BEFORE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO
PUBLIC VERSION

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TABLE OF CONTENTS

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I. INTRODUCTION

On March 30, 2012, AEP-Ohio[1] filed with the Public Utilities Commission of Ohio ("Commission") its third version of an Electric Security Plan ("Modified ESP") in these cases. There are two main components to the Modified ESP.

The first main component of the Modified ESP seeks the Commission's approval of annual increases in prices for three years for the standard service offer ("SSO"). The proposed increases occur through the base generation prices and through riders and other mechanisms that, if approved, will make electric bills less predictable and less stable. Because the first main component of the Modified ESP works to increase SSO

[1] The Applications commencing these cases were filed by the Ohio Power Company ("OP") and the Columbus Southern Power Company ("CSP"). Since the commencement of these cases the two applicants have merged. For convenience, the merged companies will be referred to as AEP-Ohio unless the context requires the identification of one of the former companies.

prices that are already above-market, the earnings-protection vitality of AEP-Ohio's first main component depends on it being cemented to the second.

The second main component of the Modified ESP asks the Commission to permit AEP-Ohio to deploy an economic blockade against Competitive Retail Electric Service ("CRES") providers serving any customers in AEP-Ohio's distribution service territory. The proposed economic blockade would occur through the imposition of a discriminatory, non-comparable and significantly above-market charge (the wholesale capacity charge) that AEP-Ohio seeks to uniquely levy on CRES providers serving customers in AEP-Ohio's distribution service territory. Through what amounts to a shopping tax, the second main component insulates the above-market revenue AEP-Ohio seeks through the first main component against the discipline of market forces.

The profit guarantees and constraints on customer choice offend fundamental requirements of Ohio law and policy and result in a Modified ESP that is worse for customers and competition than the one the Commission rejected in February 2012. The sum causes the Modified ESP to be less favorable, in the aggregate, than the expected results under Section 4928.142, Revised Code (the Market Rate Offer or "MRO" option).

For the reasons discussed below, AEP-Ohio's Modified ESP must be rejected. The structure and the consequences of the Modified ESP are unreasonable and unlawful.

II. THE MODIFIED ESP IS NOT MORE FAVORABLE THAN A MRO

In order to approve an ESP, the Commission is required to find that the ESP is more favorable in the aggregate than a MRO ("ESP versus MRO test").[2] The electric distribution utility ("EDU") has the burden of demonstrating that the ESP is more favorable.[3] AEP-Ohio's attempt to demonstrate that the Modified ESP satisfies the ESP versus MRO test, however, is meritless. When the ESP versus MRO test is properly applied, the Modified ESP fails the ESP versus MRO test by $1.5 billion.

A. The Modified ESP

The Modified ESP consists of two main components and several interrelated parts. The first component addresses the terms of the ESP. This portion of the Modified ESP fixes generation rates by adopting the current non-fuel generation rates including the current Environmental Investment Carrying Charge Rider ("EICCR").[4] It continues the Fuel Adjustment Clause ("FAC") with a modification to separately account for alternative energy credits through a separate rider.[5] It contains a "placeholder" for a Generation Resource Rider ("GRR") that is designated in the Application for the Turning Point Solar Facility ("Turning Point").[6] Additionally, the Modified ESP contains a Retail Stability Rider ("RSR") that would guarantee a level of revenue sufficient to produce a

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

[3] *Id*.

[4] Application at 7 (Mar. 30, 2012) ("Application").

[5] *Id*. at 7-8.

[6] *Id*. at 8.

total company rate of return of 10.5% based on 2011 average total company equity.[7] The Modified ESP also includes a Pool Termination Provision ("PTP") that would permit AEP-Ohio to seek lost revenue resulting from the termination of the System Interconnection Agreement ("Pool Agreement").[8]

The second part addresses the prices that CRES providers will pay for capacity to serve customers in the AEP-Ohio distribution service territory. As part of the total package that AEP-Ohio is seeking to sustain its revenue goals and to prevent shopping, it also proposes to provide "discounted" capacity. Superficially similar to the proposal contained in the September 7, 2011 Stipulation[9] which the Commission ultimately rejected, capacity available to CRES providers would be priced at $145.79/megawatt-day (mw-day) (Tier 1) and $255/mw-day (Tier 2) ("Pricing Scheme").[10] Eligibility for Tier 1 capacity would be limited to certain percentages of customers based on a Detailed Implementation Plan ("DIP").[11]

Additionally, AEP-Ohio proposes several other changes in corporate structure and the pricing of energy through the SSO in a separate filing that it claims are critical to the approval of the Modified ESP.[12] As part of its corporate separation plan, it seeks

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[7] *Id*. at 10 and Co. Ex. 116 at 13-15.

[8] Co. Ex. 104 at 21.

[9] Stipulation and Recommendation (Sept. 7, 2011) ("Stipulation ESP").

[10] Co. Ex. 116 at 6-9.

[11] *Id*. at 6-7. Governmental aggregation program customers in those communities that approved such programs on or before November 8, 2011 would be assigned the Tier 1 price if they elected to participate in the first year. In all subsequent years of the ESP, they would be allocated Tier 1 status only if they qualified under the proposed caps. *Id*. at 7. Mercantile customers would be precluded from participating in Tier 1 capacity, under the Modified ESP. *Id*. at 8.

[12] Application at 5-6.

approval to place its generation into a separate subsidiary with the expectation that the Amos and Mitchell plants will be transferred to other out-of-state affiliates. AEP-Ohio also proposes to conduct an energy-only auction for a 5% slice-of-the system six months after the Commission issues final orders approving the Modified ESP and AEP-Ohio's related corporate separation plan.[13] Finally, AEP-Ohio proposes to conduct a 100% energy-only auction for the SSO load for the last five months of the Modified ESP.[14]

B. AEP-Ohio Fails to Demonstrate that the Modified ESP Satisfies the ESP versus MRO test

Through convoluted reasoning and without respect for the Commission's December 14, 2011 decision addressing (and rejecting) much of the same approach,[15] AEP-Ohio claims that the Modified ESP is more favorable than a MRO by $961 million. In support of this claim, AEP-Ohio asserts that the ESP is $256 million cheaper than the MRO, claims that the "discounted capacity" is worth another $989 million, and then offsets these "benefits" by the $284 million revenue increase represented by the RSR.[16] Because each of the claims on which the alleged benefits are based is wrong, AEP-Ohio's conclusion that the Modified ESP is more favorable than the MRO is ludicrous.

The most egregious error in AEP-Ohio's ESP versus MRO math is its transformation of excessive and above-market capacity charges into a "discounted

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[13] Application at 11.

[14] *Id*.

[15] Ms. Thomas testified that she did not consider the Commission's December 14, 2011 Opinion and Order reviewing the Stipulation ESP when she prepared her testimony. Tr. Vol. IV at 1265.

[16] Co. Ex. 114, LJT 1 at 1.

capacity" benefit. AEP-Ohio's supposed "benefit" from discounted capacity assumes that CRES providers serving customers in AEP-Ohio's distribution service area would pay $355/mw-day but for the Modified ESP.[17] AEP-Ohio, however, has no authority to charge $355/mw-day.[18] In response to the same approach (manufacturing an ESP benefit out of a proposed ESP disadvantage), the Commission previously concluded, "AEP-Ohio cannot claim the discounted price to CRES providers as a benefit. AEP-Ohio's requested capacity price in its application was never certain, and therefore, it cannot be considered as a benefit or a meaningful number for purposes of conducting the ESP versus MRO test."[19]

Additionally, the Modified ESP brings the RSR into play to eliminate most if not all of the so-called "discount" that AEP-Ohio attributes to its above-market capacity prices. As explained by AEP-Ohio, for every $10/mw-day reduction in the Pricing Scheme, there is a corresponding $33 million increase in the RSR revenues.[20] "Thus, the RSR is designed to act [as] a backstop to guarantee [OP] a target level of

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[17] AEP-Ohio repeatedly has asserted that the difference between the price of capacity under the Pricing Scheme and its "cost" of capacity is the proper measure of the "benefit." *See, e.g.*, Co. Ex. 116 at 6. This reference to cost is an apparent attempt to avoid the effect of the Commission's prior finding in the December 14, 2011 Opinion and Order that rejected AEP-Ohio's attempt to claim the same kind of benefit based on AEP-Ohio's proposed rate in *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 ("Capacity Case"). In either instance, the claimed benefit is the difference between $355/mw-day and a two-tiered capacity pricing proposal. AEP-Ohio has admitted that it did not have and has not had authorization from the Commission or the Federal Energy Regulatory Commission ("FERC") to collect AEP-Ohio's claimed cost of capacity. Tr. Vol. IV at 1284-85. Moreover, following the presentation of the Staff case in the Capacity Case and the testimony by FES in this case and the Capacity Case, there is substantial evidence that AEP-Ohio's "cost" of capacity, if at all relevant to the proper price, is grossly overstated.

[18] IEU-Ohio Ex. 125 at 50-51; Tr. Vol. IV at 1284-85.

[19] Opinion and Order at 30-31 (Dec. 14, 2011.) Staff confirmed that its position is that "discounted capacity" is not a benefit of AEP-Ohio's Modified ESP. Tr. Vol. XVI at 4592 & 4610-11.

[20] Co. Ex. 116 at 14-15.

generation revenue irrespective of what level of capacity pricing may ultimately be approved."[21]

If the Commission follows its prior holding that AEP-Ohio cannot claim "discounted" capacity as a benefit of the Modified ESP, it fails the ESP versus MRO test by $28 million.[22] Further, "the almost $1 billion swing in the results of the ESP versus MRO price test highlights the significantly excessive above-market burden that the Modified ESP would, if approved, impose on electric consumers and the high degree of sensitivity that [OP's] analysis has to adjustments that are needed to better reflect the market prices essential to the ESP versus MRO comparison."[23]

When properly accounted for, AEP-Ohio's Pricing Scheme is an additional cost of the Modified ESP. Although the Commission has issued two entries permitting AEP-Ohio to implement a temporary two-tiered capacity pricing scheme, the long-understood and currently ordered price of capacity as of July 2, 2012 is the price resulting from PJM Interconnection LLC's ("PJM") Reliability Pricing Model ("RPM") pricing mechanism.[24] The Modified ESP, however, assumes that AEP-Ohio would be permitted to charge $355/mw-day, well above the RPM prices in the three years of the ESP, in the absence of approval of the Modified ESP.[25] The more appropriate assumption based on the proper legal and factual analysis is that AEP-Ohio is requesting permission to

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[21] IEU-Ohio Ex. 125 at 53.

[22] *Id*. at 54. The "benefit" of the capacity "discount" is the largest of the so-called benefits; without claiming some benefit from the "discounted" capacity price, the Modified ESP would fail the ESP versus MRO test. Tr. Vol. IV at 1265.

[23] IEU-Ohio Ex. 125 at 54.

[24] Entry (Mar. 7, 2012); Entry (May 30, 2012).

[25] FES Ex. 104 at 14.

significantly increase prices for capacity, a real additional cost to CRES providers and their customers that results from the Modified ESP.[26]

AEP-Ohio also fails to account for the RSR properly in its implementation of the ESP versus MRO test. As shown on Exhibit LJT-1, Ms. Thomas did not include the RSR in her implementation of the "price test" portion of her analysis. Instead, she identified the $284.1 million cost separately and used the "discounted" capacity to hide the effects of the RSR.[27] When the RSR is included as a part of the Modified ESP price and the alleged "benefit" of capacity charges is removed, Ms. Thomas admits that the Modified ESP fails her "price test."[28]

Additional problems infect AEP-Ohio's ESP versus MRO analysis. First, AEP-Ohio's methodology relies exclusively on administratively determined market prices rather than on the results of recent auctions. The recent auctions would have provided a "sanity check" that AEP-Ohio ignored as it attempted to support an inflated market price to cover the inflated Modified ESP price.[29] The only ESP prices AEP-Ohio used to "check" its results were those found in the Duke Energy Ohio ESP stipulation,[30] prices

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[26] *Id*. at 15. As Mr. Banks explained, a Commission order approving above-market capacity prices may trigger reopeners in CRES contracts. Tr. Vol. XVI at 4530.

[27] Co. Ex. 114, Ex. LJT-1.

[28] Tr. Vol. IV at 1296.

[29] IEU-Ohio Ex. 125 at 54-55 & 58-62; Tr. Vol. IV at 1321.

[30] *In the Matter of the Application of Duke Energy Ohio Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO *at al*., Stipulation and Recommendation (Oct. 24, 2011) ("Duke Stipulation").

that Ms. Thomas acknowledged were developed before 2012.[31] Subsequent auction results for Duke resulted in substantial price reductions for customers.[32]

Second, to inflate the MRO, AEP-Ohio used a capacity cost of $355/mw-day for the MRO.[33] Because there is no basis for assuming that AEP-Ohio would be permitted to charge or has ever charged its proposed cost-based capacity price, there is no basis to assume that the competitive benchmark price used by AEP-Ohio to forecast the MRO is correct.

Third, AEP-Ohio's version of the ESP versus MRO test excludes the cost of the various riders. For example, AEP-Ohio failed to recognize two distribution riders, the gridSMART Rider and the Enhanced Service Reliability Rider, that would increase the cost of the Modified ESP. These riders, however, would not be lawful under an MRO either for the competitive bid portion or the legacy ESP portion of the MRO's blended SSO price.[34] AEP-Ohio also excludes the Distribution Investment Rider ("DIR"), a rider only available under an ESP, when it calculates the ESP price.[35]

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[31] Tr. Vol. IV at 1323. Reliance on the Duke Stipulation also violates the terms of the Stipulation. See below.

[32] Tr. Vol. XVI at 4598.

[33] IEU-Ohio Ex. 125 at 55 & 62-64. Ms. Thomas's testimony also conflicts with the assumption presented by Mr. Allen that capacity would be set based on the Pricing Scheme. *Id*. at 55.

[34] *Id*. at 67-68.

[35] *Id*. at 55. Under the Modified ESP, the ESP price would increase by over $300 million over the life of the Modified ESP if the full amount under the proposed DIR caps were recovered. Co. Ex. 116 at 11. Although AEP-Ohio argues that it could recover these amounts through a distribution case, *id*. at 12, the amounts recovered through the ESP are a cost of the ESP, would not be recovered through the MRO, and cannot be ignored in the ESP versus MRO test. Based on the legal requirements of Section 4928.143(C), Revised Code, the Commission has incorrectly concluded that the DIR can be ignored for purposes of conducting the ESP versus MRO test. Opinion and Order at 31 (Dec. 14, 2011).

Fourth, AEP-Ohio's ESP versus MRO test failed to include the known costs of the GRR. Excluding the GRR from the Modified ESP, however, was inconsistent with the Commission's prior decision in the review of the Stipulation ESP that found that the GRR had to be included to properly perform the ESP versus MRO test.[36] When the Commission forced AEP-Ohio to identify the costs of the GRR, it then asserted that the GRR would be also be a component of the MRO,[37] thereby attempting again to hide the cost of the GRR as part of the Modified ESP.[38]

Fifth, in addition to failing to properly account for the GRR and other riders in its version of the ESP versus MRO test, AEP-Ohio failed to account for the cost of delaying the implementation of the Phase-In Recovery Rider ("PIRR")[39] or the potential cost of a PTP.[40] A delay in implementing the PIRR would add an additional $40-$45 million to the ESP side of the ESP versus MRO test.[41] AEP-Ohio also has indicated that it will seek to recover additional "lost" revenue from the termination of the Pool Agreement if its corporate separation amendment and generating asset transfer is not approved as

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[36] Opinion and Order at 30 (Dec. 14, 2011).

[37] Co. Ex. 115 at 2.

[38] AEP-Ohio attempted to establish in cross-examination of a staff witness that a GRR might exist under an MRO. If all the steps for approval of a GRR charge were satisfied, it would create a non-bypassable charge for the life of the underlying asset that is the basis for the charge. Section 4928.143(B)(2)(c), Revised Code. Approval of the charge in this or a future ESP raises the possibility of a non-bypassable charge affecting a MRO replacing the existing ESP, *see* Tr. Vol. XVI at 4627-29, but that possibility does not provide any basis for a finding that the GRR is a cost that should be included in the calculation of the MRO in this case.

[39] Tr. Vol. IV at 1323. Staff also disagrees with AEP-Ohio's treatment of the PIRR "benefit." Tr. Vol. XVI at 4591.

[40] Tr. Vol. IV at 1336.

[41] Tr. Vol. XVI at 4549.

filed.[42] Yet, it has not accounted for the additional revenue associated with the PTP in its ESP versus MRO test or the potential future increases in capacity prices that may result from its corporate separation proposal.[43] The failure to account for the PTP and corporate separation costs further understates the amount by which the Modified ESP fails the ESP versus MRO test.

Sixth, AEP-Ohio fails to account from the effect of the 5% slice-of-the-system auction that is likely to increase the cost of the Modified ESP relative to the MRO.[44] As Mr. Murray explained, the results of the 5% slice-of-the-system auction are likely to increase the average fuel cost above the otherwise applicable fuel rates, but this additional cost is not reflected in AEP-Ohio's estimate of the Modified ESP.[45]

Finally, AEP-Ohio also provides two alternative scenarios to address the last five months of the ESP term, both of which are based on assumptions that render the scenarios meaningless. In both scenarios, AEP-Ohio asserts that the MRO and the Modified ESP produce the same SSO outcomes the last five months of the Modified

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[42] Co. Ex. 104 at 22.

[43] AEP-Ohio's failure to include the cost of the PTP in the ESP versus MRO test is particularly troubling because the PTP, corporate separation, and generating asset transfers proposal have costs to customers. If the Commission modifies the corporate separation proposal, AEP-Ohio states customers would pay the PTP. If the Commission approves the corporate separation proposal and the Amos and Mitchell transfer, customers will likely pay higher capacity prices; transferring the Amos and Mitchell units to Appalachian Power Company ("APCo") and Kentucky Power Company ("KPCo") would effectively prevent the units from being bid into the base residual auction ("BRA"), likely raising capacity costs. As witnesses Nelson, Ibrahim, and Murray testified, all other things being equal, if supply increases, the price of capacity will decrease, and vice versa. *See* Tr. Vol. II at 718-719; Tr. Vol. VII at 2282-2283; Tr. Vol. XII at 3412.

[44] IEU-Ohio Ex. 125 at 57 & 72-78. By treating the modified ESP price as equivalent to the MRO price, AEP-Ohio also ignored the Commission's decision in *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer for Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order (Feb. 23, 2011).

[45] IEU-Ohio Ex. 125 at 72-74.

