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
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APPLICATION FOR REHEARING
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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As part of our advocacy for residential consumers of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP Ohio" or "Company") to receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") and the Appalachian Peace and Justice Network ("APJN") file this application for rehearing of the Opinion and Order ("O&O") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned proceedings on August 8, 2012. OCC and APJN are authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

The O&O approved, with modifications, AEP Ohio's modified electric security plan ("ESP"), filed in these proceedings on March 30, 2012. As a result, the O&O

approved an Electric Security Plan ("ESP") for the Companies that will collect increased rates from customers for the period September 2012 through May 31, 2015.

The O&O was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1:

The PUCO's Finding That The Modified Electric Security Plan Is More Favorable In The Aggregate Than A Market Rate Offer ("MRO") Is Unreasonable And Unlawful.

A. In conducting the statutory test of the Company's electric security plan, the Commission erred in unreasonably and unlawfully comparing prices that excluded the first ten months of the Company's ESP term. As a result of this error, the Commission overstated the price of the market rate offer, compared to the electric security plan, making the Commission's analysis unreasonable and unlawful under R.C. 4928.143(C)(1), and the resulting rates are not reasonably priced violating R.C. 4928.02(A).

B. The Commission erred in unreasonably and unlawfully comparing prices that excluded the first ten months of the Company's ESP term. This was an abuse of discretion and violated R.C. 4903.09, as the Commission departed from its prior precedent without showing a clear need to depart from precedent or that prior decisions were in error.

C. Because the Commission did not consider the first ten months of the ESP term in its statutory analysis under R.C. 4928.143(C)(1), it was unreasonable and unlawful for the Commission to commence the ESP term before June 1, 2013. The Commission should also have ordered existing rates to continue during the ten-month period.

D. The Commission erred in failing to include all the conditions of the Generation Resource Rider, including future expected costs, in its statutory analysis, violating R.C.4928.143(C)(1). This understated the price of the ESP, making the Commission's analysis unreasonable and resulting in rates that are not reasonably priced under R.C. 4928.02(A). Additionally, the Commission erred, under R.C. 4903.10, in failing to state the rationale or reason for its holding.[1]

E. The Commission erred under R.C. 4928.143(C)(1) in evaluating the non-quantifiable benefits of the ESP and unreasonably concluded that the non-quantifiable benefits outweigh the hundreds of millions of dollars of costs of the modified ESP. On this basis the PUCO's finding that the ESP is

[1] APJN does not join the OCC in this assignment of error.

more favorable in the aggregate than the electric security plan is unlawful, unreasonable, and unsupported by the record.

1. Under an MRO, within two and a half years, 100% of energy may be supplied through the market.

2. There is a safe harbor for consumers under an MRO.

3. There is financial security for an EDU under an MRO.

ASSIGNMENT OF ERROR 2:

The Base Generation Rates For Standard Service Offer ("SSO") Customers Are Not Just Or Reasonable, And Do Not Provide A Benefit To Customers.

A. The Commission erred in permitting base generation rates that are not unbundled between energy and capacity. In doing so, the Commission failed to ensure the comparable and non-discriminatory retail rates are available to customers, in violation of R.C. 4928.141 and 4928.02(A) and (B).

B. The Commission erred in failing to reduce the SSO generation rates, consistent with its findings in the Capacity Charge Case that AEP Ohio's capacity cost is not $355/MW-day but $188/MW-day.

1. Under the SSO base generation rates approved there is discriminatory pricing of capacity between shopping customers, CRES providers and non-shopping customers, which is unreasonable and violates R.C. 4905.33, 4905.35, 4928.02(H), and 4928.141(A).

2. The PUCO's failure to reduce the standard service offer rate was unreasonable and inconsistent with its findings in the Capacity Charge Case. As a result the generation rates for SSO customers are not just and reasonable and are not reasonably priced under R.C. 4928.02 (A).

3. The Commission abused its discretion in denying administrative notice of the Capacity Charge Case materials.

ASSIGNMENT OF ERROR 3:

The Commission Erred In Allowing the Company to Collect hundreds of millions of dollars from customers through a Retail Stability Rider That Guarantees a steady source of Non-Fuel Base Generation Revenues For The Company.

