BEFORE
THE 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

REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK

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On Behalf of the Appalachian Peace and Justice Network

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I. INTRODUCTION

Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP Ohio" or "Companies") seek approval of a modified version of their second standard service offer ("SSO") to charge their Ohio customers for electricity for the period of June 2012 ending May 31, 2015. Their proposal is for a Modified Electric Security Plan ("ESP"). After a lengthy hearing, parties filed initial briefs on June 29, 2012.

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of AEP Ohio's 1.2 million residential utility customers, and the Appalachian Peace and Justice Network ("APJN"), a not for profit organization whose members include low-income customers in southeast Ohio (collectively, "Residential Consumer Advocates"), jointly submit their

Reply Brief with recommendations to protect customers from hundreds of millions of dollars in unjustified rate increases.[1]

II. ARGUMENT

A. The Companies' Retail Stability Rider should be rejected.

The Retail Stability Rider ("RSR") is a charge that the Companies proposed to collect from customers for the non-fuel generation revenues that they would lose during the Modified ESP term.[2] The RSR is directly related to the Companies' proposal to "discount" its capacity charges to competitive retail electric service ("CRES") providers.[3] According to AEP Ohio any price for capacity less than its alleged embedded cost of capacity of $355/mw-day is a "discount." If AEP Ohio's Modified ESP is adopted, any discount in capacity charges would cause the RSR to increase (and increase the amount collected from customers).

The amounts are staggering that customers are at risk of paying under AEP Ohio's proposal. AEP Ohio Witness Allen estimates that RSR revenues of $284.1 million would need to be collected from customers during the term of the Modified ESP, based on its two-tiered capacity pricing.[4] This revenue requirement flows from a target

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[1] In not addressing each and every argument raised in the briefs of other parties, the Residential Consumer Advocates are not necessarily agreeing with or acquiescing to such arguments.

[2] OCC Ex. No. 114 at 13 (Hixon); OCC Ex. No. 111 at 7. (Dr. Duann).

[3] The Companies' two-tiered pricing plan for pricing capacity to CRES providers appears to be rejected under the Commission's Opinion and Order in the Capacity Charge Case. That Order effectively eliminates the tiered pricing in favor of RPM pricing for the term of the ESP beginning August 8, 2012 or the issuance of the ESP decision, whichever is sooner. See *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 23 ("Capacity Charge Order") at 23-24 (July 2, 2012).

[4] AEP Ohio Ex. No. 116 at WAA-6. (Allen).

level of $929 million in annual non-fuel generation revenues, built upon a 10.5% return on equity.[5]

OCC Witness Wallach testified that under AEP Ohio's RSR, SSO customers would effectively hold shareholders harmless for any capacity-price "discounts" given to government aggregators or CRES suppliers.[6] That is a bad deal for SSO customers that could cost them hundreds of millions of dollars. Indeed, the RSR revenue collection as proposed by the Companies is a moving target and can range as high as $643 million if the capacity charge is set at $145.79/MW-Day.[7] And, under the RSR, AEP Ohio's collections from customers could go even higher if the level of shopping increases. Nobody knows what the RSR will be in the second and third years of the ESP. The "S" for "stability" in the RSR represents just an empty word. The RSR does not promote rate stability at all.[8]

1. There is no legal basis for the Retail Stability Rider.

The Ohio Supreme Court recently determined that if a provision of an electric security plan does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized by statute.[9] The Companies claim that the RSR is a permissible element of an ESP under numerous provisions of R.C. 4928.143(B)(2).[10] Notably, when directly asked for the statutory basis of the RSR in discovery, the

[5] Id. at 14; Exhibit WAA-6.

[6] OCC Ex. No. 117 at 17. (Wallach).

[7] OCC Brief at 38.

[8] Id. at 40.

[9] See *In re: Application of Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶ 32.

[10] AEP Ohio Brief at 39-40.

Companies could only come up with division (B)(2)(d).[11] Now, with newfound knowledge, the Companies allege that the RSR falls under divisions (B)(2)(d), (e), and (i).[12]

With respect to (B)(2)(d), the Companies claim that the RSR relates to "default service." This conclusion is presented by Witness Dias based on advice of counsel.[13] Mr. Dias testified that the RSR ensures AEP Ohio is financially strong enough to stand ready to fulfill its provider of last resort duty.[14] But this reasoning unravels quickly when examined.

The RSR is tied to lost revenues based on shopping -- revenues lost based on "discounted" capacity prices[15] that AEP Ohio would charge to CRES providers. Generation revenues lost from customers switching to CRES providers are not a provider of last resort ("POLR") "cost." This Commission resoundingly determined that migration risk -- the risk of customers switching to a CRES provider -- IS NOT A POLR RISK.[16] Rather, it is a business risk faced by all retail suppliers as a result of competition. POLR, according to the Commission, is limited to the return risk -- the risk of customers returning to the electric distribution utility's ("EDU's") SSO rates from

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[11] See OCC Ex. No. 111 at DJD-C (Dr. Duann). Under Ohio Adm. Code 4901-1-16 (D), the Companies had a duty to supplement this discovery and yet did not. OCC submits that it is improper to consider the additional basis offered by AEP Ohio on brief since AEP Ohio failed to supplement its discovery response on this very issue. The Commission should not tolerate AEP Ohio's approach that restricts the opportunity of others to present a balanced record for the Commission's consideration.

[12] AEP Ohio Brief at 39-40.

[13] AEP Ohio Ex. No. 119 at 5. (Dias Supplemental).

[14] Id.

[15] "Discounted" capacity prices are defined by the Companies to mean anything less than their fully embedded cost of capacity, which they allege is $355/MW-day.

[16] *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 32 (Oct. 3, 2011) ("Remand Order").

service with a CRES provider.[17] Hence, AEP Ohio's proposal -- to collect lost revenues from customers due to customers migrating -- is unrelated to POLR. Indeed, there is no connection between the RSR and POLR or default service. Thus, the RSR cannot be justified under R.C. 4928.143(B)(2)(d).

The Companies also rely on R.C. 4928.143(B)(2)(e) as a basis for permitting the RSR. The Companies allege that the RSR is a "revenue decoupling mechanism."[18] As such the RSR allows for "automatic increases or decreases in any component of the standard service offer price."[19] But this assumes that the RSR is indeed a component of the standard service offer price when it is not.[20] The RSR is not a cost of providing an SSO. It is not a cost pertaining to the supply and pricing of electric generation service under the SSO. And the revenues collected for the RSR are also derived from events totally unrelated to the SSO, such as weather, or declining energy usage, which exist independent of the standard service offer price.

Instead, the RSR assures a source of revenue for the Companies that will protect them from the risk of customers migrating to CRES providers. It is a make-whole charge for the Companies. Dr. Duann, an OCC witness, described the charge as "guaranteeing" AEP Ohio' revenue collections.[21] Dr. Duann testified that this guarantee "will lead to higher electricity rates and financial uncertainty to all native load customers."[22] The RSR is linked to increases or decreases in revenue received by the Companies -- it is not

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[17] Id.

[18] See AEP Ohio Brief at 39-40; AEP Ohio Ex. No. 116 at 13. (Allen).

[19] AEP Ohio Brief at 39.

[20] See for example, the components of the standard service offer price shown on AEP Ohio Ex. No. 114, LJT-2.

[21] OCC Ex. No. 111 at 10. (Dr. Duann).

[22] Id.

linked to increases or decreases in the cost of providing the standard service offer. Increases or decreases in cost components of the SSO are the components that are authorized under R.C. 4928.143(B)(2)(e). Make-whole charges are not.

Dr. Duann also testified that the imposing the RSR would result in SSO customers "being asked to subsidize other parties * * *"[23] He testified that this subsidization "appears to be inconsistent with the state policy contained in R.C. 4928.02(H) which prohibits anti-competitive subsidies."[24] The RSR would result in an unlawful subsidy.

Additionally, IEU-Ohio identified the RSR as an "illegal attempt to collect transition revenue."[25] IEU-Ohio explained that, under Senate Bill 3 in 1999, there was an opportunity for electric utilities to seek revenue for transitioning to competition -- and that opportunity "has long since passed * * * "[26] Thus, the RSR is an unlawful attempt to levy a transition charge on customers that is no longer permitted under Ohio law.

Finally, despite AEP Ohio's allegations otherwise, the RSR does not fit under division R.C. 4928.143(B)(2)(i).[27] That section of the statute allows an ESP to contain provisions "under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customer of the utility and those of the electric distribution utilities in the same holding company system." But the language in each subsection requires a direct connection. The RSR itself must directly fall within the provisions of R.C. 4928.143(B)(2).

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[23] OCC Ex. No. 111 at 11. (Dr. Duann).

[24] Id.

[25] IEU Brief at 57.

[26] Id. at 36.

[27] See AEP Ohio Brief at 39.

Had the General Assembly wanted to allow more permissive structuring of an ESP, it would have inserted language to that effect. For instance the statute would have been written with the phraseology "which provision may enable ***." But the statute is not written in such an indirect manner. Under the doctrine of *expressio unius est exclusio alterius*, if the General Assembly wanted to give the Commission authority to approve provisions in an electric security plan that "enable" other provisions (such as enabling the implementation of economic development, job retention, and economic efficiency), it would have expressly done so. But the General Assembly did not. Neither the Commission nor the Companies can rewrite the law. These claims must fail.

Where the statute is clear and unambiguous, as are the provisions of R.C. 4928.143(B)(2), "[the] only task is to give effect to the words used,"[28] and "not to delete words used or to insert words not used."[29] "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts."[30]

The Companies attempt to add words to the statute in order to fit the RSR into R.C. 4928.143(B)(2). That should be rejected. The RSR, as a matter of law, does not fit within any of the categories listed under subdivision (B)(2) of that statute. Dr. Duann, OCC's witness, testified that there is "no legal basis for such a charge * * *"[31] It must be

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[28] *State v. Elam (1993)*, 68 Ohio St.3d 585, 587.