ESP's term. It reaches this conclusion on the basis that all generation could be obtained through a competitive bid.[46] In the initial MRO for AEP-Ohio, however, it would be subject to the five year blending period contained in Section 4928.142(D), Revised Code, because it owned and operated its own generation in July 2008,[47] and that blending period assumes that part of the MRO is based on the legacy ESP with certain limited adjustments.[48] Additionally, during the January to May 2015 period, AEP-Ohio it could charge $355/mw-day for its capacity. As with the competitive bid calculations AEP-Ohio made, this capacity cost assumption is meaningless.[49]

C. A Proper Quantification of the Modified ESP Demonstrates that It Fails the ESP versus MRO test

As demonstrated by IEU-Ohio and others, the Modified ESP fails the ESP versus MRO test by a substantial margin when more reasonable assumptions are made concerning capacity and energy pricing and the known costs of the Modified ESP are included. In his application of the ESP versus MRO test, Mr. Murray divided the term into two periods to account for the availability of relevant auction information to develop the competitive benchmark price. He used FirstEnergy SSO auction results for the June 2012 to May 2014 delivery period and used Ms. Thomas's estimated market prices and then adjusted capacity prices for the proper RPM prices for the June 2014 to May 2015

[46] Co. Ex. 114 at 19.

[47] Tr. Vol. IV at 1320.

[48] IEU-Ohio Ex. 125 at 74-76. Mr. Fortney makes a similar error in his application of the ESP versus MRO test. Tr. Vol. XVI at 4600.

[49] IEU-Ohio Ex. 125 at 57.

delivery period.[50] Because the FirstEnergy Corp ("FirstEnergy") competitive bid process ("CBP") did not require the provision of renewable energy credits, he added a credit that increased the competitive benchmark price in the same amount as AEP-Ohio used in its calculation.[51] Mr. Murray removed the distribution riders from the legacy ESP rates as required by Section 4928.142(D), Revised Code,[52] and assigned values to the RSR, DIR, gridSMART Rider, and GRR in the ESP.[53] For only the period of June 2012 to December 2014 and based on the same shopping assumptions used by AEP-Ohio, Mr. Murray estimated that the Modified ESP would fail the ESP versus MRO test by $330 million.[54] Mr. Murray estimated the Modified ESP would fail the ESP versus MRO test for the period of January 2015 to May 2015 by another $77 million,[55] and this second calculation does not reflect the additional higher costs of the 5% energy-only auction.[56]

While the Modified ESP substantially fails the ESP versus MRO test when viewed exclusively from its effects on shopping customers receiving service under the SSO, the true and very serious detriments of the Modified ESP are even greater when the effects on non-shopping customers and CRES providers are included. Under the Modified ESP, non-shopping customers and CRES providers will see their costs

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[50] *Id*. at 65-66.

[51] *Id*. at 66-67.

[52] *Id.* at 67.

[53] *Id.* at 67-69.

[54] *Id*. at 69-70 & Ex. KMM-20.

[55] *Id*. During his cross examination Mr. Murray corrected Exhibit KMM 20 to reflect the ESP being less favorable than a MRO between January 2014 and May 2015 by $13.34/mwh, rather than $13.53 per mwh.

[56] *Id*. at 72-74.

increased. Based on Mr. Allen's shopping assumptions, shopping customers would be responsible for $198 million under the RSR.[57] CRES providers would be required to pass on to retail customers or absorb an additional $770 million in higher capacity prices under the Pricing Scheme.[58] All customers, shopping and non-shopping, would absorb an additional cost in the form of carrying charges associated with the delay of the implementation of the PIRR, as proposed in the Modified ESP.[59] Further, the amount of carrying costs associated with the delay would be overstated by the failure to properly account for accumulated deferred income taxes currently embedded in the calculation.[60] *When all additional costs of the Modified ESP are recognized, it is less favorable in the aggregate by over $1.5 billion for the period of June 2012 to May 2015.*[61]

IEU-Ohio's evidence showing that the Modified ESP fails the ESP versus MRO test is confirmed by other parties that performed the ESP versus MRO test. Correcting for numerous errors contained in AEP-Ohio's analysis, FES concluded that the Modified ESP failed the ESP versus MRO test by $400 million to $1.3 billion, with the range in the amount driven by assumptions concerning the level of capacity charges.[62] If the

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[57] *Id*. at 71.

[58] *Id*.

[59] *Id*. at 72 (total increased costs in the range of $186 million); Tr. Vol. XVI at 4549 (one year delay amounts in increased carrying charges $40-$45 million).

[60] See discussion below regarding the effect of accumulated deferred income taxes ("ADIT") on the deferral balance.

[61] IEU-Ohio Ex. 125 at 6.

[62] FES Ex. 104 at 36.

cost of the Alternate Pricing Scheme[63] is used in place of the Pricing Scheme, the Modified ESP fails by an additional $400 million.[64] The Staff analysis performed by Mr. Fortney likewise concluded that the Modified ESP failed the ESP versus MRO test using RPM prices, $146/mw-day, and $255/mw-day as the capacity charge.[65] By Staff's estimate, the Modified ESP fails by $465 million when RPM prices are used to estimate the cost of the Modified ESP.[66] Moreover, the Staff analysis reached this conclusion by accounting for only the RSR,[67] and the analysis understates the effect of using RPM pricing on the RSR.[68] As the Staff's witness made clear, the Modified ESP would fail by a larger dollar amount if Mr. Fortney had made the additional adjustments that he thought were legitimate but did not include in his application of the ESP versus MRO test.[69]

D. The Modified ESP Is Worse for Customers than the Stipulation ESP

If the Commission were to approve the Modified ESP, moreover, it would authorize a result worse for customers than the Stipulation ESP the Commission rejected in February 2012. According to AEP-Ohio's estimates, average rates for all customers would be generally no better under the Modified ESP than they would have

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[63] Co. Ex. 116 at 15-17. As an alternative to the Pricing Scheme, AEP-Ohio proposes to offer a shopping credit, subject to total revenue limitations, if it is permitted to set is capacity charge to CRES providers operating in the AEP-Ohio service territory at $355/mw-day.

[64] FES Ex. 118.

[65] Staff Ex. 110 at 6.

[66] *Id*., Att. A. Staff's calculation of the estimate did not use scalars for the embedded capacity prices set at RPM levels. When those are included, the Modified ESP still fails by $445 million. Tr. Vol. XVI at 4647.

[67] Staff Ex. 110 at 7.

[68] Tr. Vol. XVI at 4583 & 4587.

[69] Tr. Vol. XVI at 4588-90.

been under the Stipulation ESP.[70] ESP rates, however, do not account for the full effects of the Modified ESP. As Mr. Schnitzer explained, the Modified ESP is worse than the Stipulation ESP due to the increase in the capacity charges and application of the RSR proposed for Tier 1 and 2 to shopping customers. Additionally, SSO customers would see increases in generation charges due to the structure of the auctions and other changes.[71] Essentially, then, AEP-Ohio has not offered anything better for SSO customers and greatly increased the costs of CRES providers and shopping customers in its Modified ESP as compared to the Stipulation ESP.

E. The "Fixes" Proposed by Several Parties Do Not Result in an ESP that Satisfies the ESP versus MRO Test

Several parties propose adjustments to the Modified ESP. For example, the Ohio Consumers' Counsel ("OCC") would adjust the rate design of the RSR and the EDR.[72] Ohio Energy Group ("OEG") recommends the redesign of riders also,[73] but more broadly offers a replacement for the RSR that OEG calls an Equity Stabilization Mechanism and capacity prices applicable to CRES providers serving customers in the AEP-Ohio service territory.[74] Exelon likewise proposes changes to the RSR and the capacity charges applicable to CRES providers.[75] None of these parties, however,

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[70] Compare Co. Ex. 2, Ex. DMR-1 (Roush Stipulation ESP testimony) (average rates for CSP and OP in December 2014 at 10¢/kwh and 9.26¢/kwh, respectively) with Co. Ex. 111, DMR-1 (Roush Modified ESP testimony) (average rates for CSP Zone and OP Zone in December 2014 at 10.09¢/kwh and 9.21¢/kwh, respectively.

[71] FES Ex. 104 at 37-42.

[72] IEU-Ohio Ex. 125, *passim*.

[73] OEG Ex. 102 at 3.

[74] OEG Ex. 101 at 8.

[75] Exelon Ex. 101.

testified that the changes they proposed would result in an ESP that would satisfy the ESP versus MRO test.[76]

F. The "Non-Quantifiable Benefits" Are Illusory

As part of its direct case presenting the Modified ESP, AEP-Ohio identifies six qualitative "benefits" including a move to a CBP-based SSO in June 2015, a fixed non-fuel generation rate, a blending of the FAC and PIRR, a streamlined approach to cost recovery to support reliability improvements, support for vegetation management, and support for gridSMART (which would create opportunities to realize efficiency gains).[77] The Staff indicates that the Modified ESP contains three qualitative benefits: a more rapid move to a SSO rate based on a CBP than would be available under the MRO alternative; rate certainty and stability; and a mechanism to allow for the construction of generation facilities if there is an established need.[78] Because these "benefits" are illusory, they do not provide any justification for finding that the Modified ESP passes the ESP versus MRO test.

AEP-Ohio and Staff argue that AEP-Ohio will be able to move to a CBP-based SSO more quickly than through a MRO. The argument is premised on the "limitation" contained in Section 4928.142(D), Revised Code, that requires a portion to be competitively bid, starting at 10% and increasing by not more than another 10% of load annually. The Commission, however, may prospectively alter and accelerate the MRO

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[76] *See, e.g.*, Tr. Vol. X at 2808-09 & Tr. Vol. XIII at 3496.

[77] Co. Ex. 114, LJT-1.

[78] Staff Ex. 110 at 6-7.

blending percentages at any time after the first year.[79] Further, any price benefit associated with waiting until June 2015 and then moving to a CBP-based ESP is questionable. Because energy costs are anticipated to increase by 2015, the CBP-based ESP in June 2015 would likely result in increased SSO prices when compared to rates under a MRO that blends bid prices with legacy ESP rates.[80] There is no "benefit" from AEP-Ohio's foot-dragging move to a CBP.

AEP-Ohio and Staff further claim that AEP-Ohio's proposal to fix the non-fuel base generation price and incorporate the EICCR into the base generation price is a benefit. While the non-fuel base generation prices would be fixed, AEP-Ohio also is proposing to make the total SSO bill unpredictable and unstable through the workings of the FAC, the RSR, the GRR, the DIR and other distribution riders, the PIRR, the PTP and the Pricing Scheme.[81] The degree of electric bill instability introduced by the combination of these price adjustment mechanisms is greater under the Modified ESP than would be lawful under a MRO. Any suggestion that customers will benefit from fixed non-fuel generation prices ignores the larger effect of the Modified ESP on the total electric bill "in the aggregate."

AEP-Ohio also argues that there is a benefit to blending the FAC and PIRR rates. Customers in the aggregate, however, will not see any benefit from the blending. They will remain responsible for the total fuel costs and deferrals that the Commission

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[79] Section 4928.142(E), Revised Code; *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 17 (Feb. 23, 2011).

[80] IEU-Ohio Ex. 125 at 80.

[81] Tr. Vol. XVI at 4597-98.

authorizes. Further, the blending will result in disparate impacts on customers: some will see increases in rates; others will see reductions in rates.[82] AEP-Ohio has failed to address the intra-company effects that the blending causes. AEP-Ohio, moreover, fails to identify the additional cost associated with the delay in implementation of the PIRR. Under its proposal, there is a quantifiable increase in the PIRR of $40 to $45 million due to the delay.[83]

AEP-Ohio also suggests that the Modified ESP will result in support of distribution reliability and permit a more streamlined process for cost recovery. Notably, AEP-Ohio has not made any commitment to increased reliability,[84] and customers are paying the riders for the "benefits." Once again, there is nothing in this claim that provides any qualitative benefit to customers.

Staff's claim that the Modified ESP provides the additional benefit of a mechanism for the development of generation also fails. First, AEP-Ohio does not and will not need additional generation during the period of the proposed ESP.[85] Second, the evidence, including the opinions offered by AEP-Ohio's witnesses, shows that the reliability-driven market-based mechanisms managed by PJM will rationally support the development of new generation and other capacity resources.[86] In the December 14,

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[82] FES Ex. 110.

[83] Tr. Vol. XVI at 4549. As indicated in the discussion of the problems with AEP-Ohio's proposed delay in the implementation of the PIRR, AEP-Ohio also does not address the statutory requirement that governmental aggregation customers cannot be charged deferral costs in excess of the benefits they received. Section 4928.20(I), Revised Code.

[84] Staff Ex. 106 at 9-10.

[85] Tr. Vol. XVI at 4593.

[86] Co. Ex. 105, *passim*.

2011 decision adopting the Stipulation ESP, the Commission made it clear that the role of the GRR would be subordinate to the role of market forces.[87] Third, there is a cost to the GRR. Customers will be responsible for a non-bypassable charge for Turning Point if AEP-Ohio proceeds with the project and the Commission authorizes a rate under the GRR. Thus, the GRR offers customers no qualitative benefit.

Finally, neither the Staff nor AEP-Ohio qualitatively tested the Modified ESP in the aggregate against the MRO. For example, Staff conceded that the capacity prices that are part of the Modified ESP "package" would reduce the likelihood of shopping.[88] As was the case with the Stipulation ESP, the expected effect of the Modified ESP is to raise the prices that retail SSO and shopping customers will see and increase the costs of CRES providers, thereby locking customers into higher SSO prices while suppressing the opportunities of customers to shop. It is a result that provides both a quantitative and qualitative harm to customers and the development of a competitive retail electric market.

G. The Commission Should Reject AEP-Ohio's Modified ESP

In summary, AEP-Ohio's Modified ESP fails the ESP versus MRO test. It is less favorable than the MRO by at least $1.5 billion, and it does not provide qualitative benefits. Because the ESP versus MRO test is not satisfied, the Commission is required by Section 4928.143(C)(1), Revised Code, to reject or modify the proposed ESP. Based on the law and evidence, IEU-Ohio recommends that the Commission

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[87] Opinion and Order at 39 (Dec. 14, 2011).

[88] Tr. Vol. XVI at 4603.

reject the Modified ESP rather than attempt to modify and approve the Modified ESP. The best lawful outcome at this point is to maintain the current SSO rates.

III. THE MODIFIED ESP CONTAINS UNLAWFUL AND UNREASONABLE CAPACITY, GENERATION, AND OTHER LOST REVENUE PROVISIONS

AEP-Ohio's Modified ESP proposal includes bundled requests for authority to implement several new riders and electric bill escalating mechanisms. As explained above, these riders and mechanisms add to the cost of the Modified ESP, make the electric bills produced by the Modified ESP less predictable and stable and contribute to the Modified ESP's failure of the ESP versus MRO test. Specifically, AEP-Ohio has requested authority for: (1) above-market, discriminatory and non-comparable generation service capacity prices applicable to CRES providers serving customers in AEP-Ohio's distribution service area; (2) a revenue-guarantee rider, the RSR; (3) a placeholder for a non-bypassable charge to recover the costs of Turning Point, the GRR; and, (4) a mechanism to raise rates to replace revenue that AEP-Ohio may claim is lost as a result of termination of the Pool Agreement, the PTP.

As to each of the proposals, common defects bar their adoption. First, various Sections of Chapter 4928, Revised Code, specifically prohibit the collection of above-market generation-related charges to facilitate any further transition to a competitive retail electric service market. Second, none of the riders or mechanisms falls within Section 4928.143, Revised Code, and therefore they cannot be lawfully approved as part of an ESP. Third, several of the proposals run afoul of the requirements for corporate separation. Fourth, although AEP-Ohio claims it needs a transition to avoid financial harm, it has failed to follow the statutory process that allows a utility to prosecute such a claim and has failed to actually demonstrate that it will suffer financial

harm. Because there is no basis in law or fact for a second transition to market, the Commission must reject AEP-Ohio's RSR proposal, capacity pricing proposals, and PTP.

Additionally, the Modified ESP's bundled proposal to increase the amount of any phase-in deferral eligible for recovery by delaying the amortization (through the PIRR or other adjustments) is unreasonable and should be rejected.

A. AEP-Ohio's proposed generation service capacity charges are unlawful and unreasonable inasmuch as they would allow AEP-Ohio to collect above-market transition revenues long after the time for collecting such charges has passed, cannot be approved as a part of an ESP, are beyond the limits of the Commission's jurisdiction, and are not supported by the record.

In this proceeding, AEP-Ohio requests authority to set the price of generation service capacity available to CRES providers serving retail customers in AEP-Ohio's distribution service area in accordance with its raise-rates-block-shopping Pricing Scheme. The proposed Pricing Scheme is arbitrary; it is neither cost-based nor market-based.[89] Alternatively, AEP-Ohio proposes to set the price of generation service capacity available to CRES providers serving retail customers in AEP-Ohio's distribution service area in accordance with a formula rate that is tied to what AEP-Ohio claims (wrongly) is its cost of providing capacity and then provide shopping customers with the Alternate Pricing Scheme.[90] Both Schemes are designed to permit AEP-Ohio to collect above-market, generation-related revenue during the term of the Modified ESP. AEP-

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[89] Tr. Vol. V at 1401, 1405-1407.

[90] Co. Ex. 116 at 15-17. While neither of AEP-Ohio's Schemes is lawful or reasonable, the Alternate Pricing Scheme adds an extra $439.3 million to the price tag of the Modified ESP over and beyond the Pricing Scheme and would only make the Modified ESP fail the statutory ESP versus MRO test by an even greater amount. FES Ex. 118.

Ohio claims (wrongly) that the collection of above-market, generation-related charges are appropriate to provide AEP-Ohio with extra time to "transition" to competition.[91]

Various sections in Chapter 4928, Revised Code, explicitly prohibit the Commission from authorizing recovery of above-market generation-related revenues beyond the statutory end date for the transition period. Furthermore, the Commission is without the authority to permit a generation service capacity charge applicable to CRES providers serving retail customers in AEP-Ohio's distribution service territory under the authority contained in Chapter 4928, Revised Code, or the traditional "cost-based" ratemaking statutes contained in Chapter 4909, Revised Code. Additionally, while AEP-Ohio bases the need for a transition in part on a claim of potential financial harm, it has not followed the statutory and Commission requirements necessary to achieve a rate increase due to financial harm. Finally, there is no factual basis to support AEP-Ohio's financial harm claim or its claim that it needs additional time to "wind down" its contractual obligations prior to using market-based principles (RPM and a CBP auction for its default SSO price) to set its rates. Accordingly, the Commission must reject AEP-Ohio's Pricing Scheme and Alternate Pricing Scheme.

1. AEP-Ohio is barred from collecting transition revenue

AEP-Ohio has characterized its proposal to set capacity prices well above market as a transition mechanism that limits shopping.[92] Following the rejection of the Stipulation ESP, AEP-Ohio complained that it was being forced to move to RPM-priced

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[91] *See* Co. Ex. 101 at 14-16.

[92] FES Ex. 105 at Ex. TCB-6; *see also* Section 4928.40, Revised Code.

capacity "without a reasonable transition mechanism" for "a transition period."[93] In a press release following the rejection of the Stipulation, the Chief Executive Officer of AEP stated, "[t]he settlement agreement allowed AEP Ohio a reasonable transition to market over a period of time."[94] AEP-Ohio, however, has elsewhere admitted that Ohio law no longer allows for a transition charge to recover lost revenue associated with above-market generation assets.[95] Notwithstanding AEP-Ohio's contradictory views regarding the lawfulness of a further transition period, the law and the facts in this proceeding are quite clear: any further transition mechanism that permits AEP-Ohio to impose above-market generation related charges is unlawful and unsupported by the evidence.

