur if the Stipulation is approved. Providing the Commission with the information necessary to evaluate the ESP as it will be implemented if the Stipulation, and thus the merger, is approved enables the Commission to expedite AEP Ohio's pending proceedings before the Commission and avoids unnecessary delay and duplication of effort. AEP Ohio submits that providing the Commission with this information <u>in addition to</u> the information on each individual EDU was not improper.

**2. The ESPs proposed in the Application and the Stipulation satisfy R.C 4928.143(B).**

The Stipulation's proposal to establish an ESP under R.C. 4928.143 is valid and appropriate for Commission consideration as the Company's next SSO. As R.C. 4928.143 provides:

> (A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. . . .
>
> (B)(1) An electric security plan <u>shall</u> include provisions relating to the supply and pricing of electric generation service. . . .
> (2) The plan <u>may</u> provide for or include, without limitation, any of the following: . . .

(Emphasis added). The governing statutory provisions require an ESP proposal to include, at a minimum, provisions relating to the supply and pricing of electric generation service. The proposal may, but is not required to, include other provisions as well. The core requirement for Commission consideration is that it contain generation supply and pricing provisions. The modified ESP that the Stipulation presents for the Commission's review and approval (as well as the ESP originally included in the Application) satisfies this requirement.

**3. AEP Ohio has satisfied the ESP filing requirements.**

The Commission has already found that AEP Ohio met the filing requirements set forth in O.A.C. 4901:1-35-03. IEU did not timely object to this finding and, therefore, should be estopped from doing so here. Further, the Commission is empowered to waive any filing requirement, O.A.C. 4901:1-35-02(B), and did so in certain regards here. *See* Case No. 11-346-EL-SSO, Entry (Mar. 23, 2011). The filing requirements are designed to facilitate the

Commission's understanding of a proposed ESP. That need has been satisfied here through a technical conference, extensive discovery, testimony, and briefing, and a lengthy and thorough hearing.

Nonetheless, IEU quotes R.C. 4928.143(A), apparently for the proposition that AEP Ohio was required to have immediately conformed the Stipulation to the filing requirements set forth for ESP applications. (IEU Brief at 8-9.) That construction, however, fundamentally misinterprets the statute, which states:

> For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application *prior to the effective date of any rules the commission may adopt for the purpose of this section,* and, as the commission determines necessary, the utility immediately shall conform its filing *to those rules* upon their taking effect.

R.C. 4928.143(A) (emphasis added). The final sentence of that provision, when read in the context of the passage as a whole, clearly only applies when a new rule or regulation is adopted during the pendency of an ESP application. No such new rule or regulation was adopted during the pendency of the Company's present ESP application. Thus, IEU's reliance upon that provision is in error. AEP Ohio also notes that R.C. 4928.143 relates to ESP <u>applications</u>, not stipulations. Thus, any failure on the Signatory Parties' part to conform the Stipulation to the Commission's ESP filing rules does not warrant dismissal.

**B. IEU's Arguments Regarding Shopping Caps, The PIRR, Aggregation, Rate Discrimination, And The DIR Are Not Appropriate Grounds For Dismissal.**

IEU's remaining arguments go the merits of several provisions proposed in the Stipulation. These arguments relate to the Commissions approval or modification of specific items, not to dismissal. Argument on the merits of those provisions was had at hearing and in initial post-hearing briefing, and the substance and appropriateness of each of the provisions is dealt with in detail elsewhere in the parties' post-hearing briefs. The Commission should decline to dismiss the proposed ESP on those grounds and instead should consider the merits of each provision fully in determining whether the ESP proposed in the Stipulation is more favorable, in the aggregate, than the expected results of an MRO.