[29] *Columbus-Suburban Coach Lines, Inc. v. Public Utilities Comm.* (1969), 20 Ohio St.2d 125, 127. *See also State ex rel. v. Evatt* (1944), 144 Ohio St. 65, (no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statue to meet a situation not provided for).

[30] *Thompson Elec., Inc. v. Bank One, Akron, N.A.* (1988), 37 Ohio St.3d 259, 264, [remaining citation omitted].

[31] OCC Ex. No. 111 at 5 (Dr. Duann).

rejected in accordance with the Ohio Supreme Court's ruling in *In re: Application of Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶ 32.[32]

2. Duke Energy Ohio's electric security stabilization charge does not provide authority for the Commission to approve the Companies' Retail Stability Rider charge.

The Companies also try to rely upon the Commission's holding in the Duke Energy Ohio[33] case. The Companies are mistaken. That decision resulted from a settlement.[34]

The Companies claim that Duke Energy Ohio has a charge similar to their proposal, the electric security stabilization charge ("ESSC").[35] This is wrong on a number of fronts. First, by citing to the Duke ESSC as precedent, the Companies are violating the provisions of the Duke Stipulation. It not only violates the terms of the Duke Stipulation, but also is contrary to the inherent nature of a stipulation. Second, the *Duke Energy Ohio case* is factually dissimilar to the case at hand.

AEP Ohio is seeking to use the Duke Stipulation and the Commission order adopting it as precedent. The plain words of the Duke Stipulation preclude such use:

> This Stipulation is submitted for purposes of these proceedings only, and neither this Stipulation or any Commission Order considering this Stipulation shall be deemed binding in any other proceeding * * *."[36]

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[32] Where the Supreme Court remanded carrying charges on environmental investment, after concluding that the PUCO wrongfully construed R.C. 4928.143(B)(2).

[33] *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 et al.

[34] Id., Stipulation and Recommendation (Oct. 24, 2011) ("Duke Stipulation").

[35] See AEP Ohio Brief at 40.

[36] Duke Stipulation at 2, 42.

The only permissible use of the Duke Stipulation or the Order adopting the stipulation is for purposes of enforcing the stipulation. This is seen under the following provision within the Duke Stipulation:

> [N]or shall this Stipulation or any such Order be offered or relied upon by any Party in any proceedings except as necessary to enforce the terms of this Stipulation. [37]

Indeed the Commission duly noted in the Companies' corporate separation case, Case No. 11-5333-EL-UNC, that these provisions in the Duke Stipulation are binding on the signatory parties.[38] Accordingly, the PUCO struck portions of AEP Ohio's reply comments where the Companies overstepped the dictates of the Duke Stipulation.[39] Here, once again, AEP Ohio is misusing the Duke Stipulation.

Moreover, a stipulation, such as the Duke Stipulation, represents a resolution of a number of issues in a proceeding or multiple proceedings. A stipulation is a package composed of many different provisions -- provisions which may not be acceptable on a stand-alone basis, but when put together with other terms, constitute an acceptable compromise. Indeed as the Duke Stipulation stated "[t]his stipulation represents an agreement by all Parties to a package of provisions rather than an agreement to each of the individual provisions included within the Stipulation."[40] It is, in the words of the Signatory Parties, "a comprehensive compromise of issues raised by Parties with diverse interests."[41]

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[37] Id.

[38] *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 11-5333-EL-UNC, Finding and Order at ¶32 (Jan. 23, 2012).

[39] Id.

[40] Duke Stipulation at 2.

[41] Id. at 3.

Similarly, a Commission Order adopting a stipulation is based on, *inter alia*, whether the stipulation "as a package" benefits ratepayers and the public interest. While distinct provisions of the stipulation may not have passed the "public interest" standard, the Commission's Order adopting the stipulation package does not necessitate such a finding. For AEP Ohio to extricate a distinct provision of a Stipulation package (the ESSC) and use it on a stand-alone basis as precedent for a different company, under a different set of facts, perverts the whole settlement process.

Further, the Companies' misuse of the Duke Stipulation, in violation of the terms therein, will have a chilling effect on the willingness of parties to enter into future negotiations. If parties to a settlement are not assured that the terms of the settlement agreement, agreed to and eventually approved by the PUCO, will be adhered to and not be used as precedent, parties will not be inclined to sign onto settlements. Sound regulation should not discourage dispute-resolution through settlements. Settlement may also bring about regulatory certainty that may otherwise be delayed until the termination of all litigation. The Residential Consumer Advocates, therefore, urge the Commission to disregard the Companies' arguments that rely heavily on the approved ESSC in the Duke case as a means to obtain approval for their Retail Stability Rider.

Additionally, the Companies ignore a crucial distinguishing factor found in the *Duke Energy Ohio Case* that is missing in this case. In the *Duke Energy Ohio case*, Duke was not transitioning to a competitive bidding process. Duke instead agreed to a 100% competitive bidding process to be held in December 2011. Thus, the benefits of a competitively bid process were made available to all customers immediately. Those benefits for customers were far and away better than what AEP proposes for its

customers in this case. In exchange for that condition of competitive (and lower) rates, that was favorable for Duke's customers, **and other conditions**, the parties agreed to an electric service stability charge of $330 million.

Here the Companies want a rate stability charge with no immediate move to a competitive bidding process where customers *may* experience the benefit of market-based rates. Instead AEP Ohio's proposed move to market-based rates does not occur until the after the term of the ESP expires. Only then will customers be given a potential opportunity to experience the benefit of market-based rates. Thus, there is no comparable set of facts present in this case. The Commission should for this reason and those discussed above, disregard the Companies' arguments which seek to improperly and unreasonably rely upon the Duke Stipulation.

3. The Commission has no authority to approve the Retail Stability Rider as a financial emergency measure.

The Companies argue that the PUCO has a duty to avoid imposing a rate plan that results in confiscatory rates through an unconstitutional taking[42] of the Companies' property without adequate compensation.[43] The Companies' argument, however, is founded upon a statute that applies only to a market rate offer. Specifically, the Companies rely on R.C. 4828.142(D)(4), which permits the PUCO to adjust the most recent SSO **set under a market rate offer** to address any emergency that threatens the utility's financial integrity. The Companies argue that the General Assembly must have meant for the PUCO to also retain such authority for an ESP because it would not make

[42] But, the PUCO has no jurisdiction to entertain a constitutional claim. *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St.2d 43.

[43] AEP Ohio Brief at 40-46.

sense that the General Assembly intended to remedy a confiscatory MRO rate, but not a confiscatory ESP rate.[44]

The Companies' argument must be rejected. The Companies are asking the Commission to rewrite the legislation to protect their interests. The General Assembly could have included the "financial emergency" language of R.C. 4928.142(D) in the ESP statute (R.C. 4928.143). But it did not. Under the doctrine of *expressio unius est exclusio alterius*, because the General Assembly did not, neither the Commission nor the Companies can rewrite the law.[45]

Additionally, the protection from financial emergency threatening the utility's financial integrity is not needed under an electric security plan.[46] The Companies have ultimate veto power over any modifications made to the ESP. If the Commission modifies and approves, or disapproves the ESP, the Companies may withdraw their application, thereby terminating it and may file a new SSO.[47] And there are other opportunities for utilities to terminate the ESP, for example, if the Commission orders a return of significantly excessive earnings under R.C. 4928.143(E) or (F). These provisions already protect the Companies far beyond the means of other parties. No further protection is needed. No further protection is given under the statutes.

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[44] Id. at 41.

[45] *See State ex rel. v. Evatt* (1944), 144 Ohio St. 65 (no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statue to meet a situation not provided for).

[46] A utility filing an MRO does not have the same unilateral veto power over modifications made by the PUCO to the MRO. Thus, protections to the utility may be considered a quid pro quo for being unable to withdraw and terminate.

[47] R.C. 4928.143(C)(2)(a).

4. The Retail Stability Rider, if imposed on customers, should be appropriately reduced to compensate customers for freed-up energy sold off system.

The Companies propose an asymmetric plan where they are made whole for revenues they lose to shopping while they do not appropriately share with their customers the revenues they gain from selling energy freed up by shopping. In support, the Companies argue there is no basis for their retail customers to claim a right to "confiscate profit margins" based on wholesale sales.[48] They point to the fact that the Commission does not consider profits from off-system sales in the significantly excessive earnings test ("SEET") analysis, and no off-system sales profits were recognized in the ESP I Order.[49]

Yet, the Companies' arguments need to be placed in context. The Commission in the ESP I Order determined that it was not *required* to use the profits from off-system sales to reduce the Companies' ESP rates.[50] The Commission never decided that it was **without authority** to include off-system sales profits as an offset to the ESP rates that customers pay.

Moreover, in the ESP I case the Companies did not seek an RSR-like mechanism to be made whole financially from shopping.[51] Here, OCC and APJN propose the credit for off-system sales as a logical, reasonable, and necessary offset to the RSR. For if customers are forced to pay for the Companies' financial losses due to shopping, customers should get credit for offsetting revenues that the Companies receive as a result

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[48] AEP Ohio Brief at 52.

[49] Id. at 52-53.

[50] See *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 at 17-18 (Mar. 18, 2009) ("ESP I Order").

[51] The Companies did propose a POLR charge to compensate them for revenues lost due to customers shopping, which was intended to accomplish the same objective as the RSR here. On remand from the Supreme Court, the PUCO determined that POLR charges were not substantiated by the record.

of customers shopping. The revenues derived from off-system sales from energy freed up by shopping should be fully netted against the revenues to be collected from customers for the RSR.[52] This is only fair and reasonable **if** the PUCO determines to allow the RSR to be collected, over the objections of the Residential Consumer Advocates and others.

5. The Retail Stability Rider, if imposed on customers, should be allocated based on the customer class' share of switched sales.