Both the Ohio Revised Code and the stipulation and recommendation filed in AEP-Ohio's Electric Transition Plan proceeding[96] ("ETP Stipulation") prohibit it from collecting transition revenue. While the form of the Pricing Scheme and Alternate Pricing Scheme may be different in name than the transition revenue claim previously advanced by AEP-Ohio in the ETP proceeding, it is clear that the Pricing Schemes are, in substance, another claim for generation plant-related transition revenue.[97] The proposals which AEP-Ohio has put forward are designed to provide it with generation-

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[93] *Id.*

[94] IEU-Ohio Ex. 124 at Ex. JEH-4.

[95] *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan,* Case No. 12-1126-EL-UNC, Application at 7 (March 30, 2012).

[96] *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, ("*AEP-Ohio ETP Case*").

[97] IEU-Ohio Ex. 125 at 30.

related revenue it claims it will lose if customers shop and CRES providers pay an RPM-based capacity price.[98]

a. Background: Amended Substitute Senate Bill 3 and the opportunity to collect transition revenues

In 1999, Ohio fundamentally altered its law regarding the structure of the electricity industry in Ohio and the Commission's economic and other regulation of that industry through the passage of Amended Substitute Senate Bill 3 ("SB 3"). SB 3's means of restructuring of the electric industry was organized and systematic. It established a "transition period" beginning on January 1, 2001 and ending on December 31, 2010.[99]

Within this transition period, SB 3 created a five-year market development period ("MDP") during which incumbent investor-owned utilities and customers had the opportunity to prepare for and transition to a competitive market.[100] SB 3 directed the Commission to structure transition plans with the objective of obtaining at least 20% customer switching by the mid-point of the MDP which could end no later than December 31, 2005.[101]

The evolutionary approach to restructuring the retail investor-owned electric industry in Ohio, accompanied by the completion of the transitional tasks, served two important objectives. The first objective was to provide customers with certain price protections from the dysfunction that is often associated with new and immature

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[98] Co. Ex. 116 at 6-9 & 13-17.

[99] Section 4928.40, Revised Code.

[100] *Id.*; IEU-Ohio Ex. 125 at 31.

[101] Section 4928.40, Revised Code.

markets until such time as the retail market was mature enough to produce "reasonable" prices.[102] The General Assembly protected customers by specifying that the total price of electricity in effect in October 1999 would define the total price envelope within which the individual or unbundled generation, transmission and distribution prices would be established through the transition plan process.[103] SB 3 also provided residential customers an immediate benefit in the form of a 5% discount on the unbundled generation price.[104]

The second consequence of the SB 3 restructuring protected incumbent EDUs during the MDP from potential revenue loss that might otherwise be caused by an abrupt exposure to a new and immature market where customers had the ability to obtain generation supply from a CRES provider.[105] In 2001, price offers for competitive retail service were relatively low and the transition structure protected EDUs from revenue and earnings erosion.[106]

More specifically, SB 3 provided each EDU with the opportunity to protect itself in the event the EDU judged its unbundled generation prices to be in excess or above the generation service prices that would result from the forces of effective competition.[107]

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[102] IEU-Ohio Ex. 125 at 31.

[103] The total bundled price for each electric rate schedule established the total rate cap, which is then divided between the functional components (generation, transmission, and distribution). Ohio provided, in Section 4928.34(A)(6), Revised Code, that such rate cap was subject to adjustment for changes in taxes, costs related to the establishment of a universal service fund ("USF"), and a temporary rider established by Section 4928.61, Revised Code. Thus, the rate cap was not an absolute cap on the total charges paid by customers during the MDP.

[104] Section 4928.40, Revised Code.

[105] IEU-Ohio Ex. 125 at 32.

[106] *Id.*

[107] *Id.*

The opportunity to pursue this protection required an EDU to file a claim with the Commission for "transition revenue" (*i.e.*, the positive difference between existing unbundled generation prices and the unbundled prices attributed by the utility to effective competition—sometimes called "stranded costs") as part of the ETP filings.[108] All transition revenue was required to be collected by December 31, 2010.[109] SB 3 contains the criteria[110] that the Commission applied to determine how much, if any, of the transition revenue claim was eligible for recovery.

When the Commission approved a transition revenue claim, it also approved transition charges that the EDU could then charge shopping customers for the period specified by the Commission.[111] For non-shopping customers, the transition charges were embedded in the default generation supply SSO price and were equal to the portion of the applicable default generation supply price that was not avoidable by shopping customers.[112]

These criteria were applied to determine the total amount of transition revenue that was eligible for collection through transition charges ***if*** an EDU submitted a claim for transition revenue. SB 3 did not require transition revenue to be addressed unless the EDU submitted a claim for transition revenue.[113] A transition revenue claim was

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[108] *Id.*

[109] Section 4928.40, Revised Code.

[110] Section 4928.39, Revised Code.

[111] IEU-Ohio Ex. 124 at 5.

[112] *Id.*

[113] *Id.* at 6.

eligible for collection through transition charges if the revenue claim was limited to: (1) costs that were prudently incurred; (2) costs that were legitimate, net verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (3) costs that were unrecoverable in a competitive market; and (4) costs that the utility would otherwise have been entitled an opportunity to recover.[114] All four of the criteria had to be satisfied for the transition revenue claim to be recoverable from shopping and non-shopping customers.[115]

The total allowable amount of any transition revenue claim was separated if a portion of that total claim involved generation-related regulatory assets.[116] The total transition charge resulting from any allowable transition revenue claim was also separated to show a separate regulatory asset charge.[117] SB 3 limited the Commission's ability to make adjustments to the regulatory asset portion of an allowed transition charge and also required the regulatory asset portion of a transition charge to end no later than December 31, 2010. As stated previously, under SB 3 the non-regulatory asset portion of any transition charge which was associated with above-market generating plants had to end by no later than December 31, 2005 or the end of the MDP, whichever occurred first.[118] Section 4928.141, Revised Code, which was added after SB 3, excluded any previously authorized allowances for transition costs

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[114] Section 4928.39, Revised Code; *see also* IEU-Ohio Ex. 124 at 7.

[115] *Id.*

[116] Section 4928.39(D), Revised Code; IEU-Ohio Ex. 124 at 8.

[117] IEU-Ohio Ex. 124 at 8.

[118] Section 4928.40, Revised Code.

with the exclusion becoming effective on and after the date the allowance was scheduled to end under the prior rate plan.

If an EDU wanted to make a claim for transition revenue, it had to include the claim in its proposed ETP.[119] A proposed ETP had to be filed 90 days after the effective date of SB 3.[120] The statutory criteria discussed above were then used to determine how much of the transition revenue claim was eligible for collection through transition charges. For the generation plant-related portion of the transition revenue claim, the net book value of generating assets at December 31, 2000 was used as the baseline to determine how much, if any, of the net, verifiable, prudently incurred book value was not recoverable in the market and, in this context, the market included the entire market, including the wholesale and retail segments.[121]

Various methods were used by EDUs to forecast how much transition revenue they might experience as a result of customers being able to select their generation service supplier.[122] The most popular approach was a revenue-based approach.[123] Generally, the revenue-based approach projected revenue streams for the various generating plants and computed a present value of the future estimated revenue streams.[124] The present value of the estimated future revenue streams was then

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[119] IEU-Ohio Ex. 124 at 9.

[120] Section 4928.31(A), Revised Code.

[121] IEU-Ohio Ex. 124 at 9.

[122] *Id.*

[123] *Id.*

[124] *Id.*

compared to the net book value of the generating plants at December 31, 2000.[125] Generation plant-related transition costs were deemed to be positive (and potentially eligible for recovery through transition charges) if the present value of the projected revenue streams was, in the aggregate, less than the net book value of the generating plants at December 31, 2000.[126] Again, the generation plant-related transition revenue had to be recovered during the period beginning January 1, 2001 through either the end of the MDP or December 31, 2005, whichever occurred first.[127]

SB 3 also established the obligation for EDUs to provide an SSO. Specifically, SB 3 required:

> After its market development period, an electric distribution utility in this state shall provide consumers, on a non-discriminatory and comparable basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.[128]

b. AEP-Ohio's ETP Case

AEP-Ohio filed its proposed ETP on December 30, 1999.[129] As a part of the proposed ETP, AEP-Ohio submitted a claim for transition revenue which included an

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[125] *Id.*

[126] *Id.* at 9-10.

[127] *Id.* at 10.

[128] Former Section 4928.14(A), Revised Code (SB 221 repealed and replaced the former Section 4928.14(A), Revised Code, which was enacted by SB 3. A link to SB 3, which contains the former Section 4928.14(A), Revised Code, is available at the following link: http://www.legislature.state.oh.us/BillText123/123_SB_3_10_N.htm. (last viewed June 29, 2012)).

[129] IEU-Ohio Ex. 104 at 1.

allowance for both above-market generation plants and generation-related regulatory assets.[130]

AEP-Ohio relied upon Dr. John Landon to estimate the extent to which they had a basis for claiming generation plant-related transition revenue.[131] Dr. Landon used a revenue-based approach described in IEU-Ohio witness Hess' testimony.[132] Dr. Landon projected market-based generation revenue, expenses and capital expenditures for the period 2001 through 2030 using multiple scenarios reflecting different assumptions about natural gas prices and environmental regulations.[133] Dr. Landon discounted these projections to December 31, 2000 to develop his net present value revenue stream and then compared this net present value to net generation plant and associated asset book values as of the same date, December 31, 2000.[134] From this comparison, he rendered an opinion on the amount of generation plant-related transition revenue that the Commission should approve for AEP-Ohio (the present value revenue delta or difference between a cost-based ratemaking revenue stream and a competitive market revenue stream).[135]

Dr. Landon's methodology included all of the components of cost-based ratemaking including a rate base, return on rate base, operation and maintenance expenses, depreciation expense, taxes other than income taxes, and income taxes

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[130] IEU-Ohio Ex. 124 at 10.

[131] *Id.*

[132] *Id*.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 10-11, Ex. JEH-1.

associated with the total generation service (both wholesale and retail market segments).[136] The analysis covered the period from 2001 through 2030.[137] Dr. Landon's testimony concluded that AEP-Ohio would be unable to recover a significant amount of generating plant-related investment in the competitive market.

AEP-Ohio's ETP case was ultimately resolved through a stipulation approved by the Commission.[138] In the ETP Stipulation, AEP-Ohio agreed to forego claims for recovery of above-market generation plants (generation transition costs or "GTC").[139] Specifically, AEP-Ohio agreed to not "… impose any lost revenue charges (generation transition charges (GTC)) on any switching customer," an outcome that was designed to encourage shopping.[140] As OP witness Munczinski testified in support of the Stipulation:

> [t]he purpose, as I understand it, of the generation transition charge was to collect above market generation costs. The typical stranded costs. This gets a little complicated because in our filing, even though we had shown we had stranded costs on a typical 20-year [sic] revenue present-value calculation, we were seeking the lost revenue charge, which is more tied to that FERC formula that says if you are a customer that leaves the utility, you pay the difference between the market rate and what your embedded generation rate is.
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> So as part of the stipulation, let's go to the stipulation first, Section IV, what we agreed to is not to seek or to drop our seeking of the lost revenue charge.[141]

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[136] *Id.* at 11.

[137] *Id.*

[138] IEU-Ohio Ex. 104 at 5, 48.

[139] *Id*. at 15-18.

[140] IEU-Ohio Ex. 124 at 13; IEU-Ohio Ex. 104 at 6, 15-18.

[141] IEU-Ohio Ex. 124 at Ex. JEH-2 page III-16.

The FERC Form 1s for AEP-Ohio for 2001 correctly describe the effect of SB 3 as "…allowing retail customers to select alternative generation suppliers" effective January 1, 2001 and identified the accounting policy changes adopted by AEP-Ohio as a result of the "deregulation" of generation service in Ohio.[142] More specifically and for example, the 2001 FERC Form 1 for CSP states:

> Prior to 1999, CSPCo's financial statements reflected the economic effects of regulation under the requirements of SFAS 71. As a result of deregulation of generation, the application of SFAS 71 for the generation portion of the business in Ohio was discontinued. Remaining generation-related regulatory assets will be amortized as they are recovered under terms of transition plans. Management believes that substantially all generation-related regulatory assets and stranded costs will be recovered under terms of the transition plans. If future events were to make their recovery no longer probable, the Company would write-off the portion of such regulatory assets and stranded costs deemed unrecoverable as a non-cash extraordinary charge to earnings. If any write-off of regulatory assets or stranded costs occurred, it could have a material adverse effect on future results of operations, cash flows and possibly financial condition.[143]

By the express terms of the Commission-approved ETP settlement, AEP-Ohio is prohibited from proposing and charging a generation-related lost revenue charge (regardless of what it is called or the methodology by which it is computed).

The ETP Stipulation was ultimately contested by one party because the party believed that AEP-Ohio had negative transition revenue or "stranded benefits" and argued that the "stranded benefits" (generation plant net book values below market) should have been netted against the regulatory asset transition costs authorized for AEP-Ohio to increase the shopping credits that were used to encourage shopping.[144]

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[142] IEU-Ohio Ex. 105 at 123.7.

[143] *Id.*

[144] IEU-Ohio Ex. 124 at 15.

On November 6, 2000, AEP-Ohio filed a memorandum contra to the party's application for rehearing on the settlement's treatment of transition revenue. In its memorandum contra, AEP-Ohio stated:

> Under the Stipulation, neither Company will impose any generation transition charge on any switching customer. Stipulation, Section IV. The Companies original transition plan filings included GTCs calculated on the basis of a lost revenues approach. The Commission in its Opinion and Order estimated that the claims that the Companies had foregone as a result of their agreement not to impose GTCs amounted to several hundred million dollars. Nonetheless, Shell argues on rehearing that the Commission erred in adopting the Stipulation's resolution of the Companies' GTCs.
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> This argument illustrates perfectly the bankrupt nature of Shell's advocacy. Shell is relegated to arguing that the Stipulation is unreasonable because it contains a provision that eliminates all generation transition charges for both Companies. (emphasis removed and added)[145]

In the Commission's November 21, 2000 Entry on Rehearing addressing and rejecting this party's protest of the Commission-approved ETP Stipulation, the Commission said:

> The primary stipulation also addresses the netting of GTCs since AEP agreed to withdraw its claim for recovery of any GTCs set forth in its transition plans. To the extent that there may be stranded generation plant benefits, the signatory parties to the primary stipulation have agreed that AEP's withdrawal of GTCs reasonably offsets any possible stranded benefits. The Commission finds this compromise to be a reasonable resolution of the netting issue raised by the language in Section 4928.39(B), Revised Code.[146]

The Commission-approved settlement, however, still provided AEP-Ohio with the opportunity to collect transition charges for several hundred million dollars of regulatory

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[145] *Id*. at 15.

[146] *Id.* at 16.

assets with the regulatory asset transition charges ending on December 31, 2007 for OP and December 31, 2008 for CSP.[147]

It is important to note that the provisions of the ETP Stipulation was incorporated into the subsequent rate stabilization plan ("RSP") proposal filed with, modified and approved by the Commission on February 9, 2004 and January 26, 2005 respectively.[148] Although the ETP Stipulation and Opinion and Order made it clear that AEP-Ohio had waived transition cost recovery for any above-market generation-plant related costs and agreed not to impose any charge to recover such costs from shopping customers, AEP-Ohio's subsequent statements eliminate any doubt that could have been remaining. The time has come for the Commission to hold AEP-Ohio to its word, and require AEP-Ohio to follow the law. For these reasons, and for the additional reasons discussed below, the Commission must reject AEP-Ohio's Pricing Scheme and Alternate Pricing Scheme.

c. Amended Substitute Senate Bill 221 did not grant AEP-Ohio a second chance to receive transition revenues

In case SB 3 left any doubt, Amended Substitute Senate Bill 221 ("SB 221") made it clear that further collection of transition revenue is precluded by Ohio law. In 2008 the General Assembly passed SB 221, which altered somewhat the structure of Ohio's electricity regulations. Although the General Assembly changed the options available to establish pricing for the SSO, SB 221 retained the obligation of EDUs to provide all consumers in their certified service area "a standard service offer of all competitive retail electric services necessary to maintain essential electric service to

[147] IEU-Ohio Ex. 104 at 11

[148] IEU-Ohio Ex. 109.

consumers, including a firm supply of electric generation service."[149] SB 221 expressly provided that "[a] standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan."[150]

2. The Commission May Not Authorize AEP-Ohio's Pricing Scheme or Alternate Pricing Scheme under Section 4928.143, Revised Code.

In addition to the fact that the statutory timeframe for approving transition revenue has long since passed, the Commission is still otherwise without authority to approve AEP-Ohio's capacity charge proposals. The Commission may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.[151] With the enactment of SB 3, generation-related retail electric service became, and remains today, a competitive retail electric service.[152] The Ohio Supreme Court has held on several occasions that the generation component of retail electric service is not subject to the Commission's regulation:

> [i]t is well settled that the generation component of electric service is not subject to commission regulation. In *Constellation NewEnergy, Inc.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 2, we stated that S.B. 3 'provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service.'

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[149] Section 4928.141, Revised Code.

[150] *Id*.

[151] *Time Warner AxS v. Pub. Util. Comm*., 75 Ohio St.3d 229, 234, 661 N.E. 2d 1097 (1999).

[152] "Beginning on the starting date of competitive retail electric service [January 1, 2001], *retail electric generation*, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility *are competitive retail electric services* that the consumers may obtain subject to this chapter from any supplier or suppliers." Section 4928.03, Revised Code (emphasis added).

> R.C. 4928.03 specifies that retail electric-generation service is competitive and therefore not subject to commission regulation, and R.C. 4928.05 expressly removes competitive retail electric services from commission regulation.[153]

The Ohio Supreme Court has also held that concerns about the future do not empower the Commission to create remedies beyond those permitted by the law.[154]

With respect to establishing rates for competitive retail electric services, the Commission's authority is limited to an EDU's SSO.[155] As the Commission held in its decision denying recovery of closure costs for the Sporn 5 generating facility:

> Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code. Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service, we find that so too is the closure of an electric generating facility. Additionally, although there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances, the enumerated statutory exceptions do not include Sections 4905.20 and 4905.21, Revised Code, which otherwise govern applications to abandon or close certain facilities.
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> …
>
> OP also requests approval of a rider to collect the costs associated with the closure of Sporn Unit 5. As discussed above. Section 4928.05(A)(1), Revised Code, generally prohibits Commission regulation of retail electric

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[153] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶20. The Court's use of "regulation" was in reference to the Commission's ability to use its traditional "cost-based" ratemaking authority. *Id.* at ¶19. That Court was effectively holding that in the context of competitive retail electric services, the Commission could only approve rates based on market prices, just as AEP-Ohio has claimed. IEU-Ohio Ex. 119 at 18.