## V. THE ATTORNEY EXAMINERS PROPERLY DENIED EACH OF OCC'S MOTIONS TO STRIKE.

OCC and APJN attack the merit of rulings made from the bench and the very credibility of the Attorney Examiners in an attempt to seek a second bite at OCC's motions to strike that were denied in the hearing. OCC and APJN take issue with oral rulings made from the bench throughout the course of the public evidentiary hearing. (OCC/APJN Brief at 8.) In their attempt to rehash the denied motions, OCC and APJN attack the objectivity of the Examiners themselves, citing a standard in footnote 20 that the actions of the Examiners are more than an error of law or judgment but implying that the court's attitude is unreasonable, arbitrary or unconscionable. (*Id.* at 9 n.20.) The Attorney Examiners were objective and balanced, making rulings against both Signatory and Non-Signatory Parties. The Commission even assigned two Examiners to the case, which allowed the bench to caucus and consider the motions raised. The Attorney Examiners took advantage of that approach and took time to discuss motions made, even taking breaks in the proceeding or reserving ruling until later to ensure that they would have time to fully consider the matters raised. OCC and APJN's attacks on the objectivity and balanced rulings of the Commission's Examiners is inappropriate and baseless and should be denied.

### A. OCC And APJN Have Failed To Demonstrate That Any Of The Attorney Examiners' Evidentiary Rulings Prejudiced Them In Any Way.

Ohio Administrative Code Rule 4901-1-15(F) provides:

> Any party adversely affected by . . . any oral ruling issued during a public hearing . . . that elects not to take an interlocutory appeal from the ruling . . . may still raise the propriety of that ruling as an issue for the [C]ommission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.

(Emphasis added). In at least one recent proceeding, the Commission has required that a party raising the propriety of an attorney examiner's oral ruling demonstrate that the ruling caused the party prejudice. *See ESP I*, Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, Order on Remand at 8 (Oct. 3, 2011) (upholding attorney examiner's denial of OCC and OPAE's motion to strike rebuttal testimony because OCC and OPAE did not "[demonstrate] how the admission of the testimony into the record caused them prejudice.").

OCC and APJN similarly have failed to demonstrate that any of the evidentiary rulings complained about in their Initial Post-Hearing Brief caused them prejudice. In fact, OCC and APJN do not explain at all how any of the Attorney Examiners' evidentiary rulings prejudiced them in any way. Rather, they state only that "the information permitted into the record was largely hearsay and, due to the rulings at issue, the information may not be wrongly relied upon by the PUCO in reaching its decision," (OCC/APJN Brief at 9,) and offer vague and unsupported allegations that they will be prejudiced. (*Id.* at 12, 20.) Those vague and conclusory assertions fail to meet the Commission's standard for determining appeals taken from evidentiary rulings at hearing. OCC and APJN's appeal must, therefore, be denied.

**B. The Attorney Examiners' Evidentiary Rulings Were Proper.**

Not only were OCC and APJN not prejudiced by the Attorney Examiners' rulings, they have not shown that the Attorney Examiners' rulings were erroneous.

### 1. The Attorney Examiners properly denied OCC's motion to strike reference to the stipulation approved in Case No. 09-756-EL-SSO.

In their rebuttal testimony, Company witness Hamrock and Staff witness Baker each presented information regarding the reliability standard-setting process approved by the Commission in Case No. 09-756-EL-SSO. (AEP Ohio Ex. 19 at 3; Staff Ex. 5 at 5.) That information was included on rebuttal in response to criticisms by OCC witness Dr. Duann and IEU witness Bowers that AEP Ohio allegedly failed to make a reliability showing that OCC and IEU contend is required for Commission approval of AEP Ohio's proposed DIR under R.C. 4928.143(B)(2)(h). (*See* OCC Ex. 1 at 31-32; IEU Ex. 9A at 22.)[57] Specifically, in his rebuttal testimony, Mr. Hamrock stated:

> The Commission constantly monitors the reporting and reliability functions of electric distribution utilities through its administrative rules found in Ohio Administrative Code 4901:1-10. <u>The Commission's Staff take an active role interacting with utilities and enforcing these rules by monitoring the level of reliability for each electric distribution utility.</u> In fact, on September 8, 2010, in Commission case number 09-756-EL-ESS[,] the Commission approved the customer average interruption duration index (CAIDI) and the system average interruption frequency index (SAIFI) related to circuit performance on the distribution system that resulted from a settlement agreement between the Commission Staff, the Ohio Consumers' Counsel, and AEP Ohio.

(AEP Ohio Ex. 19 at 3.) Mr. Baker's testimony similarly states only that OCC participated in Case No. 09-756 and signed the resulting stipulation. (Staff Ex. 5 at 5.)