In addition to the unfairness of the RSR as just discussed, there is another unfairness to address related to the RSR -- how it will be collected from customers if it is imposed. OCC Witness Ibrahim testified that if the RSR is approved, which the Residential Consumer Advocates strongly oppose, it should be allocated in proportion to each customer class' relative share of switched KWh sales, instead of being based on class' contribution to AEP Ohio's load during PJM's five highest peaks.[53] Dr. Ibrahim testified that his recommendation would essentially allocate the cost of "discounted capacity" to the cost causers.

Constellation believes the RSR should be bypassable.[54] Constellation notes that although cost causation may apply in a cost-based ratemaking regime, the "ESP reflects no such regime."[55] And Constellation argues that if there is a conflict between cost

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[52] Company Witness Allen proposes a meager $3/MWh offset which is inappropriate. The Residential Consumer Advocates proposed a $9.40/MWh credit or alternatively that the actual profit margins be credited. See OCC/APJN Brief at 53.

[53] OCC Ex. No. 110 at 8-9. (Ibrahim).

[54] Constellation Brief at 13.

[55] Id.

causation approaches and Ohio's statutory requirement to further competition, the statutory requirement "trumps" the cost-causation approach.[56]

Constellation is wrong on a number of fronts. The ESP does indeed have numerous provisions that are cost based and the Commission has, at times, clung to cost-based pricing in the context of the ESP. For instance, R.C. 4928.143(B)(2) permits provisions of an ESP to include the cost of fuel used to generate electricity, the cost of purchase power, the cost of emission allowances, and the cost of federally mandated carbon or energy taxes.

Additionally, the Commission has, on a number of occasions, embraced cost-based ratemaking under ESPs. For instance, the Commission declined to permit AEP Ohio's automatic non-Fuel Adjustment Clause ("FAC") increases in ESP I, in part because they were not cost based.[57] FirstEnergy's proposed standby charges for generation, rider SBC, were modified to be based instead on FirstEnergy's actual, prudently-incurred costs of hedging.[58] FirstEnergy's distribution service improvement rider was restructured so the rider was based on prudently incurred costs, and not just a percentage increase from year to year.[59] And the Commission applied a cost-based approach to POLR in the Remand phase of its AEP Ohio ESP I.[60]

Constellation has not argued that the allocation of RSR proposed by the Residential Consumer Advocates will impair or impede competition. Neither has any

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[56] Id.

[57] ESP I Order at 28-30.

[58] *In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Opinion and Order at 29 (Dec. 19, 2008).

[59] Id. at 40-41.

[60] Remand Order at 22.

party to this case made such a claim. With no evidence or argument to the contrary, the "trumping" of competition by cost-based allocation principles is merely a hypothetical conflict that this Commission need not address.

Indeed, competition seems to be developing across the state of Ohio and in AEP Ohio's service territory. If AEP Ohio's switching estimates come to fruition, shopping will be pervasive by the end of the ESP term, with switching at or around 90% for all commercial and industrial customers and at 65% for residential customers.[61] Competition appears to be increasing at the present time, though residential customers lag far behind other classes. Use of PJM's reliability pricing model ("RPM") pricing, in lieu of the two-tiered higher priced capacity, as mandated in the Commission's decision in the recent Capacity Charge Case, should contribute to furthering competition.

6. AEP Ohio should not be allowed to use its proposed Retail Stability Rider or any other mechanism to collect from customers the capacity costs the Commission authorized to be deferred in the Capacity Charge Case.

In the Capacity Charge Case, the Commission determined that AEP Ohio must charge CRES providers the prevailing PJM RPM rate in effect during the remainder of the Companies' ESP term.[62] This means that from June 2012 to June 2013, CRES providers will pay $20/MW-day. From June 2013 to June 2014, CRES providers will pay $33/MW-day. CRES providers will pay $153 /MW-day for June 2014 through June 2015.[63] The Commission also permitted the Companies to defer capacity charges not collected from CRES provider billings during the ESP period to the extent that the total

[61] See AEP Ohio Ex. No. 116 at 5.

[62] Capacity Charge Order at 23-24.

[63] See id. at 10.

capacity charges do not exceed the capacity price of $188.88/MW-day.[64] The capacity price of $188.88 /MW-day was found to be "the appropriate charge to enable AEP-Ohio to recover its capacity costs for its FRR obligations from CRES providers."[65] The capacity price was developed by the PUCO on a cost basis.

The PUCO also authorized the Companies to collect carrying charges on such deferrals based on the Companies' weighted average cost of capital ("WACC") "until such time as a recovery mechanism is approved in 11-346."[66] "Thereafter, AEP-Ohio should be authorized to collect carrying charges at its long-term cost of debt."[67] The Commission noted that it would "establish an appropriate recovery mechanism for such deferred costs and address any additional financial considerations in the 11-346 proceeding."[68]

a. There is no evidence in the record to address a mechanism for collecting the capacity charge deferrals.

The Commission is bringing the mechanism for collecting the deferrals from the Capacity Charge Case into this proceeding for resolution.[69] But the primary capacity-related issue in this proceeding was the Company's alleged or claimed discounts for capacity, i.e., the two-tiered pricing scheme for capacity and the alternative $10/MWh shopping credit from the Company's proposed $355/MW-day capacity price.

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[64] Id. at 23

[65] See id. at 33.

[66] Id. at 23-24.

[67] Id. at 24.

[68] Id.

[69] OCC may seek rehearing of the Capacity Charge Order.

The appropriate mechanism for collecting any deferrals established in the Capacity Charge Case was never discussed or analyzed in **this** proceeding. There was no evidence presented in this case for the appropriate mechanism for collecting deferrals established in the Capacity Charge Case. Accordingly, the Commission does not have any, let alone, a "complete" record in this or any other proceeding on which it can determine how such deferrals can or should be treated. And, under R.C. 4903.09, the Commission must base its decision on facts in the record.[70]

The newly adopted collection mechanism has not been a subject of this nearly completed proceeding.[71] And therefore it is unreasonable, inefficient, and unlawful for this issue to be introduced into this proceeding at such a late date to determine the appropriate mechanism for collections from customers.

In this regard, the Commission noted in the Capacity Charge Case that the very purpose for initiating the Capacity Charge proceeding was to "**fully develop the record** to address the issue raised expeditiously."[72] So it does not logically follow that the Commission has now declared that it will address a mechanism for collecting the capacity charge deferrals in **this** proceeding, where there is no record on the issue.

b. There is no legal basis to collect the proposed capacity charge deferrals from customers in the Companies' Modified ESP.

The PUCO appears to intend that costs it has identified (in a separate case, under separate evidence) as attributable to **non-competitive wholesale** capacity, will be able to be collected as a provision of *competitive retail* electric generation service under the

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[70] *Ideal Transportation Co. v. Pub. Util. Comm.*, 42 OhioSt.2d 195 (1974).

[71] Nor was such a collection measure discussed or analyzed in the Capacity Charge Case.

[72] Capacity Charge Case, Entry at 3 (May 3, 2012) (emphasis added).

Companies' electric security plan. But the Ohio Supreme Court has held that, if a given provision of an ESP does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized by statute.[73] The deferrals created in the Capacity Charge Order do not fit within the provisions of R.C. 4928.143(B)(2), and thus cannot be authorized by the PUCO as part of an ESP.[74] Moreover, the Commission cannot approve a rate plan that violates numerous policy provisions of R.C. 4928.02, such as 4928.02(A), (H), and (L).[75]

The Commission seems to assume that deferrals created under the Commission's regulatory authority in Chapters 4905 and 4909 can be whisked into the Companies' ESP, which is governed by a different chapter of the Ohio Revised Code. While the Commission found an obligation under traditional regulation to ensure that jurisdictional utilities receive reasonable compensation for services they render,[76] there is no corresponding obligation under Chapter 4928.

And just as there is no statutory basis under Chapter 4928 for the RSR, there is likewise no statutory basis to include these deferred charges. The charges do not fit under any provision of R.C. 4928.142(B)(2). If it were argued that such charges fit under division (d) as a charge that has the effect of stabilizing or providing certainty, that argument fails. That statutory subdivision only permits a charge to stabilize or provide certainty specifically as it relates to **retail electric service**. Because the capacity charge is a wholesale capacity charge to CRES suppliers, and CRES suppliers ultimately choose

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[73] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32.

[74] IEU argues that the lost revenues sought to be collected through the RSR are "transition costs" that cannot be collected. See IEU Brief at 57-58. Residential Consumer Advocates agree that this is another basis under which the Commission could and should reject the RSR.

[75] *Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305.

[76] Capacity Charge Order at 22.

how that charge is flowed through to retail rates, there is no direct connection and no conclusive rate stability or certainty.

Additionally, the Companies, who bear the burden of proof in this proceeding (R.C. 4928.143(C)(1)), have not put forth evidence that establishes the newly created deferrals as a mechanism that will stabilize or provide certainty. Indeed, the deferrals will introduce further instability and uncertainty as customers could be subject to ever increasing transfers of their money to AEP Ohio depending on levels of shopping.

The Residential Consumer Advocates oppose the Commission-ordered deferral of the difference between RPM prices and the Company's capacity-related costs, if such deferrals will be ultimately collected from customers of the Companies. The deferrals -- which are likely to cost consumers hundreds of millions of dollars -- violate Ohio law and will cause consumers considerable harm.

First, the Commission authorized the capacity charges -- and the deferrals -- specifically under R.C. 4905.04, 4905.05, and 4905.06, and generally under R.C. Chapters 4905 and 4909.[77] The Company's ESP, however, is governed by R.C. 4928.143. The only deferrals mentioned in R.C. 4928.143 are "deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service."[78]

In the Capacity Charge Order, however, the Commission did not find that the deferral would have the effect of stabilizing or providing certainty regarding retail electric service. (In the view of the Residential Consumer Advocates, the deferrals would have the opposite effect.) Instead, the Commission recognized that "the provision of

[77] Id.