A. There is no statutory basis to allow the Company to be made whole for revenues lost due to competition from Competitive Retail Electric Service Providers.

B. The Commission erred in unreasonably and unlawfully determining there is a statutory basis for including a Retail Stability Rider in the Company's electric security plan under R.C. 4928.143.

   1. The Commission failed to give effect to all the words in the statute, violating R.C. 1.47.

   2. The Commission erred by unreasonably and unlawfully engaging in statutory construction when the plain meaning of the statute was clear.

C. Assuming arguendo that there is a legal basis for the Retail Stability Rider, the Commission erred in unreasonably determining that $508 million rather than the $284 million requested by AEP Ohio is the appropriate level of the rider. The Commission's calculation of the rider is overstated, making the rates to be collected from customers unjust, unreasonable, and unsubstantiated. If the rider is to be implemented, over the strenuous objections of OCC/APJN and others, rehearing should be permitted to allow parties to examine, on the record, the appropriate calculation of the Retail Stability Rider.

   1. In assigning a value for competitive retail electric supplier revenues, the Commission unreasonably assumed capacity revenues are based on Retail Pricing Model ("RPM") pricing, when AEP Ohio was authorized to, and will in fact, collect capacity revenues at the level of $188.88/MW-day.

   2. In calculating the Retail Stability Rider, the Commission unreasonably excluded revenues that the Company will receive for capacity associated with auctions that occur prior to June 2015.

   3. Third, the Commission erred when it unreasonably and unlawfully applied too low of a credit for shopped load, without setting forth the reasoning or rationale for adopting that low value.

ASSIGNMENT OF ERROR 4:

The Commission Erred When It Ruled That The Company Is Authorized To File An Application To Adjust The RSR If There Is A Significant Reduction In Non-Shopping Load For Reasons Beyond The Control Of The Company, Other Than Shopping. The Commission's Ruling Unreasonably Transfers The Risks Of Weather, Economic Downturn, And Customer Mobility Away From The Company And Onto Consumers Which Is Unfair, Unjust, And Unreasonable.

ASSIGNMENT OF ERROR 5:

The Commission Violated R.C. 4903.09 When It Unreasonably And Unlawfully Failed To Allocate The Retail Stability Rider According To The Percentage Of Customers Shopping In Each Class.

ASSIGNMENT OF ERROR 6:

The Commission Unreasonably and Unlawfully Ruled That, After Corporate Separation Is Implemented, The Retail Stability Rider Revenues Which Are Not Allocated To Recovering The Capacity Charge Deferrals, Should Flow To Company's generating affiliate, GenResources, Inc., Which Violates R.C. 4928.02(H). In Failing To Explain The Rationale Or Reasons For Its Ruling, The Commission Also Violated R.C. 4903.09.

ASSIGNMENT OF ERROR 7:

In Permitting The Company (As Part Of The Retail Stability Rider), To Collect From Customers The Difference In Revenues Between The RPM-Based Wholesale Capacity Rate And The Company's State Compensation Mechanism For Wholesale Capacity, The Commission Unreasonably And Unlawfully Acted, Without Jurisdiction.

A. There is no statutory basis under R.C. 4928.143 or 4928.144 to allow the Company to collect revenues for wholesale capacity service to CRES providers from rates charged to retail customers.

B. CRES providers should be responsible for paying the difference in revenues as they are the cost causers.

C. It is unlawful, unreasonable, and inconsistent with the terms of the RAA and Section 201 of the Federal Power Act to impose wholesale capacity costs on Standard Service offer customers.

D. The Commission unlawfully created an anti-competitive subsidy of a product or service other than retail electric service that flows from a competitive retail electric service, thus violating R.C. 4928.02(H).

E. Collecting deferrals from customers will cause customers, both shopping and non-shopping, to pay twice for the capacity—a result that is unlawful, unjust, unreasonable, contrary to public policy, and has no statutory basis.

F. Charging non-shopping SSO customers a higher capacity charge than shopping customers violates the anti-discrimination provisions of R.C. 4928.141, 4928.02(A), R.C. 4905.33, and 4905.35.

G. The Commission unreasonably and unlawfully failed to provide a basis for determining that the capacity revenues could be collected through a Retail Stability Rider, thus violating R.C. 4903.09.

