**BEFORE THE**
**PUBLIC UTILITES 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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OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION

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## MEMORANDUM IN OPPOSITION

On December 14, 2011, the Commission issued an Opinion and Order in the above-captioned cases (Opinion and Order), modifying and adopting the September 7, 2011 Stipulation and Recommendation (Stipulation). The Opinion and Order, among other things, adopted a modified Electric Security Plan (ESP) for Ohio Power Company (OPCo) and Columbus Southern Power Company (CSP) and approved the proposed merger of CSP and OPCo. In conformance with the modified Stipulation adopted by the Commission, CSP merged into OPCo effective at the end of 2011. Accordingly, OPCo (also referred to as "AEP Ohio") also represents, and is the successor in interest to, the interests of CSP. On January 13, 2012, various parties filed applications for rehearing As set forth below, AEP Ohio submits its memorandum in opposition to the rehearing applications of the Office of Consumers' Counsel/ Appalachian Peace and Justice Network (OCC/APJN), FirstEnergy Solutions Corp. (FES), Ormet Primary Aluminum Corp. (Ormet), and the Industrial Energy Users-Ohio (IEU). Due to the extensive arguments raised by parties and the limited time for which to respond, AEP Ohio will address the most pertinent arguments and the failure to respond to (or otherwise address) a particular argument raised on rehearing should not be construed as acceptance or non-opposition by AEP Ohio.

The three-part test for consideration of contested stipulations, along with analysis of the proposed ESP under the statutory MRO test, continue to be the controlling standards of review during this rehearing phase of the decision-making process. No party challenges the Commission's findings regarding the first prong regarding serious bargaining among knowledgeable, capable parties There is no serious challenge of the third prong regarding the Stipulation package benefiting ratepayers and the public interest, though FES and IEU set forth token challenges to the Commission's findings in this regard.[1] Accordingly, as with the merit briefing stage of the cases, the material arguments on rehearing relate to whether the provisions of the Stipulation violate any important regulatory principle or practice – the second prong. The Commission should avoid further modifications to the Stipulation and leave the remainder of the package in tact.

## ARGUMENT

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

### I. The fixed base generation rate increases do not violate any important regulatory principles or practices [OCC Issue A, IEU Issue 14]

AEP Ohio's ESP II Application (at 7-8) proposed to "rationalize the rate relationships based upon the manner in which the market would price such loads using the same methodology used to develop the competitive benchmark price and applying it to the class load shapes." The Application (at 8-9) also proposed a Market Transition Rider (MTR) to facilitate the transition from the Company's current generation rates to the market-based SSO generation rates. The Stipulation adopts AEP Ohio's proposed rate re-design of generation rates, including the MTR. (Par. IV.1.b.) While the Opinion and Order slashed the proposed base generation rate increases in half based on the stated

[1] *See* FES Issue D (at 49-50) and IEU Issue 25 (at 66). AEP Ohio rests on the arguments presented on brief in this regard and hereby incorporates those responses. See Signatory Parties Initial Brief at 131-136; Joint Reply Brief at 84-88.

reason of resolving MRO test concerns (a matter that was separately challenged in AEP Ohio's application for rehearing), neither the proposed rates nor the Commission's reductions were tied to AEP Ohio's cost of providing generation service. The base generation rates are addressed in this section of argument and the MTR issues are addressed in the next section.

As it did on brief prior to the decision, OCC/APJN object (at 8) to the fixed generation rates because they are not tied to AEP Ohio's "cost of providing service to each rate class" and because the automatic rate increases violates the Commission's supposed precedent against rates that are not explicitly justified by cost. IEU also falls in line with this argument, claiming (at 46) that the automatic increases are "arbitrary" and were not demonstrated to be needed to cover the cost of providing service. IEU also misapprehends the *ESP I* decision as establishing a principle that rate increases cannot be adopted as part of an ESP without being strictly tied to costs of service.

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. As discussed further below, AEP Ohio witness Roush demonstrated that the proposed generation rates operate to eliminate historical cost subsidies and align remarkably well with market rates. The Opinion and Order found that the modified base generation rates were lawful and reasonable:

> The Commission has the authority to approve these modified automatic rate changes pursuant Section 4928.143(B)(2)(e), Revised Code, and believes the record demonstrates the automatic base generation rate increases are reasonable. The Non-Signatory Parties' arguments that the base generation increases lack justification are meritless, as there is not a statutory requirement nor is there a Commission mandate to require that the Companies conduct a cost of service study.
> Furthermore, the automatic increases replace the provisions of the EICRR and are fully bypassable, which should promote competition in conformance with the state's policies set forth in Section 4928.02, Revised Code. We believe the proposed base generation rate increases will also ensure rate stability and certainty for customers throughout the transition period.

(Opinion and Order at 42.) The Commission's application of R.C. 4928.143(B)(2)(e) is appropriate. The ESP statute explicitly grants the Commission without qualification the ability to approve automatic rate changes under R.C. 4928.143(B)(2)(e). While the opposing parties clearly do not like this statute, that is no basis upon which to reject or modify the Stipulation.

Further, the Commission's factual findings in this regard are supported by the record. AEP Ohio witness Roush explained the reasons supporting the market re-design of the generation rates:

> CSP and OPCo's last rate cases were in the early 1990's. Since that time the Company's rates have been unbundled into generation, transmission and distribution components and subsequently adjusted based upon percentage adjustments to the then current unbundled rates. As such, the generation rates reflect an amalgamation of very old cost relationships, including any historical levels of cross-subsidization among tariff classes. In addition, the Stipulation provides for the merger of CSP and OPCo and the post-merger Company is what is reflected in the stipulated ESP rates. Lastly, since the Stipulation will result in SSO rates beginning in June 2015 being based upon a competitive bid process, it is important to begin the transition to such market based pricing during 2012 through May 2015.

(AEP Ex. 2 at 9.)

With regard to the notion that the resulting base generation rates were not justified based on cost, Mr. Roush's Exhibit DMR-R1 showed 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 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.) AEP Ohio witness Roush empirically demonstrated that the rate changes being made in the generation rate re-design of the Stipulation are reasonable. (AEP Ohio Ex. 22.) He also showed that the proposed rates are justified both by the elimination of historical subsidies among rate classes but also as an appropriate transition to market-designed rates during the pre-auction period of the ESP term. (*Id.* at 4-6.)

Mr Roush also explained the second major reason why it is important to implement the rate re-design during the pre-auction period of the ESP term, through a comparison to FirstEnergy rates:

> [S]ince the Stipulation will result in SSO rates beginning in June 2015 being based upon a competitive bid process, it is important to begin the transition to such market-based pricing during 2012 through May 2015. Exhibit DMR-R2 shows a comparison of the First Energy EDU's Generation Service Rider (RIDER GEN) to AEP Ohio's generation service rates before and with the Stipulation ESP. Since RIDER GEN is based upon the conversion of the results of a bidding process into rates by class under a Commission approved methodology, one would expect the rate relationships (but not the absolute values of the rates) to roughly approximate the outcome of such a process for AEP Ohio As can be seen in Exhibit DMR-R2, the Stipulation rate relationships are significantly better aligned with 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.) Accordingly, the generation rate design is reasonable and appropriate from a cost basis and a market basis – fitting in well with SB 221's hybrid form of regulation known as an electric security plan.

Further, AEP Ohio witness Hamrock explained withdrawal of the nonbypassable generation riders and the proposal to establish fixed base generation rates:

> AEP Ohio's agreement to withdraw the nonbypassable riders is consistent with this transition to market. Elimination of these riders, along with implementation of a fixed base generation rate through the transition plan significantly improves rate stability and predictability for customers, while shifting risks to AEP Ohio. Of particular note, the significant environmental compliance investments AEP Ohio expects to make during the plan will not be associated with a rider designed to track those investments. Nor will AEP Ohio have a nonbypassable rider for recovering plant closure costs. AEP Ohio's agreement to provide fixed base generation rates without such variable rate mechanisms is a significant compromise by the Company, and provides customers with clear stable price signals during the plan.

(AEP Ex. 8 at 14.) By dropping the nonbypassable riders and establishing fixed base generation rates, the Stipulation transfers substantial risk from customers to AEP Ohio while simultaneously achieving one of the policy goals of R.C. 4928.02 and following the Commission's Mission, by improving rate certainty and stability for customers. (*See* R.C. 4928.02(A); and PUCO Mission Statement- Administratively Noticed Tr. Vol. VII at 1230.)

Finally regarding the base generation rates, IEU claims (at 48) that adoption of the base generation rates is an unjustified departure from the Commission's prior decision in AEP Ohio's *ESP I* cases. IEU's attempt to construct a conflict between the two cases is inapt. The Commission's March 2009 Opinion and Order in Case Nos. 08-917-EL-SSO et al. expressed discomfort for a different automatic rate increase proposal (15% automatic annual increases) at a different time (proposed in 2008 at the onset of the great recession) as part of a different package of proposals (2008 ESP filing for regulated rates with no transition to market) based on a different record (involving additional different facts and circumstances). Moreover, IEU's position is inherently flawed to the extent it would read the prior decision as writing R.C. 4928.143(B)(2)(e) out of the law. As demonstrated above, the record in the instant case supports the generation rate increases and the Commission issued clear findings supporting the modified generation rates. To the extent the Commission wants to further explain on rehearing the differences between the two cases, it can easily do so.

In short, the Opinion and Order's findings (at 42) that the fixed base generation rates would ensure stability and certainty and would promote competition were not only grounded in the ESP statute and state policy, but also are abundantly supported by the record.

## II. The Market Transition Rider does not violate any important regulatory principles or practices [FES Issue C.3, OCC Issue D, IEU Issues 18-20]

AEP Ohio's ESP II Application (at 7-8) proposed to "rationalize the rate relationships based upon the manner in which the market would price such loads using the same methodology used to develop the competitive benchmark price and applying it to the class load shapes." The Application (at 8-9) also proposed a Market Transition Rider (MTR) to facilitate the transition from the Company's current generation rates to the market-based SSO generation rates. The Stipulation adopts AEP Ohio's proposed rate re-design of generation rates, including the MTR. (Par. IV.1.b.)

The Commission found as follows with respect to the proposed MTR:

> The Commission finds that the proposed MTR is consistent with state policy by providing rate certainty and stability to AEP-Ohio customers

> while AEP-Ohio transitions its rate structure. The Commission believes that rate stability is an essential tool in order to promote economic development and ensure business retention in Ohio and the MTR ensures that customers will not face any uncertainty or abrupt changes through June 2015.

(Opinion and Order at 37-38.) Thus, the Commission's adoption of the MTR was justified by R.C. 4928.143(B)(2)(d), which authorizes charges for rate stability and certainty.

FES maintains (at 18-19) that the MTR is not authorized under the ESP statute, as does IEU (at 57). Both opponents claim there is a lack of record support for concluding that the MTR serves to stabilize rates as a properly-approved mechanism under R.C. 4928.143(B)(2)(d). Further, IEU argues (at 58) that the MTR violates Ohio policy by (i) sending price signals not based on pure market prices, which IEU also bootstraps into characterizing the MTR as impeding competition, and (ii) providing an anti-competitive subsidy since the nonbypassable nature of the MTR makes it a distribution charge in IEU's estimation. IEU also challenges the MTR by arguing (at 59) that the Commission does not sufficiently explain its decision, relative to RC 4903.09 or prior precedent, which IEU wrongly claims requires cost justification for generation rate increases. Finally, OCC/APJN requests (at 14-15), without challenging the shopping credits themselves, that the Commission prohibit collection of the MTR cost from customers in other rate classes. These arguments are misguided and improperly attempt to translate a discretionary matter of rate design into a legal challenge.

As an initial matter, AEP Ohio notes that IEU's "catch 22" rehearing arguments opposing both non-cost based G rates/pure market prices (at 45-50) and non-market prices (at 58) are conflicting, disingenuous and unfair. IEU also argues (at 57) that, "[w]hile it appears that the Commission approved the MTR pursuant to Section 4928.143(B)(2)(d), Revised Code, *** the Commission's decision did not point to anything in the record that supports these conclusions [regarding rate stability and certainty]." IEU's complaint is superficial insofar as IEU itself readily observed that it appears that the Commission relied on R.C. 4928.143(B)(2)(d). Of course, the Commission could further clarify this point on rehearing so it is perfectly clear; as further discussed below, there is plenty of record evidence supporting the conclusion that the MTR provides rate certainty and stability and promotes economic development.

IEU and FES are also wrong in claiming that the Commission's decision to adopt the MTR was not supported by the record, violates state policy and was not adequately explained as required by R.C. 4903.09. As demonstrated below, the Commission's findings and rationale are supported in the evidentiary record, promote state policy and was adequately explained. The Supreme Court of Ohio has held that, as long as there is a basic rationale and record supporting the Order, no violation of §4903.09, Ohio Rev. Code, exists. *Indus. Energy Users-Ohio v. PUC*, 117 Ohio St. 3d 486, 493 (Ohio 2008 990 ¶ 30) quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337; *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87, 90, 1999 Ohio 206, 706 N.E.2d 1255; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 163, 166, 1996 Ohio 296, 666 N.E.2d 1372. The above-quoted finding from the Opinion and Order easily satisfies the R.C. 4903.09 standard of providing a record-based explanation for adoption of the MTR.

AEP Ohio witness Roush explained the purpose and effect of the MTR rate design:

> Pursuant to Paragraphs IV.1.b and IV.1.c, the MTR as shown in Stipulation Appendix A is designed to facilitate the transition from CSP and OPCo's current generation rates to the market-based SSO Generation Service rates discussed above. The MTR is a nonbypassable rider designed to limit the first, second and third year changes in rates for all customer classes to uniformly accomplish 50% of the transition from current rates to market based rates. The MTR will end with the June 1, 2015 billing cycle. Any revenue shortfall that is produced by limiting the increases for certain customer classes is collected from those classes whose decreases are limited.

(AEP Ohio Ex. 2 at 11.)