[78] R.C. 4928.143(B)(2)(d).

capacity for CRES providers by AEP-Ohio, pursuant to the Company's FRR capacity obligations, is **not a retail electric service** as defined by Ohio law."[79] The deferral itself was created out of the notion that "RPM-based capacity pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations."[80] Thus, instead of creating a deferral that meets the requirements of R.C. 4928.143(B)(2)(d), the Commission went beyond the statute governing ESPs.

Second, the deferral is unlawful under R.C. 4928.144, which states, in pertinent part: "The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established **under sections 4928.141 to 4928.143 of the Revised Code**, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers." (Emphasis added). Here, by ordering AEP Ohio to charge CRES providers RPM-based capacity prices, then deferring the difference between those prices and the Company's capacity charge for supplying FRR capacity through the ESP, the Commission appears to be phasing-in AEP's capacity charges. This does not comport with R.C. 4928.144 because (a) the rate was not established under R.C. 4928.141 to 4928.143, and (b) as mentioned above, the deferral is not necessary to ensure rate or price stability for consumers.

Third, the Commission has overstepped its authority under R.C. 4905.04, 4905.05, and 4905.06. These statutes give the PUCO **general** authority to supervise and regulate all public utilities within its jurisdiction. They are not ratemaking statutes. As it

[79] Capacity Charge Order at 13 (emphasis added).

[80] Id. at 23.

relates to EDUs, R.C. 4905.04 only gives the Commission "the power and jurisdiction to supervise and regulate public utilities [and] * * * to require all public utilities to furnish their products and render all services exacted by the commission or by law…."[81]

R.C. 4905.05 merely gives the Commission certain limited rights over public utilities' property and records:

> The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state; to the persons or companies owning, leasing, or operating such public utilities and railroads; to the records and accounts of the business thereof done within this state; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79c, and the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system. Nothing in this section, or section 4905.06 or 4905.46 of the Revised Code pertaining to regulation of holding companies, grants the public utilities commission authority to regulate a holding company or its subsidiaries which are organized under the laws of another state, render no public utility service in the state of Ohio, and are regulated as a public utility by the public utilities commission of another state or primarily by a federal regulatory commission, nor do these grants of authority apply to public utilities that are excepted from the definition of "public utility" under divisions (A) to (C) of section 4905.02 of the Revised Code.

And R.C. 4906.05 provides the Commission with general supervisory powers over public utilities' property and records:

> The public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities and

[81] The remainder of the statute is concerned only with railroads.

> keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. The commission has general supervision over all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section, and may examine such companies and keep informed as to their general condition and capitalization, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies. The commission, through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety. In order to assist the commission in the performance of its duties under this chapter, authorized employees of the motor carrier enforcement unit, created under section 5503.34 of the Revised Code in the division of state highway patrol, of the department of public safety may enter in or upon, for inspection purposes, any motor vehicle of any motor transportation company or private motor carrier as defined in section 4923.02 of the Revised Code. In order to inspect motor vehicles owned or operated by a motor transportation company engaged in the transportation of persons, authorized employees of the motor carrier enforcement unit, division of state highway patrol, of the department of public safety may enter in or upon any property of any motor transportation company, as defined in section 4921.02 of the Revised Code, engaged in the intrastate transportation of persons.

None of these statutes, which the Commission claims to be the basis for its action in the Capacity Charge Case, allows the Commission to establish the deferral of AEP Ohio's capacity costs through its ESP. Indeed, nothing in either Chapter 4905 or Chapter

4909 gives the Commission the authority to create a deferral to be collected through an ESP.

The Commission is a creature of statute and can only exercise the authority granted it under Ohio law.[82] Nothing in Ohio law allows the Commission to create a deferral under R.C. Chapter 4905 or 4909 to be collected through an ESP authorized under R.C. 4928.143. The deferral established in the Capacity Charge Case violates Ohio law and cannot be discharged through the ESP in this proceeding.

c. Collecting deferrals (created in the Capacity Charge Case) from customers creates a subsidy to CRES providers and violates R.C. 4928.02(H).

The deferrals created in the Capacity Charge Case are based on the PUCO's decision to allow AEP Ohio to charge CRES providers less than AEP Ohio's cost of capacity. The Commission determined that AEP Ohio's cost of capacity is $188.88/MW-day. Under the PUCO's approach, AEP Ohio will collect from customers (and apparently not from CRES providers) the difference between the cost of AEP Ohio's capacity and the discounted rate it will charge CRES providers for capacity.

The PUCO's approach has created a subsidy for CRES providers, whereby others will have to pay AEP Ohio to make it whole so that AEP Ohio can give a capacity discount to CRES providers. In her concurring and dissenting opinion, Commissioner Roberto refers to this payment as a "significant, no-strings-attached, unearned benefit" to

[82] *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835*; Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444*; Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820*; Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

entice more sellers into the market.[83] She further states that the deferral mechanism is "an unnecessary, ineffective, and costly intervention into the market" that she cannot support.[84] The Residential Consumer Advocates agree.

Dr. Duann, OCC's witness, testified that using an RSR to collect lost revenues due to shopping is a "subsidization of competitive retail service by SSO customers."[85] There is no basis to extend this benefit to CRES providers at the expense of other customers, and especially no basis to make non-shopping customers pay for this subsidy.

We come to the above conclusion as the result of a ruling we did not seek in the Capacity Charge Case. There, OCC recommended that AEP Ohio's charge for capacity be set at the market rate, through the use of the Reliability Pricing Model.[86] There would have been no AEP Ohio discount for capacity, no subsidy to CRES providers, no deferrals, and competition would have been furthered. But, the decision in the Capacity Charge Case attempts to find a point in between what AEP Ohio wanted and what CRES providers wanted. Consumers are caught in the middle where the middle is defined as owing AEP Ohio hundreds of millions of dollars. That result is untenable for consumers of AEP Ohio, and the positions in this Reply Brief reflect for consumers the existing circumstances of the Capacity Charge Order.

R.C. 4928.02(H) prohibits anticompetitive subsidies from noncompetitive retail electric service to competitive retail service. Under this statute, it would unlawful to collect the discount (whether or not deferred) from SSO customers.

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[83] Capacity Charge Order, Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4.

[84] Id.

[85] OCC Ex. No. 111 at 17 (Dr. Duann).

[86] See Capacity Charge Order at 19.

d. Collecting the deferrals from customers will cause customers, shoppers and non-shoppers, to pay twice for the capacity—a result that must be avoided.

R.C. 4928.02(A) requires ensuring that "reasonably priced retail electric service" is available to consumers. R.C. 4928.02(L) requires that the PUCO "protect at-risk populations." If the deferred subsidy amounts are collected from customers, instead of from the CRES providers (who are AEP Ohio customers for capacity and who received the capacity cost at a discount), hundreds of millions of dollars will be added to customers' bills. Such a result would be contrary to these objectives under the statute.

Commissioner Roberto's concurring and dissenting opinion is noteworthy, where she writes that shopping customers may pay twice for the capacity unless the CRES providers pass through all the discount:

> If the retail providers do not pass along the entirety of the discount, then consumers will certainly and inevitably pay twice for the discount today granted to the retail suppliers. To be clear, unless every retail provider disgorges 100 percent of the discount to consumers in the form of lower prices, shopping consumers will pay more for Fixed Resource Requirements service than the retail provider did. This represents the first payment by the consumer for the service. Then the deferral, with carrying costs, will come due and the consumer will pay for it all over again -- plus interest.[87]

But it gets even worse for customers. Non-shopping customers, like their shopping neighbors, *will* pay twice. Under the Companies' proposed Modified ESP, SSO customers (non-shopping customers) will pay what AEP Ohio claims is its embedded cost of capacity ($355/MW-day) through base generation rates.[88] Unless the

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[87] Capacity Charge Order, Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto (July 2, 2012) at 4.

[88] See AEP Ohio Ex. 142 at 19-20, Tr. Vol. II at 304, 350; OCC Ex. 111 at 17 (Dr. Duann).

Commission orders the Companies to reduce the capacity portion of base generation rates for non-switching customers, then SSO customers will be overpaying (at $355/MW-day) compared to what the PUCO determined was AEP's capacity cost ($188.88/MW-day) and overpaying even more compared to what the PUCO determined to charge CRES providers for capacity (RPM). And SSO customers would likely be paying higher prices for capacity than shopping customers (whose capacity could be priced at the much lower RPM price of capacity charged to CRES providers).

The PUCO should reduce SSO prices to reflect inclusion of capacity charges at a rate much lower than $355/MW-day and not higher than what the PUCO determined as $188.88/MW-day for AEP Ohio's cost. If the maximum price of $188.88/MW-day is not used for SSO (non-shopping) customers, then these customers will pay for capacity *once* in an overstated (above the $188.88/MW-day) SSO rate and then a **second** time if they pay for the deferrals that the PUCO has created in the Capacity Charge Case (or if they pay the RSR).

e. Charging non-shopping SSO customers a higher capacity charge than shopping customers violates the anti-discrimination provisions of R.C. 4928.02(A) and R.C. 4905.33 and 4905.35.

R.C. 4928.02(A) requires ensuring that consumers have "nondiscriminatory" retail electric service. R.C. 4905.33 prohibits a public utility from charging greater or lesser compensation for services rendered for "like and contemporaneous service under substantially the same circumstances and conditions." R.C. 4905.35 prohibits a utility from giving any "undue or unreasonable preference or advantage" to any person.

The capacity that the Companies provide to non-shopping customers is no different than the capacity provided to shopping customers (through capacity made

available to CRES providers). A system where SSO (non-shopping) customers are paying ($355/MW-day) for capacity in their rates contrasted with CRES providers being authorized to serve shopping customers at RPM (currently $20/MW day) is discriminatory. It violates R.C. 4928.02(A), and R.C. 4905.33 and 4905.35.