ASSIGNMENT OF ERROR 8:

The Commission Erred In Ordering Separate Phase-In Recovery Rider Rates For The CSP And OP Rate Zones, Instead Of One Unified Phase-In Recovery Rider.

ASSIGNMENT OF ERROR 9:

The Commission's Approval Of The Generation Resource Rider Without A Showing Of Need For The Turning Point Facility Violated R.C. 4928.143(B)(2)(C).[2]

ASSIGNMENT OF ERROR 10:

The Commission's Approval Of The Generation Resource Rider As A "Placeholder" Rider With A Zero Value Unlawfully Skewed The Commission's ESP-MRO Comparison.

ASSIGNMENT OF ERROR 11:

The Commission's Approval Of The Generation Resource Rider As A Surcharge For Collecting Costs Specifically For The Turning Point Solar Facility Violated R.C. 4928.143(B)(2)(C) Because AEP Ohio Did Not Make The Showing The Statute Requires To Establish A Non-bypassable Surcharge For Collecting Costs Associated With An Electric Generating Facility.[3]

ASSIGNMENT OF ERROR 12:

The Commission's Order Regarding The Companies' Collection Of The Deferrals On Capacity Charges Is Unlawfully Vague.

ASSIGNMENT OF ERROR 13:

There Is No Statutory Basis For The Pool Termination Rider, And Thus The Commission's Approval Of The Rider Is Unlawful.

ASSIGNMENT OF ERROR 14:

By Approving Merged Rates For The Energy Efficiency And Peak Demand Reduction Rider, The Commission Adversely Affected The Rights Of Signatory Parties To The Stipulation In The Companies' Program Portfolio Case.

[2] APJN does not join OCC in this assignment of error.

[3] APJN does not join OCC in this assignment of error.

ASSIGNMENT OF ERROR 15:

The Commission's Failure to Provide Partnership With Ohio Funding Was Unjust, Unreasonable and Unlawful. The Partnership with Ohio Was a Key Component of the Economic Development Proposal in the Companies' First ESP and Should be Maintained.

ASSIGNMENT OF ERROR 16:

The Commission's Decision Regarding The Rate Cap Is Unlawfully Vague.

ASSIGNMENT OF ERROR 17:

The PUCO's finding that the Distribution Investment Rider was warranted is Unreasonable and Unlawful.

A. In approving the Distribution Investment Rider the Commission failed to apply the appropriate statutory standard as set forth in R.C. 4928.143 (B)(2)(h).

B. The Commission erred in failing to meet the requirement in R.C. 4903.09 to set forth its findings when it did not address AEP Ohio's failure to include four key categories of information as part of its Application, and was inconsistent with its own precedent.

C. The Commission erred in failing to meet the requirement in R.C. 4903.09 to set forth its findings when it did not address the issue of basic customer affordability of a Modified ESP that included a $365.7 million Distribution Investment Rider.

ASSIGNMENT OF ERROR 18:

The PUCO's Decision to Approve the Separation of the Alternative Energy Rider from the Fuel Adjustment Clause but Delay Unification of the Fuel Adjustment Clause Until June 2013 is Unjust, Unreasonable and Inconsistent With How the PUCO Treated Other Elements of the Modified ESP in this Opinion and Order.

ASSIGNMENT OF ERROR 19:

The PUCO Erred by Failing to Meet the Requirements of R.C. 4903.09 When Without Explanation it Failed to Follow its Own Precedent in Approving the Separation of the Alternative Energy Rider from the Fuel Adjustment Clause but Delaying Unification of the Fuel Adjustment Clause Until June 2013, Resulting in an Unreasonable Negative Impact on the Customers of Ohio Power.

ASSIGNMENT OF ERROR 20:

The PUCO Erred by not Stating that Interruptible Power-Discretionary Schedule Credit Cost Will be Collected Only From Non-residential GS 4/IRP Customers and not From Residential Customers, Consistent With the Stipulation in Case No. 11-5568-EL-POR.

The reasons in support of these grounds for this application for rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On January 27, 2011, the Company filed its second SSO application,[4] seeking approval of the Application under R.C. 4928.143. During early August 2011, the Company, the intervenors, and PUCO Staff entered into settlement negotiations. Although a Stipulation was signed by a number of parties, OCC and APJN declined to sign. The Stipulation was filed on September 7, 2011.