Mr. Roush also explained another major reason why it is important to implement the rate re-design during the pre-auction period of the ESP term (to transition to a market rate structure), through a comparison to FirstEnergy rates:

> [S]ince the Stipulation will result in SSO rates beginning in June 2015 being based upon a competitive bid process, it is important to begin the transition to such market-based pricing during 2012 through May 2015. Exhibit DMR-R2 shows a comparison of the First Energy EDU's Generation Service Rider (RIDER GEN) to AEP Ohio's generation service rates before and with the Stipulation ESP. Since RIDER GEN is based upon the conversion of the results of a bidding process into rates by class under a Commission approved methodology, one would expect the rate relationships (but not the absolute values of the rates) to roughly approximate the outcome of such a process for AEP Ohio. As can be seen in Exhibit DMR-R2, the Stipulation rate relationships are significantly better aligned with 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.) Accordingly, the evidence of record supports the Commission's finding that the generation rate design is reasonable and appropriate – both in the context of comparison to cost of service and to market rate structure. Despite the criticisms of FES and IEU, the MTR is a valuable part of the Stipulation for customers to facilitate the transition from CSP's and OPCo's current generation rates to the market-based SSO generation service rates.

Further, as AEP Ohio witness Roush testified, his Exhibit DMR-R4 clearly shows that the intent and purpose of the MTR will be accomplished. Column (5) of Exhibit DMR-R4 shows the change in rates after the MTR compared to the change in rates before the MTR in Column (3). (AEP Ohio Ex. 22 at Exhibit DMR-R4.) For example, the change for the CSP GS-2 class before the MTR is a reduction of 2.35 cents per kWh and after the MTR is a reduction of 0.77 cents per kWh. (*Id.*) Conversely, the change for the CSP Residential class before the MTR is an increase of 0.60 cents per kWh and after the MTR is an increase of 0.30 cents per kWh. (*Id.*)

Fundamentally, the MTR manages the transition from today's rates (Point A) to the rates in June 2015 through May 2016 which will be based upon the results of a competitive bidding process (Point B). Rather than waiting until June 2015 and potentially subjecting customers to abrupt rate changes at that time, the Stipulation provides through the MTR a reasonable glide path through the MTR to get from Point A to Point B. Thus, the MTR is justified as being reasonable based on both cost and market relationships and the Commission's findings are supported by the record.

The MTR is essentially a rate design tool and the Supreme Court of Ohio has often recognized the Commission's "unique rate design expertise" and the "wide discretion" afforded to the Commission on rate design issues. *Green Cove Resort I Owners' Ass'n v. Pub. Util. Comm.*, 103 Ohio St. 3d 125, 129 (2004); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 540 (1993); *Gen. Motors Corp. v. Pub. Util. Comm.*, 47 Ohio St.2d 58, 351 N.E.2d 183 (1976). FES's and IEU's attempt to second-guess the Commission in approving this rate design mechanism does not constitute a proper basis for rehearing.

IEU also contends (at 58) that the MTR's nonbypassability makes it a distribution charge and, as such, it creates an anti-competitive subsidy. IEU's circular argument is a flawed syllogism (the nonbypassable aspect of the MTR makes it "distribution"; can't have a distribution charge for a generation service; therefore, the MTR charge is unlawful). 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. And 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. (Case No. 08-917-EL-SSO, October 3, 2011 Remand Order at 18.) The IEU's argument should again be rejected.

Finally, as referenced above, OCC/APJN requests (at 14-15), without challenging the shopping credits themselves, that the Commission prohibit collection of the MTR cost from customers in other rate classes. OCC/APJN's concern is unfounded and reveals a misapprehension of the facts. As demonstrated in AEP Ohio's workpapers related to its compliance tariffs (provided to OCC/APJN, Staff and other parties that requested them), the residential class does not pay for any of the shopping credits approved for the commercial and industrial customers – either the Stipulation's shopping credits or the expanded shopping credits ordered by the Commission. While the MTR rates did change from the proposed to the compliance version (in conjunction with the Commission's ordered reductions in base generation rate increases), OCC/APJN apparently misapprehends those changes as being related to the shopping credits. Residential customers do not pay for the shopping credits and have no standing to raise concerns about them. Accordingly, OCC/APJN rehearing argument 14 should be denied.

In sum, the MTR as adopted by the Opinion and Order is authorized under the ESP, is supported by record evidence and does not violate any important regulatory principle or practice.

## III. Ormet fails to provide a sufficient reason to warrant rehearing of the Commission's decision regarding the Load Factor Provision. [Ormet Issues 1-7]

Ormet claims that the Commission erred in its Order by relying on an "erroneous" figure that quantified the impact of the Load Factor Provision's ("LFP") 250 MW limitation on Ormet at $17 million per year.[2] Ormet's claim is based on a

[2] Ormet Application for Rehearing at 7.

mischaracterization of the Commission's Order. There is no basis to assume (as Ormet does) that the Commission critically relied upon the $17 million estimate or that the Commission would have taken different action if the projection were, in fact, updated to Ormet's new estimate of $28 million per year. The portion of the Order mentioning the $17 million figure that Ormet cites is merely the portion of the Order where the Commission summarizes Ormet's own position.[3] The Commission's rationale for its decision to approve the LFP is based on the fact that the LFP promotes economic development and rate stability and that the LFP is not discriminatory to Ormet because of Ormet's huge size and current unique arrangement that is tied to the world-wide price of aluminum.[4] The Commission's rationale did not turn on any specific quantification of the impact of the LFP on Ormet. Accordingly, Ormet's argument regarding the new quantification of the annual impact of the LFP on Ormet -- for which there is absolutely no evidentiary support-- does not warrant rehearing.

Further, if Ormet's new $28 million estimate (which is not supported by the record) is correct, then the reasonableness of the Commission's Order is enhanced rather than undermined. The LFP is a closed loop. That is, if Ormet receives a net credit of $28 million per year, then all other business customers of AEP Ohio pay $28 million per year in higher rates. Based upon Ormet's new estimate, over the 41-month term of the ESP, adoption of Ormet's position would cost all of the other AEP Ohio business customers $95.7 million.[5] While a tremendous windfall to the equity owners of Ormet, such a result would be bad for the Ohio economy and is not in the public interest.

[3] ESP Order at 37.

[4] ESP Order at 37-38.

[5] $28 million ÷ 12 = $2.33 million/month x 41 months = approx. $95.67 million.

Ormet cites the Load Factor Rider tariff sheet in AEP Ohio's Compliance Filing[6] for the proposition that the impact of Ormet's exclusion from the LFP has changed. Ormet also contends that AEP Ohio's testimony presented erroneous information. Ormet is factually wrong. The Load Factor Rider tariff sheet reflects exactly the same rates for the LFP that were set forth in the Stipulation filed in this proceeding. Specifically, page 4 of the Stipulation provides:

> For GS-3 and GS-4 customers, there will be a non-bypassable demand charge of **\$6.57/kW**-month and an initial energy credit of **\$0.01545/kWh** (the energy credit will be adjusted quarterly) to produce a net charge of \$0 quarterly. For GS-2 customers, there will be a non-bypassable demand charge of **\$3.29/kW-month** and an initial energy credit of **\$0.00228/kWh** (the energy credit will be adjusted quarterly) to produce a net charge of \$0 quarterly. (emphasis added)

In accordance with the terms of the Stipulation, the Load Factor Rider tariff sheet cited by Ormet reflects a demand charge of **\$6.57/KW** and an energy credit of \$0.**01545/KWh** to GS-3 and GS-4 customers. The Load Factor Rider tariff sheet also reflects a demand charge of **\$3.29/KW** and an energy credit of **\$0.00228/KWH** for GS-2 customers. Thus, the Load Factor Rider rates in AEP Ohio's Compliance Filing have not changed from the rates that the Commission reviewed in making its determination regarding the LFP in this case. And the same billing determinants were used throughout this case by AEP Ohio, from the application clear through to the compliance tariff filing. Introducing such new information on rehearing is improper, especially when Ormet is doing so without disclosing or explaining what it is doing. The billing determinants used by AEP Ohio throughout the case were not updated for any other customer and should not be done for

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[6] Compliance Tariffs of AEP Ohio ("Compliance Filing") at Original Sheet No. 495-1 (Dec. 22, 2011).

Ormet alone at this stage of the proceeding. The Commission's Order was based upon exactly the same Load Factor Rider rates that appear in AEP Ohio's compliance filing.

What Ormet appears to be relying on in conveying the extra-record and unsubstantiated $28 million impact is a change in its load – reflecting a higher demand based on increased production activity that ramped up in 2011. So, while business is booming for Ormet, its electricity bill will undoubtedly be higher. That is no surprise and, indeed, is a structural feature of Ormet's unique arrangement (they pay a higher effective rate when production increases). But Ormet's "apples-to-oranges" comparison does not demonstrate that AEP Ohio presented, or the Commission relied upon, faulty information. More to the point, it does not present a basis for rehearing the issue

Ormet also claims that the Commission erred by failing to address a number of Ormet's arguments.[7] However, the Commission is not legally compelled to address every detail of every argument of every party in an order. R.C. 4903.09 provides "[i]n all contested cases heard by the public utilities commission . . . the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Supreme Court of Ohio has stated that "[t]he purpose of R.C. 4903.09 is to provide th[e] court with sufficient details to enable [the court] to determine, upon appeal, how the commission

[7] Ormet Application for Rehearing ("The Commission erred by failing to explain how the elimination of the discount Ormet receives under its Unique Arrangement does not undermine the Unique Arrangement. . . ," "The Commission erred by failing to address Ormet's arguments that the exclusion of Ormet from the LFP violates the important regulatory principles regarding cost causation and cost shifting," and "The Commission erred by failing to address Ormet's arguments that exclusion of Ormet from the LFP violates the regulatory principles of promoting economic efficiency and reducing the growth rate of energy consumption.").

reached its decision."[8] The Court stated "[i]n order to meet the requirements of R.C. 4903.09... the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion."[9] In its Order, the Commission set forth the reasons behind its decision regarding the LFP in sufficient detail, citing policy justifications and Ormet's current unique arrangement. Thus, the Commission complied with the requirements of R.C. 4903.09 in making its finding approving the LFP.

Further, the Commission did adequately address Ormet's arguments, stating:

> The Commission finds Ormet's arguments to be without merit. While it is true that Ormet is not eligible to receive the LFP, the provision is not discriminatory towards Ormet, as Ormet's rates are set pursuant to its Unique Arrangement Case, not AEP-Ohio's SSO rates that other high load industrial and commercial customers fall under. Accordingly, as Ormet has its own unique arrangement plan which runs through the entire term of the proposed ESP, it is disingenuous for Ormet to proclaim its being treated differently from similarly situated customers when there are no similarly situated customers. Further, as a result of Ormet's Unique Arrangement Case, Ormet is already a beneficiary of the rate stability benefits the LFP is designed to create.[10]

The Commission's decision regarding the LFP is not "unlawful or unreasonable."[11] Neither is the decision "manifestly against the weight of the evidence and...so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty."[12] The Commission's rationale in determining that the LFP is

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[8] *Cleveland Elec. Illuminating Co. v. Public Utilities Com'n of Ohio*, 4 Ohio St.3d 107, 110, 447 N.E.2d 746 (1983).
[9] *MCI Telecommunications Corp. v. Public Utilities Com'n of Ohio*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987).
[10] ESP Order at 38.
[11] R.C. 4903.13.
[12] *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, (1975), 42 Ohio St. 2d 403, 423, 330 N.E. 2d 1.

not discriminatory towards Ormet is based on the fact that Ormet is not similarly situated to other customers. That rationale is supported by the record in this proceeding

Under Ormet's current unique arrangement, Ormet enjoys a substantial discount from AEP Ohio's tariff rates. Pursuant to Ormet's unique arrangement, Ormet received a rate discount of $60 million each year in 2010 and 2011.[13] Ormet can also receive a maximum discount of $54 million in 2012, $44 million in 2013, $34 million in 2014, $24 million in 2015, and $14 million in 2016.[14] This substantial discount is paid for by all other AEP Ohio customers, including commercial and industrial customers. In light of the fact that Ormet has been and will likely continue to be significantly subsidized by all other AEP Ohio customers, Ormet's arguments regarding the *Mahoning County Townships* case, cost causation and cost-shifting are disingenuous.[15] Ormet should not be entitled to reap the benefits of substantial discounts on AEP Ohio's standard service offer rates subsidized by all other customers and then complain that the Commission must strictly adhere to cost causation principles in this proceeding. If cost causation was the sole guiding principle in the Commission's ratemaking, then Ormet's heavily subsidized unique arrangement would be terminated.

Contrary to Ormet's insinuations,[16] the Commission's Order is not an attack on Ormet's current unique arrangement. Ormet's discount is connected to AEP Ohio's tariff rates, which are subject to change over time. Although AEP Ohio's tariff rates will increase as a result of the ESP (primarily the fuel adjustment clause due to the end of fuel

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[13] *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, Opinion and Order (July 15, 2009) at 9-11.
[14] Ormet Application for Rehearing at 9.
[15] Ormet Application for Rehearing at 13-16; 21.
[16] Ormet Application for Rehearing at 10-12.

deferrals), and therefore increase the rates that Ormet (along with other non-shopping AEP Ohio customers) will pay, Ormet's unique arrangement still permits Ormet to receive substantial discounts from those tariff rates during the term of the ESP. Thus, Ormet still receives protection from AEP Ohio's tariff rates that is not afforded to other AEP Ohio customers.

The Commission is correct in asserting that Ormet is not similarly situated to other customers because of its current unique arrangement. Ormet's arguments that the justifications for applying the LFP to other high load factor customers apply equally to Ormet[17] are undermined by the fact that Ormet currently receives rate protections that other customers do not enjoy. Further, since the passage of Senate Bill 3 in 1999, Ormet has been exempt from paying the kilowatt hour tax under R.C. 5727.81 that all other AEP Ohio customers must pay to fund state and local government. Ormet has always been treated as a unique customer, enjoying a series of special arrangements for its electric service rates paid for by all other AEP Ohio customers, as well as funded by state and local governments. It is reasonable to treat Ormet as unique in this proceeding as well. Accordingly, the Commission's finding that Ormet is not similarly situated to other customers is supported by the record. The Commission should deny Ormet's Application for Rehearing.

The fact that other AEP Ohio customers who qualify for the LFP may have a reasonable arrangement does not render the Commission's decision an error.[18] Ormet's huge 520 MW load and the nature of its unique arrangement wherein the amount of the subsidy it receives is tied to world-wide aluminum prices distinguishes Ormet from those

[17] Ormet Application for Rehearing at 19-24.
[18] Ormet Application for Rehearing at 12

customers. Applying the LFP to very large AEP Ohio customers like Ormet would frustrate the LFP's intended purpose of promoting economic development and providing rate stability.[19] The application of the LFP to Ormet would cost AEP Ohio's GS-2 customers approximately $11.9 million over the term of the ESP. This would serve to partially off-set the $10 million per year added benefit to the GS 2 customers which the Commission ordered when it increased the $10/MWh GS 2 shopping incentive from 1 million MWh to 2 million MWh. Adoption of Ormet's position would cost GS-3/GS-4 customers $50.9 million over the term of the ESP.[20] In other words, based upon the evidence of record, including Ormet in the LFP 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-Ohio, even though IEU-Ohio was not a signatory party.