Such an approach fails to provide correct price signals to all customers (not just shoppers) and causes an illegal subsidization of switching customers by non-switching customers. That subsidy will occur if only capacity sales to CRES providers are priced at RPM and no adjustment is made to the capacity component of non-shopping customers' generation rates.

f. Deferrals caused by discounted capacity pricing for CRES providers and their shopping customers should not be collected from SSO customers.

As stated above, there is no basis in the law to collect the deferrals. There is no basis in the record to collect the deferrals.

Assuming *arguendo* that the PUCO allows deferrals to be collected, deferrals should not be collected from SSO customers (non-shoppers). Rather, any collection of deferrals should be from CRES providers, who are the direct beneficiaries of RPM pricing. The reasons for these recommendations have been explained in the preceding sections of this Reply Brief.

B. AEP Ohio Has Not Proven The Need for the DIR and That its Interests and Customers Interests Regarding Reliability are Aligned.

The Companies claim that their proposed Distribution Investment Rider ("DIR") is reasonable and lawful because it would (1) benefit customers by ensuring continued investment without the risk associated with regulatory lag and (2) assist in customer

reliability and provide stability for electric service.[89] The DIR would allow the Companies to collect from customers up to $86 million in 2012, $104 million in 2013, $124 million in 2014, and $51.7 million for the first five months of 2015.[90]

The Companies have not proved their claims. Indeed, the PUCO Staff's Witness, Mr. Baker, testified that with regard to reliability standards the Companies' proposal does not align AEP Ohio's interest with customers' interest in reliability. "Based on its 2011 performance, missing one of its reliability standards, Staff recommend the Commission find that OPC's reliability expectations are not currently in alignment with those of its customers."[91] The PUCO Staff is "not recommending that the Commission *not* approve the DIR."[92] But there is no affirmative recommendation from the PUCO Staff to adopt the DIR on brief.[93] Instead any recommendation to approve the DIR by Staff is contingent on a number of factors.[94]

At the outset, it should be noted that AEP Ohio has a duty to provide reliable service to its Ohio customers. AEP Ohio's duty to customers exists whether or not it is granted a DIR. In this regard, R.C. 4905.22 requires adequate service. O.A.C. 4901:1-10-26(B)(1) requires utility planning and reporting on "ensur[ing] high quality, safe, and reliable delivery of energy to customers * * *" AEP Ohio's tariff requires "reasonable

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[89] AEP Ohio Brief at 87-88.

[90] Id. at 88.

[91] Staff Ex. No. 106 at 9. (Baker).

[92] Staff Brief at 25 (original emphasis).

[93] Id. at 25.

[94] Id.

diligence in delivering a regular and uninterrupted supply of energy to the customer * * *"[95]

The authority listed above and other authority show clearly that AEP Ohio is required by law and rule to provide reliable service quality, whether or not there is a DIR. Ohio law provides a mechanism, in the form of rate cases, for electric utilities to collect from customers the costs of distribution service and for parties and the PUCO to review those costs, in R.C. 4909.18 and 4909.19.

It is not clear that even the Companies are convinced the statutes allow for the DIR. They refer to R.C. 4928.143(B)(2)(h) and/or (d) as "potential justifications for the rider."[96] And the Companies have gone so far as to claim that the PUCO "is not limited by the statutory provisions [they have] offered to justify worthy mechanisms like the DIR."[97] Of course, the PUCO is bound by Ohio law.

R.C. 4928.143(B)(2)(h) provides as follows:

> [P]rovisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and **ensure that customers' and the electric distribution utility's expectations are aligned** and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system. (Emphasis added.)

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[95] Ohio Power Company Tariff, original sheet No. 103-15D.

[96] AEP Ohio Brief at 88.

[97] Id.

To the extent that this statute allows a mechanism such as the DIR, the Companies must meet certain elements in the statute in order to obtain the accelerated cost collection from customers that they seek. But the Companies failed to even specify what specific portion of R.C. 4928.143(B)(2)(h) allows the DIR. That is telling.

R.C. 4928.143(B)2(h) has two parts: one part where the certain charges are allowed (such as for modernization) and another part where the utility and PUCO must meet certain elements (such as alignment of customer and utility interest regarding reliability) in order to approve charges for modernization. The Companies have briefed the second part of the law but they have not justified the DIR under the first part. They thus failed in their burden of proof.

For purposes of briefing this issue, we infer the Companies are relying on the language in the statute that supports the modernization incentives for EDUs. But the statute specifically requires a "long-term energy delivery infrastructure modernization plan * * *." The Companies' proposal for the DIR does not meet this requirement because, as noted by Staff Witness Baker, the Companies' Witness Kirkpatrick failed to include four key categories of information as part of the DIR proposal. As Staff Witness Baker explained, Mr. Kirkpatrick did not include:

> 1. The quantity of these assets OPC plans to install during each year of the [Modified] ESP;
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> 2. The planed cost for each asset class;
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> 3. The incremental amount of cost above previous levels; and
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> 4. The quantified improvement in reliability performance estimated to result from the incremental expenditures.[98]

[98] Staff Ex. No. 106 at 10. (Baker).

It is noteworthy that Staff Witness Baker identified not just four missing pieces of information, but four entire categories of missing information. Mr. Kirkpatrick also failed to include any information regarding Cost Savings in Operations and Maintenance costs resulting from replacement of distribution assets. Without this level of information, the Companies cannot possibly meet the statutory requirements that any modernization plan be a long-term one. As noted in the OCC/APJN Initial Brief, the Companies have the burden of proof in these cases,[99] and the Companies could not meet that burden of proof when such crucial information is totally lacking in the record.

Further, the Companies must prove under R.C. 4928.143(B)(2)(h) that their expectations are "aligned" with the expectations of their customers. They did not. In fact, PUCO Staff witness Baker stated that the interests of the Companies and customers are not aligned regarding reliability.[100] He testified "**Staff recommends the Commission find that OPC's expectations are not currently in alignment with those of its customers**."[101] Although the Companies spent considerable time in their Initial Brief criticizing the Staff analysis[102] that led to the conclusion that the Companies' and customers' expectations regarding service reliability are not aligned, the fact remains that the Staff did reach that conclusion and the Companies' criticism does not change the Staff conclusion or recommendation. In addition, none of the other 33 participating intervenors, which would include a multitude of customer interests, have supported AEP Ohio's proposed DIR on brief.

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[99] OCC/APJN Initial Brief at 8.

[100] Staff Ex. No. 106 at 9-10. (Baker).

[101] Id. (emphasis added). (Baker).

[102] AEP Ohio Brief at 92-94.

Moreover, in addition to CSP failing to meet the Customer Average Interruption Duration Index ("CAIDI") performance standard, it is noteworthy that although CSP's System Average Interruption Frequency Index performance and OP's CAIDI performance standards did not fail, they showed a **decline** of 8% to 15% in performance from 2010 to 2011.[103]

The Companies claim that the DIR removes the risk associated with regulatory lag.[104] That may be. But their assertion that this is a benefit for customers is misplaced because regulatory lag has the effect of delaying cost recovery. Thus, removing regulatory lag permits accelerated cost recovery which means customers are paying more and paying sooner. This is not a benefit for customers.

Moreover, regulatory lag is a long-established part of the normal distribution rate case process created by the Ohio General Assembly. It provides incentives for utility efficiencies in advance of regulatory approval to collect costs from customers. And the rate case process time that contributes to the so-called "lag" includes considerable customer safeguards for reviewing the just and reasonable nature of utility expenditures and the adequacy of the utility's service reliability.[105]

Also R.C 4928.143 does not include the same type of customer and procedural safeguards as included in R.C. 4909.18 and 4909.19 for setting distribution rates. That regulatory process also includes due process protections for customers.[106] Thus, the Companies' proposal for a DIR to eliminate regulatory lag and accelerate cost recovery is

[103] See Staff Ex. No. 106 at 8, table. (Baker).

[104] AEP Ohio Brief at 88.

[105] R.C. 4909.18, which states "At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility."

[106] R.C. 4909.18 and 4909.19.

more of a utility-centered benefit than it is a customer-centered benefit. As such, AEP Ohio's proposal does not provide a sufficient basis for approval of the DIR under the law.

An additional consideration for customers is whether utility spending is reasonable. Again, a comparison of the DIR to a distribution rate case favors the distribution rate case because the DIR is lacking in basic information that is necessary to determine if the spending is reasonable. From a customer perspective the lack of a basic cost-benefit analysis casts doubt on any DIR spending. On this subject that is of great importance to consumers -- service reliability, this lack of analysis fails to provide any assurance that service reliability will be improved. There is a lack of assurance that the DIR spending will produce real benefit to customers.

The Companies' focus on the risk associated with regulatory lag also begs the question that if the elimination of regulatory risk is so important to the Companies, then should any DIR that eliminated the risk associated with regulatory lag go hand-in-hand with a lower rate of return to account for the reduced risk for the Companies.[107] The answer is yes. Again, not surprisingly, the Companies failed to discuss this necessary quid pro quo.

The Companies also argue, regarding R.C. 4928.143(B)(2)(h), that the DIR would assist in customer reliability improvements.[108] Yet again the Companies' focus is misplaced because the DIR as proposed fails to include significant detail necessary to properly evaluate the program including a basic cost-benefit study. The Companies did not prove their point regarding an assurance that the DIR will provide improvement in

[107] For example see *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, Entry on Rehearing (December 19, 2008) at 5, where the Commission acknowledged that the reduced risk faced by the Company under the straight fixed variable rate design justified a lower rate of return.

[108] AEP Ohio Brief at 87.

customer service reliability. The PUCO Staff's Witness, Mr. Baker, was critical of the Companies' lack of a cost-benefit analysis of the DIR.[109] Without a cost-benefit analysis there is no assurance that any DIR spending will be reasonable or that it will produce any comparable service reliability benefits for customers.