The PUCO conducted a hearing on the Stipulation during October 2011. On December 14, 2011, the Commission issued its Opinion and Order in these proceedings that adopted, yet modified, the Stipulation. On February 23, 2012, on rehearing, and after considerable public outcry about the rate increases resulting from the modified Stipulation, the Commission rejected the ESP plan. The Commission directed the Company to file new tariffs to continue the provisions of its previous electric security

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[4] Case Nos. 11-346-EL-SSO and 11-348-EL-SSO, Application (January 27, 2011).

plan.[5] Additionally, the Commission provided the Company the opportunity to modify or withdraw its original ESP application.[6]

On March 30, 2012, the Companies filed an application containing a Modified ESP. Evidentiary hearings were held from May 17, 2012 through June 15, 2012. On July 2, 2012, the Commission issued its order in the Company's Capacity Charge proceeding, Case No. 10-2929-EL-UNC. Oral arguments were conducted following briefing in this proceeding. On August 8, 2012, the PUCO issued its decision in this case modifying and approving the Company's electric security plan. The Company now must determine whether to withdraw its application and file a new plan, or accept the new modified plan.[7]

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on February 4, 2011, which was granted in an Entry dated March 23, 2011. APJN filed a motion to intervene on February 22, 2011, which also was granted in the March 23, 2011 Entry. OCC also filed testimony regarding the Application containing the Modified ESP. Both OCC and APJN participated in the hearing on the Modified

[5] Id., Entry on Rehearing at ¶20.

[6] Id. at ¶21.

[7] See R.C. 4928.143(C)(2)(a).

ESP.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." As shown herein, the statutory standard for abrogating some portions of the Order and modifying other portions is met here. The Commission should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its August 8, 2012 decision.

III. ARGUMENT

ASSIGNMENT OF ERROR 1:

The PUCO's Finding That The Modified Electric Security Plan Is More Favorable In The Aggregate Than A Market Rate Offer ("MRO") Is Unreasonable And Unlawful.

Under R.C. 4928.141(C)(1), the Commission must compare the expected price of standard service offer generation under an electric security plan ("ESP") to the expected price of a market rate offer ("MRO"). *This price comparison is required in order to* *determine what is better for customers.* The Commission can only approve the electric security plan if it is "more favorable in the aggregate" than the market rate offer. "In the aggregate" means that the comparison must consider "all other terms and conditions" of the utility's electric security plan. The Commission cannot approve a utility's electric security plan that does not pass this statutory test (ESP/MRO comparison). While the Commission has discretion in applying this test, it cannot apply the test in a manner that is unlawful or unreasonable to the detriment of customers of the utility.[8]

Yet here, the Commission abused its discretion in a number of respects. In comparing the ESP to an MRO it made arbitrary adjustments to the pricing of the electric security plan which were contrary to law, inconsistent with Commission precedent, and without evidentiary support. It failed to follow the statutory mandate to include in its price test "all other terms and conditions" of the electric security plan. And it unreasonably determined that the ESP was more favorable in the aggregate than an MRO largely on the basis of non-quantifiable benefits -- the most significant being that AEP will be delivering and pricing energy at market prices, earlier than what would otherwise occur under an MRO option. These are all errors that OCC/APJN seeks rehearing on, as explained in detail below.

[8] See e.g. R.C. 1.47 which establishes that when enacting a statute, the entire statute is intended to be effective and a just and reasonable result is also intended.

A. In conducting the statutory test of the Company's electric security plan, the Commission erred in unreasonably and unlawfully comparing prices that excluded the first ten months of the Company's ESP term. As a result of this error, the Commission overstated the price of the market rate offer, compared to the electric security plan, making the Commission's analysis unreasonable and unlawful under R.C. 4928.143(C)(1), and the resulting rates are not reasonably priced violating R.C. 4928.02(A).