[154] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶23.

[155] "On and after the starting date of competitive retail electric service, *a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation … by the public utilities commission under Chapters 4901. to 4909.*, 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter." Section 4928.05(A)(1), Revised Code (emphasis added).

> generation service. However, that section expressly provides that it does not limit the Commission's authority under Sections 4928.141 to 4928.144, Revised Code.[156]

While Section 4928.143, Revised Code authorizes the Commission to approve an SSO in the form of an ESP, an ESP may contain only the provisions provided by that Section.[157] In an ESP proceeding, Section 4928.143(C)(1), Revised Code, places "[t]he burden of proof ... on the electric distribution utility." That burden requires the EDU to demonstrate that the provisions in its ESP fall within the enumerated categories of Section 4928.143(B)(2), Revised Code.[158] Establishment of a capacity pricing method for CRES providers is not on the list of items that may be included in an ESP. AEP-Ohio has not claimed otherwise. In fact, AEP-Ohio has not identified any legal authority the Commission might have to approve its Pricing Scheme or Alternate Pricing Scheme. Rather, AEP-Ohio and American Electric Power Service Corporation ("AEPSC") on behalf of AEP-Ohio have asserted repeatedly that the Commission is without any jurisdiction to authorize capacity charges applicable to CRES providers serving retail customers in AEP-Ohio's distribution service area.[159]

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[156] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider,* Case No. 10-1454-EL-RDR, Finding and Order at 16-17 (Jan. 11, 2012) (hereinafter "*Sporn Decision*").

[157] *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 520 ("if a given provision does not fit within one of the categories listed "following" (B)(2), it is not authorized by statute.") ("*Remand Decision"*).

[158] *Id*.

[159] Co. Ex. 101 at 4 ("AEP-Ohio's litigation in the capacity charge proceeding (Case No. 10-2929-EL-UNC) remains intact"); *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, Ohio Power company's and Columbus Southern Power Company's Application for Rehearing at 18-21 (Jan. 7, 2011); *American Electric Power Service Corporation*, FERC Docket No. ER11-2183-001, Request for Rehearing at 13 (Feb. 22, 2011).

These commonly acknowledged limitations on the Commission's authority extend more broadly to the Modified ESP considerations required of the Commission. For example, the ESP versus MRO test advanced by AEP-Ohio effectively assumes that the Commission can set the capacity price associated with the MRO option at a level that is even higher than the capacity prices advanced as part of the Modified ESP's Pricing Scheme.

Beyond the limitations on the Commission's authority under Ohio law, the Commission is preempted from regulating wholesale transactions within the exclusive purview of the Federal Energy Regulatory Commission ("FERC"). As described by AEP-Ohio, its Pricing Scheme and Alternate Pricing Scheme would apply to wholesale transactions that involve sales for resale.[160]

Under the Federal Power Act, the FERC has exclusive jurisdiction over wholesale transactions including sales for resale.[161] In PJM's territory, the Reliability Assurance Agreement ("RAA") is the FERC-approved document that controls the pricing of wholesale capacity charges.[162] The RAA does not, and cannot, alter the Commission jurisdiction; the Commission's authority is a result of state and federal law.[163] Thus, the Commission is without authority to approve either of the capacity proposals.

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[160] Co. Ex. 101 at 4.

[161] 16 U.S.C. § 824(b); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).

[162] IEU-Ohio Ex. 114.

[163] *See e.g.*, *American Electric Power Service Corp. v. PJM Interconnection, L.L.C.*, FERC Docket No. EL11-32-000, Answer of PJM Interconnection, L.L.C. to Complaint at 8 (April 25, 2011) ("Notably, although this provision [Section D.8 of Schedule 8.1] is more broadly worded than AEP would like, the RAA does not, indeed cannot, enlarge or contract a state commission's jurisdiction. While AEP contends that the Ohio Commission is improperly regulating wholesale transactions by setting a rate for AEP

3. Although AEP-Ohio has claimed a need to increase its capacity charges to avoid financial harm, AEP-Ohio has not complied with the Statutory and Commission requirements that would allow AEP-Ohio to secure such an increase

Much of the chanting that has accompanied AEP-Ohio's prosecution of its proposal to sharply increase capacity prices consists of implicit and explicit references to financial harm that AEP-Ohio says will fall upon AEP-Ohio or its one shareholder if the Commission does not yield to AEP-Ohio's desire to raise capacity prices and maintain the enviable profits which Ohio has heretofore helped AEP-Ohio achieve year after year.

The claims of financial harm are, of course, dripping in irony in view of AEP-Ohio's efforts to rate-shock many small businesses off the face of Ohio's map and they are an implicit acknowledgement that AEP-Ohio's current SSO prices are disconnected at a level well above-market.

In effect, AEP-Ohio is asking the Commission to substantially raise prices on CRES providers to elevate the competitive benchmark prices that are supposed to discipline AEP-Ohio's SSO prices. AEP-Ohio's circular fox-guarding-the-hen-house approach to providing consumers with the benefits of customer choice and effective competition would be comical if this situation had not, long ago, turned serious.

Historically, the Commission has carefully considered the claims of utilities seeking rate increases to avoid financial harm and it has used its authority under Section 4909.16, Revised Code, to carefully respond to such rate increase proposals. But, here again, AEP-Ohio has not attempted to satisfy any of the requirements that

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capacity in connection with retail load-switching, whether a state has exceeded its jurisdiction is not a matter that can be decided by reference to the RAA.").

must be met before the Commission can grant a rate increase based on utility claims of financial harm:

> [w]hen the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.[164]

The Commission has held that the ultimate question for it to decide in an emergency rate relief case is "whether, absent emergency rate relief, the public utility will be financially imperiled or its ability to render service will be impaired."[165] Additionally, "[i]f the applicant fails to sustain its [heavy] burden of proof on this issue, the Commission's inquiry is at an end."[166] To review the "ultimate question" the Commission has developed a 4-step process.

> [f]irst, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the applicant's supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation. Next, emergency relief will not be granted pursuant to Section 4909.16, Revised Code, if the emergency request is filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.[167]

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[164] Section 4909.16, Revised Code.

[165] *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order at 6 (Sept. 2, 2009).

[166] *Id.*

[167] *Id.*

In this proceeding, AEP-Ohio has not offered any evidence demonstrating the nature and extent to which AEP-Ohio will be financially imperiled or its ability to render service will be impaired but for increasing rates. Generalized and unsubstantiated claims of lower returns on common equity than the significantly excessive returns that AEP-Ohio has enjoyed as a result of its Ohio electricity prices do not get the job done.[168] Therefore, the Commission cannot rely upon its authority under Section 4909.16, Revised Code, to consider or act upon AEP-Ohio's proposal to significantly increase capacity charges applicable to CRES providers serving retail customers in AEP-Ohio's distribution service territory.

In this proceeding, AEP-Ohio has repeatedly claimed that the Commission must consider AEP-Ohio's financial condition to address the contested issues associated with generation supply prices, but the Commission has previously held that the financial results of generation-related pricing are irrelevant. In OP's and CSP's rate stabilization plan ("RSP") proceedings, automatic annual generation-related increases of 3% (CSP) and 7% (OP) were proposed for three years. The automatic increases were opposed by several parties.[169] These parties argued that the Commission should reject the proposed annual automatic generation-related increases because the EDUs were already earning healthy returns on common equity and the increases would simply increase those returns. In response, the Commission rejected the intervenors'

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[168] *See* Co. Ex. 151 at 11-14.

[169] *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, Opinion and Order at 15, 18 (Jan. 26, 2005).

objections, stating that market prices and not earnings determine the prices for generation-related services.

> With the expiration of the MDP, generation rates are subject to the market (not the Commission's traditional cost-of-service rate regulation) … Section 4928.05(A)(1), Revised Code. *We make this observation to point out that, under the statutory scheme, company earnings levels would not come into play for establishing generation rates - market tolerances would otherwise dictate, just as AEP argued (AEP Reply Br. 26-27)*. We are strongly committed to encouraging the competitive market in AEP's service territories as it is the policy of this state, per Section 4928.02, Revised Code. Given that commitment, we do not feel that the earnings levels evidence or cost-based analyses and arguments presented by [the intervenors] justify rejection of this provision.[170]

As the above quote documents, AEP-Ohio has previously and successfully urged the Commission to ignore the financial effects of changes in generation-related prices. In this proceeding, AEP-Ohio has reversed course and is now claiming that the Commission must approve the Modified ESP largely because of AEP-Ohio's desire to maintain earnings for its generation business.

Based on Commission precedent, the potential effects of generation service pricing (including the generation capacity service available to CRES providers) on the financial condition of AEP-Ohio's generation business are irrelevant.

4. The Commission's other statutory powers do not provide the Commission with the requisite authority to authorize the Pricing Scheme or Alternate Pricing Scheme

Beyond its SSO authority in Chapter 4928, Revised Code, and its emergency rate relief authority, the Commission is without authority to authorize the Pricing Scheme or the Alternate Pricing Scheme. Under Chapter 4909, Revised Code, the Commission has authority to authorize rates and regulate non-competitive retail electric

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[170] *Id*. at 18 (emphasis added).

service. Chapter 4909, however, does not extend to competitive services.[171] By law, retail generation service is defined as competitive, and the Commission has properly held that retail electric generation service can be regulated under only Chapter 4928, Revised Code.[172] Thus, the Commission does not have authority under Chapter 4909, Revised Code, to set a non-market-based capacity charge, even if that Chapter was properly invoked.

Even if one pretended that the Commission has authority under its traditional cost-based regulation to consider and approve either of AEP-Ohio's Schemes, AEP-Ohio has not satisfied any of the procedural requirements necessary to invoke the Commission's traditional ratemaking authority. For example, AEP-Ohio did not file a pre-filing notice and serve it upon the proper entities.[173] AEP-Ohio did not file an application to increase rates in accordance with the filing requirements contained in Section 4909.18, Revised Code and the Commission's rules. Additionally, an application to increase rates must be based on property used and useful in providing service and convenience to the public, as determined by Section 4909.05, Revised Code. AEP-Ohio did not introduce any evidence to suggest its property valuation complied with the Revised Code. Thus, the Commission cannot approve AEP-Ohio's Pricing Schemes under Chapter 4909, Revised Code.

Additionally, the Commission has certain powers under its general supervisory authority. That authority, however, does not allow the Commission to authorize rates

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[171] Section 4928.05(A), Revised Code.

[172] *Sporn Decision* at 16-17.

[173] Section 4909.43, Revised Code; Rule 4901-7-1, O.A.C., Appendix at 7; Section 4909.43, Revised Code.

based on methods or procedures that are inconsistent with those specified by the Ohio Revised Code. Because the General Assembly has specified the methods and procedures that the Commission must follow, the Commission cannot usurp those statutory methods or procedures by relying on the statutes granting the Commission general supervisory powers.[174] Thus, the Commission lacks authority to consider or authorize the Pricing Scheme or the Alternate Pricing Scheme in an ESP proceeding or any other proceeding.

5. The Pricing Scheme and Alternate Pricing Scheme would result in an unlawful and unreasonable subsidy

An above-market price for capacity would allow AEP-Ohio to impose and collect revenue from a currently higher-than-market charge on the CRES providers seeking customers in AEP-Ohio's service territory while various AEP-Ohio affiliates are actively acquiring market share in both the wholesale and retail markets associated with other service areas through the use of RPM-based pricing. This favoritism that AEP-Ohio seeks violates Ohio law and is fundamentally unfair to customers throughout Ohio, the broader PJM region, and to CRES providers.

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[174] *Columbus S. Power Co. v. Pub. Util. Comm.,* 67 Ohio St.3d 535, 620 N.E.2d 835, 840 (1993). In this case, the Ohio Supreme Court had to address whether the Commission could use its seemingly broad grant of authority contained in Section 4901.02, Revised Code ("The commission shall possess the powers and duties specified in, as well as all powers necessary and proper to carry out the purposes of Chapters …") to promulgate an order that conflicted with other ratemaking statutes. The Court held:

> The comprehensive ratemaking formula provided by the General Assembly is meant to protect and balance the interests of the public utilities and their ratepayers alike. *Dayton Power & Light Co. v. Pub. Util. Comm., supra,* 4 Ohio St.3d 91, 4 OBR 341, 447 N.E.2d 733. We cannot conclude that it was the General Assembly's intent under the above enabling statute, R.C. 4901.02(A), to permit the PUCO to disregard *that very formula* in instances in which it simply did not agree with the result Cf. *Consumers' Counsel, supra,* 67 Ohio St.2d at 165, 21 O.O.3d at 104, 423 N.E.2d at 828 ("the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the PUCO may effortlessly abrogate that very formula").

Id. at 840.

Section 4928.02(H), Revised Code, states the general policy prohibiting anticompetitive subsidies. In AEP-Ohio's *Sporn* proceeding, the Commission held that under Section 4928.02(H), Revised Code, AEP-Ohio was not entitled to a rider it sought to recover the costs it alleged resulted from the closure of the Sporn 5 generating unit.[175] The Commission concluded that such a rider would effectively subsidize AEP-Ohio's generation, in violation of Section 4928.02(H), Revised Code.[176] Despite the plain meaning of Section 4928.02(H), Revised Code, and the Commission's recent refusal to authorize the recovery of the unamortized generation-related costs of Sporn 5 through a non-bypassable charge, AEP-Ohio nonetheless persists with its proposal to increase capacity rates to recover generation-related costs that it claims are not recoverable in the generation market.

The Pricing Scheme and Alternate Pricing Scheme would have all CRES providers pay AEP-Ohio's capacity charge because CRES providers now have no alternative.[177] Because all CRES providers will be required to pay the charge if they seek to provide retail electric service in AEP-Ohio's service territory, AEP-Ohio will effectively receive a preference and subsidy for the competitive generation business in violation of the requirements of Section 4928.02(H), Revised Code.

Further, AEP-Ohio's proposal would create an unreasonable advantage for AEP-Ohio's retail affiliates to enter other Ohio service territories. While AEP-Ohio's retail affiliates are competing successfully in the CBPs of Duke and FirstEnergy areas for

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[175] *Sporn Decision*, Opinion and Order at 19 (Jan. 11, 2012).

[176] *Id.*

[177] Tr. Vol. XIII at 3497-3498; FES Ex. 102A at 16; *see also* IEU-Ohio Ex. 125 at 3, 40.

SSO load,[178] AEP-Ohio is refusing to initiate the very type of CBP that it has used and supported in the past until its dubious claims regarding the effect of the AEP System Interconnection Agreement (sometimes called the "Pool Agreement") and the RAA on its ability to participate in an SSO auction are resolved to the satisfaction of AEP-Ohio.[179] Additionally, AEP-Ohio is seeking to subsidize its generation function with above-market capacity prices (or more likely, retain its SSO load by pricing capacity to thwart competitive entry).[180] It would be unfair to permit AEP-Ohio affiliates to compete for customers in other service territories while AEP-Ohio is proactively foreclosing competitive entry through its capacity pricing proposal.

The Fixed Resource Requirement ("FRR") election, moreover, does not provide a basis for securing approval of above-market capacity prices. From 2007 through the end of 2011, AEP-Ohio used RPM-based pricing. During this period, the FRR option was in force in its current form, yet AEP-Ohio did not claim that the FRR Alternative required above-market capacity prices.[181] Both Duke's and FirstEnergy's EDUs are also operating under the FRR alternative, and each provided capacity to CRES providers at the RPM price (Duke) or a very similar market-based price established by separate integration auctions (FirstEnergy).[182] Likewise, CRES providers serving customers taking distribution service in The Dayton Power & Light ("DP&L") service

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[178] IEU-Ohio Ex. 125 at 35-40.

[179] Co. Ex. 100 at 10-11; Co. Ex. 101.

[180] IEU-Ohio Ex. 125 at 35.

[181] IEU-Ohio Ex. 125 at 13-14.

[182] *Id.*at 35-38.

territory compensate the EDU at the RPM price.[183] In contrast, AEP-Ohio has not identified any legitimate legal or practical reason why its generation function prices cannot continue to be subjected to market forces.

6. Approval of the Pricing Scheme or the Alternate Pricing Scheme would unlawfully result in discriminatory and non-comparable service

Charging CRES providers for capacity based on the Pricing Scheme or the Alternate Pricing Scheme would result in the generation capacity price embedded in SSO rates being non-comparable to the capacity prices charged to CRES providers. The rates within the Pricing Scheme and between the Alternate Pricing Scheme and the SSO rates would also result in unlawful discrimination. Various sections of the Revised Code and Commission rules require the Commission to ensure that rates, services, and practices associated with competitive and non-competitive retail electric service rates are comparable and non-discriminatory. Section 4905.33(A), Revised Code, prohibits a utility from implementing a discriminatory pricing scheme:

> No public utility shall directly or indirectly ... charge, demand, collect, or receive ... a greater or lesser compensation for any services rendered [except as provided by the Revised Code] than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.

The comparability and anti-discrimination requirements, key concepts of deregulation, are picked up and continued throughout Chapter 4928. For example, Section 4928.02(A), Revised Code, provides that it is the State's policy to "[e]nsure the availability to consumers of … nondiscriminatory … retail electric service." Section

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[183] *Id*. at 39-40.

4928.02(B), provides that is the State's policy to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." Similarly, Section 4928.40(D), Revised Code, provides that "no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service."

Likewise, the definition of "standard service offer" in Rule 4901:1-35-01(L), Ohio Administrative Code ("OAC"), highlights the importance of the role of the nondiscriminatory and comparable pricing requirements that are imposed by Chapter 4928, Revised Code: "'[s]tandard service offer' means an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." These statutory and administrative requirements for nondiscriminatory and comparable rates extend to both customers and suppliers. For example, Sections 4928.15 and 4928.35(C), Revised Code, require electric distribution service to be available to all consumers and suppliers on a non-discriminatory and comparable basis.

In this case, AEP-Ohio has not demonstrated that the discrimination and non-comparability in the Pricing Scheme and Alternate Pricing Scheme are appropriate based on cost of service or other proper considerations. Further, when specifically requested to identify the capacity component of its SSO rates, AEP-Ohio could not or chose not to do so.[184]

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[184] *Id.* See IEU-Ohio Ex. 125 at 43 and Ex. KMM-14.