The Companies argue that service reliability will be improved through the DIR proposal to proactively replace equipment before it fails.[110] However, the Companies' claim has insufficient support. The Companies failed to demonstrate that the proposed undefined proactive spending[111] will actually improve service reliability or that it will do so in a cost-effective manner, because the Companies did not conduct a cost-benefit analysis.[112] Without such a study, the only assurance that customers have regarding the DIR is that they will have to pay higher rates without any assurance of reliability improvements.

In fact, the Companies are proposing reduced reliability standards at the same time they are seeking additional DIR funding.[113] According to the Companies' Application in Case No. 12-1945-EL-ESS, the Companies are seeking a Customer Average Interruption Duration Index of 152.36 minutes[114] -- an increase of 17.19 minutes from the current CSP standard of 135.17 minutes. In addition, the Companies are proposing a System Average Interruption Frequency Index of 1.34 -- an increase of .15

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[109] Staff Ex. No. 106 at 10. (Baker).

[110] AEP Ohio Brief at 89 citing AEP Ohio Ex. No. 110 at 18-19. (Kirkpatrick).

[111] Staff Ex. No. 106 at 10. (Baker).

[112] Id.

[113] *In the Matter of the Establishment of 4901:1-10-10(B) Minimum Reliability Performance Standards for Ohio Power Company*, Case 12-1945-EL-ESS, Application (June 29, 2012).

[114] Id. at 16. OCC requests that the PUCO take Administrative Notice of the Companies filing in Case No, 12-1945-EL-ESS, pursuant to Ohio Rules of Evidence Rule 201(F) that indicates that "Judicial notice may be taken at any stage of the proceeding."

over the current OP standard of 1.19. The Companies' Application to reduce standards seems to be aimed at better aligning the Companies' and customers' expectations regarding reliability -- by reducing them, instead of improving reliability expectations.

The Companies' proposal in Case No. 12-1945 means that they want to be allowed to have more customer outage time going forward than what currently is the standard per year. It cannot be reconciled that the utility would be seeking more money to be recovered faster from customers (via a Distribution Investment Rider), to allegedly improve service reliability, while at the same time proposing that its allowed outage time be increased (meaning reliability would be decreased). But that is the reality of AEP Ohio's proposal.

Under R.C. 4928.143(B)(2)(d), the key is that the ESP provision must have the effect "of stabilizing or providing certainty regarding retail electric service." The Companies claim that a PUCO decision to not approve the DIR will lead to less stability in rates because there will be the need for an immediate distribution rate case.[115] Thus, the Companies' argument seems to be that a $365.7 million DIR program ($86 million in 2012, $104 million in 2013, $124 million in 2014 and $51.7 million through the first five months of 2015)[116] provides more stability than an unknown future distribution rate case. In making this argument, the Companies are placing a premium on the value of the DIR caps.[117] However, these DIR caps only provide a benefit to customers if the alternative of the distribution rate case results in a rate increase greater than the $365.7 million AEP Ohio seeks for the DIR. The fact that AEP Ohio seeks a DIR instead of a rate case for

[115] AEP Ohio Brief at 89.

[116] Id. at 88.

[117] Id. at 89.

increasing customers' rates suggests that even it may doubt that it could obtain the rate increases from a rate case that it proposes for the DIR.

It is also worth noting that a distribution rate case -- which would include full regulatory review, including process rights for customers -- might include offsetting cost reductions that could mitigate the impact of any rate increase. In a full distribution rate case all elements of distribution service are reviewed, not just an isolated distribution investment increase. In addition any increase from a distribution rate increase would be a set flat amount from year to year in contrast to the DIR that would produce an increase each year over the prior year, from $86 million to $104 million to $124 million.

These escalating caps on the DIR do not provide for stable rates. Instead, under the Companies' proposal the DIR would increase from year to year to year. This proposal for larger increases from one year to the next does not provide better rate stability than a distribution rate case, where any resulting increase would be the same from year to year. From the customer perspective the Companies' proposal is **NOT** a benefit. When this is considered in the context of the Companies' failure to include a basic cost-benefit analysis, the Companies' proposal also fails to produce reliability or stability.

To the extent that the DIR would defer the immediate distribution rate case that the Companies noted in their Initial Brief, the Companies had previously stated that, with the DIR, they would not seek such a rate case with an effective date any earlier than June 1, 2015.[118] For this trade to be of a benefit to customers, the result from the immediate distribution rate case would have to be an increase in rates more than the alternative

[118] AEP Ohio Ex. No. 116 at 12. (Allen).

$365.7 million DIR. In addition to rates, the rate case process can be expected to provide more protections and better outcomes for consumers regarding reliability, given the greater scrutiny in a rate case.

The Companies' interpretation that the DIR provides better stability than a distribution rate case presupposes that the result of any distribution rate case will be an increase in rates greater than the DIR. If on the other hand, any future distribution rate case results in a rate increase less than the DIR, then customers would clearly be better off with the lower rates from the distribution rate case, which would in turn provide better rate stability. It is only from the Companies' perspective that higher rates through the DIR provide better rate stability. Clearly it is not the intent of R.C. 4928.143(B)(2)(d) for rates to be higher than otherwise would be the case.

The Companies' interpretation of R.C. 4928.143(B)(2)(d) also contradicts the state policy objective in R.C. 4928.02(A) for reasonably priced retail electric service. Reasonably priced retail electric service does not include rates that are higher than otherwise would be the case.

For all of the forgoing reasons the PUCO should adopt the Residential Consumer Advocates' recommendations to protect customers regarding the DIR.

C. The gridSMART Rider Should Not be Expanded Until the Phase 1 Pilot Has Been Completed and Analyzed.

The Companies argue for the continuation of the gridSMART Rider as part of the Modified ESP.[119] The gridSMART program is designed to explore technologies, including communications interfaces between the customer and the utility.[120] The

[119] Id. at 95.

[120] AEP Ohio Ex, No. 110 at 9. (Kirkpatrick).

Residential Consumer Advocates do not oppose the continuation of the current Phase 1 Pilot gridSMART Rider collection. However, the Residential Consumer Advocates recommend against any expansion or continuation of the gridSMART program that goes beyond the Phase 1 Pilot until the Pilot is completed and fully analyzed by the PUCO and parties to determine the effectiveness of the gridSMART program. Despite the Companies' acknowledgement of Staff's concern with any expansion of the gridSMART program prior to completion and analysis of the Phase 1 Pilot,[121] the Companies propose to go forward with gridSMART in the normal course of business.[122] This plan is akin to putting the cart before the horse.

OCC urges the PUCO to make it clear to the Companies that any expansion of the gridSMART program prior to completion and analysis of the Phase 1 Pilot is not authorized for recovery in the gridSMART Rider. If the Companies decide to go forward with expansion of gridSMART prior to completion and analysis of the Phase 1 Pilot, then any cost collection from customers should be through a distribution rate case, where the Companies bear the burden of proving that the gridSMART expansion was just and reasonable.[123]

D. AEP Ohio's Proposed Rate Freeze for Non-fuel Generation Rates Will Not Necessarily Ensure Reasonably Priced Electric Service for Customers in the State of Ohio.

The Companies argue that freezing the current base generation rates until such time as those rates are established through a competitive bidding process is a benefit for

[121] Id.

[122] Id. at 96.

[123] R.C. 4909.18.

customers.[124] The Companies argue that this rate freeze also complies with the state policy[125] for reasonably priced electricity.[126] The Companies have also made a rate freeze pledge regarding distribution base rates -- (that any new rates will not be in effect prior to June 2015).[127]

However, for either rate freeze to actually be a benefit for customers, the rates being frozen must be reasonable in the first place. Notably, OCC Witness Dr. Duann testified that keeping base generation rates at current levels is not a benefit to customers when the auction prices of generation service or prices of electricity service by CRES providers have generally declined and are expected to decline further over the next few years.[128]

Additionally, non-fuel base generation rates are only a portion of the rates that customers will pay if the numerous riders are imposed under the ESP. Customers may pay the cost of fuel under the fuel adjustment clause. Customers may pay riders for costs that the Companies have not even quantified such as the Alternative Energy Rider and the Pool Termination Provision. For other riders where there has been some estimate of expected costs, i.e. the Retail Stability Rider and the Generation Resource Rider ("GRR"), the Companies have not limited or capped the increase. The fact remains that all of the FAC and these Riders will add costs -- significant costs -- to the base generation rates that customers must pay to get electric service. Thus to focus on the non-fuel base

[124] AEP Ohio Brief at 25.

[125] R.C. 4928.02(A).

[126] AEP Ohio Brief at 26.

[127] AEP Ohio Ex. No. 116 at 12. (Allen).

[128] OCC Ex. No. 111 at 15. (Dr. Duann).

generation rate freeze, which is but one component of customers' bills, is to put blinders on to the remaining portions of customers' bills.

And, the scope of AEP Ohio's ESP charges is ever growing. For instance, in a separate application filed before the PUCO on June 15, 2012,[129] AEP Ohio updated its Transmission Cost Recovery Rider ("TCRR"), effective September 1, 2012. AEP Ohio is proposing a unified TCRR for CSP and OP that increases TCRR rates for both utilities, by approximately 28.17 %. AEP Ohio's TCRR update includes a significant rate impact due to under-recovery from the prior period, which AEP Ohio describes as "a direct function of projected non-shopping load."[130]

AEP Ohio proposes to mitigate the rate impact by collecting the prior period's under-recovery over three years, rather than the traditional one-year TCRR true-up.[131] AEP Ohio estimates the monthly total bill impact (on a RES 1000 kWh bill) of the TCRR increase to be 2.7% for OP and 1.6% for CSP, if the three-year proposal is used.[132] If the under recovery is charged over 12 months, the increases are 4.2% for OP and 3% for CSP.[133]

As a further alternative to mitigate the rate impact, AEP Ohio proposes that the PUCO could adopt an ESP phase-in under R.C. 4928.144, over three years on a **non-bypassable** basis. The TCRR has been, and is now, a bypassable charge.[134] Under this non-bypassable charge alternative, the increase would be 2.2% for OP and 1.1% for

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[129] See *In the Matter of the Application of the Ohio Power Company to Update Its Transmission Cost Recovery Rider Rates*, Case No. 12-1046-EL-RDR, Application (June 15, 2012).