In considering the statutory test the Commission concluded that "to appropriately predict the results that would otherwise occur [where generation service is provided by market means, the MRO] under this section, we cannot in good conscience, compare prices during a time period that has elapsed prior to the issuance of an order."[9] The Commission was referring to the time period that had elapsed as being June through August 2012, the first three months of the Company's proposed ESP term.[10]

But instead of stopping there, it digressed even further from the law, making its statutory comparison unlawful and unreasonable. The Commission started the comparison not at the beginning of the actual ESP term, i.e., when new ESP rates will go into effect,[11] but at a different, later period. The period it arbitrarily chose for the MRO/ESP comparison was June 2013 through May 31, 2015, a period starting nearly ten months after the Company's ESP rates are to be implemented.

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[9] Opinion and Order at 74 (August 8, 2012).

[10] See Company Application at 2.

[11] Under the Commission's order, the Company was ordered to file tariffs by August 16, 2012, and these tariffs are to be effective with bills rendered as of the first billing cycle in September 2012. See Opinion and Order at 77.

The Commission, however, has no such authority.[12] R.C. 4928.143(C)(1) requires a full comparison of the electric security plan "so approved, including its pricing and all other terms and conditions***." One of the "terms and conditions" of the Company's ESP "so approved" is the period of time during which the new rates are in effect -- known as the "term of the ESP." While the Company proposed a term of June 1, 2012 through May 31, 2015, the Commission unilaterally modified that part of the ESP. Instead, the Commission ordered the new rates implemented, effective with bills rendered as of the first billing cycle in September 2012.[13] Thus, the term of the Companies' ESP "so approved" is the first billing cycle in September 2012 through May 31, 2015. It is the period of time during which the SSO rates are in effect.

The term of the ESP "so approved" creates the logical and necessary time period over which the statutory comparison must occur. And because the ESP term is one of the terms and conditions of the ESP "so approved," the Commission must consider that period in its analysis under R.C. 4928.143(C)(1). The Commission has no authority to choose a different or shortened period for its analysis. When the Commission chose a different period, (June 2013 through May 2015) other than the "so approved" ESP term to conduct its statutory price test, it was unlawfully acting beyond the scope of its authority under R.C. 4928.143(C)(1).

[12] The Commission is a creature of statute and has no authority other than that expressly granted to it by the General Assembly. See *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; and *Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St.2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

[13] Opinion and Order at 77.

Additionally, by choosing a shorter period of time over which to conduct the ESP/MRO comparison the Commission's action was internally inconsistent and its analysis lacked record support. It approved a term for the ESP, but failed to conduct its analysis over that term. Such a mismatched comparison is not envisioned by the statute and is unreasonable.

The PUCO's decision also lacked record support. No party to the case, not even the Company, ever proposed pushing the analysis forward for ten months, and ignoring the comparison for the first ten months. Rather the parties to the proceeding all conducted their analysis consistent with the term of the ESP proposed by the Company. Hence, the approach devised by the Commission was against the manifest weight of the evidence and clearly unsupported by the record.[14]

While the Commission chose the comparison period based on the notion that it should consider when an MRO could actually be offered, such an adjustment is aimed at bringing a degree of precision that is not called for under the statute. Such ad hoc tinkering given the nature of the statutes' forward looking analysis, is inappropriate and inconsistent with the Commission's past rulings.

In past electric security plan cases the Commission has declined to infuse precision into the MRO/ESP analysis through updated or actual information. For instance, in the Company's first ESP filing, the Commission disregarded parties' recommendations to update the market price analysis considering that forward market

[14] See *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571, 578 (holding that the PUCO will be reversed by the Ohio Supreme Court when its determination is manifestly against the weight of the evidence and clearly unsupported by the record).

pricing for energy had fallen since the Company filed its ESP application.[15] Similarly in another separate case, the Commission refused to adjust the MRO/ESP comparison to use more recent forward-looking energy prices[16] that were available.

And, the Commission's analysis in this regard appears to bias the results of the comparison in favor of the ESP. This is because expected market prices increased over the term AEP Ohio proposed (June 2013 through May 2015), as noted by many parties[17] and as can even be seen in AEP Ohio's own annual competitive benchmarks.[18] Thus, analysis that disregards the months during which expected market prices were lowest results in higher MRO annual prices that are used to compare to ESP prices.