Ormet criticizes the Commission for not addressing Ormet's suggestion to include the first 250 MW of Ormet's monthly peak load in the LFP.[21] But the Commission was correct in approving the LFP without modification. The inclusion of 250 MW of Ormet's monthly peak load in the LFP would still substantially skew the intended results of the LFP, again to the benefit of a single customer that already pays heavily subsidized rates. Even if the LFP applied to only the first 250 MW of Ormet's 520 MW load, the effect would still be an increase in the rates paid by all other AEP Ohio business customers of

[19] Direct Testimony of Stephen J. Baron Testimony (Sept. 13, 2011) ("Baron Testimony") at 6, line 8 though 7, line 3. *See also* Direct Testimony of Peggy Claytor on Behalf of the OMA Energy Group, Case Nos. 11-346 et al (Sept. 13, 2011) at 4, lines 1-8.
[20] Baron Testimony at 7, lines 16-20.
[21] Ormet Application for Rehearing at 13.

approximately $30 million.[22] Although this amount represents only about half of the windfall that Ormet would receive if the LFP applied to its entire load, $30 million would still be a significant windfall to Ormet shareholders, and a corresponding detriment to the Ohio economy as a whole.

The dramatic rate increase to other business customers that would result from applying the LFP to Ormet is counter to the LFP's intended purpose of promoting economic development and rate stability. Though Ormet may protest that the LFP does not promote economic development and rate stability for Ormet, the LFP serves to accomplish those objectives for other AEP Ohio commercial and industrial customers. Without the rate stability and affordability provided by the LFP during AEP Ohio's transition to market, high load factor commercial and industrial customers that are critical to Ohio's economy would be seriously harmed. Thus, the Commission decision to approve the LFP's 250 MW limitation serves to promote economic development and rate stability. Accordingly, the Commission should deny Ormet's Application for Rehearing.

## IV. The Generation Resource Rider does not violate any important regulatory principles or practices [FES Issues B.6 and C.4; IEU Issues15 and 16]

### A. Legal and policy support for GRR [FES Issue C.4; IEU Issues15 and 16]

FES claims (at 19-21) that the GRR is not authorized under the ESP statute and that a prior determination of "need" must be made prior to authorizing the charge. FES not only re-argues the law in opposing the GRR placeholder but also re-submits its policy objections to the GRR. Similarly, IEU objects (at 51-53) to the GRR as a "placeholder"

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[22] 250 MW/520 MW of Ormet peak load = 48%. 48% of $62.8 million = $30 million.

rider. 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. In any case, these arguments were raised on brief and disposed of by the Opinion and Order as being premature. As such, these alleged errors merely constitute re-argument of the merits and should be rejected.

It is permissible under R.C. 4928.143(B)(2)(b) and (c) for the Commission to establish the GRR as part of approving 2012-2016 ESP with an initial rate of zero; 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 for inclusion in the GRR as part of deciding a future rider case during the term of the ESP. For example, 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.

Moreover, under Paragraph IV.1.d (page 6) of the Stipulation, the Parties have reserved their right to contest or otherwise take positions in the separate future cases that will determine whether to establish a nonbypassable charge and the appropriate level of the charge through the GRR. The Stipulation's GRR provision specifies that establishment of the GRR does not constitute precedent for purposes of interpreting and applying R.C. 4928.143(B)(2)(b) and (c), and Parties reserve their right to contest or otherwise take positions in the separate future cases that will determine whether to establish a nonbypassable charge and the appropriate level of the charge through the GRR. Thus, upon adoption of the Stipulation (including the GRR provision), both the Parties and the Commission fully reserve their ability to support or oppose the future establishment of a non-zero charge for inclusion in the GRR. Conversely, rejecting the GRR would preclude the possibility that the Commission could subsequently approve the MR 6 shale gas project or the Turning Point solar project.

The Opinion and Order (at 40) properly dismissed IEU's and FES's GRR objections as being premature and properly found that establishment of the placeholder GRR mechanism does not violate any important regulatory principles or practices. As such, the rehearing arguments of IEU and FES regarding the GRR should be denied.

### B. The Commission has the discretion to organize its proceedings as it sees fit and determine how it will determine need for purposes of a nonbypassable surcharge under R.C. 4928.143(B)(2)(c) for the Turning Point project. [FES Issue B.6]

FES mistakenly argues (at 23-25) that the Commission is confused on the determination of need and the elements required to establish a charge under R.C 4928.143(B)(2)(c). However, it is FES and not the Commission that is confused. FES attempts to cast the Commission's understanding of the authorizing statutes as incorrect and use the Commission's language to assert the Commission is mistakenly applying the standard from R.C. 4928.64 to the surcharge in R.C. 4928 143(B)(2)(c)

FES is wrong to tell the Commission what it must consider in its determination of need under R.C. 4928.143(B)(2)(c). The Commission provided guidance in what it intends to look at in this area, but is not tied to FES interpretation of the parameters for the finding. It is true that R.C. 4928.64 provides an option for adding generation resourced but that does equate to the exclusive avenue. The Commission is well-versed in R.C. 4928 143(B)(2) and explicitly stated what it will look at to make that discretionary finding as part of its integrated resource planning process.

FES does not discuss the notation by the Commission that the decision approves the placeholder for the nonbypassable surcharge, but that, in order to include charges in that mechanism that Ohio Power must meet the burden set forth in R.C. 4928 143(B)(2). This is an appropriate and allowable organization of the docket by the Commission. The

Commission made clear that other decisions will be necessary to make the determination in these proceedings to charge a surcharge under R.C. 4928.143(B)(2), but that those decisions will come and be tied to these proceedings and this approval of the placeholder mechanism.

FES's limited view does not respect the Commission's authority to make findings in the most efficient manner. The Supreme Court of Ohio previously recognized the broad discretion of the Commission in managing its dockets to avoid undue delay and duplication of effort

> R.C. 4901.13 provides that the "commission may adopt and publish rules to govern its proceedings and to *regulate the mode and manner of all * * * hearings relating to parties before it*." "Under R.C. 4901.13 the commission has *broad discretion in the conduct of its hearings*." *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379, 10 Ohio Op. 3d 493, 500 N.E.2d 264, 273. "It 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*." (Footnote omitted.) *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560, 23 Ohio Op. 3d 474, 475, 433 N.E.2d 212, 214.

*Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St. 3d 15, 2000 Ohio 5, 734 N.E.2d 775 Emphasis Added. The Commission has the discrection pursuant to statute to organize its dockets. The Commission rules call for the consideration of need in the resource plan filing and the Commission recognizes its existing process for those decisions.

The Commission previously used another docket to make its finding of need for a R.C. 4928.143(B)(2) purpose. In the April 19, 2011 Opinion and Order in docket number 10-505-EL-FOR, *In the Matter of the Long-Term Forecast Report of Dayton Power and Light Company and Related Matters*, the Commission approved the need for a solar generation facility. (Finding 11) Specifically, the Commission described this portion of the agreement stating:

> In addition, the Signatory Parties agree that, based on resource planning projections submitted by DP&L pursuant to the alternative energy resource requirements in Sections 4928.143(B)(2)(c), and 4929(B)(2), Revised Code, there is a need for a 1.1 MW solar generation facility , known as Yankee 1, and for additional solar generation facilities during the LTFR planning period.

The Commission also stated in the Opinion that plans to build additional solar generating facilities will be addressed in future annual LTFR proceedings. The determination of need and incorporation of R.C. 4928.143(B)(2) was already a matter considered by the Commission for other utilities.

FES' attempts to portray the Commission's management of its dockets as confused are baseless and should be rejected. The Commission can clarify that satisfaction of the requirement of R.C 4928.143(B)(2) are appropriately found as organized by the Commission in its discretion over its dockets. The authorization for those findings are enabled by the Commission's actions in these proceedings.

## V. The Commission properly approved the Distribution Investment Rider. [OCC Issues F.1-5]

### A. R.C. 4928.143(B)(2)(h) is an appropriate basis for the DIR. [OCC/APJN Issue F.1]

OCC/APJN's opposition to the DIR causes it to challenge every aspect of the Commission's approval of the mechanism, regardless of the Commission's justification for its decision. OCC/APJN argues that the approval of the DIR as an incentive ratemaking mechanism is improper. OCC/APJN bases this argument on its opinion of the benefit of the DIR and non-record citations to policies. OCC/APJN challenged the

DIR throughout the proceeding; therefore it is no surprise that it does not support the need for implementation of the DIR. However, it is the Commission making the decision in this case and not OCC/APJN And the Commission properly recognizes the benefits and need for the DIR in its Opinion and Order (see 44-46).

OCC/APJN incorrectly asserts that the DIR cannot be considered an incentive ratemaking mechanism because it provides no benefit to ratepayers. Again this is nothing but an assertion from OCC/APJN without any facts or evidence of its own for the record. Through the rebuttal testimony of AEP Ohio President Joseph Hamrock, there is testimony 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 cited in the Opinion and Order at 43-44.) 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.) The hearing and Commission order applying that factual evidence supports the 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 benefits supported by Mr. Hamrock does not negate the evidence provided or the Commission's findings in support of the DIR. The Commission states its concerns with reactive asset management programs and indicates its support for the proactive asset management program discussed by Mr. Hamrock. (Opinion and Order at 46.) The approval of the DIR is based on the only evidence of record on the matter and does not violate R.C. 4903.09 as asserted by OCC/APJN.

OCC/APJN improperly attempts to supplement the record with citations to FERC policy statements on natural gas pipelines[23], asserting they represent the general industry meaning of "incentive ratemaking." The items cited are not part of the record and there is no ability to determine if they represent the general industry definition of "incentive ratemaking." From the limited information provided, the FERC policy statements appear to only relate to a specific gas pipeline discussion. It is inappropriate to seek to enter a FERC program into this record on rehearing. The Commission should deny the grounds for rehearing and the references to the FERC policy statements Either way, even the FERC policy paper leaves it to the regulatory bodies to determine the details. The exercise of power by the Commission in this case is the regulatory body and the benefits it has determined would still be basis of any incentive ratemaking the Commission may choose to apply. Therefore, even under the inappropriate FERC standard being raised by OCC/APJN, the statutory basis for the DIR is met.

OCC/APJN's disagreement with the evidence weighed and determined by the Commission does not constitute an error by the Commission in need of a remedy on rehearing. The Commission order adequately establishes the support for approval of the DIR mechanism under R.C. 4928.143(B)(2)(h)[24] and the fact that the Commission did not

23 OCC/APJN Application for Rehearing at 20-24.

24 The Commission could also provide alternative grounds for approval of the mechanism under R.C. 4928.143(B)(2)(d) as a simple carrying charge under that provision of the statute.

agree with OCC/APJN on the issue does not provide grounds for rehearing. Accordingly the Commission should deny rehearing on this issue and uphold the approval of the DIR.

### B. The record factually supports approval of the DIR under R.C. 4928.143(B)(2)(h).

#### 1. The Commission examined the reliability of the distribution system. [OCC/APJN Issue F.2]

OCC/APJN also takes issue with the weight of evidence relied upon by the Commission applying R.C. 4928.143(B)(2)(h) in examining the reliability of distribution system. OCC/APJN asserts that the Commission failed to show it satisfied this requirement. OCC/APJN makes this claim even though it cites to no evidence it offered to challenge the reliability of the system to call it into question. The argument raised seeking rehearing amounts to nothing more than "what if" speculation, without any evidence offered to weigh against the evidence offered.

OCC/APJN's argument that the Opinion and Order violates R.C. 4903.09 is without merit. The justification provided by OCC/APJN is not even applicable to the Commission's actions in this case. OCC/APJN cites to *Motor Service v. Pub. Util. Comm.* (1974), 39 Ohio St.2d 3 in footnote 61 of its Application for Rehearing in support of its position that the Commission statute does not comply with the statutory requirements. There is no case under that citation. AEP Ohio will assume that OCC/APJN intended to cite the *Forest Hills* opinion found at 39 Ohio St. 2d 1 (1974). In the *Forest Hills* opinion the Commission did its own research after the hearing taking notice of items not referenced at the hearing. That is not the same situation in this case. Here the Commission relied upon the testimony of both a company and Staff witness concerning the reliability status of the distribution system. The parties had a full opportunity to probe the depth of that factual offering at the time of the hearing and were on notice of the examples those witnesses were relying upon for their positions.

OCC/APJN has no record basis to contradict the evidence of record relied upon by the Commission in its examination of the reliability of the distribution system. The only evidence of record OCC/APJN attempts (at 25) to suggest Staff was not knowledgeable about the basis for the DIR, citing testimony of Staff witnesses not offered to support the DIR. The obvious problem with this criticism is that the Staff offered witness Baker to support the DIR, not Hecker or Fortney. Mr. Hecker did testify that he had not performed a reliability study, but his testimony was offered to support the storm damage recovery mechanism not the basis of the DIR. (Tr. IX at 1656.) Mr. Fortney answered questions that were being asked about the unsponsored testimony of another Commission employee and cannot testify as to what Ms. McCarter did or did not do. OCC/APJN attempts 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.

The evidence the Commission relies upon in the Opinion and Order is from the evidentiary hearing. OCC/APJN's argument that the Commission's decision violates R.C. 4903.09 ignores the record from which the Commission bases its ultimate decision. The Commission should not entertain the request for rehearing and, if anything can simply clarify that it relied upon the un-rebutted Company testimony to fulfill its examination of the reliability of the distribution system.

**2. The Commission properly examined customer and company expectations. [Reply to OCC/APJN (F)(3)].**

OCC/APJN and IEU incorrectly argue that the Commission filed to meet the requirements of the statute by not finding the expectations of the customer and the Companies are aligned. OCC/APJN made this same argument in its initial post-hearing brief 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. (*See* OCC/APJN Initial Brief at 52.) As stated in the AEP Ohio's reply brief, the Company appreciates OCC/APJN position that it is doing a good job and satisfying its customers' expectations on service, but their praise ignores the point of the request for the DIR. As indicated in the record AEP Ohio faces an increasing number of failure rates on its aging equipment. (AEP Ex. 19 at 4.) And 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 ensuring service levels can be maintained.