[130] Id. at 4.

[131] Id. at 4-5.

[132] See id., Schedule B-5 at 1, 3.

[133] Id. at Exhibit 1.

[134] Id. at Exhibit 2.

CSP.[135] These bill increases due to the TCRR would be in addition to any bill increases experienced as a result of AEP Ohio's proposed Modified ESP 2.

Even more charges are likely to be added onto customers' bills as a result of the Commission's decision in the Capacity Charge Case. There the Commission determined that the Companies could defer their incurred capacity costs not recovered from billings to CRES providers during the ESP period.[136] Additionally, the PUCO authorized the Companies to collect carrying charges on such deferrals based on the weighted average cost of capital until "a recovery mechanism is approved in 11-346."[137] These rulings are likely to cause deferrals in the hundreds of millions of dollars that could potentially be collected from the Companies' customers. Thus the very real threat of hundreds of millions of dollars in additional deferral costs on top of already high rates on top of hundreds of millions in DIR and RSR costs hover over customers -- and especially at-risk or close to at-risk customers -- like the Sword of Damocles.

As noted *infra*, the DIR represents an alternative to an immediate distribution rate case.[138] Whether the DIR is a benefit for customers compared to the alternative distribution rate case is not a given. In fact, a distribution rate case would afford customers significant process safeguards as well as including a prudence review[139] that the DIR does not. In fact, the DIR as proposed suffers from a serious lack of detail, including no cost-benefit analysis to determine whether the DIR spending will actually

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[135] See *In the Matter of the Application of the Ohio Power Company to Update Its Transmission Cost Recovery Rider Rates*, Case No. 12-1046-EL-RDR, Application at Exhibit 2 (June 15, 2012).

[136] Capacity Charge Order at 23.

[137] Id.

[138] AEP Ohio Brief at 89.

[139] R.C. 4909.18 and 4909.19.

benefit customers through improved service reliability.[140] Moreover, a distribution rate case could result in a flat rate increase whereas the DIR is scheduled to be an ever larger rate increase from year to year to year, from $86 million in 2012 to $104 million in 2013 to $124 million in 2014.[141] Thus, freezing rates that include the DIR does not provide a benefit to customers.

On the other hand, from the Companies' perspective, trading the uncertainties of a distribution rate case for the guaranteed collection of the DIR constitutes a benefit for the Companies and their shareholders over customers. The same uncertainty with a generation base rate case is also more than offset by the numerous riders that provide more certain and stable cost recovery for the Companies. Again this is not a benefit for customers.

The same analysis with the RSR also indicates that a freeze of base generation rates that includes the $929 million RSR is not a benefit for customers but rather for the Companies. Even if the questions of whether the RSR is legal are set aside, the sheer magnitude of the RSR ensures that the resulting rates -- even if under a generation base rate freeze -- will result in rates that significantly and negatively impact AEP Ohio's customers.

OCC Witness Williams testified that almost 20% of the Companies' customers are already having difficulties paying their current rates inasmuch as they either had their service disconnected, participated in the Percentage of Income Payment Plan Plus program or another payment plan in 2011 in order to just be able to maintain their electric

[140] Staff Ex. No. 106 at 10. (Baker).

[141] AEP Ohio Brief at 88.

service.[142] When the impact of the $929 million RSR, the $365.7 million DIR, and the numerous other riders are heaped on the current rates, that same 20% of customers will have even more difficulty with affordability in 2012 and into the future, as will potentially thousands more customers who may slide from barely being able to afford their electric service to no longer being able to do so.

Rates that put that large a percentage of the Companies' customers at risk with regard to affordability cannot be the end result that the General Assembly contemplated when R.C. 4928.02(A) was enacted. To the extent that the Companies have evoked R.C. 4928.02 as a justification for the Modified ESP, the Companies have totally misconstrued R.C. 4928.02 and have in fact expanded the intent of the statute to include the financial well being of the Companies and their shareholders -- **an item that IS NOT included in the statute.**

Then, when fuel costs, deferrals, and the numerous riders inside and outside of the ESP are factored on top of the current non-fuel base generation rates, affordability becomes an even larger issue for an even larger number of customers. The Companies argue that their proposed Modified ESP provides benefits to customers because the policy goal of reasonably priced electric service is best met by ensuring the future financial viability of the Companies.[143] Inasmuch as the Companies may believe this to be the case, the fact remains that R.C. 4928.02 does not list the Companies' financial well being as one of the state policy considerations. Moreover, "stable" high rates do not provide a benefit to customers that cannot afford to pay those rates.

[142] OCC Ex. No. 113 at 5-7. (Williams).

[143] AEP Ohio Ex. No. 101 at 10. (Powers).

E. The Modified ESP Fails to Satisfy the Ohio Policy to Protect At Risk Populations, under R.C. 4928.02(L).

AEP Ohio claims that the Modified ESP advances the policy in R.C. 4928.02(L). This claim however, is based to a large extent upon the provisions of a settlement in the Companies' distribution case, Case No. 11-351-EL-AIR.[144] In that case, the Companies assert that the distribution settlement applied $46.7 million of expected DIR funds to offset the increased rate base approved in the distribution case; and another $15.7 million of expected DIR funds were to fund a residential credit, and under the Partnership with Ohio ("PWO"), including the Neighbor-to-Neighbor bill payment assistance program. Thus, according to the Companies, the total benefit to at-risk populations that exists, by way of the distribution case, is $62 million.[145]

The Companies lay claim to the Distribution Case Stipulation benefits by maintaining that they "are inextricably intertwined with the outcome of the Modified ESP and in particular the approval of the DIR."[146] Upon closer examination, however, these claimed benefits for "at-risk populations" are overstated and misleading. The proclaimed benefits come from an entirely different case and are not a part of this ESP.

Moreover, the case where such benefits are attached to was a case that was stipulated and cannot be used as precedent. Using the Stipulation as precedent violates the very terms of the Stipulation. The plain words of the Distribution Case stipulation preclude such use:

> Except for enforcement purposes or to establish that the terms of the Stipulation are lawful, neither this Stipulation nor the information and data contained herein or attached

[144] AEP Ohio Brief at 121-123.

[145] Id. at 122.

[146] Id.

> hereto shall be cited as a precedent in any future proceeding for or against any Signatory Party, or the Commission itself, if the Commission approves the Stipulation.[147]

The Residential Consumer Advocates thus urge the Commission to disregard the Companies' arguments that would have the Commission count the funding of PWO through the distribution case as a benefit in the ESP proceeding.

To be clear, the Modified ESP itself contains no funding whatsoever for the PWO, Neighbor-to-Neighbor, or any other low income or bill payment assistance program. Second, the distribution case funding for the PWO is apparently not contingent on the Commission's accepting every term and condition of the Companies' Modified ESP, including the DIR. Third, in their brief, the Companies lump together the $15.7 million of expected DIR funds that the distribution case applied to both the residential credits **and** the PWO, treating both as going to the at-risk or low-income population.

Actually, the distribution case only permitted **$1 million** of the total residential credits to be applied to the PWO (for bill payment assistance). In short, the $1 million in PWO funding is a provision of AEP Ohio's distribution case. It is not a provision of AEP Ohio's Modified ESP. As for the remaining $60 million in claimed "benefits" for at-risk populations, those benefits -- the $15.7 million residential bill credits and the $46.7 million offset to increased rate base in the distribution case -- accrue to all residential customers and do not provide any special protections or benefits for at-risk populations.

Furthermore, these purported benefits are tied to the DIR and must be weighed against the economic costs that will be imposed on customers by the DIR. The

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[147] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, individually and, if there proposed merger is approved, as a merged company (collectively AEP Ohio) for an increase in electric distribution rates,* Case No. 11-351-EL-AIR, Joint Stipulation and Recommendation at 14 (Nov. 21, 2011).

Companies have proposed a three-year $365.7 million rate increase for DIR as a part of its Modified ESP. The DIR does not meet statutory standards and thus the Residential Consumer Advocates oppose it. The Companies have not done a cost-benefit analysis of the DIR or provided the information necessary to conduct a cost-benefit analysis. As explained by Staff Witness Baker, the Companies have not provided any detailed information about the DIR such as the quantity of assets the Companies plan to install during each year of the Modified ESP, the planned cost for each asset class, or the incremental amount of costs above previous levels.[148] And most importantly, the Companies have not committed to any quantifiable improvement in reliability performance that is to result from the spending of these hundreds of millions of dollars.[149] Absence of any readily quantifiable costs or benefits, or of any cost-benefit analysis, suggests that the alleged DIR benefits for residential customers are questionable at best and are more than outweighed by the increased rates customers will be paying for the DIR.

Moreover, the Commission should recognize that the $1 million residential credits that go directly to the at-risk population represents a far lower level of funding then the Commission ordered, and the Companies implemented, in their first ESP. By contrast, in the Companies' first ESP, the Commission directed the Companies to commit a specific dollar amount - at least $15 million over the three years -- "to low-income, at

[148] Staff Ex. No. 106 at 10. (Baker).

[149] Id.

risk customer programs."[150] Indeed, the Commission noted that the PWO fund was "a key component" of the Companies' economic development proposal.[151] The Commission also required that the funding come from shareholder dollars,[152] and not from customers.