B. The Commission erred in unreasonably and unlawfully comparing prices that excluded the first ten months of the Company's ESP term. This was an abuse of discretion and violated R.C. 4903.09, as the Commission departed from its prior precedent without showing a clear need to depart from precedent or that prior decisions were in error.

R.C. 4903.09 requires the PUCO to set forth "findings of fact and written opinions setting forth the reason prompting the decisions arrived at, based upon said

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[15] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to the Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case No. 08-917-EL-SSO et al., Opinion and Order at 71-72 (Mar. 18, 2009).

[16] *In the Matter of the Application of 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 64-68 (Dec. 19, 2008).

[17] Increasing expected market prices can be seen in FES Witness Schnitzer's Exhibit MMS-4, IEU-Ohio Witness Murray's Exhibit KMM-20 and Staff Witness Johnson's testimony at 32.

[18] AEP Ohio's Attachment B to its reply brief (which the Commission's referenced adjusting in its Order, at 75), estimated competitive benchmark prices for capacity and energy of $57.07 for PY 2012/2013 that rose to $62.77 for PY 2014/2015. Even AEP Ohio witness Thomas' original Exhibit LJT-2 estimated competitive benchmark prices of $69.36 for PY 2012/2013 that rose to $74.34 for PY 2014/2015.

findings of fact." Where the PUCO does not set forth detailed findings, it fails to comply with the requirements of this section and its Order is unlawful.[19]

In particular, where the PUCO issues a decision departing from precedent, it has a heightened responsibility to explain its decision, in order to comply with R.C. 4903.09.[20] This responsibility is created because the Ohio Supreme Court values predictability in administrative law. Such predictability is assured when precedent set by an administrative body, such as the PUCO, is followed. Indeed, the Court has noted that prior determinations of the PUCO should not be disregarded and set aside unless the need to change is clear and the prior decisions are in error.[21]

The Commission dramatically changed the way it conducts the statutory test. Never before has the Commission determined that the statutory test can only begin when an actual MRO can be implemented. Rather the Commission, consistent with the statute, has always compared the ESP to the MRO for the entire time period during which the ESP rates were in effect. It ran such a comparison in the earlier Opinion and Order issued in this case.[22] And it conducted the comparison over the term of the ESP in its

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[19] *Ideal Transportation Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 195, 71 O.O.2d 183, 326 N.E.2d 861.

[20] See e.g. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431-432, 71 O.O. 393, 330 N.E.2d 1, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302, appeal after remand (1976), 46 Ohio St.2d 105, 75 O.O.2d 172, 346 N.E.2d 778 (citing *State ex rel. Automobile Machine Co. v. Brown* (1929), 121 Ohio St. 73,75, 166 N.E. 903 -- "It has been held in this state that 'administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative to do so.'" (Citation omitted).

[21] Id.

[22] *In the Matter of the Application of Columbus Southern Power Company, Case No.* 11-346-EL-SSO et al., Opinion and Order at 27-32 (Dec. 14, 2011) (conducting the ESP/MRO analysis based on a term of January 1, 2012 through May 31, 2014, with the analysis starting at the beginning of the ESP term, not ten months later).

Opinion and Orders issued on all other utilities' ESP/MRO applications.[23] But here, the Commission created a new approach to the statutory price test and yet failed to show that its prior application of the statutory test was erroneous.

The Commission's new approach has the effect of increasing the price of the MRO in the ESP/MRO comparison because it fails to take into account the lower market prices available during the first ten months of the ESP term. By focusing instead on the MRO prices during the remainder of the ESP term, it captures market prices during a period of time when such prices are higher. This exaggerates the differential between MRO and ESP, making the ESP by comparison cheaper than the MRO. This skews the MRO/ESP comparison, and will likely cause rates that are not reasonably priced. It is an unreasonable and unlawful interpretation of R.C. 4928.143(C)(1).

Additionally, the Commission failed to explain why it needed to change how it applied the ESP/MRO comparison. Nor did it explain how prior application of the test, where the ESP was compared to the MRO during the entire term of the ESP, was in error. This is an error that the Ohio Supreme Court has found to be reversible.[24] The PUCO should grant rehearing on this issue and abrogate or modify its Order so that its decision complies with the law.