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.) 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 Commission's decision shows that it acknowledged 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 the Commission blessed the move to a proactive program because it recognizes the importance of maintaining a reliable system and that the DIR mechanism is a way to maintain current and meet those future expectations in line with R.C. 4928.143(B)(2)(h).

### C. The Commission approval of the DIR is needed and appropriate. [OCC/APJN Issue F.4]

OCC/APJN raise a combination of some of the arguments raised above to assert that the DIR is no an appropriate incentive mechanism because there is no reason to incent AEP Ohio to move from a reactive to a proactive asset replacement strategy. This argument is without merit and rehearing should be denied.

OCC/APJN's argument that AEP Ohio does not need an incentive to invest in its distribution system ignores the record evidence The testimony of AEP Ohio President Hamrock cited above states that the DIR enabled, "the opportunity to accelerate replacement of key assets that improve reliability." (Tr. XII at 1992.) This argument relies upon the mistaken belief that the DIR will provide no benefit. As shown above this argument is off-base and is without credibility The Commission recognized the need for AEP Ohio to move to a proactive system and the evidence it relied upon shows that the DIR is a tool to meet that stated Commission goal. Accordingly the grounds for rehearing should be denied.

### D. The Commission approval of the DIR is not retroactive ratemaking. [OCC/APJN Issue F.5]

OCC/APJN attempt a new approach to attack the Commission's approval of the DIR, asserting that collection constitutes retroactive ratemaking. OCC/APJN assert that because the carrying charge set to be collected under the DIR could relate back to previous investment that it is an improper retroactive rate mechanism. OCC/APJN's argument is fundamentally flawed.

As approved by the Commission, the DIR is a distribution mechanism that allows an incentive on distribution-related investment. R.C. 4928.143 provides for recovery of certain distribution mechanisms. The rate base is typically updated to reflect the current balance of rate base when conducting a distribution rate case. This is not retroactive ratemaking, but is simply a reflection in rates of actual investment without the normal regulatory lag. A distribution mechanism under R.C. 4928.143(B)(2)(h) that prospectively allows for the establishment of a carrying cost on plant investment before it is included in rate base is another legitimate accounting mechanism to recognize plant investment and not a retroactive collection of some type of cost or expense.

OCC/APJN's attempts to define R.C. 4928.143(B)(2)(h) as illegally validating retroactive rate making is inappropriate. The Commission should reject OCC/APJN's request for rehearing on this issue.

## VI. AEP Ohio's previously-approved minimum stay requirements and switching fees are reasonable and lawful, as confirmed by the Opinion and Order [FES Issue C.9]

FES contends (at 35-37) that the modified Stipulation unreasonably incorporates barriers to competition, including the switching fees and minimum stay requirements previously approved by the Commission. The Opinion and Order (at 48) found that FES failed to demonstrate any violation of Commission or state regulatory requirements and concluded that the pertinent provisions are reasonable in comparison to other Ohio

EDUs. FES has failed to demonstrate that the minimum stay requirement and switching fees constitute a barrier to competition and its rehearing argument should be rejected.

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. The Opinion and Order so found and that finding should not be modified on rehearing.

## VII. The Commission's Opinion and Order should not be modified to create a more restrictive corporate separation process. [FES Issue C.8; IEU Issue 24]

FES seeks further Commission modifications to the corporate separation process to require more process, more information, and more requirements to ensure separation occurs timely under FES' preferred terms. (FES Application for Rehearing at 33-35.) Its requests are unrealistic and should be denied. As stated in the Company's application for rehearing the disparate treatment of the Company compared to Duke Energy in its ESP proceeding is the inappropriate element of the corporate separation issue. IEU argues that the corporate separation and asset transfer process is not the same thing and seeks independent approval of the two matters. (IEU Application for Rehearing at 65-66). FES's and IEU's further proposed modifications would take the order deeper into the untimely abyss of inaction and confusion, as opposed to closer to a consistent Commission application of the corporate separation provisions.

FES' and IEU's requests are unreasonable and should be denied. IEU appears to only seek more bites at the apple to oppose and slow down the process of corporate separation and asset transfer. The Commission has the ability to organize its dockets and handle matters efficiently. A Commission order that both areas are satisfied is appropriate in light of the application of the rules to other utilities and in appreciation for the schedules reflected in the Order. FES requests the Commission to order the Company to provide all necessary information to make its decision and to hold a hearing. FES' recommendation presupposes certain information and hearing is needed. If the Commission determines differently then broad declarations in the ESP docket are unnecessary. FES also seeks to force its preferences for competitive auctions regardless of the reality the Company may be facing in its corporate separation efforts. The Commission should act as the regulator and not fall prey to the preferences of a marketer like FES that is focused on one outcome. Thus, the preferences of FES, a non-signatory party, requiring the auction to move forward and protect its individual interest without the benefit of assessing the situation at that time should be avoided. FES' and IEU's request for rehearing in this area should be denied.

## VIII. The Pool Modification Rider does not violate any important regulatory principles or practices [FES C.5; IEU Issue 17]

FES again attacks the legal authority for the PMR but also recommends (at 21-23) that the Commission render the charge bypassable on rehearing. Similarly, IEU objects (at 51, 54-55) to the PMR as a "placeholder" rider. These arguments were raised on brief and merely constitute re-argument of the merits. The Opinion and Order (at 50) modified the PMR to only allow a request for recovery to the extent the impact exceeded $50 million and found it was authorized to establish a placeholder PMR under R.C. 4928.143(B) Because they were already considered and rejected by the Opinion and Order (and based on the "placeholder" precedent stated above in connection with the GRR), IEU's and FES's bids to further modify the PMR should not be entertained.

The Commission imposed a substantial burden on AEP Ohio with respect to any future PMR filing:

> If and when AEP-Ohio seeks recovery under the PMR, it will maintain the burden set forth in Section 4928.143, Revised Code. In addition, the Commission finds that in the event AEP-Ohio seeks recovery under the PMR, AEP-Ohio must first demonstrate the extent that the pool modification or termination benefited the ratepayers and the extent that these costs and/or revenues should be allocated to Ohio ratepayers. Further, AEP-Ohio must demonstrate to the Commission that any recovery it seeks under the PMR is based upon costs which were prudently incurred and are reasonable

(Opinion and Order at 50.)

It would be unreasonable to further modify or restrict the PMR at this time. The Commission has fully reserved challenges to the future PMR filing, if any, and has imposed a substantial burden of proof on AEP Ohio in this regard. The IEU/FES arguments on rehearing are premature and otherwise misguided and should be rejected.

**The Opinion and Order's resolution of capacity pricing issues (Case No. 10-2929-EL-UNC)**

## IX. Based on record evidence and a fully explained rationale, the Commission lawfully and reasonably approved the two-tiered capacity discount as the state compensation mechanism. [IEU Issues 8-11; FES Issues C.1, C.2 and C.7;]

### A. IEU's Arguments That the Capacity Charges Authorized by the Commission Are Unlawfully Arbitrary, Retroactive, Outside the Commission's Authority, and Discriminatory are Without Merit. [IEU Issue 8]

IEU contends, at 25, that there is no evidence in the record that explains the basis for the $255/MW-Day charge for capacity other than the set-aside capacity (that is available at the RPM price). In addition, IEU claims, also at 25 (and at note 50), that the $255/MW-Day capacity pricing is somehow being retroactively applied. At 26-27, IEU argues that it is beyond the Commission's authority to establish capacity pricing. Moreover, IEU asserts, at 25 and 27-29, that the $255/MW-Day capacity pricing is unlawfully discriminatory. As explained below, these arguments are baseless.

#### 1. Record Basis for $255/MW-Day Capacity Pricing

IEU's claim that there is no record basis for the $255/MW-Day rate for capacity supplied above the RPM set-aside amounts 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. In short, the reasonableness of the $255/MW-Day price for non set-aside capacity is supported by the cost analysis that Dr Pearce provided.

Moreover, the Signatory Parties' proposed resolution of the capacity charge dispute, which the Commission adopted, is a reasonable result as part of the package of arm's length bargaining settlement terms contained in the Stipulation Indeed, the hybrid solution of part RPM-based and part cost-based pricing resolves the disparate litigation positions of the parties through a classic middle ground compromise; this resolution is inherently reasonable.

**2. No retroactive application of $255/MW-Day capacity pricing**

There is no retroactive application of the $255/MW-Day price for capacity in excess of RPM set-aside amounts of capacity. The $255/MW-Day is applicable to capacity purchased from AEP Ohio and provided to suppliers beginning in 2012, not to capacity suppliers purchased from AEP Ohio after the Stipulation was filed or before the Commission issued its Opinion and Order.

**3. Commission authority to establish capacity pricing**

IEU's contention on rehearing that the Commission does not have jurisdiction to establish capacity prices, pursuant to a state compensation mechanism, and therefore did not have authority to adopt the Stipulation's two-tiered capacity pricing provisions, is contradicted and refuted by IEU's own prior arguments in this case In a January 14, 2011 filing in that proceeding, IEU argued at length that the Commission does have jurisdiction to establish rates providing for capacity cost recovery. *See* IEU's

Memorandum Contra Application for Rehearing, at 5-10, Case No 10-2929-EL-UNC (January 14, 2011).

Indeed, IEU characterized the proposition that the Commission lacks jurisdiction to set rates for capacity compensation as "fundamentally defective." (*Id.* at 5.) IEU noted that the Commission previously has rejected the argument that a specific grant of authority is required before it can make a determination that has significance for purposes of implementing a requirement approved by FERC. (*Id* at 8.)

Specifically, IEU noted that in AEP Ohio's first ESP proceedings, Case Nos. 08-1729- and 08-1730-EL-SS), AEP Ohio asked the Commission to approve a provision that would block retail customers from participating in PJMs demand response programs. One of the parties in the ESP proceedings argued that 18 C.F.R. Section 35.28(g) prohibited the Commission from granting AEP Ohio's request, based on the following text:

> Each Commission-approved independent system operator and regional transmission organization must permit a qualified aggregator of retail customers to bid demand response on behalf of retail customers directly into the Commission-approved independent system operator's or regional transmission organization's organized markets, unless the laws and regulations of the relevant electric retail regulatory authority expressly do not permit a retail customer to participate.

The Commission rejected the notion that it lacked jurisdiction because the General Assembly had not delegated specific authority to do so, responding as follows:

> The Commission finds that the General Assembly has vested the Commission with broad authority to address the rate, charges, and service issues of Ohio's public utilities as evidenced in Title 49 of the Revised Code. Accordingly, we consider this Commission the entity to which FERC was referring in the Final Rule when it referred to the 'relevant electric retail regulatory authority.' We are not convinced.... that a specific authority to determine whether or not Ohio's retail customers are permitted to participate in the RTO's demand response programs.

*Id.*, Opinion and Order, at 57-58 (March 18, 2009).

IEU contended in its January 14, 2011 filing in Case No. 10-2929-EL-UNC that the same logic applies to, and confirms, the Commission's authority to establish rates for capacity, pursuant to the State compensation mechanism option that FERC approved pursuant to Section D.8 of Schedule 8.1 of the PJM Reliability Assurance Agreement.

IEU 's arguments on rehearing that the Commission does not have the authority to establish rates for capacity that AEP Ohio provides to CRES providers are baseless. In addition, IEU should be estopped from making those arguments in light of the contrary positions it already advanced in this proceeding

### B. The two-tiered capacity charge promotes retail shopping [FES Issues C.2 and C.7; IEU Issues 9 and 10]

FES again argues (at 28-30) that the RPM-priced set-aside levels operate as unlawful caps on shopping. IEU similarly maintains (at 29-36), as it also did on brief and during the hearing, that the two-tiered capacity discount was designed by AEP Ohio to limit shopping and asserts that no headroom exists to stimulate competition, concluding that customer choice "is thwarted" by the Stipulation. FES also laments that the auction-based SSO will not be fully implemented until mid-2015 but fails to demonstrate any legal requirement for doing so.

As a related matter, FES continues to argue (at 26-28) that CRES providers have relied on their expectation of receiving an endless supply of capacity resources from AEP Ohio at RPM prices and, therefore, are entitled to receive what they anticipated receiving. FES also second-guesses the Commission's assessment of the record (at 30-33) by claiming that AEP Ohio "invented its capacity costs" and maintaining that the testimony of FES witness Schnitzer provides the only credible evidence of capacity costs. These criticisms are without merit.

The Opinion and Order properly found the capacity prices to be reasonable based on the record:

> [T]he Commission is persuaded that the $255/MW-day capacity price negotiated in the Stipulation is a reasonable compromise given the evidence presented in this proceeding. *** [T]he CRES providers as well as other Signatory Parties endorse the two-tiered capacity pricing and the transition to market faster than could otherwise be accomplished as part of an MRO, as part of the rationale for entering into and supporting the Stipulation. Further, the record in this proceeding provides a range of possible capacity costs, from a low of $57 35/MW-day, according to FES, to a high of $355/MWday, claimed by AEP-Ohio. However, one of the key aspects of the record evidence demonstrating the reasonableness of the $255/MW-day interim capacity charge of the Stipulation is the testimony of one of FES's witness. The witness specifically acknowledges that with an adjustment for deferred fuel his "maximum" capacity charge for AEP-Ohio would be more than $200/MW-day (Tr. VII at 1457-1459). Thus, the evidence presented at hearing demonstrates that the $255/MW-day interim capacity charge is within the range of reasonableness, particularly in light of the fact that it is one component of an extensive settlement package that includes components which benefit the public and could not otherwise be achieved in a fully litigated proceeding.

Thus, the Commission fully considered the record and explained its record-based rationale for concluding that the two-tiered capacity charge is reasonable. The arguments raised by FES and IEU amount to nothing more than second-guessing the Commission's assessment of the evidentiary record and should be rejected.

For example, RESA witness Ringenbach testified that her company (Direct Energy) currently is making competitive offers in the market based on the Stipulation's $255/MW-Day price. (Tr. IV at 544.) In addition, AEP Ohio witness Allen, in his rebuttal testimony, reported that in excess of 1,500 customers had switched to a CRES after September 7, 2011, in classes that had exceeded the initial RPM set-aside. (AEP

Ohio Ex. 20B at 8-9.) Thus, the evidence of record supports the conclusion that shopping will continue under the Stipulation's two-tiered capacity discount structure.