As Mr. Margard pointed out during the hearing, OCC's participation in that case and stipulation are matters of fact already in the public record. (Tr. XIII at 2372.) Neither Mr. Hamrock nor Mr. Baker testified to the content or any provisions of that stipulation. The

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[57] AEP Ohio notes that by its language, R.C. 4928.143(B)(2)(h) requires only that the <u>Commission</u> "examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system:" when analyzing provisions like the DIR.

information clearly does violate boilerplate language in the 09-756 stipulation prohibiting the citing as precedent of the terms, information, and data contained in the stipulation. The information provided was not cited, as OCC and APJN claim, "against OCC" (OCC/APJN Brief at 12), nor did the Company or Staff seek to use any term of that stipulation as precedent. AEP Ohio and Staff simply offered that proceeding and its resolution to demonstrate that Staff and customer parties have participated actively in monitoring the Company's reliability and service quality. As Examiner See rightly ruled, such an offering is perfectly permissible. The Commission should affirm that ruling.

### 2. The Attorney Examiners properly admitted rebuttal testimony related to customer survey results and Staff witness Baker's testimony that AEP Ohio has met the reliability standards adopted in Case No. 09-756-EL-CSS.

OCC and APJN assert that the Attorney Examiners erred in denying OCC's motions to strike (1) rebuttal testimony offered by Company witness Hamrock and Staff witness Baker regarding the results of 2009, 2010, and 2011 surveys of customer reliability expectations, and (2) testimony offered by Staff witness Baker that the CSP and OPCo have met the reliability standards required under the stipulation adopted in Case No. 09-756-EL-SSO. Each of these claims is without merit.

As both the Ohio Supreme Court and the Commission have consistently recognized, "the Commission is not bound by the Ohio Rules of Evidence. *Ohio Bell Telephone Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49, 50; *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Commn.* (1982), 2 Ohio St.3d 62, 68; *In the Matter of the Complaint of Pro Se Commercial Properties*, Case No. 07-1306-EL-SSO, Entry on Rehearing at 9 (Nov. 5, 2008) (*"Pro Se"*). Indeed, the Commission is granted broad discretion in the conduct of its hearings. *Greater Cleveland Welfare Rights Org., Inc.*, 2 Ohio St.3d at 68. Further, the Commission has specifically held that "[c]laims of inadmissible hearsay are not applicable to [Commission] proceedings . . ." *Pro Se*, at 9. In the *Pro Se* proceeding, the Commission explained:

> When the Commission has deemed it appropriate, it has allowed the admission of hearsay testimony. We would also note that hearsay rules are designed, in part, to exclude evidence, not because it is not relevant or probative, but because of concerns regarding jurors' inability to weigh evidence appropriately. <u>These concerns are inapplicable to administrative proceedings before the Commission</u>. As the Commission has that expertise, it can and did give the appropriate weight to testimony and evidence in this case.

*Id.* (emphasis added).

The concern behind the hearsay rule remains inapplicable to this proceeding. The Attorney Examiners and the Commissioners are attorneys and are experts in the area of public utility regulation. They are more than capable of intelligently weighing and determining for themselves the value to assign to the evidence offered at hearing. For this reason, OCC and APJN's request that the Commission overrule the Attorney Examiners' rulings on the alleged hearsay regarding customer survey results and Staff witness Baker's testimony on CSP and OPCO's attainment of reliability standards should be denied.

It is also worth noting that, even if the Commission applied the hearsay rule to the customer survey results – which, for the reasons discussed above, it should not – it would still determine that the Attorney Examiners' rulings on those issues were proper. As counsel for the Company and the Staff explained at hearing, Mr. Hamrock's and Mr. Baker's rebuttal testimony on customer surveys was properly admitted because the surveys are both business records and public records. (Tr. XII at 1988-1989; Tr. XIII at 2371.) With respect to Mr. Baker's testimony that CSP and OPCo have met their reliability standards since 2010, Mr. Margard also correctly pointed out that that statement was not hearsay but was simply Mr. Baker's expert opinion. (Tr. XIII at 2372.) Accordingly, even if the hearsay rule were applicable, it would not operate to the exclusion of any of the testimony about which OCC and APJN now complain. The Commission, in its broad discretion, should affirm each of the Attorney Examiners' rulings and should consider he testimony offered regarding customer survey results and AEP Ohio's attainment of reliability standards in evaluating the Stipulation.