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[23] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to the Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case No. 08-917-EL-SSO et al., Opinion and Order at 64, 69-72 (Mar. 18, 2009) (conducting the ERP/MRO analysis based on term of 1/1/2009 through 2011, despite the fact that the Order was issued in March 2009, with rates going into effect in April, 2009); *In the Matter of the Application of 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 64-68 (Dec. 19, 2008) (conducting the ESP/MRO analysis consistent with the term of the ESP for 2009-2011, and refusing to update the analysis for more current forward electricity prices).

[24] *Office of Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 21, 16 OBR 371, 475 N.E.2d 786.

C. Because the Commission did not consider the first ten months of the ESP term in its statutory analysis under R.C. 4928.143(C)(1), it was unreasonable and unlawful for the Commission to commence the ESP term before June 1, 2013. The Commission should also have ordered existing rates to continue during the ten-month period.

If the Commission upholds its analysis of the MRO/ESP price comparison, in order to be consistent with that approach and to comply with R.C. 4928.143(C), it must also determine that the ESP term does not start until the date that its price comparison starts, June 2013. That would mean that the existing, continued rates placed in effect on March 9, 2013,[25] would remain in effect for the next ten months. For consumers this means no increase in rates until June 2013. Then starting in June 2013, new ESP rates can go into effect so long as they have been shown to be more reasonable in the aggregate than the rates expected to be achieved under an MRO. Such a showing would require holding rehearing on this issue, and after rehearing, modifying or abrogating the Commission's order.

But the Commission failed to do so, and as a result its analysis did not comply with R.C. 4928.143(C)(1). It was also unreasonable for the PUCO to implement new ESP rates starting in September 2012 and yet not include those rates in its statutory analysis. The Commission erred and rehearing should be granted.

[25] Entry (Mar. 9, 2012).

D. The Commission erred in failing to include all the conditions of the Generation Resource Rider, including future expected costs, in its statutory analysis, violating R.C.4928.143(C)(1). This understated the price of the ESP, making the Commission's analysis unreasonable and resulting in rates that are not reasonably priced under R.C. 4928.02(A). Additionally, the Commission erred, under R.C. 4903.10, in failing to state the rationale or reason for its holding.[26]

In conducting the statutory price test the Commission appropriately recognized that it must include costs associated with the Generation Resource Rider ("GRR"),[27] on the basis that it is a non-bypassable provision falling under R.C. 4928.143(B)(2)(c) that would not occur under an MRO.[28] Here the Commission duly noted its previous holding in the earlier phase of this case that the costs of the GRR must be included in the MRO/ESP comparison.[29] However, the Commission included only $8 million[30] in costs related to the GRR.[31] Such costs, according to the Commission, are the known costs of the GRR during the term of the Company's ESP, and should be included in the quantitative analysis.[32]

But the Commission approved the GRR as a "placeholder rider." This means that the Company can come in at any future time, either within or outside the term of the ESP, and seek to collect revenues from customers to cover the costs of the Turning Point

[26] APJN does not join OCC in this section of the Argument under Assignment of Error 1.

[27] This rider will collect the costs of the Turning Point Solar project from the Company's customers.

[28] The Commission rejected the unsubstantiated claim of Company Witness Thomas that a GRR provision would be permissible under a market rate offer. See AEP Ohio Ex. No. 114 at 8-9 (Thomas).

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

[30] $8 million reflects the Company's estimate of the Turning Point net revenue requirement during the term of the ESP. See OCC Ex. 114 at 17.

[31] Opinion and Order at 75 (Aug. 8, 2012). The original holding was made in the PUCO's Opinion and Order of Dec. 14, 2011. See Opinion and Order at 30.

[32] Id.

facility. The ability of the Company to do so means that there may be additional costs collected from customers.

OCC Witness Hixon testified that these additional costs are estimated by the Company to be $346 million.[33] The $346 million represents the remaining estimated revenue requirement for June 2015 through 2040. This figure was supplied to OCC through the discovery process and was not subject to dispute. However, the PUCO completely disregarded the testimony of Ms. Hixon and assigned only $8 million to the GRR, without explaining why additional costs of the GRR should not be considered as a cost of the ESP.