Second, using data relied upon by FES witnesses Schnitzer (FES Ex. 3 at Ex. MMS-4), Mr. Allen, also on rebuttal, showed that there is potential "headroom" between the stipulated ESP prices and market prices under both RPM priced capacity and $255/MW-day priced capacity. He explained that this "headroom" is the amount remaining, after deducting market costs, that a CRES provider has available to cover overheads and margins. He further observed that additional "headroom" would be available to CRES providers if they have access to energy supplies at a cost below market, such as from owned assets or bilateral contracts. Tables 1 and 2, at page 8 of Mr. Allen's rebuttal testimony, provide the results of his analysis.

Mr. Allen also pointed out that CRES providers also have the option to structure multi-year contracts with customers that could allow them to purchase capacity at $255/MW-day in 2012 and 2013 and at RPM in the remaining years of the contract depending upon the customer's position in the RPM set-aside queue. For example, a CRES provider could offer a customer a 41-month contract starting in January 2012 to a customer that received an RPM set-aside allotment in January 2013. Under this scenario a CRES provider could offer customers a 5% discount to the price to compare and still have available headroom of approximately $5/MWh as shown in CONFIDENTIAL Exhibit WAA-R2A to AEP Ohio Ex. 20(A).

Third, Dr. Lesser also very effectively refuted the contention that the Stipulation's $255/MW-Day capacity price would cap shopping. (*See* FES Ex. 2 at 35-38.) He testified that, if one assumes that AEP Ohio's embedded capacity costs are

$355/MW-Day, AEP Ohio's proposed 2012 ESP SSO generation rates will under-recover by $50 million the $949 million of non-shopping embedded costs. (Tr. VII at 1375-1377.) Consequently, he conceded that, on a percentage basis the under-recovery of capacity costs is, approximately, only 5 1/2 % and that the Stipulation's 2012 SSO rates would recover 94.5% of the $355/MW-Day capacity costs. (*Id.* at 1377.)

Although Dr. Lesser did not convert the 94.5% of $355/M-Day into a final figure on the stand, the simple arithmetic shows that it would be $335.5/MW-Day (94.5% x $355). In other words, Dr. Lesser's exercise that he presents on pages 35-38 and in Tables 7 and 9 of his Direct Testimony shows that, even under his analysis, the Stipulation's 2012 ESP generation prices would recover through SSO rates over $335/MW-Day. That is $80/MW-Day more than the $255/MW-Day that the Stipulation capacity price would allow AEP Ohio to realize from capacity sales to CRES providers. Clearly, under Dr. Lesser's analysis, the $255/MW-Day Stipulation capacity price provides, by itself, substantial head room to CRES providers. Just as clearly, the Stipulation's $255/MW-Day creates no barrier to, or cap on, shopping.

When IEU witness Murray was questioned about his opinion, based on a statement by AEP Vice President Richard Munczinski during a conference call with investment analysts (Tr. XI at 1859), that shopping would be constrained above the Stipulation's RPM-priced set aside amounts of capacity, he conceded that AEP Ohio had provided the following context and explanation in a discovery response prepared by Mr. Munczinski,:

> In a strict economic sense, any increased price input for providing service acts as a constraint on retail shopping – albeit an appropriate cost based constraint. While shopping might increase if AEP Ohio provided free capacity for use by CRES providers, that would be inappropriate. The stipulated capacity rate of

> $255/MW-Day is reasonable and supported by the filed testimony. See the testimony of Company witnesses Munczinski [which Mr. Nelson adopted] and Pearce.

(*See* AEP Ohio Ex. 15.) The purpose of the Stipulation's provision for capacity pricing for shopping load is to provide some measure of compensation for AEP Ohio's capacity costs while providing substantial and increasing amounts of capacity at prices discounted to levels substantially below cost.

For his part, Mr. Murray subsequently acknowledged on cross examination that the Stipulation does not impose a literal or absolute cap and that his use of the cap terminology is based on economic considerations. (Tr. XI at 1883.) He also admitted that any projection that there will not be shopping based on the $255/MW-Day capacity charge is based on a series of factors that are not known and any predictions in this regard may simply end up being wrong. (Tr. XI at 1863, 1886-1887.) Moreover, he admitted that the capacity charge paid by CRES providers who do not self-supply capacity to support their retail generation service is only one factor that drives the price of the CRES provider's retail price offers. (Tr. XI at 1863.)

The reality is that the Stipulation's RPM set-aside levels foster considerable potential for the expansion of competitive market-based rates for significant retail loads within AEP Ohio's service territory. The 2012 set-aside of 21% of AEP Ohio total retail load is approximately 10,000 GWh, which is roughly equal to the entire 2010 load of Toledo Edison Company. The potential 2013 set-aside of 31% of AEP Ohio total retail load is approximately 15,000 GWh, which is roughly equal to the entire 2010 load of Dayton Power & Light Company. And the 2014-2015 set-aside of 41% of AEP Ohio total retail load is approximately 20,000 GWh, which is roughly equal to the entire 2010 load of Duke Energy-Ohio. (*Id.* at 12-13.) Further, as discussed above, the evidence of record demonstrates that retail shopping has continued to expand after the Stipulation was signed – even above the RPM set-aside levels. Thus, the Commission should ignore any rhetoric that falsely claims the Stipulation imposes caps on shopping.

### C. The two-tiered capacity pricing is not discriminatory [FES Issues C.1 and C.7; IEU Issue 8]

FES argues (at 14-16) that the two-tiered capacity discount and shopping credit provisions are discriminatory, merely because they are not available to all customers. Similarly, IEU argues (at 25-28) that the capacity charges are discriminatory, arguing that similarly situated customers will be charged different prices based on when they shopped. These arguments are without merit. R.C. 4905.33 only prohibits discriminatory pricing for "like and contemporaneous service" rendered "under substantially the same circumstances and conditions."

If (as here) "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 discrimination argument regarding AEP Ohio's capacity set-aside is disingenuous and rehearing should be denied.

**D. IEU's contention that the capacity pricing that the Commission authorized permits AEP Ohio to unlawfully collect transition revenues in violation of S.B. 3 is without merit. [IEU Issue 11]**

IEU contends (at 36-39) that the capacity pricing that the Commission approved in its Opinion and Order unlawfully allows AEP Ohio to collect transition revenues outside of the market development period and after the transition period established by S.B. 3. While acknowledging (at 37) that the Commission considered and rejected IEU's S.B. 3-based objections to the Stipulation's capacity pricing provision in its Opinion and Order, IEU claims that the Commission has nevertheless erred because it ignored that its ESP authority is strictly limited to retail electric service. Accordingly, IEU's arguments are two-fold. First, the capacity pricing violated S.B. 3's prohibition, in R.C. 4928.38, against recovery of stranded costs after the end of the market development period. Second, the Commission cannot set wholesale capacity pricing as part of an ESP. As explained in greater detail below, IEU's first argument is incorrect because R.C. 4928.38 does not apply to wholesale capacity prices. Its second argument misses its mark because the capacity prices are not established as part of the ESP. Rather, they are being set through the Commission's resolution of Case No. 10-2929-EL-UNC, which is a proceeding separate and apart from the ESP proceeding.

**a. R.C. 4928.38 applies to retail generation prices, not to wholesale capacity prices, and AEP Ohio is not collecting transition revenues through wholesale prices for capacity.**

IEU claims that the capacity pricing that the Commission approved in its Opinion and Order conflicts with provisions of S.B. 3 that prohibit recovery, through generation SSO rates, of stranded costs after the end of the transition period The Commission properly rejected this argument in its Opinion and Order (at 55)

Under SB 3, electric utilities were given an opportunity to recover transition revenues that could include the amount of generation investment that would not be recoverable in a competitive market. The determination of whether such investments were stranded under SB 3 was done based on an analysis of 2000 vintage information as to whether the net book value for generation assets exceeded the market value of the assets (using forward market price estimates for electricity at that time). As part of a settlement in Case No. 99-1729-EL-ETP and 99-1730-EL-ETP (ETP Settlement), AEP Ohio agreed not to pursue SB 3's opportunity for recovery of stranded generation investment through its SSO generation rates.

First, capacity charges are wholesale prices. The electric transition plan cases from 2000 did not establish wholesale capacity prices for CSP and OPCo, nor could they have done so. As Mr. Nelson explained on rebuttal, the ETP cases were retail cases and they have no bearing on a wholesale rate charged to CRES providers. (AEP Ohio Ex. 21 at 2.) Accordingly, any restrictions on recovery of generation costs through retail pricing that resulted from S.B. 3 and the Commission's 2000 orders in Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP are simply inapplicable to wholesale capacity pricing.

Mr. Nelson explained on rebuttal that in the numerous proceedings before this Commission involving the AEP Ohio companies since the 2000 ETP cases, the Commission has not excluded any significant generation plant costs from the Companies' retail SSO rates. On the contrary, Mr. Nelson noted that in the cases after the ETP cases, including the 2004 RSP cases, the subsequent RSP "4%" cases, the initial ESP proceeding and the Remand proceeding for that ESP proceeding, the Commission supported specific recovery of environmental compliance investments that have allowed AEP Ohio's generation units to operate. Specifically, in those cases AEP Ohio presented evidence that it had spent over $2 5 billion since 2000 on projects that enabled AEP Ohio's generating plants to comply with environmental requirements. (AEP Ohio Ex. 21 at 2-3.)

Similarly, IEU witness Murray alleges that the Stipulation contains a "second transition period" in violation of SB 3 (IEU Ex. 9A at 10-15.) But Murray agreed that stranded costs under SB 3 were determined based on then-forward projection of likely market prices and net book value of plants at that time. (Tr. XI at 1868.) Both factors have changed and AEP Ohio submits that any determination under SB 3 of whether or not a particular plant is stranded in the competitive market has no bearing on the current issues under the Stipulation

IEU witness Murray agreed that forward market prices can and do change. (*Id.* at 1869.) He also acknowledged that the environmental costs based on the then-current view of environmental regulations would have been reflected in the forward market prices used at that time. Thus, not only does IEU use an outdated and irrelevant basis for concluding that that AEP Ohio's cost-based capacity charge amounts to stranded investment, it also applies a measure of market prices for capacity that did not exist during SB 3's transition period (*i e.*, the RPM pricing).

Mr. Nelson also explained on rebuttal that the ETP Settlement dealt with the market development (transition) period from 2001 through 2005, and envisioned that the Company's generation would be at market in 2006. Because of high market prices in 2006, the Commission encouraged the Company to file a rate stabilization plan to keep the retail customer from experiencing substantial increases in rates. (AEP Ohio Ex. 21at 7-11). Also, during this period AEP Ohio was encouraged to take over the service territory of Monongahela Power in Ohio to protect their customers from market prices for generation service. It was also around this time period that Ormet petitioned to return to service by AEP Ohio to avoid these high market prices as previously discussed.

Perhaps the most glaring error in IEU's stranded cost argument is that it ignores the fact that the entire regulatory regime for standard service offer pricing has substantially changed with the enactment of SB 221 in 2008. During the period 2001 through 2008, the Company's generation was well below market and the Company's retail customers benefited greatly. Yet, even though SB 3 was premised on the ability to charge market rates starting in 2006, at no time during the past decade was AEP Ohio ever permitted to charge a true market rate for its standard service offer. As IEU witness Murray admitted, however, while SB 3 was premised on collection of market rates after the transition period, AEP Ohio never got to charge those market rates and instead entered into a Rate Stabilization Plan at rates lower than projected market rates. (Tr. XI at 1871-1874.)

The ESP option under SB 221 now involves several cost-based rate adjustments and amounts to a hybrid system of regulation and market-based pricing. Even an MRO option under SB 221 involves an additional transition period of 6-10 years before a full market price is charged for the standard service offer Another significant change made through SB 221 regarding generation assets is that a utility is required to obtain approval from the Commission to transfer generation assets. Under SB 3, an electric utility could freely transfer generation assets In its first ESP filed under SB 221, the Company sought to transfer a limited amount of its generation and its request was denied. Yet another significant aspect of SB 221 is application of the significantly excessive earnings test. All of these factors limit an electric utility's ability to charge and retain market rates for generation service and manage the business and financial risks associated with its fleet of generation assets.

The Commission in its Opinion and Order correctly rejected claims that SB 3 of the ETP cases foreclosed or conflicts with AEP Ohio's ability to pursue cost-based capacity rates at this time (*Id.*) IEU has provided no basis to support a different result on rehearing.

**b. The Capacity Prices are established through resolution of Case No. 10-2929-EL-UNC, not the ESP proceeding**

IEU's argument second argument misses its mark because the capacity prices are not established as part of the ESP. Rather, they are being set through the Commission's resolution of Case No. 10-2929-EL-UNC, which is a proceeding separate and apart from the ESP proceeding. Accordingly, IEU's contention that by adopting the Stipulation's capacity pricing provision, the Opinion and Order acted beyond authority contained in R.C. 4928.143 provides no basis for challenging the Commission's decision regarding the capacity pricing issue.

## X. The overbroad interpretations of the Opinion and Order's modification (at 54) relating to governmental aggregation – and the outright requests to expand that modification – are unreasonable and should be denied as they would likely cause the Stipulation to be withdrawn. [FES C.10, OCC/APJN E and IEU 13]

OCC/APJN admit (at 15-16) that the Commission addressed its concerns about aggregation customers being able to secure some of the RPM-priced capacity, but argue that additional RPM-priced capacity above the set-aside levels should also be made available for communities that aggregate before and after the November 2011 ballot initiative OCC/APJN readily acknowledge that the obvious purpose and effect of the Opinion and Order's modification was tied to the November 2011 ballot initiative communities – they simply argue that the Commission should have gone further in accommodating aggregation by accommodating aggregation ballot initiatives that have come before November 2011 and that may come in 2012. FES also acknowledges benefit from the modification already made by the Commission in the name of governmental aggregation for residential customers, but FES goes on to advocate (at 38-44) two additional "clarifications" regarding this modification IEU (at 44-45) makes similar arguments to FES's two expansive interpretations.