The Commission has previously faced comparability claims, and has rejected the "just-trust-us, it's comparable and doesn't discriminate" approach advanced by AEP-Ohio. In 1993, Cellnet filed a complaint against various wholesale cellular telephone service providers for favoring their own retail divisions over competitors, such as Cellnet.[185] Cellnet argued that one of the wholesale providers, Ameritech Mobile, had failed to follow through with corporate separation and failed to charge its retail arm the same rates it was charging Cellnet. Similar to this case, the *Cellnet Comparability Complaint Case* revealed that the wholesale arm was not keeping records of transactions with the retail segment.[186] The Commission held:

> in the absence of records reflecting Ameritech Mobile's internal rate under which Ameritech Mobile's retail receives service, Ameritech Mobile is simply requesting the Commission to trust it based on its self-serving arguments for any disparity in the treatment between Ameritech Mobile's retail and Cellnet.[187]

The Commission went on to conclude Ameritech Mobile had failed to prove it charged its retail segment and Cellnet comparable rates and that the disparity in treatment violated Ohio law.[188]

Similarly, AEP-Ohio did not demonstrate what capacity cost is embedded in the base SSO rates.[189] While AEP-Ohio's witness Allen suggested that the AEP-Ohio's

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[185] *In the Matter of the complaint of Westside Cellular, Inc. dba Cellnet v. New Par Companies dba AirTouch Cellular and Cincinnati SMSA Limited Partnership*, Case No. 93-1758-RC-CSS, Opinion and Order (Jan. 18, 2001), aff'd, *New Par v. Pub. Util. Comm'n of Ohio*, 98 Ohio St.3d 277 (2002) (hereinafter "*Cellnet Comparability Complaint Case*").

[186] *Id.* at 33-39.

[187] *Cellnet Comparability Complaint Case*, Opinion and Order at 51.

[188] *Id.*

SSO rates are comparable to a $355/mw-day charge assessed to CRES providers,[190] his calculation merely compares the revenue that would be produced from base generation rates if all customers were receiving SSO service and concludes it would be roughly equivalent to the revenue that would be collected from a $355/mw-day charge if all customers were shopping.[191]

The comparison is meaningless: it offers no basis for concluding that the capacity prices embedded in the SSO are comparable to the capacity prices AEP-Ohio seeks. During cross-examination, moreover, Mr. Allen admitted that costs other than capacity were recovered in base generation rates.[192] As Mr. Allen's "revenue comparison" was AEP-Ohio's only evidence to prove comparability, there is nothing in the record to support a finding that SSO rates and the Pricing Scheme or the Alternate Pricing Scheme would be comparable. Moreover, as discussed in the testimony of IEU-Ohio witness Murray, structural differences between SSO rates, the Pricing Scheme and the Alternate Pricing Scheme make it difficult, if not impossible, to achieve true comparability.[193] Additionally, even if one assumed that SSO rates and a $355/mw-day charge assessed to CRES providers based on a "revenue comparison" were comparable, Mr. Allen's comparison also fails to account for the shopping credit that would apply under the Alternate Pricing Scheme.

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[189] Tr. Vol. V at 1440-1441; IEU-Ohio Ex. 125 at 43, Ex. KMM-14.

[190] Tr. Vol. V at 1438.

[191] *Id.*

[192] Tr. Vol. V at 1440-1441.

[193] IEU-Ohio Ex. 125 at 43.

The combination of AEP-Ohio's positions that it can, on the one hand, establish non-cost-based default generation supply prices (which have historically been justified based on market price estimates) and, on the other hand, contemporaneously impose above-market capacity charges on CRES providers defies the purpose of the concepts of comparability and non-discrimination, concepts that are key to successfully restructuring the electricity industry to allow competition to serve the public interest in reasonable prices and reliable service.[194] Because AEP-Ohio failed to meet its statutory burden of proof in this proceeding, the Commission must reject the pricing schemes.

The Pricing Scheme and Alternate Pricing Scheme also fail because they are unduly discriminatory. The Ohio Supreme Court has held that differences in treatment of customers can be justified only "where such differential is based upon some actual and measurable differences in the furnishing of services to them."[195] As the record demonstrates, under the Pricing Scheme the only reason CRES providers of shopping customers will pay different capacity rates is that some customers contracted to receive retail electric generation service earlier than other customers.[196] Additionally, under the Alternate Pricing Scheme shopping customers would receive a shopping credit. This

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[194] *Id*. at 43-44; Chapter 4928, Revised Code; *see also American Electric Power Service Corporation (AEP)*, 67 FERC ¶ 61,168 at 61,490 (1994) (the comparability standard as applied by FERC provided that "an open-access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system."); *Promoting Wholesale Competition Through Open-Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Docket Nos. RM95-8-000 and RM94-7-001, Notice of Proposed Rulemaking, 60 Fed. Reg. 17662 (Apr. 7, 1995), FERC Statutes and Regulations ¶ 32,514 (1995) (open-access NOPR).

[195] *Townships of Mahoning County v. Pub. Util. Comm'n of Ohio*, 58 Ohio St.2d 40, 44 (1979).

[196] Tr. Vol. XIII at 3498-99.

credit would mean, assuming AEP-Ohio's only evidence (the "revenue comparison") is true, that SSO customers are paying higher capacity charges ($355/mw-day) than shopping customers ($355/mw-day minus the $10/mwh shopping credit). AEP-Ohio has not offered any reason why it believes SSO customers and customers under the Alternate Pricing Scheme should pay different rates for the same service. AEP-Ohio's limited evidence to support the different charges certainly does not demonstrate the "measurable difference" required by law.

In fact, the pricing discrimination AEP-Ohio proposes under the Pricing Scheme and Alternate Pricing Scheme is about maintaining AEP-Ohio's hold on customers by blocking the ability of CRES providers to offer alternatives to default service. As the Commission is well aware, AEP-Ohio designed the Pricing Scheme as a means of preventing customers from shopping, telling members of the investment community that shopping would not occur at $255/mw-day.[197] Blocking customer choice certainly cannot be a legal basis for the discrimination contained in the Pricing Scheme or the Alternate Pricing Scheme. Even if the Commission had authority to authorize a price for capacity available to CRES providers serving customers in AEP-Ohio's distribution service area, such authority is of no use here because AEP-Ohio's Pricing Scheme and Alternate Pricing Scheme produce unlawful, non-comparable and discriminatory outcomes. The Commission must reject the proposed Pricing Scheme and Alternate Pricing Scheme.

7. State policy demonstrates use of RPM is an appropriate market price for capacity

[197] FES Ex. 105 at Ex. TCB-6.

Section 4928.02, Revised Code, contains State policies which the Commission is obligated to effectuate pursuant to Section 4928.06, Revised Code. These policies generally support reliance on market-based approaches to set prices for competitive services such as generation service and strongly favor competition to discipline prices of competitive services. As recently as December 14, 2011, the Commission endorsed the same principle:

> We will first look to the market to build needed capacity. ... [Any cost-based generation facility] must be based upon a demonstration of need under the integrated resource planning process and be narrowly tailored to advance the policy provision contained in Section 4928.02, Revised Code ... .[198]

In this proceeding, however, AEP-Ohio requests the Commission temporarily ignore the State's and the Commission's own policy. AEP-Ohio's temporary request is nothing more than an attempt to avoid charging market-based pricing over the next three years when market prices are low and could lower consumers' electric bills while it waits for market prices to increase three years out. Because AEP-Ohio has not demonstrated that the Commission could, or should, deviate from these policies, the Commission must reject AEP-Ohio's pricing schemes.

8. AEP-Ohio will not suffer financial harm if it charges RPM

Notwithstanding the unlawful nature of the request and the Commission's prior holdings that the financial effects of generation service pricing are irrelevant under Ohio law discussed above, AEP-Ohio's claim that it needs another transition period for financial reasons is not supported by AEP-Ohio's analyses.[199] In 2001, AEP-Ohio

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[198] Opinion and Order at 39-40 (Dec. 14, 2011).

[199] IEU-Ohio Ex. 121; OCC Ex. 104.

concluded that its generating assets would not be impaired as a result of SB 3 and deregulation.[200] In late 2011, a second analysis concerning the AEP East generating units was conducted to address whether new environmental regulation resulted in an impairment of generating assets.[201] That analysis assumed that capacity prices would be set at known and forecasted RPM prices[202] and concluded that the AEP East generating assets had a positive cash flow over the 30-year expected life of the generating assets of over $22 billion. CONFIDENTIAL: [203] END CONFIDENTIAL

Thus, AEP-Ohio's own analyses demonstrate that since 2001 it has been able to, and expects future cash flow to permit recovery of generation plant investment through market-based rates. If properly subjected to market forces, AEP-Ohio's generation business may not be as wildly profitable as it has been during the last few years. Regardless of the outcome of continuing to use RPM-based pricing, AEP-Ohio's generation business is, as a matter of law, supposed to be fully on its own in the competitive market.[204]

In conclusion, the Commission does not have a legal or factual basis to permit AEP-Ohio to implement the Pricing Scheme or the Alternate Pricing Scheme. The timeframe to collect above-market generation-related or transition revenues has

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[200] IEU-Ohio Ex. 105 at 123.7 ("At the time the Company discontinued SFAS 71, the [impairment] analysis showed that there was no accounting impairment of generation assets.").

[201] *See also* OCC Ex. 104.

[202] IEU-Ohio Exs. 117 & 121; Co. Ex. 117.

[203] IEU-Ohio 121 at 10-13.

[204] Section 4928.38, Revised Code.

passed. AEP-Ohio is bound by its prior agreement to not impose lost revenue charges on shopping customers. Moreover, the Modified ESP prices would be non-comparable and unduly discriminatory. Finally, AEP-Ohio's allegation that its capacity pricing proposals are necessary to avoid financial harm are irrelevant, unsupported by either AEP-Ohio's prior use of RPM based pricing or its own internal analyses. Thus, AEP-Ohio has failed to demonstrate that the Commission has a legal basis on which to approve either.

B. The Retail Stability Rider Is an Illegal and Unreasonable Rate Increase

As part of its Modified ESP, AEP-Ohio is proposing a new rider, the RSR.[205] As proposed, the RSR would be non-bypassable[206] and would be set to make up the difference between $929 million annually[207] and the non-fuel base generation revenue, capacity revenue based on the two-tiered capacity prices of $146/mw-day and $255/mw-day (and subject to a $3/mwh energy credit), and capacity revenue associated with the energy-only auctions.[208] Based on the assumptions contained in the AEP-Ohio proposal, the resulting rider would average $2/mwh.[209]

As with its proposals concerning capacity charges, this so-called "transitional rider"[210] is illegal and unreasonable for many of the same reasons. First, it would permit

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[205] Co. Ex. 116 at 13.

[206] Application at 10.

[207] The $929 million target revenue is based on a calculation of revenue necessary to produce a 10.5% return on average 2011 equity. Co. Ex. 116 at 14.

[208] *Id*. at 14 and Ex. WAA-6.

[209] *Id*., Ex. WAA-6.

[210] Co. Ex. 116 at 13.

AEP-Ohio to collect above-market generation or transition revenue in violation of state law. Second, the RSR violates requirements of corporate separation that prohibit the EDU from favoring its own generation or that of its affiliate. Third, AEP-Ohio has failed to demonstrate that the RSR can be approved under Section 4928.143(B), Revised Code. Fourth, AEP-Ohio has failed to demonstrate any reasoned basis for the rider based on the alleged claims that it will improve shopping opportunities or is necessary to prevent "financial harm." Because it is not legal or reasonable, the Commission should reject the RSR.

1. The RSR Is an illegal attempt to collect Transition Revenue

AEP-Ohio has made it abundantly clear that it believes that it is entitled to a second bite at the "transition revenue" apple, and the RSR, along with the above market capacity charges and the PTP, are the primary means it proposes to assure that shopping and non-shopping customers satisfy AEP-Ohio's appetite. As proposed by AEP-Ohio, the RSR is designed to supplement the AEP-Ohio generation revenue stream to produce $929 million annually.[211] The differential used to calculate the RSR is based on the "lost" revenue associated with the shopping customers.[212] As a means of providing AEP-Ohio with revenue it could not recover through its SSO rates and

[211] During rebuttal, AEP-Ohio offered that the RSR did not generate a particular level of revenue or earnings. Co. Ex. 151 at 2-5. Regardless of how AEP-Ohio wishes to cast the RSR, its discovery response regarding the design of the rider indicates that it will recover revenue lost as a result of shopping. Ormet Ex. 110.

[212] AEP-Ohio has taken the position that the RSR would not be necessary and AEP-Ohio would offer a shopping credit if it was permitted to charge $355/mw-day for capacity. Co. Ex. 116 at 15-17. According to Mr. Allen, AEP-Ohio recovers at least its embedded cost of capacity as a result of its current, and future, SSO rates. Thus, anything less than $355/mw-day would result in underrecovery of capacity costs, according to AEP-Ohio logic. *Id*. at 9. Of course, the AEP-Ohio logic is highly flawed as AEP-Ohio has admitted that it has no basis for asserting that the SSO rates have a cost basis. IEU-Ohio Ex. 125, KMM-14.

capacity charges, the RSR is nothing more than a prohibited transition revenue recovery mechanism.

As discussed above, however, AEP-Ohio's claim for above-market generation or transition revenue is meritless. As Mr. Hess's testimony demonstrated, the one-and-done opportunity to recover above-market generation revenue was through the ETP process. The time for that recovery is long gone. Based on the unequivocal restriction on the Commission's authority, the ETP settlement, and the unrebutted testimony that AEP-Ohio is seeking above-market generation revenue, the Commission cannot authorize the RSR.

2. The RSR violates corporate separation requirements and policy

Chapter 4928, Revised Code, and the rules the Commission has adopted to implement the corporate separation requirements are designed to assure that retail customers as well as CRES providers are not subjected to the EDU's discretion in ways that would allow the EDU to favor its or its affiliate's assets or lines of business.[213] The RSR would permit what is prohibited under the corporate separation rules. As Mr. Hess explains:

> Instead of being competitively neutral, AEP-Ohio, the EDU, is selectively advancing proposals to provide its generation business segment with financial and other benefits or preferences not available to any other supplier of generation service. Throughout this proceeding and in other cases, AEP-Ohio has often portrayed itself as competing with CRES suppliers even though AEP-Ohio, the EDU, can only provide generation supply when a customer is not served by a CRES supplier. AEP-Ohio has also asserted that the generation supply benefits of Ohio's customer choice must be delayed to allow AEP-Ohio to adjust its latest business model. The claim that AEP-Ohio needs additional time is irreconcilably

[213] *See, e.g.*, Section 4928.17, Revised Code; Chapter 4901:1-20, OAC; IEU-Ohio Ex. 124 at 26.

> inconsistent with the somewhat unique wires-transfer corporate separation plan approved by the Commission for AEP-Ohio. It is also my understanding that any competitive service provided by AEP-Ohio, the EDU, must be provided through a separate entity that is not benefitted by anything that AEP-Ohio, the EDU, does with regard to the provision of non-competitive services.
>
> When AEP-Ohio's capacity charge, Pool Termination Provision and RSR proposals are considered in light of the role and purpose of the corporate separation requirements, I believe it is clear that the Modified ESP is essentially an attempt to bypass the corporate separation requirements for the benefit of AEP-Ohio's generation business segment and to the disadvantage of retail customers and CRES suppliers. Thus, the blueprint used by AEP-Ohio to assemble its Modified ESP ignores the building code established by the General Assembly and the Commission's rules.[214]

The improper benefit the proposed ESP seeks to bestow on AEP-Ohio's generation is best demonstrated by AEP-Ohio's proposal to "pass through" the SSO charges including the RSR to the competitive affiliate once corporate separation is completed.[215] As discussed below in regard to AEP-Ohio's corporate separation proposal, AEP-Ohio proposes to enter a full requirements generation supply contract for the SSO load with AEP Generation Resources Inc. ("Genco"), a competitive generation affiliate, following corporate separation. Under the proposal, AEP-Ohio would pass all generation-related revenue, including the RSR revenue to Genco.[216] Because the competitive affiliate will receive the revenue AEP-Ohio has identified is necessary to make up for the "lost" revenue associated with shopping, the RSR improperly subsidizes the generation function and is thereby illegal.

3. The RSR is not permitted under Section 4928.143(B)(2), Revised Code

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[214] IEU-Ohio Ex. 124 at 30-31.

[215] Co. Ex. 104 at 6-8.

[216] *Id*. at 8.

The Commission is strictly bound by Section 4928.143(B)(2), Revised Code, as to the provisions it may authorize in an ESP. "[I]f a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[217]

None of the provisions of Section 4928.143(B)(2), Revised Code, authorizes the Commission to permit the RSR in an ESP. Because the RSR is not designed to recover costs, the cost recovery provisions do not apply.[218] The RSR also does not provide for an automatic increase in any component of the ESP, economic development, a phase-in, or securitization.[219] The only remaining provision is Section 4928.143(B)(2)(d), Revised Code, but AEP-Ohio has failed to demonstrate that the requirements of that division are satisfied. Even if Section 4928.143(B)(2)(d), Revised Code, were applicable, AEP-Ohio would confirm that the charge "relat[es] to limitations on customer shopping" and further confirm that the RSR is a cost of the Modified ESP that must be recognized in the ESP versus MRO test.

Section 4928.143(B)(2)(d), Revised Code, permits "[t]erms, conditions, or charges relating to customer shopping for retail electric generation service, bypassability, … [and] default service… as would have the effect of stabilizing or providing certainty regarding retail electric service." Retail electric service is defined by Section 4928.01(A)(27), Revised Code, to mean "any service involved in the supplying or arranging of electricity to ultimate customers in this state." The terms "certainty" and "stabilizing," however, are not defined in Chapter 4928, Revised Code. Due to the lack

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[217] *Remand Decision,* 128 Ohio St.3d at 520.

[218] Section 4928.143(B)(2)(a), (b), (c), & (h), Revised Code.

[219] Section 4928.143(B)(2)(e), (f) & (i), Revised Code.

of statutory definition, it is necessary to rely on the ordinary and appropriate dictionary meaning of the term.[220] Under that standard, the ordinary and appropriate definition of "certainty" is that the subject is made more probable of occurrence.[221] "Stabilizing" denotes "to hold steady."[222] Because the burden of proof rested with AEP-Ohio to demonstrate that the charge is reasonable and lawful, AEP-Ohio was required to show that the RSR was necessary to make it probable that customers would receive retail electric service or to hold steady the provision of retail electric service.

Despite its burden to demonstrate the reasonableness and lawfulness of the RSR, the testimony AEP-Ohio offered did not explain how the RSR would have the effect of making retail electric service more stable or certain. The only statement Mr. Allen offered in support of the statutory requirement appears to be the following Question and Answer taken from his direct testimony which offers only a conclusion without explanation:

> Q. Is there a reason that you are proposing a retail stability rider that focuses on revenues instead of earnings?
>
> A. Yes. There are several reasons: 1) it provides greater certainty and stability for customers and AEP Ohio … .[223]

Mr. Allen's testimony merely contrasts the difference between an RSR that is focused on guaranteeing earnings and an RSR that is focused on guaranteeing revenue

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[220] *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049 ¶ 14 (quoting *Sharp v. Union Carbide Corp*., 38 Ohio St.3d 69, 70 (1988) ("[w]here a particular term employed in a statute is not defined, it will be accorded its plain, everyday meaning.").

[221] Webster's Ninth New Collegiate Dictionary at 223 (1983).

[222] *Id*. at 1146.

[223] Co. Ex. 114 at 15.