In this case, especially in light of the likely increases to residential rates that may occur, and the looming capacity charge deferrals that may find their way into residential rates, the Commission should require the Companies to modify the ESP in order to protect the at risk population, in keeping with the policy objectives of the State under R.C. 4928.02(L). The ESP should be modified to permit the funding, through shareholder dollars, of the PWO at its current level ($5 million per year) -- if not the amount proposed in AEP Ohio's original application ($6 million per year) -- with at least $2 million per year specified for the Neighbor-to-Neighbor bill payment assistance fund. If, however, the Commission does not require a full funding of the PWO, the Commission should at least direct AEP Ohio to fund the Neighbor-to-Neighbor program (or any successor bill payment assistance program), through shareholder dollars, at the minimum $2 million a year funding level recommended by the Residential Consumer Advocates. The Commission should also require that the funding come from shareholders dollars as it did in the *ESP I Order*.

Low income customers -- including many elderly persons, individuals with disabilities, and families with children, and the growing ranks of the long-term

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[150] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if the Proposed Merger is Approved, as a Merged Company Collectively, AEP Ohio for Increase in Electric Distribution Rates*, Case Nos. 11-351-EL AIR and 11-352-EL AIR, Opinion and Order at 6 (December 14, 2011).

[151] Id.

[152] Id.

unemployed -- clearly constitute an "at-risk population" under the statutory policy of objective set forth in our R.C. 4928.02(L). Even in the best of economic times, low-income customers struggled to pay their bills and purchase basic necessities.

The current economic downturn -- the worst economic period since the Great Depression -- has greatly exacerbated the financial plight of low-income families and households. The Commission should not allow the Companies to take a huge step backward by eliminating or drastically reducing its funding for bill payment assistance for low income customers, while increasing rates, especially in a region (Appalachian Ohio) where there are many economically distressed communities.

F. In the Capacity Charge Case, the Commission Adopted a Single Price for AEP Ohio's Capacity, and thus has Rejected the Company's Two-tiered Capacity Proposal.

In this proceeding, AEP Ohio proposes a two-tiered capacity pricing plan to be in effect through December 2014. The first tier would be priced at $146/MW-day,[153] which is considerably higher than the RPM rates that will be in effect during the term of the ESP.[154] This capacity rate would be available to approximately 21% of each customer class through December 31, 2012, approximately 31% of each customer class during 2013 and approximately 41% of each class from January 1, 2014 through May 31, 2015.[155] Any capacity purchased after these thresholds are met would be offered at $255/MW-day.[156] For 2012, governmental aggregation initiatives approved before or as a result of the November 2011 elections would be awarded as additional allotments of the

[153] See AEP Ohio Ex. No. 101 at 15. (Powers Direct).

[154] See IEU Ex. Nos. 125 (Murray Public Direct) and 126 (Murray Confidential Direct) at 38.

[155] AEP Ohio Ex. No. 101 at 15. (Powers Direct).

[156] Id.

$146/MW-day capacity price, while the additional aggregation load would be included within the 31% set-aside level for 2013 and the 41% set-aside level for 2014.[157]

According to the Companies, the purpose of this two-tiered scheme is largely two-fold: 1) "to mitigate significant financial harm of more than $600 million in lost revenue that AEP Ohio would potentially suffer annually if the Commission required it to supply CRES providers with capacity at an RPM-based price * * *[158]; and 2) to "promote and support expedited growth of robust competitive supply options for retail customers."[159] Although the two-tiered scheme would assuredly mitigate any financial harm that increased competition might cause the Companies, there is little evidence to support the notion that the two-tiered scheme would support expedited growth of competition.

As discussed in the Residential Consumer Advocates' initial brief, AEP Ohio witness Allen attempted to refute the notion that confusion surrounding the two-tiered system is not an impediment to shopping. In his rebuttal testimony, Mr. Allen presented data showing the increase in shopping in AEP Ohio's service territory since the two-tiered scheme was put forth in the September 7, 2011 Stipulation.[160] Mr. Allen, however, ignored two facts. First, the amount of residential shopping has not yet reached 21%, and thus residential customers have not been subjected to Tier 2 pricing, only the lower Tier 1 capacity prices.[161] Thus, many residential customers may not even know there is a two-

[157] Id.

[158] AEP Ohio Brief at 60.

[159] Id. at 61 (citations omitted).

[160] AEP Ohio Ex. No. 151 at 10. (Allen Rebuttal).

[161] See Tr. Vol. XVII at 4815-4816.

tiered system in place.[162] Second, the commercial class and industrial classes are already over the 21% shopping threshold and thus are subject only to the Tier 2 pricing. They, too, are faced with only one price for capacity.

The Residential Consumer Advocates and other parties to this proceeding have opposed the two-tiered capacity scheme. There is a potential for confusion among CRES suppliers and customers concerning the prices to be charged, which AEP Ohio was unable to rebut.[163] The Residential Consumer Advocates urged the Commission to reject AEP Ohio's two-tiered scheme and instead order the Companies to charge a single price for capacity, preferably an RPM market-based price.[164]

In addition, the Commission largely set to rest the issue of AEP Ohio's proposed two-tiered capacity pricing scheme in the Capacity Charge Order. There, the Commission noted that AEP Ohio had two tiers of capacity pricing since at least December 14, 2011.[165] Thus, the Commission might have opted for continuation of two-tiered capacity pricing by AEP Ohio. The Commission did not, however.

Instead, the Commission -- while instituting cost-based capacity pricing for AEP Ohio -- directed the Companies to charge RPM-based capacity prices during the transition to full competitive bidding for generation pricing.[166] The Commission noted that "RPM-based capacity pricing will stimulate true competition among suppliers in

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[162] See id. at 4818.

[163] See OCC/APJN Initial Brief at 81.

[164] Id.

[165] Capacity Charge Order at 5-6.

[166] Id. at 23.

AEP-Ohio's service territory" and "will facilitate AEP-Ohio's transition to full participation in the competitive market, as well as incent shopping."[167]

The Commission did not adopt a two-tiered capacity price in the Capacity Charge Case. The Commission should also reject AEP Ohio's proposed two-tiered capacity charge as part of the Companies' proposed ESP.

G. The Costs of the Generation Resource Rider, Both During the Term of the Electric Security Plan and After, Must Be Included in the ESP/MRO Comparison.[168]

The Company continues to assert that it is premature to include costs of the Turning Point Solar Project ("Turning Point") when placing a value on the GRR for purposes of the ESP-MRO comparison.[169] AEP Ohio's position remains that the Commission should place the cost of the GRR at zero,[170] or at most include only those costs expected to be incurred during the term of the ESP.[171] AEP Ohio's position is misguided, however.

The Company would have the Commission take an unreasonable, one-sided view of Turning Point in this proceeding. In AEP Ohio's view, the Commission should consider Turning Point a benefit of the ESP, but turn a blind eye to the costs that customers will be asked to pay. This is unfair to customers. If the Companies do not want the Commission to consider Turning Point's costs in this proceeding, then the Companies should not have made Turning Point a part of the ESP. But because AEP Ohio made Turning Point an issue as a claimed benefit of the ESP, the Commission then

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[167] Id.

[168] APJN does not join in this subsection -- II.G of the Residential Consumer Advocates Reply Brief.

[169] AEP Ohio Brief at 29-32.

[170] Id.

[171] Id. at 31.

is obligated to also examine the costs as part of its statutorily required determination of whether the proposed ESP is more favorable in the aggregate than an MRO.

AEP Ohio contends that, as part of the ESP-MRO comparison, the Commission should not consider the total costs to be incurred over the 25-year life of the Turning Point project.[172] But as Ms. Hixon pointed out, "While the Company proposes the GRR as a 'placeholder rider' set a zero, if the Commission approves the GRR it becomes a rate mechanism through which AEP may charge all customers for the cost of generation facilities over the life of those facilities."[173] Thus, because the rider is being established in this proceeding, its total expected cost to consumers should be considered in the ESP-MRO comparison. Additionally, the MRO-ESP comparison statute is clear in this respect: the Commission shall approve or modify and approve the electric security plan if it finds that the plan, "including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals" is more favorable in the aggregate than an MRO.[174]

AEP Ohio also points to the testimony of Staff witness Fortney for the proposition that it would not be appropriate to assign a cost to the GRR, because he "did not believe it was a valid cost to include as part of the ESP because it's unknown."[175] Nevertheless, the Commission believes "the inclusion of projected Turning Point solar project costs were an important consideration in the statutory test under Section 4928.143, Revised

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[172] Id.

[173] OCC Ex. No. 114 at 15. (Hixon).

[174] R.C. 4928.143(C)(1).

[175] AEP Ohio Brief at 31, citing Tr. Vol. XVI at 4589.

Code."[176] In this regard, Mr. Fortney's opinion, which seems to conflict with the Commission's express ruling, should carry little weight.

III. CONCLUSION

The overwhelming evidence adduced at the evidentiary hearing shows that the Companies' Modified ESP does not pass the statutory test. Because of this, the Commission should reject the Modified ESP, or modify it and approve it. The Commission can also modify the ESP even if it determines that the statutory test is met, so long as the modifications are supported by the record.

The Residential Consumer Advocates recommend modifications to the Companies' ESP. These modifications include, but are not limited to, rejecting the Rate Stability Rider (which could impose increases up to $1 billion on customers), rejecting excessive carrying costs on deferrals, and rejecting riders which will unnecessarily add costs onto customers' bills. Additionally, the Residential Consumer Advocates reject the notion that deferrals authorized in the Capacity Charge Case should be collected from SSO customers. In light of the likely rate increases to residential customers under new SSO rates, the Residential Consumer Advocates support shareholder-funded bill payment assistance to low-income customers.

The modifications proposed by the Residential Consumer Advocates are intended to ensure that the base generation rates of residential customers are reasonably priced, consistent with this policy objective under R.C. 4928.02(A). Reasonably priced electric service, in keeping with R.C. 4928.02(A), should be the end goal.

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[176] See March 25 Entry at 3; December 14 Order at 30.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief has been served electronically upon those persons listed below this 9th day of July 2012.

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Summary: Brief Reply Brief by the Office of the Ohio Consumers' Counsel and The Appalachian Peace and Justice Network electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.