Specifically, FES and IEU advocate that:

- The aggregation-related accommodation should be "on top of" the Stipulation's annual set-aside levels, without regard to the Opinion and Order's language that it be expanded "to the extent and only if necessary." (FES at 39; IEU at 45)
- The aggregation-related accommodation should apply to all aggregation programs (including those who passed ballot initiatives either before November 2011 or will do so before the end of 2014), not just those referenced in the Opinion and Order as having passed ballot initiatives in November 2011. (FES at 40; IEU at 44)

FES and IEU believe that the governmental aggregation load for 2012 must be provided in addition to the 21% level established in the Stipulation for residential and commercial classes and cannot be included as part of the 21%, regardless of what shopping beyond aggregation may occur in those classes and when the shopping occurs. Those positions ignore the language deliberately used by the Commission in modifying the RPM-priced set aside level. Neither of the above-listed overbroad interpretations are grounded in the language of the Opinion and Order and they otherwise lack merit

FES and IEU are wrong in suggesting that the aggregation load cannot be included as part of the 21%, as there is no basis in the Opinion and Order to support the interpretation that the Commission intended to hard-wire the RPM set-aside to be "21% plus all aggregation load" in 2012. Rather, the Opinion and Order required (at 54) modification of the 2012 set-aside limitation "to accommodate" the load of any community that approved a governmental aggregation program in the November 8, 2011, election, provided that the aggregation programs complete the steps necessary to take service under the program in 2012. Similarly, the Opinion and Order (at 54) provided that the RPM set-aside level "shall be adjusted to accommodate such governmental aggregation programs for each subsequent year of the Stipulated ESP, *to the extent, and only, if necessary*." (Emphasis added.) The interpretation submitted by FES and IEU ignores the key qualification that the modification to the set-aside level be made to "accommodate" the actual aggregation load that meets the specified conditions and the set-aside levels be modified "to the extent, and only, if necessary." Thus, the Stipulation's set-aside level should only be expanded to the extent necessary to accommodate the December 31, 2012 completed governmental aggregation load. This concept is already captured in the Revised DIP.

Another overbroad interpretation advocated by FES and IEU is that the Revised DIP improperly limits the set-aside modification to only communities that passed ordinances during the November 2011 election. FES elaborates (at 39) that the Commission broadly modified the set-aside levels to accommodate governmental aggregation and did not provide any rational basis to distinguish between November 2011 ballot communities and others that have already completed the process. IEU (at 44) takes a similar position, arguing that completing the process by December 31, 2012 is the only condition in this regard. Contrary to these claims, the Opinion and Order clearly does tailor its set-aside modification to November 2011 ballot communities. The arguments advanced by FES and IEU plainly constitute rehearing requests seeking modification of the Opinion and Order rather than implementation of the existing decision.

The Opinion and Order explained the modification to the RPM set-aside:

> Although currently shopping customers will not be adversely affected by the capacity set-aside provisions, the Commission is greatly *concerned that governmental aggregations approved by communities across the state in the November 2011 election will be foreclosed from participation* by the September 7, 2011 Stipulation. It is the state policy to ensure the availability of unbundled and comparable retail electric service to all customer classes, including residential customers, and governmental aggregation programs have proven to be the most likely means to get substantial numbers of residential customers to become the customer of a CRES provider. For these reasons, we find it necessary to modify the proposed Stipulation to adjust the RPM set-aside levels *to accommodate the load of any community that approved a governmental aggregation program in the November 8, 2011, election* to ensure that any customer located in a governmental aggregation community will qualify for the RPM set aside, so long as the community or its CRES provider completes the necessary process to take service in the AEP-Ohio service territory by December 31, 2012.

Opinion and Order at 54 (emphasis added)

Thus, the modification made by the Commission was limited to accommodating the load associated with communities that approved a governmental aggregation program in the November 8, 2011 election, not any aggregation that may occur by the end of 2012. That the Commission's modification was limited to the November 2011 election is also unequivocally confirmed elsewhere in the Opinion and Order. *See e.g.*, page 64 (where the Commission indicated it already addressed concerns about shopping caps "by modifying the Stipulation to include governmental aggregation ballots that passed this November."); and page 65 (referencing that the above "modification of the capacity plan allows for all of the communities and municipalities that recently passed governmental aggregation initiatives this November to take advantage of CRES suppliers' offers that may be lower than what AEP-Ohio is offering to its customers.") While AEP Ohio does not agree with the modification, it is obvious that the whole point of the Commission's change was to give communities who may have relied on RPM availability in pursuing ballot initiatives access to RPM-priced capacity. In addition, any opt-in aggregation could be done at any time under the normal set aside limits and would not require a modification of the Stipulation's set aside limits.

As previously pointed out by AEP Ohio, FES's proposal to expand the set-aside to include all future aggregation in 2013 and 2014 should not be entertained. Not only would it impose unacceptable level of financial risk and uncertainty on AEP Ohio that goes far beyond the settlement framework, it bears no relation to the equity argument made throughout this proceeding (which apparently served as the Commission's motivation in adopting the aggregation-related accommodation) that communities pursued ballot initiatives in the Fall of 2011 in reliance on the notion that RPM-priced capacity and could not complete that process by January 1, 2012. Holding the set-aside open for all aggregation through 2014 would be unreasonable and would cause AEP Ohio to withdraw from the Stipulation such that the cases that were settled as part of the Stipulation would be fully litigated.

FES also seeks (at 43) to have the Commission further expand the aggregation-related modification by providing that an aggregation ordinance/contract should be enough to and the communities should not be required to complete the process necessary to take service in order to trigger an expansion of the RPM set-aside. AEP Ohio strongly opposes such an expansion for several reasons. First, the Opinion and Order affirmatively required that the November 2011 ballot initiative communities must complete the process necessary to take service under the aggregation program. Requiring completion of the normal process is reasonable and not unduly burdensome. There is no requirement that communities who pass a ballot initiative for opt-out aggregation move forward with implementing an aggregation program and there are additional uncertainties at that point in the process about the number of customers who would opt out and the load that would join the aggregation Most importantly, entertaining this type of expansion would cause significant financial uncertainty for AEP Ohio and would further erode the ongoing viability of the pro-competitive capacity charges included in the settlement package.

In addition to advocating the three interpretations to the aggregation-related modification as discussed above, FES also claims (at 42) that AEP Ohio has misinterpreted the Opinion and Order in implementing the aggregation-related modification (through the Revised DIP compliance filing) to accommodate non-mercantile customer load. IEU (at 44) advances a similar claim. FES's position is premised on the false assertion (at 42) that "Ohio law does not make any distinction between mercantile and non-mercantile governmental aggregation customers once a governmental aggregation program is established." IEU acknowledges that mercantile customers are prohibited from being included in opt-out programs, but asserts that they should be included in the additional aggregation set-aside since they can participate in opt-in programs.

The Revised DIP properly limits the qualifying aggregation load to non-mercantile customers, in conjunction with the requirement under Ohio law that opt-out aggregation programs exclude mercantile customers. As already discussed above, the Opinion and Order's modification of the set-aside levels is focused on communities that adopted November 2011 ballot initiatives. Ballot initiatives are only required for opt-out aggregation initiatives – R.C. 4928.20(B) requires that any proposed opt-out initiative must be placed on the ballot and passed by a majority of the electors before it can be pursued. 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 center proposed to be aggregated." (Emphasis added.) To the extent that mercantile customers can voluntarily opt in to an existing aggregation program after it is established should not change the nature and intent of the Commission's modification based on a concern for opt-out aggregation customers and the November 2011 ballot initiatives – all of which were necessarily opt-out programs.

As referenced above, the Commission's modification was based in large part on the notion that "governmental aggregation programs have proven to be the most likely means to get substantial numbers of residential customers to become the customer of a CRES provider." This concern for residential customers has nothing to do with subsequent industrial opt-in to an existing program. And the electorate is made up of residential and small commercial customers, not large industrial customers. Large industrial customers were not part of the General Assembly's design for governmental aggregation and were not part of the November 2011 ballot initiatives approved by the communities that the Commission was concerned about. Expanding the Opinion and Order's modification for November 2011 opt-out aggregation programs to include subsequent opt-in decisions by industrial customers is not supported by the existing language in the Opinion and Order and would unnecessarily create a substantial additional financial burden and uncertainty for AEP Ohio. While AEP Ohio is opposed to such set-aside expansion under any circumstances, the only appropriate stage for considering such modifications and clarifications is through the normal rehearing process – not as part of addressing compliance issues related to the Opinion and Order.

## XI. FES's request to further modify the initial pro rata allocation of RPM-priced capacity should be rejected. [FES C.11]

Similar to its "clarifications" regarding the aggregation-related modification that actually involves further modifications, FES requests (at 44-45) clarification of the modification on Page 55 of the Opinion and Order regarding reallocation of unused capacity as of January 1, 2012 – such that the initial allocation of RPM-priced capacity among the customer classes done back in September 2011 would also be modified. No other party – opposing or supporting the Stipulation – has endorsed FES's interpretation in this regard. The reality is that FES's argument attempts to impose an additional modification of the Stipulation beyond the modification made in the Opinion and Order regarding the *pro rata* allocation.

Paragraph IV.2.b.3 of the Stipulation provides that the initial RPM-priced set aside allocation for each class will be established pursuant to Appendix C. The original DIP filed under the terms of Appendix C provided in Par. 4(a) that if the allotment to any customer class as of September 7, 2011 exceeds 21%, then the allocation to the remaining classes shall be reduced on a pro rata basis such that the total allotment does not exceed 21%. This provision was not modified by the Opinion and Order. Rather, the Opinion and Order (at 55) explicitly modified Paragraph IV.2.b.3's provision that as of January 2012 "any kWhs of RPM-priced capacity that have not been consumed by a customer class will be available for customers in any customer class based on the priority set forth in Appendix C." FES ignores the fact that the Opinion and Order explicitly quoted the above language which only involves the reversion to other classes of unused capacity allotments as of January 2012 – it does not relate to the initial calculation of the classes' set-aside. As the evidentiary record abundantly made clear and discussed, the <u>initial</u> set-aside for the residential and industrial classes was slightly lower than 21% for 2012 because of the pre-existing oversubscription of the commercial class as of September 7, 2011 (the date the Stipulation was executed).

The Opinion and Order's modification (at 55) explicitly changed the January 2012 reversion of capacity set-aside "to ensure that residential customers are not foreclosed from their share of the capacity at RPM rates." The modification did not go back to the initial allocation among the classes based on September 7, 2011 data. Expanding the initial set-aside to 21% for residential and industrial classes would exceed the overall limit of 21% – that would be a material and costly modification going beyond anything discussed in the Opinion and Order. FES's rehearing request should be denied.

## XII. FES's request for additional oversight regarding AEP Ohio's implementation of the RPM set-aside is premature and unfounded [FES C.12 and C.13]

Finally regarding implementation of the RPM set-aside provisions, FES claims (at 45-48) there are "holes" in AEP Ohio's current implementation plan details and that the Commission should exert additional oversight to address detailed implementation matters that have not been fully resolved. These matters are premature and are not proper grounds for rehearing. It is inaccurate and unfair to advocate present action or additional oversight by the Commission, just because all of FES's detailed implementation questions have not been answered. In reality, the Stipulation has precipitated a substantial and unprecedented level of retail shopping in AEP Ohio's service territory. There is no reason to assume a problem or conflict that needs an instant remedy for every implementation issue that FES can think of (such as the specific and highly detailed questions listed on page 47). The Revised DIP already includes an audit process (Section 6) and a dispute resolution process (Section 7) that will serve to facilitate resolution of disputes and issues. Additionally, AEP Ohio routinely works proactively with Staff to address and resolve such issues as they arise. AEP Ohio fully understands that its implementation of the Stipulation is subject to Commission oversight and direction, but submits that FES simply fails to demonstrate any need presently exists.

## XIII. The State Compensation Mechanism associated with the Stipulation's two-tiered capacity charge discount is appropriately pursued through the existing FERC and PJM tariff process and a retail tariff is not needed; IEU's abstract criticisms regarding potential future billing issues is not a proper basis for rehearing. [IEU 12]

IEU argues (at 39-40) that an intrastate tariff should be filed and approved by the Commission, in order to properly implement the Stipulation's two-tiered capacity charge discount levied against CRES providers. IEU fails to acknowledge that the State Compensation Mechanism (SCM) is being administered through a FERC and PJM tariff process, not unilaterally by AEP Ohio. Moreover, AEP Ohio expects that the Commission will approve (or modify and approve) the Revised DIP, which serves a comparable function as a filed tariff by being a detailed plan for implementation of the SCM's two-tiered capacity charge. Thus, IEU has simply not demonstrated the need for a separate retail tariff to implement the revised SCM adopted by the Opinion and Order.

The SCM is ordered by the Commission pursuant to the terms of the FERC-approved Reliability Assurance Agreement (RAA) applicable to PJM Interconnection. Specifically, Section D.8 of Schedule 8.1 of PJM's RAA is the basis for a State commission such as the PUCO to adopt a SCM. IEU admits (at 39) that the Opinion and Order effectively modifies the existing SCM it had previously adopted through the December 8, 2010 Entry in Case No. 10-2929-EL-UNC. There has been no PUCO-approved tariff required in order to implement the SCM that has been in place for more than a year. There is no reason to conclude now that a State tariff is required. But AEP

Ohio will, of course, file a tariff should the Commission believe it to be necessary or appropriate.

AEP Ohio indicated in its December 22, 2011 compliance tariff filing implementing the Opinion and Order that subject to any further direction from the Commission regarding implementation of this aspect of the modified Stipulation, AEP Ohio was in the process of making a FERC filing in concert with PJM Interconnection to ensure that the SCM is administered as adopted by the Commission. That FERC filing was served on all parties of record in this proceeding and is attached to this memorandum in opposition. As indicated in the attached FERC filing made by AEP Ohio, PJM has advised AEP Ohio that under RAA Schedule 8 1, Section D 8, no additional filing with the FERC is necessary to incorporate the Ohio SCM as an appendix to the RAA.

PJM further stated that it would put CRES Providers and other market participants on notice of the AEP Ohio capacity rate via a posting of the rate on PJM's website, which, according to PJM, is the same manner in which PJM notifies market participants of network transmission service rates and other rates. The PJM notice/posting did occur on January 4, 2012. AEP Ohio informally provided information about this process to Staff contemporaneous to the developments and has transparently offered to provide any additional information requested or address any questions that arise.

In sum, the SCM, as amended by the Opinion and Order, is already being implemented under a FERC-approved tariff for wholesale electric service. This is the same method used to implement the SCM that has been in place for more than a year. There is no need for a separate retail tariff to mirror the existing FERC tariff. To the extent that the Commission wants to exert additional oversight on these issues, it can approve (or modify and approve) the Revised DIP, which serves a comparable function as a filed tariff by being a detailed plan for implementation of the SCM's two-tiered capacity charge.