(including a specified earnings component). Saying that one illegal version of the RSR provides more stability and certainty than another is not responsive to the requirements of Section 4928.143(B)(2)(d), Revised Code. Also, as Mr. Allen acknowledged, both in his direct and rebuttal cross-examination, that the EDU operates within the PJM system, and the reliability of retail generation service is a function of PJM's management system.[224] If AEP-Ohio did not have any generating facilities, PJM would still dispatch resources under its control to satisfy the needs of AEP-Ohio's customers.[225]

It is also important to note that charges that may be authorized under Section 4928.143(B)(2)(d), Revised Code, bring into play the rights of governmental aggregators to avoid charges as provided by Section 4928.20, Revised Code. AEP-Ohio made no effort to address the rights of governmental aggregators to avoid, on behalf of governmental aggregation customers, charges that might otherwise lawfully be approved as non-bypassable charges.

The only other testimony offered by AEP-Ohio to support the RSR likewise fails to demonstrate how the RSR satisfies the requirements of Section 4928.143(B)(2)(d), Revised Code. In his Supplemental Testimony, Mr. Dias offered that lower revenue might result in less investment, but provided no demonstration of any likely impact on retail generation service.[226] Because there was no demonstration that the RSR would have the effect of providing stability or certainty in the provision of retail electric service,

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[224] Tr. Vol. V at 1495-96.

[225] Tr. Vol. V at 1495-96.

[226] Co. Ex. 119 at 5.

the Commission has no basis to find that the RSR can be authorized under Section 4928.143(B)(2)(d), Revised Code.

The RSR also would not provide for rate stability because the level of the RSR is uncertain from year to year.[227] In fact, the only certainty or stability that the RSR offers is that, as one witness eloquently explained, it guarantees that AEP-Ohio never has a bad year.[228] Because AEP-Ohio failed to demonstrate that retail electric service will be stable or certain, it has failed to satisfy the requirements of Section 4928.143(B)(2)(d), Revised Code, and the Commission may not authorize it.

4. The RSR violates Section 4928.02(H), Revised Code

Furthermore, the RSR violates the statutory prohibition on recovering generation-related costs through transmission or distribution rates. Section 4928.02(H), Revised Code, states that it is the policy of the State to ensure effective competition in the provision of retail electric service "by prohibiting the recovery of any generation-related costs through distribution or transmission rates." The Commission has correctly concluded that a non-bypassable charge to recover generation-related costs would result in a subsidy of generation through a rider that is collected from all distribution customers.[229] Despite this prohibition, AEP-Ohio has proposed that the RSR, which is designed to recover generation related revenue, be non-bypassable.[230] Thus, this transition revenue provision not only assures that AEP-Ohio never has a "bad year," it

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[227] Tr. Vol. V at 1370.

[228] Tr. Vol. XIII at 3615.

[229] *Sporn Decision* at 19.

[230] Application at 10 (Mar. 30, 2012).

does so through a mechanism that violates state law prohibiting the recovery of generation revenue through distribution rates.

5. OP's rationales for the RSR are unsupported

In contrast to its failure to address the statutory requirements for an RSR, AEP-Ohio offers three "policy" reasons for approving the RSR (if one assumed that there were some statutory authority to do so). It claims that the RSR, as part of the larger package, will encourage competition by allowing CRES providers access to "discounted" capacity. Additionally, it claims that the RSR is necessary to avoid "financial harm" to AEP-Ohio if it provides capacity to CRES providers at something less than what it claims is its cost. Finally, Mr. Dias states that the RSR was necessary to support AEP-Ohio's provider of last resort ("POLR") obligation. None of these claims permits the Commission to approve the RSR even if there were legal authority for the Commission to do so.

If Mr. Dias' brief testimony on the subject is taken to mean that the RSR is a non-bypassable charge associated with a POLR obligation, then its non-bypassability offends prior Commission determinations that customers electing to return to SSO service at a market price should be able to avoid a POLR charge. Analogizing to the rights provided to governmental aggregators under Section 4928.20, Revised Code, the Commission previously ruled that a POLR rider "shall be avoidable for those customers who shop and agree to return at a market price."[231]

[231] *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case Nos. 08-917-EL-SSO *et al*. Opinion and Order at 40 (March 18, 2009)

Although AEP-Ohio claims that the RSR will allow for greater shopping,[232] its proof is based on a far-fetched hypothetical. Mr. Allen indicated he anticipated that CRES providers would be able to provide competitive offers under the Pricing Scheme, but he assumed the competitive offers could be made under the Pricing Scheme by manipulating the "competitive benchmark price" by removing various components.[233] Further, he did not provide any analysis of the effect increased prices would have on customer decision-making.[234] Thus, the claim that shopping would increase was not credible.

Moreover, AEP-Ohio's public representations to the investment community concerning the effects of a less restrictive two-tiered capacity pricing scheme are inconsistent with Mr. Allen's hypothetical claim that higher capacity prices will promote the shopping that AEP-Ohio is seeking to block. AEP-Ohio expected its Pricing Scheme contained in the Stipulation ESP to constrain shopping.[235] Because the Modified ESP contains higher capacity prices over the first two years than those in the Stipulation ESP and generally dumps RPM pricing during the entirety of the Modified ESP,[236] shopping will likely be "constrained" even more.

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[232] *Id*.

[233] Tr. Vol. V at 1401.

[234] Tr. Vol. V. at 1382-83.

[235] FES Ex. 105, Ex. TCB-6.

[236] The first tier price is fixed at $146/mw-day under the Modified ESP. Under the Stipulation ESP, the Tier 1 price was set at the RPM rates for the planning years included in the ESP.

AEP-Ohio also claims that it needs to have the RSR to prevent "financial harm" or "duress"[237] because it is proposing to offer capacity at a "discount" to its alleged and irrelevant cost. As noted above, AEP-Ohio has not demonstrated that it will face a financial emergency if it does not receive the capacity prices it is requesting.[238] Moreover, AEP-Ohio has failed to demonstrate that it has met any of the requirements to invoke emergency relief, as noted above. As discussed above, moreover, the Commission has previously held, at AEP-Ohio's urging, that the financial effects of generation-related service pricing are irrelevant under Ohio law. Therefore, AEP-Ohio has failed to demonstrate any reasonable basis based on financial harm for approving a $2/mwh rate increase on all customers even if the Commission could authorize the proposed RSR under Section 4928.143(B)(2), Revised Code.

Finally, Mr. Dias offers that AEP-Ohio's responsibility as the POLR requires the Commission to approve the RSR.[239] This argument, however, runs directly afoul of the Supreme Court's admonition to carefully consider what is recovered as a POLR charge.[240] Responding to the Court' direction, the Commission has required that there be a showing of cost to establish a POLR charge[241] and determined that the POLR

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[237] Co. Ex. 119 at 3 & 5.

[238] OCC Ex. 104; IEU-Ohio Ex. 121. CSP and OP have reported double-digit earnings in 18 of the last 21 FERC Form 1 reports. IEU-Ohio Ex. 129, Ex. JGB-5.

[239] Co. Ex. 119 at 5.

[240] *Remand Decision*, 128 Ohio St.3d at 518. *See, also, Industrial Energy User v. Pub. Util. Comm'n of Ohio*, 2008-Ohio-990 ¶¶ 31-33.

[241] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO, *et al*., Order on Remand at 22 (Oct. 3, 2011) (company failed to demonstrate out-of-pocket cost of serving POLR obligation).

obligation related only to the cost of returning customers, not migration risk. As the Commission explained, "migration risk is more properly regarded as a business risk faced by all retail suppliers as a result of competition rather than a risk resulting from an EDU's POLR obligation."[242] As mentioned above, even when a POLR rider might otherwise be to the Commission's liking, the Commission has ruled that a POLR Rider must be bypassable for customers agreeing to return to SSO service at a market price.

AEP-Ohio failed to provide proof to authorize the RSR as a POLR charge. First, AEP-Ohio has not provided any testimony identifying its cost to provide POLR service or how it might relate to the POLR revenue. Second, AEP-Ohio has repeatedly stated that the RSR is designed to recover revenue that would be lost as a result of customers taking advantage of the "discounted" capacity prices contained in the Pricing Scheme.[243] Based on the AEP-Ohio's own demonstration, the RSR is nothing more than a means of recovering lost revenue due to migration. Just as the Commission found in the ESP I Order on Remand, AEP-Ohio has again failed to demonstrate a legal and reasonable basis for imposing an additional charge on customers based on AEP-Ohio's POLR obligation.

6. OP seeks authorization to increase the RSR in violation of the EE/PDR Stipulation

In this proceeding, AEP-Ohio has proposed to increase its interruptible ("IRP-D") credit from its current level to $8.21/kW-month and to recover some or all of the revenue it loses with an increase through the RSR.[244] The IRP-D credit, however, is governed

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

[243] *See, e.g.*, Co. Ex. 116 at 13.

[244] Application at 9.

by the terms of the Stipulation and Recommendation filed in AEP-Ohio's recent portfolio program case ("EE/PDR Stipulation").[245] The EE/PDR Stipulation requires AEP-Ohio to collect any lost revenue that results from the IRP-D credit through the Commission-approved EE/PDR Rider.[246] Thus, AEP-Ohio's proposal in this case violates the terms of the EE/PDR Stipulation. If the Commission did approve the RSR (and it should not), the Commission must prohibit AEP-Ohio from recognizing any lost revenues from the increased credit through its RSR revenue calculation.

* * *

In summary, AEP-Ohio does not provide a legal or factual basis to authorize the RSR. First, AEP-Ohio is seeking to recover transition revenue through the RSR that is precluded by law and the AEP-Ohio's 2001 settlement in the ETP cases. Second, approval of the RSR also would violate corporate separation requirements. Third, there is no statutory basis under Section 4928.143(B)(2), Revised Code, to authorize an RSR. Finally, AEP-Ohio has failed to provide a credible factual basis on which to authorize the RSR even if there were some statutory authority for the rider. Thus, the Commission must reject the RSR as a part of the Modified ESP.

C. The PTP is Unlawful and Unreasonable

In the Modified ESP, AEP-Ohio requests authority to file an application to establish the PTP to recover generation-related revenues that may be lost as a result of its election, jointly with the affiliates, to terminate the Pool Agreement. AEP-Ohio indicates that it will request authority to establish the PTP in the event that the

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[245] IEU-Ohio Ex. 130; IEU-Ohio Ex. 131.

[246] IEU-Ohio Ex. 130 at 9.

Commission modifies or rejects its Application in the *Corporate Separation Case*.[247] Like the RSR, however, AEP-Ohio has not demonstrated what provision of Section 4928.143(B)(2), Revised Code, would authorize the PTP.[248] Accordingly, authorization of a placeholder for the PTP would be unlawful and unreasonable.

Authorization of a charge under the PTP also would result in the recovery of above-market or transition revenue in violation of state law and the ETP settlement. As witness Nelson explained, the PTP would recover "lost revenue" because "[t]he Capacity payments received by AEP Ohio cannot be mitigated by opportunity sales in the market alone" after the Pool Agreement is terminated.[249] To calculate the amount to be recovered through the PTP, AEP-Ohio would "compare the lost AEP Pool capacity revenue to increases in net revenue related to new wholesale transactions or decreases in generation asset costs that result from the AEP Pool termination."[250] AEP-Ohio proposes to then collect the "lost" revenues through the PTP.[251] Since the calculation is designed to ensure that AEP-Ohio can continue to recover generation-related revenue that is not recoverable in the market, the PTP is another request to recover transition revenue—an outcome prohibited by Ohio law and the ETP Stipulation.[252]

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[247] Co. Ex. 103 at 21-23.

[248] *Remand Decision*, 128 Ohio St.3d at 519-20.

[249] Co. Ex. 103 at 21.

[250] *Id*. at 22-23.

[251] *Id*. at 22.

[252] IEU-Ohio Ex. 124 at 21-23.

Finally, the PTP should be rejected because it would violate corporate separation requirements.[253] The PTP has been proposed by the EDU—which is supposed to be competitively neutral—to provide a competitive advantage[254] to AEP-Ohio's to its affiliated generating business.

D. AEP-Ohio's Proposals Concerning the PIRR Proposal Must be Rejected

The PIRR can only be approved if the Commission determines that it does not violate sound regulatory practices and is just and reasonable.[255] Implementation of the PIRR will be addressed in a separate proceeding, but AEP-Ohio proposes in this proceeding to delay the implementation of the PIRR until June 1, 2013, and accrue carrying charges at AEP-Ohio's full weighted average cost of capital ("WACC").[256] AEP-Ohio's requested delay of the PIRR along with continued accrual of carrying charges at a full WACC would cost customers at least an additional $40-$45 million in carrying charges.[257] Additionally, AEP-Ohio proposes to spread the cost of the PIRR

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[253] *Id*. at 30-31.

[254] Section 4928.17(A), Revised Code, provides that the Corporate Separation Plan must satisfy "the public interest in preventing unfair competitive advantage and preventing the abuse of market power…. The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business." Moreover, Rule 4901:1-37-02, OAC specifically states that "the purpose of this chapter is to require all of the state's electric utilities to meet the same standards so a competitive advantage is not gained solely because of corporate affiliation."

[255] Section 4928.144, Revised Code; IEU-Ohio Ex. 129 at 30-31.

[256] While AEP-Ohio has claimed that the Commission's review of the PIRR should be limited to the delay in its implementation, AEP-Ohio also requests that the Commission suspend the procedural schedule in Case Nos. 11-4920-EL-RDR, *et al.* Granting AEP-Ohio's proposal would deny intervenors any meaningful ability to determine the terms and conditions of the PIRR in either proceeding.

[257] Tr. Vol. XVI at 4549. This example only models the impact of a delay of the PIRR and does not account for the decreased cost of the PIRR which may be realized if AEP-Ohio amortizes the PIRR at a contemporary debt rate, as discussed below. AEP-Ohio has failed to include the cost of its proposed delay in the ESP versus MRO price test.

between both CSP and OP customers.[258] AEP-Ohio does not propose to exclude customers of governmental aggregation from the PIRR, and AEP-Ohio does not intend to calculate carrying charges on a balance that excluded accumulated deferred income taxes ("ADIT"). As presented to the Commission in this case, AEP-Ohio's proposal to delay implementation of the PIRR would violate Section 4928.144, Revised Code, ignore the rights of governmental aggregators under Section 4928.20, Revised Code, to avoid phase-in deferral amortization charges and is not otherwise supported by sound regulatory principles.

First, AEP-Ohio's proposal to delay implementation unreasonably increases the cost of the PIRR. The phase-in was not related to a deferred capital investment, but rather a deferred increase in rates.[259] Thus, a carrying charge based on the full WACC would excessively compensate AEP-Ohio relative to a reasonable carrying cost.[260] Newly issued BBB rated corporate bonds are being issued at an interest rate of under 3.6%.[261] Moreover, through securitization of receivables, AEP-Ohio has obtained very low interest rates (around 0.31%).[262] AEP-Ohio has failed to demonstrate that similar avenues for reducing carrying charges are not available. Since AEP-Ohio was only authorized to accrue carrying charges at a full WACC through the end of its ESP, the Commission should direct AEP-Ohio to accrue carrying charges from January 1, 2012

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[258] Co. Ex. 111 at 5.

[259] IEU-Ohio Ex. 129 at 14; Tr. Vol. XIII at 3639.

[260] *Id.*

[261] *Id.* at 12.

[262] *Id.* at 11.

at a proper debt rate.[263] In the alternative to setting the debt rate under 3.6% (if the Commission's rejects the Staff proposal to suspend all carrying charges[264]), the Commission should direct AEP-Ohio to undertake a competitive solicitation to identify the lowest cost means of financing the amortization of the PIRR.[265] Such an approach would decrease the impact of the PIRR on customer bills, and it would also promote state policy in favor of market-based prices.[266]

Second, AEP-Ohio proposes to spread the revenue responsibility of the PIRR between former CSP and OP customers.[267] AEP-Ohio's proposal to collect the PIRR from former CSP customers misaligns cost with benefits.[268] CSP customers did not contribute to the OP phase-in deferral and have paid the CSP phase-in deferral; thus, it would be unjust and unreasonable to require CSP customers to pay for the benefit of the phase-in of OP's rates.[269]

AEP-Ohio's proposal also misaligns costs and benefits because it fails to address the assignment of the PIRR to governmental aggregation customers. Section 4928.20(I), Revised Code, requires that any phase-in deferral charge arising from Section 4928.144, Revised Code, imposed upon customers within a governmental

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[263] *Id.* at 14.

[264] Staff Ex. 109 at 6-7.

[265] IEU-Ohio Ex. 129 at 13-14; Tr. Vol. XIII at 3653.

[266] *Id.* at 13.

[267] Co. Ex. 111 at 5-6.

[268] *See* IEU-Ohio Ex. 129 at 9-11.

[269] *See id.* at 9-11. It is estimated that CSP customers have contributed to $7.8 million of the $620 million deferral balance, or approximately 1% of the total balance.

aggregation program be proportionate to the benefits received by those customers.[270] AEP-Ohio has made no attempt to demonstrate that governmental aggregation customers received a benefit in proportion to the proposed surcharge. In the case of CSP customers, that showing is impossible since CSP governmental aggregation customers received no benefit whatsoever from the phase-in of the OP revenue increases.

Third, AEP-Ohio's proposal is unjust and unreasonable because AEP-Ohio seeks to calculate carrying charges on a deferred balance that does not reduce the deferral by the ADIT. As AEP-Ohio witness Allen stated in regard to ADIT, "the Company is given some cost-free funding due to increases in ADFIT."[271] Because ADIT provides cost-free capital, it would be unjust and unreasonable and violate regulatory practices and principles to require customers to pay carrying charges on the portion of the deferral balance without an ADIT adjustment.[272]

For the reasons outlined above, the Commission should reject AEP-Ohio's unreasonable and expensive PIRR proposal. AEP-Ohio does not provide a reasoned basis for accruing carrying charges at the WACC and without adjustment for ADIT. Further, it should be required to investigate lower cost alternatives. Finally, as noted previously, if AEP-Ohio's PIRR proposal is approved, the additional cost caused by AEP-Ohio's PIRR proposal must be recognized in the ESP versus MRO test.

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[270] *Id.* at 17.

[271] Tr. Vol. XVII at 4949-50. While witness Allen was referring to ADIT associated with the DIR, ADIT associated with the deferral balance also provided AEP-Ohio with cost-free funding. AEP-Ohio witness Mitchell also testified that AEP-Ohio's affiliates have recommended that carrying charges be calculated on a deferral balance that does not included ADIT. Tr. Vol. III at 880-81.

[272] Staff Ex. 109 at 8; IEU-Ohio Ex. 129 at 15-16.

E. The GRR As Proposed Is Unlawful

AEP-Ohio requests approval of the GRR as a placeholder to recover the costs associated with Turning Point if the Commission subsequently approves cost recovery.[273] The GRR must be rejected because the cost of compliance with renewable energy requirements cannot be recovered legally through a non-bypassable surcharge,[274] and AEP-Ohio has failed to demonstrate that the GRR satisfies the requirements contained in Section 4928.143(B)(2)(c), Revised Code.