#### 3. OCC's motion to strike AEP Ohio witness Hamrock's rebuttal testimony regarding the statutory basis for approving the DIR was properly denied.

AEP Ohio witness Hamrock testified on rebuttal that, based on the advice of counsel, the Commission is not constrained by R.C. 4928.143(B)(2)(h) for approval of a distribution infrastructure mechanism like the proposed DIR, but that R.C. 4928.143(B)(2)(d) also allows for commission approval of carrying costs. (AEP Ohio Ex. 19 at 3.) Mr. Hamrock further testified that the Company and the Stipulation satisfy the requirements of R.C. 4928.143(B)(2)(h). (*Id.*) OCC argued at hearing, and OCC and APJN now argue in their Brief, that Mr. Hamrock's testimony should be stricken because (1) Mr. Hamrock, as a non-lawyer, could not present a legal opinion; (2) the "advice of counsel" to Mr. Hamrock is hearsay; and (3) AEP Ohio failed to supplement its response to OCC's discovery request inquiring about the statutory basis for approval of the DIR to include R.C. 4928.143(B)(2)(d). These arguments are without merit and do not warrant overruling the Attorney Examiners' decision to allow Mr. Hamrock's testimony.[58]

The argument that Mr. Hamrock impermissibly offered a legal opinion because his prefiled testimony stated that he was "advised by counsel" regarding the statutory bases for the DIR ignores that such language is commonly included in nearly every piece of testimony that the parties have submitted to the Commission in these proceedings. Indeed, OCC witness Dr. Duann's testimony includes similar language with respect to the three-part test that the

[58] OCC's argument that Mr. Hamrock's testimony is hearsay fails for the same reasons, discussed above, that OCC's other hearsay arguments fail.

Commission uses to evaluate a stipulation ESP. (OCC Ex. 1 at 4.) By OCC and APJN's reasoning, then, Dr. Duann's testimony that the Stipulation fails to satisfy the second and third prongs of the test is impermissible legal opinion. As counsel for AEP Ohio explained at hearing, the statement in prefiled testimony that a witness has been advised by counsel with respect to what a law or regulation states is commonly included in such testimony before the Commission to offer context, not legal argument.[59] (Tr. XII at 1975.) OCC was not the only party to have such a motion denied – AEP Ohio's own motion to strike testimony of IEU witness Murray that was based on advise of counsel was similarly denied – because the advice of counsel gave the contextual basis for Mr. Murray's understanding. (*See* Tr. VIII 1533-1543.)

The argument that Mr. Hamrock's testimony should be stricken because AEP Ohio did not supplement a response to one of the extraordinary number of discovery requests that OCC propounded to it after the September 7, 2011 Stipulation is also weak. Counsel for the Company, in response to this argument at hearing, explained that the basis for AEP Ohio's reliance upon R.C. 4928.143(B)(2)(d), the Commission's Entry on Remand in the *ESP I* case, was not released until just one day prior to the start of the Stipulation hearing. (Tr. XII at 1976-1977.) AEP Ohio's oversight with respect to supplementing its discovery responses after hearing began should not be held against it, particularly because, as counsel for OEG pointed out, the rebuttal testimony offered by the Company's witnesses during the course of the hearing supplemented the Company's position. (*Id.* at 1978.) The Attorney Examiners' rejection of each of these arguments should be affirmed.

[59] It is also for this reason that the Attorney Examiners' ruling denying OCC the ability to cross-examine Mr. Hamrock regarding privileged communications with counsel was proper. Mr. Hamrock's testimony did not divulge the substance of any protected communication and, therefore, did not waive privilege.

## VI. CONCLUSION

For the foregoing reasons, the undersigned Signatory Parties request that the Commission adopt the Stipulation without modification.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Reply Brief was served by electronic mail upon the individuals listed below this 18th day of November, 2011.

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