In connection with the tariff argument, IEU spends considerable time (at 40-43) complaining that the Revised DIP does not identify how the $255 charge will mechanically be applied to shopping load and usage characteristics. Specifically, IEU argues (at 40-41) that the Revised DIP must identify how a shopping customer's Peak Load Contribution (PLC) will be determined and how the resource adequacy obligation will be impacted. IEU maintains (at 42) that a given CRES should be invoiced for the integrated sum of the PLCs of the shopping customers it serves – effectively yielding a weighted average price of that CRES provider's customer load served under the RPM-priced set aside and any customer load served under the $255/MW-Day rate. IEU's concerns are premature and speculative; they lack a basis in any actual billing issue or problem.

As noted above, PJM will continue to administer the billing under the RAA for the capacity. The process of applying customer PLCs to shopping load associated with CRES providers has occurred for years (since the advent of the RAA in 2007) and the same billing determinants and method will continue to be used. For customers above 200 kW, AEP Ohio's tariff requires an interval meter and actual historical interval data issued to calculate the customer's PLC. For customers that do not have interval meters (such as residential customers), a load profile is published by AEP Ohio on its website and used to calculate PLCs for such customers. The only difference under the two-tiered capacity charge system is that the load associated with individual customers will be billed at one of two different rates, rather than one. As referenced above, shopping customers are identified and a list is conveyed to the serving CRES provider designating each customer as either being eligible for RPM-priced set-aside capacity charge or for the $255/MW-Day charge. CRES providers thus will have information readily available to confirm the accuracy of their bills from PJM. There is no reason to think there will be a billing problem in administering the two-tiered rate. The Commission should not address such unripe and academic issues and, more to the point, the fact that the Opinion and Order did not address such abstract potential future issues cannot form a proper basis for rehearing.

## Phase-In Recovery Rider (Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR)

## XIV. The Commission's approval of the Phase-In Recovery Rider does not violate any important regulatory principles or practices. [IEU Issues 21-23]

### A. The adopted PIRR properly aligns costs and benefits [IEU Issue 21]

IEU recycles its initial argument from the proceeding that the merger of the two operating companies and the associated deferrals misaligns customers receiving the benefit and those responsible for the benefit. The Commission already rejected this argument finding that it is not uncommon or unreasonable for the new entity to levelize the liabilities and benefits of the merger across all former customers. (Opinion and Order at 57.) IEU's rehearing should be denied.

The Commission finding on the reasonableness of levelizing benefits and liabilities as part of a merger is supported by the record as indicated in the Joint Reply

Brief at pages 82-84. As pointed out in that filing, 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 of the other company involved in the merger. Mr. Roush also used the example of Monongahela Power merger with AEP Ohio to show that the charges and debts owed in that case are not fuel deferrals does not erase the fact that the two merged, and it provides 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 also reasserts the argument it and other non-signatory parties made in initial briefs[25] that the application of the PIRR violates aggregation provisions in R.C. 4928.20(I). (IEU Application for Rehearing at 62.) 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 the underlying deferrals have 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. IEU asserts that some new finding is required, but that is not required by the statute. The finding was made when appropriate and it is not necessary to revisit it at this time. Alternatively, if desired, once the Commission determines that it is reasonable for the two operating companies to merge it

[25] This argument was already raised in initial briefs. IEU Brief at 61-62; OCC/APJN Brief at 40

can be argued that it is at that time determining the benefit exists to the extent that finding is necessary

### B. The Commission's Approval of the Carrying Charge for the Phase-In Recovery Rider is Also Appropriate. [IEU Issue 22]

IEU proffers its same argument from its initial brief that the PIRR is not reasonable because it is too high and it fails to remove the accumulated deferred income taxes (ADIT) and takes issue with the overall level of the carrying charge (IEU Application for Rehearing at 63.) These matters were considered by the Commission and denied.

IEU fails to recognize the compromise made on this point and the evidence supporting the finding. 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.) The Commission recognizes that the higher carrying charge was an existing right and that the decrease is a significant compromise supporting its approval of the stipulation. (Opinion and Order at 58.) The Commission also agreed that the previous carrying charge did not require the deferral balance be adjusted for ADIT and should not change that decision at this point. (Id.) IEU's only argument is that just because it previously existed does not make it reasonable. The Commission found that the prior level of carrying cost recovery was a right of the Company, and the Company's agreement to recover a lower carrying cost is a benefit and an important part of viewing the overall settlement. IEU offers its preferences for how to figure the carrying charge but no evidence that the discretion of the Commission to continue is previous methodology is inappropriate. That factual finding is reasonable and should not be disturbed on rehearing. IEU offers nothing new to the debate and the Commission should deny the request for rehearing.

### C. IEU Ohio's request for rehearing of the Attorney Examiner's ruling granting AEP Ohio's Motion to Strike portions of IEU witness Bowser's Direct Testimony should be denied [IEU Issue 23]

IEU's request for rehearing of the Attorney Examiners' ruling striking portions of IEU witness Bowser's direct testimony should be denied because IEU failed to timely challenge the ruling, either by interlocutory appeal or on brief, and because the Attorney Examiners correctly ruled that testimony relating to the *ESP I* case that was not in the record in these proceedings should not be permitted.

#### 1. IEU's challenge to the Attorney Examiners' evidentiary ruling is untimely and therefore inappropriate for review on rehearing.

In its application for rehearing, IEU argues for the first time that the Attorney Examiner improperly granted AEP Ohio's motion to strike a portion of IEU witness Bowser's direct testimony. IEU, however, failed to raise this issuein a timely manner. IEU did not file an interlocutory appeal of the oral ruling. Nor did IEU raise the propriety of the ruling in its initial post-hearing brief or in any other filing prior to the Commission's December 14, 2011 Opinion and Order. Accordingly, the Commission should find that IEU's untimely attempt to raise the Attorney Examiner's evidentiary ruling now is improper and should deny IEU's request for rehearing on this issue. *See,* *e g , In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, Entry on Rehearing at 16-17 (Jul 15, 2010) (denying application for rehearing of procedural ruling under analogous Ohio Power Siting Board rules because applicant failed to take interlocutory appeal of the ruling and failed to challenge the ruling before the Board issued its Order).

**2. The Attorney Examiners properly granted AEP Ohio's motion to strike Mr. Bowser's testimony related to issues the Commission decided in AEP Ohio's *ESP I* case.**

Even if IEU's challenge to the Attorney Examiner's ruling granting AEP Ohio's motion to strike *were* properly made – which it is not – IEU's request for rehearing on this issue should still be denied for a number of reasons.

First, IEU has failed to demonstrate that the Attorney Examiners' ruling prejudiced it in any way. O.A.C. Rule 4901-1-15(F) requires that a party challenging a procedural ruling made during hearing to have been adversely affected by that ruling. Indeed, in at least one recent proceeding, the Commission has required that the party challenging the oral ruling demonstrate that the ruling caused the party prejudice. *See ESP I*, Order on Remand at 8 (Oct. 3, 2011) (upholding attorney examiner's denial of motion to strike because the parties challenging the denial did not "[demonstrate] how the admission of the testimony into the record caused them prejudice."). IEU similarly has failed to demonstrate how the ruling about which it complains caused in prejudice, stating only that the stricken testimony "was relevant" and its exclusion "materially and detrimentally affected" IEU's presentation of its case. Such vague and conclusory assertions fail to satisfy Rule 4901-1-15(F).

Moreover, IEU has failed to show that the Attorney Examiners' ruling was erroneous. As counsel for AEP Ohio correctly argued during the evidentiary hearing, the stricken testimony relied upon testimony that Mr. Bowser and another witness provided in the *ESP I* case, which was not a part of the record in this case, and regarding which the Commission had already issued its decision in the *ESP I* case. (Tr. VIII at 1484-1485, 1489-1490.) The Attorney Examiners appropriately struck the testimony on those grounds. (*Id.* at 1493.) Accordingly, reconsideration of that decision is inappropriate here and should be denied.

## ANALYSIS UNDER MARKET RATE OFFER TEST

### XV. Criticisms by FES, IEU, And OCC/APJN Regarding How the Opinion and Order Compared the Costs and Benefits of the ESP to An MRO Are Without Merit. [FES Issues II.A.1, A.2 and II.A.2; IEU Issues 1-7; and OCC/APJN Issues B and C]

FES contends in its Application for Rehearing, at 3-8, that the Commission erred in its comparison of the costs of the proposed ESP to an MRO alternative, by failing to include as costs of the ESP estimated fuel cost increases (during the term of the ESP) and FES witness Schnitzer's speculative estimates of Pool Modification Rider (PMR) costs. FES contends, at 9-10, that, if these purported additional costs are taken into account, the Commission's determination that the ESP is more favorable than an MRO is in error, and the ESP is less favorable (than an MRO) by over $400 million

IEU also takes exception, in several respects, to the manner in which the Commission evaluated the costs and benefits of the proposed ESP in its ESP/MRO comparison. IEU repeats FES's argument that FES witness Schnitzer's speculative estimates of PMR costs should have been included in the cost of the ESP. IEU also asserts that MR6 costs should have been included in the cost of the Generation Resource Rider (GRR) and, thus, in the ESP, and that costs for the customer-sited Combined Heat and Power (CHP) Rider also should be included. IEU Application for Rehearing, at 19-21. IEU also complains that the Commission failed to include the cost of the Distribution Investment Rider (DIR) in the overall cost of the proposed ESP. *Id.* at 21. IEU further contends, at 12-15, that the Commission erred by not including costs for the last twelve months of the ESP, June 2016 to May 2016, in the cost of the ESP. IEU claims that in those last twelve months customers will pay nearly $400 million more than they would under an MRO.

FES also argues that the other, less quantifiable, benefits of the ESP that the Commission found provided further significant value to the ESP and, thus, additional support for the conclusion that the ESP is more advantageous than an MRO, actually provide no additional value. Consequently, FES contends those benefits do not weigh in favor of the ESP. Thus, FES dismisses the value, which the Commission found to be substantial, of an earlier transition to competitive markets than would otherwise be possible absent the ESP and the contribution to generation supply diversity from the contemplated Muskingum River 6 (MR6) and Turning Point Solar (TPS) projects that the ESP supports.

IEU, like FES, also argues that less readily quantifiable benefits of the ESP, such as an earlier transition to a competitive market and corporate separation, which the Commission concluded provide substantial additional benefits, are not significant. *Id.* at 21-23. OCC/APJN make similar arguments in their Application for Rehearing, at 10-13.

The criticisms raised by FES, IEU, and OCC/APJN regarding the ESP/MRO Test, as further discussed below, for the most part, reiterate arguments that they have already raised, that the Commission has considered, and which it has rejected. They have not raised any significant new arguments regarding these topics, and their requests for rehearing regarding those arguments, accordingly, should be denied.[26]

**1. Fuel Cost Estimates**

The Signatory Parties explained, at pages 148-150 of their Joint Initial Brief and at pages 90-94 of their Reply 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) AEP Ohio witness 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)

[26] The repetition of IEU's and FES's rehearing arguments on these issues stands in sharp contrast to the objections raised by AEP Ohio regarding the manner in which the Commission conducted the ESP/MRO Test. In AEP Ohio's Application for Rehearing, it raised arguments that the Commission did not address in its Opinion and Order regarding errors in the way that the Commission included (or did not include) the impacts that the $153 million PIRR carrying cost reduction, the $35 million OGF/PWO commitments, and the $230 million effect that the approved capacity pricing had on the proper computation of the ESP/MRO Test, as well as the $42 million over-correction made by the Commission.

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.)[27]

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 (both in its post-hearing briefs and, now, in its application for rehearing). 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.

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, FES continues to advocate on rehearing for the use of forecasted fuel cost increases, while ignoring the other, more-than-offsetting, environmental cost increases.

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-

[27] 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.

R2.) AEP Ohio included in its post-hearing Reply Brief, at page 93, a corrected version of FES's re-creation of Ms. Thomas's Exhibit LJT-3 that includes both the forecasted fuel cost increases of FES Ex. 10 (that FES wants to use) and the forecasted increased environmental costs (that FES wants to ignore). When both adjustments are included in the analysis, the impact is a net benefit to the ESP of just over $.25/MWH (*i.e.*, using both adjustments changes the ESP Price Benefit (Disadvantage) from the $-.71/MWH that Ms. Thomas calculated in Ex. LJT-3 to her Direct Testimony, AEP Ohio Ex. 5 to $-.45/MWH).

The Commission properly declined to incorporate FES's estimate of increased fuel costs into the computation of the cost of the ESP, for the reasons it gave in its Opinion and Order, at 31. But if FES's fuel cost estimates were included, then increased environmental costs also must be included, and the result would be a substantial increase in the comparative value of the ESP over the MRO.

**2. 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.)

On rehearing, FES continues to advocate using the estimates that Mr. Schnitzer concocted and that the Commission properly declined to adopt. The vast bulk of FES's quantification that the Stipulation ESP is more costly than an 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. The Commission correctly concluded in its Opinion and Order, at 31, that 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.[28] FES has advanced no new arguments on rehearing that would warrant any further consideration of its position.

### 3. MR6 and Customer-Sited Combined Heat and Power Rider

There is no estimate, let alone reliable record evidence, of any costs that might be incurred during the ESP for either the MR6 aspect of the Generation Resource Rider (GRR) or for the CHP Rider. Nor is there any merit to IEU's argument that the Commission has improperly shifted the burden of proof with regard to costs associated with MR6 or CHP. That is just rhetoric. There has been no shift in the burden of proof. The Commission properly concluded that no costs associated with either MR6 or customer sited CHP could, or should, be included in the cost of the ESP because there are no costs currently proposed for either potential initiative, and there currently is no

[28] In any event, a non-zero value for the PMR only could be considered in the event that costs from Pool modification or termination exceed $50 million. (Stipulation, at §IV.5.) Even then, pursuant to the modification effected by the Opinion and Order (at 50) consideration for cost recovery could only be provided for amounts incurred in excess of $50 million. Accordingly, the Opinion and Order increased the speculative quality of Mr. Schnitzer's cost estimates by an order of magnitude.

estimate (let alone a non-speculative estimate) for any such costs or when they might be incurred.

#### 4. Distribution Investment Rider

The Commission properly concluded in its Opinion and Order, at 31, that concerns about costs related to the DIR not being included in the ESP/MRO comparison are unwarranted, because AEP Ohio would be entitled to seek an increase in distribution rates pursuant to R.C. 4909.19 if it the provision were not included in the ESP. In other words, the costs would be present in both the ESP and the MRO contexts, so they are offsetting and it is not necessary to include them in the comparison.

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.) Accordingly, there is a record basis that supports the same conclusion that the Commission reached in its Opinion and Order.