Although Section 4928.143(B)(2)(c), Revised Code, authorizes the Commission to approve a non-bypassable charge for a generating facility if certain requirements are satisfied, the section does not extend to costs recoverable for renewable energy requirements. Specifically, Section 4928.143(B), Revised Code, states that the Commission cannot approve a provision of an ESP that is "contrary" to division (E) of Section 4928.64(E), Revised Code."[275] Section 4928.64(E), Revised Code, states that "[a]ll costs incurred by an electric distribution utility in complying with the requirements of this section [renewable energy requirements] shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code." Solar facilities such as Turning Point are defined as a renewable energy resource,[276] and AEP-Ohio claims that the purpose of constructing Turning Point is to comply with

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[273] AEP-Ohio concedes that Turning Point is designed to recover the cost associated with renewable energy requirements. Tr. Vol. II at 704; Tr. Vol. VII at 2124.

[274] Section 4928.64(E), Revised Code.

[275] Section 4928.143(B), Revised Code.

[276] Section 4928.01(A)(35), Revised Code.

renewable energy requirements.[277] Because AEP-Ohio has indicated that the GRR is to be a placeholder for only Turning Point, AEP-Ohio has not offered a legal basis for the approval of a rider the Commission could authorize under Section 4928.143(B)(2)(c), Revised Code.

Even if the costs associated with Turning Point could be recovered through a non-bypassable surcharge, AEP-Ohio has failed to demonstrate that the requirements of Section 4928.143(B)(2)(c), Revised Code, have been or could be satisfied. First, the Section does not permit the approval of a placeholder. By its terms the section requires the applicant to identify a generating facility for which the rider will recover the costs and the amounts it is seeking to recover through the rider. This requirement is consistent with the need under Section 4928.143(C)(1), Revised Code, for the Commission to determine if the ESP is more favorable than a MRO. A placeholder would prevent the Commission from making that determination.

Second, Section 4928.143(B)(2)(c), Revised Code, requires that the project be sourced by a CBP. AEP-Ohio, however, has failed to submit evidence that demonstrates Turning Point was sourced through a CBP.[278]

Third, the Section requires a showing of need in the proceeding in which the rider is sought. AEP-Ohio has failed to demonstrate "in the proceeding that there is a need for the facility."[279] Instead, AEP-Ohio claims that the need for Turning Point will be determined in a forecast proceeding.[280]

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[277] Tr. Vol. II at 704; Tr. Vol. VII at 2124.

[278] Tr. Vol. II at 573-74. AEP-Ohio witness Nelson specifically stated that he did not know whether Turning Point was sourced through a CBP.

[279] Section 4928.143(B)(2)(c), Revised Code.

Also, Section 4928.20 (K), Revised Code, obligates the Commission to "consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under" an ESP. AEP-Ohio has offered no evidence to address the effect of the GRR on governmental aggregation.

Accordingly, the Commission must reject the GRR. The cost of compliance with renewable energy benchmarks cannot be recovered through a non-bypassable surcharge, and, regardless, AEP-Ohio has failed to satisfy the requirements contained in Section 4928.143(B)(2)(c), Revised Code. If the Commission nonetheless approves a placeholder rider, it must also address the cost of the GRR in its determination of whether the ESP is more favorable in the aggregate than a MRO.

IV. CORPORATE SEPARATION CANNOT BE ADDRESSED IN THIS PROCEEDING

As part of its Modified ESP, AEP-Ohio notes that it is seeking an amendment to its corporate separation plan and approval to transfer its generating assets through a separate proceeding, but also states that "approval of full structural separation . . . is a critical and necessary prerequisite for the Company's Modified ESP proposal to transition toward and implement an auction-based ESP."[281] Consideration of that separate proceeding is currently suspended to provide the Commission additional time to fully evaluate the proposed amendments.[282]

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[280] Tr. Vol. II at 569. Regardless, AEP-Ohio concedes that it does not need new capacity. Tr. Vol. II at 569-70; Tr. Vol. VII at 2124.

[281] Application at 6.

[282] *In the Matter of the Application of Ohio Power Company for Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Entry (May 29, 2012) (hereinafter "*Corporate Separation Case*").

Despite the fact that it has filed a separate application to address corporate separation and the proposed transfer of generation assets, AEP-Ohio requests that the Commission "approve the separate application for structural corporate separation."[283] While AEP-Ohio has included testimony regarding its corporate separation plan and generation asset transfer request,[284] AEP-Ohio's request is improper. Initially, AEP-Ohio has not moved to consolidate the *Corporate Separation Case* with the Modified ESP. The *Corporate Separation Case*, moreover, is not ripe for a decision. The Commission has not addressed AEP-Ohio's request for waiver of the hearing requirement (which is otherwise mandated by rule[285]) and the requirement to provide the market value and book value of the property to be transferred.[286] The Commission also has not set a procedural schedule to allow Intervenors the opportunity to exercise their statutory right to make objections to the proposed amendment.[287] Additionally,

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[283] Application at 3-4.

[284] Particularly, AEP-Ohio attempts to bolster its request to transfer the Amos and Mitchell units to Kentucky Power Company ("KPCo") and Appalachian Power Company ("APCo"). AEP-Ohio's request, however, would negatively impact the future SSO price. AEP-Ohio intends to set its future SSO price through an auction which incorporates RPM pricing. But for the transfer to KPCo and APCo, the Amos and Mitchell units would be bid into the RPM auction. Tr. Vol. II at 566. Because KPCo and APCo are FRR entities, transferring ownership of the Amos and Mitchell units to KPCo and APCo will effectively take these units out of the supply that is bid into the auction. *Id.* As witnesses Ibrahim, and Murray testified, all other things being equal, if supply increases, the price of capacity will decrease. Tr. Vol. VII at 2282-83; Tr. Vol. XII at 3412. The failure to bid the Amos and Mitchell units into the RPM auction will negatively impact the price of capacity in the 2015/2016 RPM auction and the RPM auctions in future years. Accordingly, AEP-Ohio's request to transfer the Amos and Mitchell units to APCo and KPCo is not in the public interest and should be denied, or, at minimum, held in abeyance until this issue can be explored further in the *Corporate Separation Case*. If the Commission approves the transfer of the Amos and Mitchell units, it should make such approval contingent upon bidding AEP-Ohio's current ownership percentage of those units into future RPM auctions.

[285] Rule 4901:1-37-09(D), OAC.

[286] *Corporate Separation Case*, Application at 6-7 (Mar. 30, 2012); *see Corporate Separation Case*, Memorandum Contra Ohio Power Company's Request for Waiver of Industrial Energy Users-Ohio and FirstEnergy Solutions Corp. (Apr. 26, 2012).

[287] Section 4928.17(B), Revised Code.

recent actions by AEP-Ohio have raised legal and factual concerns with the corporate separation and the transfer of assets that should be addressed in the *Corporate Separation Case*[288] that have not been fully addressed in this proceeding.[289]

When AEP-Ohio rushed the Commission into approving AEP-Ohio's corporate separation proposal as part of the Stipulation ESP-related proceedings, AEP-Ohio proposed further actions inconsistent with the Commission's understanding. This misunderstanding was sufficiently severe that, after learning that AEP-Ohio intended to transfer 2,500 MWs to KPCo and APCo and not bid the units into the BRA, the Commission determined that the Stipulation ESP was not in the public interest and rejected it.[290] AEP-Ohio's new corporate separation proposal is just old wine in new bottles. The only difference in AEP-Ohio's new proposal is that AEP-Ohio has disclosed its intention to transfer the Amos and Mitchell units to KPCo and APCo. If the transfer of Amos and Mitchell was not in the public interest then, the transfer is not in

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[288] See Tr. Vol. II at 713-16; IEU-Ohio Ex. 116 (CONFIDENTIAL). Additionally, AEP-Ohio's witnesses have made statements that indicate corporate separation requirements are being violated. AEP-Ohio witnesses Dias and Allen claimed that AEP-Ohio needs a healthy return in its ESP case to fund investment in the transmission system—even though transmission rates are regulated by FERC. Tr. Vol. VII at 2131-35; Tr. Vol. XVII at 4877-78. Witness Dias seems to imply that SSO customers are subsidizing AEP-Ohio's transmission business. *See, also*, Letter from Selwyn Dias to Daniel Johnson filed in Case No. 12-501-EL-FOR, (June 25, 2012).

[289] For example, AEP-Ohio proposes to enter into a SSO contract with its unregulated affiliate that violates federal standards of affiliate abuse. AEP-Ohio has indicated that it will enter into a wholesale power contract with its unregulated affiliate, Genco, for the provision of capacity and energy post-corporate separation. Because AEP-Ohio has also indicated that it will not compare the prices contained in the contract to any benchmark price offered by a non-affiliated company (Tr. Vol. II at 524), AEP-Ohio's proposal would violate standards regarding affiliate abuse set forth in *Boston Edison Company (Re: Edgar Electric Energy Company)*, 55 FERC ¶ 61,382 at 13-20 (1991). *See also Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 22-28 (1994). *See also Ocean State Power*, 44 FERC ¶ 61,261 at 9 (1988) ("To evaluate whether the affiliate relationship has been abused, the Commission will compare the rates paid by the affiliated purchaser to (1) the rates that the affiliated purchaser would pay to other suppliers for similar service, and (2) the rates that non-affiliated purchasers pay to the same source for similar service." (footnote omitted)) and *Southern California Edison Co*., 106 FERC ¶ 61183 (2004) (*Edgar* standards applied to all future purchase power agreements between affiliates).

[290] Entry on Rehearing at 8 (Feb. 23, 2012).

the public interest now, and the Commission cannot approve a generating asset transfer unless it is in the public interest.[291]

At a minimum, the Commission must set the *Corporate Separation Case* for hearing to give parties an opportunity to address the issues which have been raised about the application. Until the parties have had an opportunity to present their concerns to the Commission, any action approving the *Corporate Separation Case* or the proposed transfer of assets contained in that application would be premature, prejudicial, and violate the statutory and due process rights of the Intervenors.[292]

V. AEP-OHIO'S REQUEST FOR ADDITIONAL TIME TO TRANSITION IS UNJUSTIFIED

As part of its campaign to illegally raise SSO rates further above-market and constrain shopping, AEP-Ohio has attempted to justify its unlawful and unreasonable proposal by claiming that it needs three more years to "wind down" its current business plan.[293] Claiming that the Commission has changed directions in its regulation of AEP-Ohio,[294] AEP-Ohio attempts to buttress its position that it needs additional time by also arguing that the FRR obligation and Pool Agreement prevent it from charging market-

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[291] Rule 4901:1-37-09(E), OAC.

[292] Section 4928.17(B), Revised Code, states, "The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing." Additionally, Rule 4901:1-37-09(D), OAC, provides "The commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset." That rule also contains specific filing requirements.

[293] Co. Ex. 101 at 14.

[294] Tr. Vol. I at 73.

based rates.[295] Finally, AEP-Ohio argues that moving immediately to charging market-based rates will cause financial harm to it.[296] The record, however, fails to support any of these claims.

A. The Commission Has Not Changed its Regulatory Direction

First, the assertion that AEP-Ohio is facing a change in regulatory direction is absurd. Although AEP-Ohio witness Powers claims that AEP-Ohio was not allowed to charge market-based rates in the past and this past treatment legitimizes its campaign to secure an unfair advantage and transition revenue for AEP-Ohio's generation business function,[297] Mr. Powers ignores more than a decade in which AEP-Ohio has recognized that its generation function has been subject to competition and Commission and Court decisions finding that AEP-Ohio's rates are market-based.

As noted previously, AEP-Ohio has consistently represented that AEP-Ohio's generating assets were "deregulated," subject to market-based rates, and not cost-based ratemaking, since 2001. Explicit in its financial accounting and other recognition that its Ohio generation business was no longer subject to cost-based regulation, AEP-Ohio has repeatedly represented to Wall Street and Main Street that its Ohio generation business was deregulated in 2001 and financially dependent on market forces.

The Commission has also repeatedly held it was establishing market-based rates for AEP-Ohio. Following the end of AEP-Ohio's MDP, the Commission approved market-based rates for AEP-Ohio under the provisions for determining SSO rates. The

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[295] Co. Ex. 101 at 14.

[296] *See* Co. Ex. 151 at 11-14; Co. Ex. 101 at 15.

[297] Co. Ex. 101 at 7-9.

Commission in AEP-Ohio's RSP cases specifically held that its generation pricing was market-based.[298] The Supreme Court subsequently upheld the Commission's determination that rates approved under former Section 4928.14(A), Revised Code, were in fact market-based.[299]

Additionally, when AEP-Ohio filed its proposed RSP, it requested that the Commission waive the CBP option.[300] The Commission approved AEP-Ohio's proposed RSP, without the CBP option.[301] OCC appealed the Commission's approval of AEP-Ohio's request to omit the CBP option to the Supreme Court, which vacated and remanded the case to the Commission.[302] On remand, the Commission directed AEP-Ohio to file an application to implement the CBP required by Section 4928.14(B), Revised Code. In response, AEP-Ohio proposed two CBP options, one available to all

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[298] "[W]e conclude that the generation rates that we approve in this RSP today will constitute an appropriate market-based standard service offer, as required by Section 4928.14(A), Revised Code." IEU-Ohio Ex. 119 at 14.

[299] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶ 44. Additionally, in the Commission's Order on Remand in Duke Energy Ohio, Inc.'s RSP, the Commission further expanded on what it meant when it held rates under Section 4928.14(A), Revised Code, were market-based: "a market-based standard service offer price is not the same as a deregulated price. … Thus, while a standard service offer price need not reflect the sum of specific cost components, the result must produce reasonably priced retail electric service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services, be consistent with protecting consumers from market deficiencies and market power, and meet other statutory requirements." *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, *et al.*, Order on Remand at 37 (Oct. 24, 2007).

[300] IEU-Ohio Ex. 119 at 11; *see also* IEU-Ohio Ex. 109.

[301] IEU-Ohio Ex. 119 at 14.

[302] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 511, 2006-Ohio-3054 (*citing Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184).

customers and one for customers who wanted to purchase "green energy."[303] AEP-Ohio's proposal made no mention of any need to terminate the Pool Agreement prior to making the CBP option available. AEP-Ohio eventually settled the remand case by dropping the portion of its proposal that would have made the CBP option available to all customers.[304]

Although AEP-Ohio now claims otherwise, AEP-Ohio's RSP permitted AEP-Ohio to establish market-based rates for default generation supply under former Section 4928.14(A), Revised Code, *and* as AEP-Ohio proposed. It was AEP-Ohio, not the Commission or any other party, that sought to avoid offering the CBP option.

Beyond the market-based rates that AEP-Ohio began charging for its post-MDP default generation supply as a result of its RSP, AEP-Ohio sought and obtained authority to base portions of its default generation supply costs on competitive solicitations and to recover this market-based cost from retail customers. After acquiring the Monongahela Power Company's ("MP") Ohio service territory, AEP-Ohio proposed and the Commission authorized AEP-Ohio to conduct a Request for Proposals ("RFP") for the generation supply that AEP-Ohio said it needed to meet the default supply needs of the former MP customers.[305] The Commission then authorized AEP-Ohio to collect the market-based generation supply costs.[306]

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[303] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Plan to Provide Additional Options for Customer Participation in the Electric Market*, Case No. 06-1153-EL-UNC, Application (Sept. 22, 2006).

[304] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Plan to Provide Additional Options for Customer Participation in the Electric Market*, Case No. 06-1153-EL-UNC, Order on Remand (May 2, 2007).

[305] *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, Case No. 05-765-EL-UNC, Opinion and Order at 15-18 (Nov. 9, 2005).

Mr. Powers, however, attempts to recharacterize the actions of the Commission and AEP-Ohio regarding the MP decisions. He states:

> in 2005, the Commission ordered AEP Ohio to negotiate for the purchase of [MP], in order to avoid rate shock for Mon Power customers from going to market generation rates. The Commission determined that [MP] customers would be:
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> "... far better off under the rates established under the Companies' proposal than by being served at a CBP provided by [MP]."[307]

Absent from Mr. Power's discussion is any detail about AEP-Ohio's proposal, which included charging market-based rates. Thus, as AEP-Ohio requested, in the case of the former MP customers, the Commission authorized AEP-Ohio to recover default generation supply costs based on market-based prices.

Similarly, Mr. Powers ignores AEP-Ohio's regulatory efforts to secure market-based pricing when Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corp. ("Ormet") were added to its service territory. When AEP-Ohio's service territory was modified in 2005, AEP-Ohio was granted market-based compensation for the default generation supply costs associated with Ormet's load.[308] In December 2006, AEP-Ohio filed an application to set the 2007 market price for the default generation supply for Ormet, indicating a market price of $47.69/mwh,[309] which the Commission

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[306] *Id.*

[307] Co. Ex. 101 at 8 (citations omitted).

[308] IEU-Ohio Ex. 110 at 9-11. The stipulation marked as IEU-Ohio Ex. 110 was approved by the Commission. *In the Matter of the Complaint of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation*, Case No. 05-1057-EL-CSS, Supplemental Opinion and Order at 5 (Nov. 8, 2006).

[309] IEU-Ohio Ex. 118 at 1.

approved on June 27, 2007.[310] Then, in December 2007, AEP-Ohio filed a second application to set the market price for the Ormet default generation supply, indicating the market price had increased to $53.03/mwh. In this second application, AEP-Ohio used RPM-based pricing to establish the capacity portion of the default generation supply price since the RAA had gone into effect in June 2007.[311] The Commission again approved AEP-Ohio's application to establish a market-based default generation supply cost for Ormet.

AEP-Ohio's post-MDP proposals and pleadings, the Commission's orders, and the Supreme Court decisions show that Mr. Powers mischaracterizes the Commission's actions. The Commission did not "prevent utilities from collecting ... market-based rates"[312] and did not prevent AEP-Ohio from moving towards competition.[313] Rather than denying AEP-Ohio's request to move to market-based pricing, the Commission moved largely at the pace proposed by AEP-Ohio and in ways that allowed AEP-Ohio to generate double-digit returns on common equity.[314]

B. The FRR "Contract" Does Not Necessitate a Transition Period

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[310] *Id.*

[311] *Id*. The PUCO approved AEP-Ohio's 2008 market price submission (marked as IEU-Ohio Ex. 118) on December 10, 2008. *Columbus Southern Power Company's and Ohio Power Company's Application to Set the 2008 Generation Market Price for Ormet's Hannibal Facilities*, Case No. 07-1317-EL-UNC, Finding and Order (Dec. 10, 2008).

[312] Co. Ex. 101 at 9.

[313] *Id.*

[314] IEU-Ohio Ex. 129, Ex. JGB-5.

AEP-Ohio also bases its need for delay and the collection of illegal transition charges on its claimed FRR contractual obligations. As the record demonstrates, however, AEP-Ohio's FRR contractual claims are without merit.

First, AEP-Ohio is not the FRR Entity. AEPSC elected a single FRR Entity status on behalf of all of the American Electric Power ("AEP") operating companies in PJM.[315] Thus, any FRR contractual obligations would apply to AEPSC; AEP-Ohio itself would not have any FRR obligations.[316]

Second, there has been no demonstration that all of AEP-Ohio's generating assets have been relied upon to meet the FRR Entity's capacity obligation. AEP-Ohio witness Nelson testified that "certain AEP East generation units and contracts have been committed to PJM as part of the AEP System commitment to meet East System load that has been previously designated as FRR."[317] AEP-Ohio has not introduced the FRR Capacity Plan, nor has it identified what generation assets are actually part of the AEPSC FRR Capacity Plan. Instead, AEP-Ohio would have the Commission assume, without any basis, that all of AEP-Ohio's generation assets are part of the overall mix of capacity resources defined in the FRR Capacity Plan.

Third, even if some or all of AEP-Ohio's generation assets were included in the FRR Capacity Plan, these generation assets are not "dedicated" to customers in AEP-Ohio's certified distribution territory.[318] Instead, AEPSC and all other load serving

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[315] IEU-Ohio Ex. 125 at 23; Co. Ex. 103 at 9.

[316] *Id.*

[317] Co. Ex. 103 at 11.

[318] For a more in-depth analysis on exactly why this claim fails, *see* IEU-Ohio's Initial Brief at 52-55 and IEU-Ohio's Reply Brief at 10-25 filed in the Capacity Case.

entities in PJM pledge their capacity resources to PJM, which relies upon the entire PJM system pool of capacity resources to meet reliability requirements.[319] PJM also controls the dispatch of resources on a daily basis. On any given day, some or all of AEP-Ohio's generation assets may not be serving any load, anywhere.[320]

Even if one assumed AEP-Ohio was "self-supplying" and dedicated its capacity to customers in Ohio, the RAA would allow AEPSC to substitute other capacity resources for AEP-Ohio's generating assets in the FRR Capacity Plan to alleviate AEP-Ohio of any of its FRR contractual obligations. Specifically, AEPSC could replace any Capacity Resources identified in its FRR Capacity Plan with any other capacity resource so long as the capacity resource had not already been committed to PJM.[321] Thus, AEPSC could withdraw any of AEP-Ohio's generating assets from the FRR Capacity Plan, and replace that capacity through other means. One such method would be to procure the required capacity through an auction in a manner similar to what FirstEnergy did as an FRR Entity after it migrated from the Midwest ISO to PJM.[322]

Fourth, AEP-Ohio has demonstrated that any contractual obligation it might have as part of the AEPSC FRR Entity does not prevent a competitive bid for its SSO load while it remains part of an FRR Entity. As previously discussed, AEP-Ohio has proposed and implemented competitive processes to meet service obligations.

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[319] IEU-Ohio Ex. 125 at 18.

[320] *Id.* at 18; Tr. Vol. V at 1495-96. *See, also,* Tr. Vol. XVII at 4874.

[321] *See* IEU-Ohio Ex. 125 at Ex. KMM-15 page 115 ("An FRR Entity may cure deficiencies and avoid or reduce associated charges prior to the Delivery Year by procuring replacement Unforced Capacity outside of any RPM Auction and committing such capacity in its FRR Capacity Plan.").

[322] IEU-Ohio Ex. 125 at 36-38, 40.

Moreover, as FRR Entities, FirstEnergy and Duke were not prevented from moving forward with a CBP to satisfy their SSOs.[323] Thus, AEP-Ohio has failed to demonstrate that AEPSC's FRR election creates any contractual obligation that would prevent AEP-Ohio from entering a CBP to establish rates for the SSO.

C. The Pool Agreement Does Not Necessitate a Transition Period

Just as AEP-Ohio's FRR contractual claim fails, so too does its claim that the Pool Agreement requires it to be afforded a transition period to collect illegal transition charges. AEP-Ohio has been a member of the Pool Agreement since the 1950's.[324] As a result of SB 3 and deregulation in the late 1990's, AEP-Ohio's rates were required to be set by a CBP or its equivalent following the end of its MDP.[325] Absent from AEP-Ohio's ETP case was any discussion by AEP-Ohio that it needed to withdraw from the Pool Agreement prior to offering the CBP.[326] Additionally, AEP-Ohio has sought to use CBPs for generation supply and actually secured approval for them while operating under the Pool Agreement, as discussed above. Further, and regardless of the accuracy of AEP-Ohio's assertions, SB 3 was passed in 1999 and its MDP ended December 31, 2005. AEP-Ohio has had over a decade to "wind down" this contractual obligation. Thus, to the extent AEP-Ohio's contractual obligations under the Pool Agreement will cause AEP-Ohio financial harm, AEP-Ohio has no one to blame but itself.

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[323] IEU-Ohio Ex. 125 at 36-38.

[324] Tr. Vol. I at 177.

[325] Former Section 4928.14(B), Revised Code, quoted *supra*.

[326] IEU-Ohio Ex. 104.

In contrast to the unsupported claims of AEP-Ohio, FirstEnergy Solutions Corp. ("FES") witness Frame extensively analyzed why AEP-Ohio's contractual claim that the Pool Agreement prevents AEP-Ohio from conducting a CBP is meritless. Mr. Frame concluded:

> There are no provisions in the AEP Pool Agreement that would preclude the implementation by AEP Ohio of a CBP for procuring electricity to support its SSO supply. As related to the AEP Pool Agreement, the economic impact on AEP Ohio and other Members of the AEP Pool from purchases and sales under a CBP should be off-setting, or largely so. I recommend that the Commission move toward a CBP and a market-priced SSO for AEP Ohio as soon as possible.
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> To be sure, depending on how it is structured, the implementation of a CBP by AEP Ohio could create "stranded costs" for AEP Ohio in the sense that its generation capacity would not receive the same amount when forced to rely on the market for its revenues than it would under the traditional system of regulation. However, this issue is not related to the AEP Pool Agreement but rather is a direct outcome of moving from a regulated system of retail electric price determination to a market-oriented system. Moreover, as I understand things, the time has passed for stranded cost recovery in Ohio as a result of industry restructuring.[327]

Thus, as AEP-Ohio has previously indicated, and FES witness Frame confirmed in this proceeding, there is not a contractual barrier under the Pool Agreement to AEP-Ohio implementing a CBP option to establish its SSO rates now and therefore no basis for a transition.

Moreover, as AEPSC stated to FERC, the members to the Pool Agreement can waive its three-year termination provision.[328] In the application AEPSC filed at FERC in early 2012 (later withdrawn) related to seeking FERC approval to modify the Pool Agreement, AEPSC indicated that all members to the Pool Agreement had agreed to

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[327] FES Ex. 103 at 3.

[328] *Id.* at 17-18.

waive the three-year termination provision.[329] Therefore, even if there was some contractual barrier under the Pool Agreement, AEPSC has stated on AEP-Ohio's behalf that the members of the Pool Agreement can and are willing to terminate the agreement earlier.

D. AEP-Ohio Has Not Demonstrated That It Will Be Financially Harmed if It Does Not Have an Additional Transition Period During Which It Can Charge Illegal Rates

Finally, AEP-Ohio's claim that it will suffer financial injury if not authorized to collect illegal and excessive prices for its SSO and capacity provided to CRES providers is baseless. As noted previously, AEP-Ohio has never found that its assets are impaired by the State's move to competition for the provision of generation service. Over the life of the generating assets, its internal documents indicate that the cash flows will be substantially under market pricing.[330]

In summary, AEP-Ohio has failed to provide any reasoned or legal basis for implementing the Modified ESP based on the notion that it is entitled to a three year transition period due to a change in Commission regulatory direction, the FRR election, the Pool Agreement, or financial harm.

E. If the Commission Modifies the Modified ESP, It Should Require a CBP and Other Consumer Protections

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[329] *Id.*

[330] OCC Ex. 104.

Because the Modified ESP is illegal and unreasonable, the Commission should reject it. If the Commission rejects the Modified ESP, SSO rates will remain at current levels subject to increases and decreases in the cost of fuel.[331]

The Commission may also modify the Modified ESP.[332] The record, however, is devoid of any evidence that would support modifications that would bring the Modified ESP into compliance with the ESP versus MRO test. If the Commission nonetheless modifies and approves the Modified ESP, then it should order several significant changes.

Because AEP-Ohio's request for additional delay is unsupported and unreasonable and subject to a determination that the Modified ESP would satisfy the ESP versus MRO test, the Commission should order the implementation of a CBP to replace the administratively-set SSO prices proposed by AEP-Ohio.[333] As demonstrated in the prior discussion, nothing in the FRR or the Pool Agreement preclude AEP-Ohio from using the CBP to establish default generation prices.

Additionally, the Commission should reject AEP-Ohio's Pricing Scheme and the Alternate Pricing Scheme based on the establishment of a capacity price of $355/mw-day. The RPM process produces a market-based rate that is consistent with Ohio policy, prior Commission decisions and the default pricing methodology under the FERC-approved RAA. Also, the Commission lacks the legal authority to set wholesale prices for capacity used by CRES providers in the AEP-Ohio distribution service

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[331] Section 4928.143(C)(2)(b), Revised Code.

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

[333] IEU-Ohio Ex. 125 at 82.

territory, especially prices that are discriminatory and not comparable. Further, the Commission's endorsement of the RPM pricing mechanism in this case and in the *Capacity Case* will level the playing field state-wide for CRES providers. Eliminating the ambiguity and unfairness of the currently authorized capacity prices will assist Ohio customers in pursuing customer choice.[334]

Regardless of the rate AEP-Ohio charges for capacity, the Commission must require AEP-Ohio to add transparency to the generation capacity service billing process. PJM currently bills CRES providers based on the total peak load contribution ("PLC") the CRES provider serves.[335] Although AEP-Ohio has stated that it plans to informally make additional information available to CRES providers and customers, the Commission must require more.[336]

Customers have a right to know what their PLC is, and both customers and CRES providers have a right to know the method AEP-Ohio uses to assign PLC values to each customer. Without this information (the PLC value and AEP-Ohio's assignment methodology), there is no way to determine if the PLC value AEP-Ohio reports for each customer corresponds with the customer's PLC value recognized by PJM.[337] Therefore, the Commission should require AEP-Ohio to immediately provide customers and CRES providers the customers' PLC values and the method AEP-Ohio used to calculate such values and to supplement this information as it varies between PJM delivery years.

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[334] *Id*.

[335] *See* IEU-Ohio Ex. 125 at 49.

[336] Co. Ex. 111 at 4; Tr. Vol. IV at 1129-30.

[337] IEU-Ohio Ex. 125 at 49.

The Commission also should direct that the revenue that AEP-Ohio has collected illegally for capacity priced above the RPM rates since January 1, 2012 offset the deferrals AEP-Ohio is seeking to collect from its retail customers.[338] Further, the Commission should direct that the PIRR, if approved, should be collected subject to reconciliation until such time as all outstanding Commission cases and appeals that may impact the deferral balance and carrying costs are resolved.[339]

Finally, if the Commission does implement a pricing scheme, the Commission should set the Modified ESP Tier 1 capacity price based on RPM-based pricing, extend Tier 1 to all customers that submit a switching notice to AEP-Ohio by the effective date of the ESP, and remove the Modified ESP's arbitrary and illegal restriction on access to Tier 1 capacity prices by CRES providers serving governmental aggregation programs for mercantile customers.[340] As the Commission has previously determined,[341] Ohio law is clear that mercantile customers may choose to opt-in to governmental aggregation programs.[342]

VI. PROCEDURAL ERRORS

The hearing in this matter presented two procedural matters in which the Attorney Examiners erred. First, the Attorney Examiners incorrectly denied motions to strike and permitted parties to rely on stipulations to support their cases in violation of the terms of those stipulations. Second, the Attorney Examiners incorrectly denied a

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[338] IEU-Ohio Ex. 129 at 5; IEU-Ohio Ex. 124 at 33.

[339] IEU-Ohio Ex. 129. at 5-6.

[340] Co. Ex. 116, Ex. WAA-3 at 5.

[341] Entry at 6 (Jan. 23, 2012).

[342] Section 4928.20(A), Revised Code.

motion to compel and allowed AEP-Ohio to avoid discovery of information relevant to its assertion that the Amos and Mitchell transfers should be approved. The Commission should reverse both decisions by the Attorney Examiners.

A. The Record Improperly Includes Evidence of Stipulations as Precedent

On May 4, 2012, IEU-Ohio filed a Motion to Strike Ohio Power Company's Application and Supporting Testimony and Memorandum in Support. On May 11, 2012, IEU-Ohio filed a Motion to Strike Intervenor Testimony. In each, IEU-Ohio requested that the Commission strike portions of testimony that relied upon stipulations which contain provisions prohibiting reliance on them as precedent in other matters.[343] During the hearing, the Attorney Examiners denied the Motions to Strike.[344]

As a result of the Attorney Examiners' failure to strike the testimony, several witnesses improperly relied on stipulations to support their recommendations. Exelon witness Fein claimed that the Duke ESP[345] stipulation provides a basis for the RSR.[346] AEP-Ohio witness Powers used the Duke ESP Stipulation as evidence that riders in the Modified ESP are appropriate.[347] AEP-Ohio witness Hawkins relied upon the AEP-Ohio

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[343] Industrial Energy Users-Ohio's Motion to Strike Ohio Power Company's Application and Supporting Testimony and Memorandum in Support at 14-15 and Attachment 1 (May 4, 2012) ("Motion to Strike Company Testimony"); Motion to Strike Intervenor Testimony and Memorandum in Support of Industrial Energy Users-Ohio and Office of the Ohio Consumers' Counsel at 6-7 (May 11, 2012).

[344] Tr. Vol. I at 24-25; Tr. Vol. II at 447-448; Tr. Vol. IV at 1253.

[345] *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan. Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al*, Stipulation and Recommendation at 2 (Oct. 24, 2011) (hereinafter "*Duke ESP Stipulation*").

[346] Exelon Ex. 101 at 9, 13.

[347] Co. Ex.101 at 6-7.

Distribution Rate Case Stipulation for evidence of AEP-Ohio's capital structure.[348] Each of those stipulations, however, expressly states that neither the stipulation nor any Commission order adopting it may be cited as precedent.

The parties to the stipulations that are relied upon by the various witnesses have expressly agreed that the stipulations carry no precedential or evidentiary weight and will be not be cited for support in other proceedings except as it might relate to enforcement.[349] The failure to uphold and enforce the terms of the stipulations preventing their use in other proceedings casts an unnecessary shadow over the settlement process. Settlements will be more difficult to achieve if parties anticipate that any agreement they sign will be used against them in a subsequent proceeding. The provisions prohibiting the use of a stipulation in a subsequent proceeding or as precedent are designed to encourage the settlement process. By allowing parties to violate the terms of these stipulations in this case, the Attorney Examiners undermined the Commission's interest in encouraging settlements in contested cases.

B. The Commission's Denial of the Motion to Compel Was in Error.

On May 4, 2012, IEU-Ohio moved to strike portions of the Modified ESP Application and AEP-Ohio's supporting testimony on grounds that the capacity compensation issue and the *Corporate Separation Case* was beyond the scope of an

[348] Co. Ex. 102 at 4-5.

[349] In the testimony AEP-Ohio references the following cases that were resolved by the Stipulation: *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, *et al.*, Stipulation at 14 (Nov. 23, 2011); *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SS0, *et al*., Stipulation at 2 & 41-42 (Oct. 24, 2011). Each of these stipulations contains provisions prohibiting citation to them as precedent to support propositions in future proceedings.

ESP proceeding and the Commission could not otherwise authorize the rates or transfer in this proceeding.[350] The Attorney Examiners denied the Motion to Strike. IEU-Ohio also properly served interrogatories and requests for production of documents on AEP-Ohio seeking information pertaining to its forecasts of the RPM price for capacity, including forecasts of the price of capacity with and without bidding Amos unit 3 and Mitchell units 1 and 2.[351] These data requests sought information that is relevant to AEP-Ohio's claim that the transfer of the Amos and Mitchell generating units should be approved. AEP-Ohio refused to respond to the interrogatories and request for production of documents, claiming the requested discovery was beyond the scope of the ESP period and not relevant.[352] Due to AEP-Ohio's refusal to provide a response to the discovery request, IEU-Ohio filed a Motion to Compel on May 11, 2012. On June 8, 2012, the Attorney Examiner denied the Motion to Compel without explanation.[353]

Because the Commission has refused to strike testimony concerning the *Corporate Separation Case*,[354] and AEP-Ohio supplemented the testimony of witness Graves to include an analysis of the impact of the transfer of the Amos and Mitchell generating units on capacity prices outside the ESP period,[355] discovery regarding AEP-Ohio's forecast of the transfer on capacity prices is relevant to this proceeding. First,

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[350] Motion to Strike Company Testimony at 6-9.

[351] AEP-Ohio refused to respond to IEU-Ohio Interrogatory 2-001 and Request for Production 2-001.

[352] Motion to Compel Discovery Responses and Memorandum in Support, Attachment B (May 11, 2012) (hereinafter "*Motion to Compel*").

[353] Tr. Vol. XVI at 4422.

[354] Tr. Vol. I at 24-25; Tr. Vol. II at 502-04.

[355] Tr. Vol. III at 762-63

AEP-Ohio has opened the door by presenting issues concerning corporate separation and the transfer of its generating assets.[356] AEP-Ohio has stated that the *Corporate Separation Case*, which includes the transfer of its generating assets, is a foundation for the Modified ESP.[357] Any request to transfer generation requires a demonstration of the impact of the transfer on the current and future SSO price.[358]

To the extent AEP-Ohio has been permitted to offer evidence regarding the impact of the transfer of the Amos and Mitchell units, IEU-Ohio must be permitted to investigate AEP-Ohio's claims. The impact of not bidding versus bidding these units may impact the price of capacity; thus, these forecasts are relevant to the effect of the transfer on the future SSO price.

Because the Commission has permitted AEP-Ohio to present testimony regarding the price of capacity outside the ESP but has not permitted discovery upon this issue, AEP-Ohio has presented a one-sided view of this issue to the detriment of IEU-Ohio. Reliance upon AEP-Ohio's one-sided view in this case or the *Corporate Separation Case* would prejudice IEU-Ohio. Accordingly, the Attorney Examiner's denial of the Motion to Compel was in error and should be reversed.

VII. CONCLUSION

In September 2011 when AEP-Ohio filed the Stipulation ESP, AEP-Ohio made clear that its goals were to raise rates and cut off customer choice for the next three

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[356] Application at 5-6; Co. Ex. 101 at 21-22.

[357] Application at 6.

[358] Rule 4901:1-37-09, O.A.C.

years. The Modified ESP seeks to accomplish those same goals by raising SSO rates and capacity charges and adding restrictions on shopping.

The Commission rejected the Stipulation ESP because provisions were not in the public interest. Because the Modified ESP does not pass the ESP versus MRO test and contains provisions the Commission cannot authorize, the Commission should reject the Modified ESP as well.

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