IEU simply asserts, without basis, that there is no support for the conclusion that the AEP Ohio could recover, as part of the revenue requirement in a distribution rate case, the same costs that are being recovered through the DIR. The Commission has already reviewed and rejected this argument. There is no basis that IEU has advanced on rehearing for arriving at any other conclusion.

#### 5. It Is Not Necessary To Include The Auction Year (June 2015-May 2016) In The MRO Price Test.

IEU asserts that the Commission improperly omitted the initial auction year (Auction Year), which is the final twelve month-period June 2015 - May 2016 of the ESP, from its ESP/MRO Price Test analysis. IEU contends that, when the cost of the final year of the ESP is included in the ESP/MRO Price Test, Mr. Murray's analysis shows that customers would pay nearly $4900 million more than they would pay under an MRO.

IEU's criticism, which reiterates the same argument that it made in its post-hearing briefing, is incorrect. In compliance with Paragraph IV.1.r of the Stipulation, AEP Ohio will use a competitive bidding process (CBP) to meet its SSO obligation for the Auction Year and its retail tariff SSO generation rates will be set accordingly. As a result, the MRO Annual Price and the Stipulation ESP Price are equal to the Expected Bid Price (CBP or auction price). As shown in Exhibit LJT-R2, Page 1 of 2, this results in a zero benefit. That is, an ESP and a MRO would produce the same pricing result. (AEP Ohio Ex. 23, at 11.)

Contrary to IEU's argument, it is not appropriate to use any weighting of legacy generation rates for the Auction Year because 100% of the load will be subject to competitive bid. The blending percentages specified in Section 4928.142 (D), Ohio Revised Code, must correspond to the amount of load that is put up for competitive bid. Thus, if 10% of the load is competitively bid under the MRO, then the pricing is based on 10% market and 90% legacy generation rates. IEU's approach continues to ignore that linkage.

Since 100% of the load is to be competitively bid for delivery in the Auction Year, it is nonsensical to impose pricing based on a blend of legacy ESP rates that include items such as the fuel adjustment clause (FAC). As explained in Paragraph IV.1.m of the Stipulation, the FAC, in its current form, will continue only through May 31, 2015. (*Id.* at 12.)

Because IEU continues to advocates using an incorrect blending of prices in the ESP/MRO Price Test on rehearing, it remains unsurprising that it arrives at an incorrect conclusion that the Auction Year has a negative impact on the ESP/MRO Price Test. The correct application, as shown in Exhibit LJT-R2, Page 1 of 2, shows the proper result. Because the proper application of the MRO Price Test to the last year of the ESP results in a zero impact, its inclusion or exclusion from the MRO Price Test has no impact on the ESP Price Benefit. (*Id.*)

As the Signatory Parties pointed out in their Initial Brief, at 157-59, the Commission has recognized the appropriateness of applying the ESP/MRO Price Test in this fashion when the ESP contains a period in which all SSO load is being supplied through wholesale power purchased by a CPB. In its Opinion and Order, at page 44, in Case No. 10-388-EL-SSO, the Commission concluded that "[u]nder the proposed ESP in the Combined Stipulation, the rates to be charged customers will be established through a CBP; therefore, the rates in the ESP should be equivalent to the results which would be obtained under Section 4928.142, Revised Code ...." Exhibit LJT-R2, page 1 of 2, illustrates, and implements, this conclusion.

Paragraph IV.1.r of the Stipulation requires that AEP Ohio use a CBP to meet its SSO obligation for the Auction Year. Also, Paragraph IV.1.q requires the Company to implement full legal corporate separation. As a result, when the CBP is used to supply

SSO load beginning in June 2015, AEP Ohio will have divested its generation. Therefore, the SSO load will be served with purchased power acquired through the CBP.

While the AEP Ohio does not agree with IEU's approach, as the Signatory Parties pointed out in their Initial Brief, that approach does not account for the purchased power resulting from the CBP that would be required to meet the Company's SSO obligation. Section 4928.142(D) would permit an adjustment to the 2011 legacy generation prices to allow for increased purchased power expenses. If the legacy ESP price is adjusted for the purchased power resulting from the CBP and a weighting factor of 56% is applied to this price under IEU witness Murray's theory of the MRO test, the results, as shown in Exhibit LJT-R2, Page 2 of 2, are identical to those shown in Exhibit LJT-R2, Page 1 of 2. Each page shows that the MRO Annual Price and the Stipulation ESP Price are equal to the Expected Bid Price (i.e., the CBP or auction price). Therefore, even IEU's theory of the MRO Price Test for the Auction Year, when it is implemented properly, demonstrates that there is no impact on the ESP Price Benefit (shown on line 16 of page 1 and on line 17 of page 2 of LJT-R2). (AEP Ohio Ex. 23, at 13-14 and Ex. LJT-R2.)

The Commission correctly declined to adopt IEU's flawed argument regarding incorporating the twelve month (June 2015-May 2016) Auction Year period in the ESP/MRO Price Test analysis in its Opinion and Order, and it should decline to do so on rehearing.

**6. Less Quantifiable, Yet Significant, Benefits of the ESP**

Arguments by FES, IEU, and OCC/PJN that the Commission gave undue weight to less readily quantifiable benefits of various provisions of the ESP, in the course of performing the ESP/MRO Test, are really just disagreements over how the Commission has exercised its judgment, based on all of the evidence, regarding these matters. Those parties would prefer to substitute their judgments, for the Commission's, regarding the appropriate weight to give to those benefits. However, while they might disagree with how the Commission has exercised its discretion regarding the value of these less readily quantifiable benefits, their disagreement provides no basis for requiring the Commission to change its findings that the benefits are real and substantial.

**7. The Commission Approved the ESP for an EDU.**

IEU contends, at 15-19 of its Application for Rehearing, that the Commission erred because it failed to make a separate ESP versus MRO determination for CSP and OPCo as separate EDUs. Apparently, IEU believes that conducting the analysis and making the determination for CSP and OPCo on a combined basis is improper because the two Companies are not, in combination, a legal entity and, thus, not an EDU. IEU made this same argument in its post-hearing briefs.

As AEP Ohio witness Ms. Thomas, demonstrated, however, AEP Ohio's MRO price test did, in fact, include the operating company detail that IEU claims is lacking (See AEP Ohio Ex. 5 at 14-15, Ex. LJT-R3.) That this information was combined and presented on a merged Company basis is appropriate because the Stipulation expressly contemplates the merger and continued operation of CSP and OPCo as one entity. Therefore, the Commission's comparison of the benefits of the Stipulation ESP to an MRO on a merged company basis is not only appropriate but is also necessary.

CSP and OPCo both 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 merger has, in fact occurred. Each EDU filed a plan proposing a structure that would allow the Commission to plan ahead for and evaluate the business contingency (the merger). 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 addressed the merged Company's ESP in a practical manner based upon the corporate reorganization that was, ultimately, approved at the same time that the Commission approved an ESP for the combined entity. Providing the Commission with the information necessary to evaluate the ESP as it will be implemented in the event of the merger promotes regulatory efficiency 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 proper. Moreover, approving the ESP in a fashion suitable for a combined entity was also proper.

The Commission approved an ESP for an EDU. IEU's argument to the contrary was, and remains, baseless.

## MOTIONS TO DISMISS AND ADDITIONAL MOTIONS TO STRIKE

## XVI. The Opinion and Order lawfully and reasonably upheld the Attorney Examiner's remaining rulings regarding the parties' trial motions [IEU Issues 26 and 27; OCC/APJN Issue G]

### A. The Commission Did Not Err In Denying IEU's Motion To Dismiss [IEU Issue 26]

IEU claims that the Commission was in error in denying IEU's motion to dismiss AEP Ohio's Application and the Stipulation entered into by the Signatory Parties. In its application for rehearing, IEU argues, as it did on brief, (1) that the Commission was without jurisdiction to consider the Companies' Application and Stipulation because "AEP Ohio," as an entity, is not an electric distribution utility; (2) that the Application failed to satisfy the filing and evidentiary requirements governing an ESP application; and (3) that the Companies failed to demonstrate that the ESP proposed in the Stipulation is more favorable in the aggregate as compared with the expected results of an MRO.

IEU's arguments regarding the Commission's denial of its motion to dismiss do nothing more than reiterate arguments that IEU has already raised, that the Commission has considered, and that the Commission has rejected. (*See* Opinion and Order at 7-8.) IEU has failed to raise any new arguments regarding the merits of its motion to dismiss; therefore, its request for rehearing of its motion should be denied.

### 1. The Application and Stipulation each properly invoked the Commission's jurisdiction and satisfied R.C. 4928.141 and 4928.143.

The assertion that AEP Ohio failed to file an ESP for an EDU is plainly wrong. CSP and OPCo, both EDUs, filed ESP applications. As the Signatory Parties explained in their post-hearing reply brief, 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 occurred on January 1, 2012. Each EDU filed a plan proposing a structure that would allow the Commission to plan ahead for and evaluate the merger, while still providing adequate information for the Commission regarding the individual companies. 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. Indeed, "[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. Providing the Commission with the information necessary to evaluate the ESP as it will now be implemented after the merger enabled the Commission to expedite AEP Ohio's pending proceedings before the Commission and avoided unnecessary delay and duplication of effort. The Commission agreed, on page 8, that AEP Ohio provided it with sufficient and adequate evidence to establish that the Application and Stipulation were within the Commission's jurisdiction.

The Stipulation's proposal to establish an ESP under R.C. 4928.143 also was valid and appropriate for Commission consideration as the Company's next SSO. An ESP proposal must 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 presented for the Commission's review and approval (as well as the ESP originally included in the Application) satisfied this requirement, as the Commission expressly recognized. (*See* Opinion and Order at 8.)

**2. The Commission properly determined that AEP Ohio satisfied the ESP filing requirements.**

IEU again complains, as it did on brief, that AEP Ohio did not meet the filing requirements required for an ESP. Not only did the Commission previously find that AEP Ohio has met the filing requirements set forth in O.A.C. 4901:1-35-03, the Commission also is empowered to waive any filing requirement, O.A.C. 4901:1-35-02(B), and did so in certain regards in this case. *See* Case No. 11-346-EL-SSO, Entry (Mar. 23, 2011). As AEP Ohio argued in its Reply Brief, the filing requirements are designed to facilitate the Commission's understanding of a proposed ESP. That need was satisfied in this case through a technical conference, extensive discovery, testimony, and briefing, and a lengthy and thorough hearing. The Commission recognized the sufficiency of the information provided in its Opinion and Order. (Opinion and Order at 8.)

IEU's remaining argument regarding AEP Ohio's alleged failure to demonstrate that the ESP satisfies the statutory ESP/MRO test is again repetitive of the arguments it made on brief and will be more fully addressed on its merits elsewhere herein.

**B. The Commission did not err in affirming the Attorney Examiners' denial of OCC's Motion To Strike references to the Stipulation approved in Case No. 09-756-EL-SSO. [OCC/APJN Issue G]**

OCC/APJN argue in their application for rehearing, at pages 35-40, that the Commission erred in permitting the record to include references to a stipulation to which OCC was a party in Case No. 09-756-EL-CSS ("Reliability Standards Case"). They contend that the Commission's affirmation of the Attorney Examiners' denial of OCC's motion to strike AEP Ohio witness Hamrock's reference to that stipulation was without record support. Their challenge fails, however, because they have raised no new issue on rehearing that was not already considered in the Commission's Opinion and Order and because the Attorney Examiners' denial of OCC's motion to strike was proper

**1. OCC/APJN have raised no new issues on rehearing regarding the Attorney Examiners' denial of OCC's motion to strike reference to the stipulation approved in Case No. 09-756-EL-SSO.**

OCC/APJN have failed to cite any basis of error in the Commission's Opinion and Order, other than reciting the same arguments they have previously raised. OCC/APJN have failed to raise any new arguments regarding the merits of OCC's motion to strike Mr. Hamrock's testimony regarding the Reliability Standards Case stipulation. Accordingly, their request for rehearing on this topic should be denied.

Nonetheless, even if OCC/APJN's challenge to the Commission's decision raised new arguments – which it did not – their request for rehearing on this issue should still be denied because, as explained on brief, they have not demonstrated that the complained-of ruling prejudiced them in any way and have not demonstrated that the ruling actually was in error.

**2. The Attorney Examiners properly denied OCC's motion to strike.**

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 the Reliability Standards Case. (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 contended was 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.)[29] 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. *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.* 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.

[29] As it did on brief, AEP Ohio notes that by its language, R.C. 4928.143(B)(2)(h) requires only that the Commission "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.

(AEP Ohio Ex. 19 at 3 (emphasis added).) 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 Staff's counsel, 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 information clearly does not violate the boilerplate language in the 09-756 stipulation prohibiting the citing as precedent of the terms, information, and data contained in the stipulation. That proceeding and its resolution were offered only 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.

In its Opinion and Order, the Commission expressly agreed with the Signatory Parties that the acknowledgement that the reliability indices are applicable to CSP and OPCo did not constitute a violation of the boilerplate language of the Reliability Standards Case stipulation. (Opinion and Order at 11.) As the Commission correctly pointed out, the reliability indices are not a basis for answering any similar issue of law in this case. (*Id.*) Additionally, OCC/APJN's claim that the Commission's ruling on this point will have a chilling affect on future settlement negotiations has already been considered and rejected by the Commission, which found that argument to be without merit because there was no discussion of the content of the stipulation or attempt to use it as precedent. (*Id.* at 12.)

OCC/APJN's attempt (at 35-40) to argue that the Commission's agreement with the Attorney Examiner's ruling, to allow the testimony on the 09-756 standards case, is an admission that the Commission is relying on the information for its current opinion. OCC/APJN continues to confuse the fact that parties filed a settlement as a recommendation for the Commission to consider with the fact that the Commission-approved reliability standards that are, in fact, the reliability standards used for AEP Ohio. The fact that they were reached in a settlement does not mean they are not the actual reliability standards. The standards are real and there is testimony that AEP Ohio is meeting those standards. OCC/APJN's attempt to raise a ground for rehearing on this point is without merit. For these reasons, OCC/APJN's request for rehearing of the Commission's ruling on record references to the Reliability Standards Case stipulation should be denied.

## CONCLUSION

For the foregoing reasons, the Commission should deny the applications for rehearing of OCC/APJN, FES and IEU.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Ohio Power Company's Memorandum in Opposition has been served upon the below-named counsel and Attorney Examiners by electronic mail to all Parties this 23rd day of January, 2012.

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