Including the $346 million in GRR costs is important in order to render an appropriate and accurate MRO/ESP comparison. It falls directly under the "all other terms and conditions" that must be included under R.C. 4928.143(C)(1) analysis. When the Commission failed to include the future revenue requirements related to the GRR, and yet approved the rider as a placeholder rider, it acted unlawfully. Because the $346 million in GRR costs was not included in the MRO/ESP comparison conducted by the PUCO, the cost of the modified ESP was significantly understated.

[33] OCC Ex. 114 at 17 (Hixon).

And the PUCO unreasonably relied upon such a flawed analysis in its decision to modify and approve the Company's ESP. This was unreasonable and will likely result in rates that are not reasonably priced, conflicting with the policy of the State, contained in R.C. 4928.02(A).

Finally, the PUCO erred, under R.C. 4903.09, because it failed to show the facts in the record upon which its order is based and failed to state the rationale for its decision.[34] The PUCO is required under R.C. 4903.09 to address material arguments made by parties to the proceeding. The PUCO did not do so here, where a material issue was presented by OCC and FirstEnergy Solutions -- an issue that could have been the basis for further modifications to the ESP, to the benefit of consumers. The PUCO should grant rehearing.

E. The Commission erred under R.C. 4928.143(C)(1) in evaluating the non-quantifiable benefits of the ESP and unreasonably concluded that the non-quantifiable benefits outweigh the hundreds of millions of dollars of costs of the modified ESP. On this basis the PUCO's finding that the ESP is more favorable in the aggregate than the electric security plan is unlawful, unreasonable, and unsupported by the record.

The Commission found that AEP Ohio made multiple errors in conducting the statutory test.[35] In its place, the Commission conducted its own test. It determined that the statutory price test, when considering quantifiable benefits and costs, resulted in the MRO being more favorable than the ESP by $386 million.[36]

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[34] See e.g. *MCI Telecommunications v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306; *Ideal Transportation v. Pub. Util. Comm.* (1974), 42 Ohio St.2d 195.

[35] Opinion and Order at 73.

[36] Opinion and Order at 75.

But then the Commission reviewed the non-quantifiable benefits of the modified ESP. It determined that non-quantifiable benefits "significantly outweigh any of the costs."[37] The "most significant" of the non-quantifiable benefits "is the fact that, in just under two and a half years, AEP Ohio will be delivering and pricing energy at market prices."[38] This is "significantly earlier" than what would otherwise occur under an MRO option, the Commission found.[39] According to the Commission, it is not "feasible to conclude that energy would be at market prices prior to June 1, 2015***."[40] Moreover, the Commission determined that the modified ESP ensures that customers "will have a safe harbor in the event there is any uncertainty in the competitive markets by having a constant, certain and stable option on the table."[41] Additionally, the Commission found that the modified ESP will "assure that the Company maintains its financial stability necessary to continue to provide adequate, safe, and reliable service to its customers."[42]

But this conclusion is unreasonable and unlawful. It erroneously assumes that these non-quantifiable benefits are not available under a market rate offer. This is both factually and legally wrong.

1. Under an MRO, within two and a half years, 100% of energy may be supplied through the market.

The Commission assumes that AEP Ohio would be unable, in two and a half years, to deliver and price energy at market prices under an MRO. This conclusion is not

[37] Opinion and Order at 76.

[38] Id.

[39] Id.

[40] Id.

[41] Id.

[42] Id.

correct under applicable law and the PUCO's interpretation of that law, and lacks record support.

Under R.C. 4928.142 an electric utility may file an MRO as its SSO, whereby retail electric generation pricing will be based, in part, upon the results of a competitive bid process. Paragraphs (D) and (E) of that statute set forth the blended price requirements any electric distribution utility ("EDU") must abide by. Section 4928.142(D), provides that the first MRO application filed by a utility:

> [s]hall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid***as follows: ten per cent of the load in year one, not more than twenty percent in year two; thirty per cent in year three, forty per cent in year four; and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five.

Section 4928.142(E) provides, inter alia, that:

> Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, *the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change* in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. (Emphasis added).

The Commission had occasion to delve into the meaning of these statutes in response to an application by Duke Energy Ohio Inc. ("Duke") for PUCO approval of a market rate offer, which ended the blending period at the beginning of year three and based SSO pricing exclusively on the market prices derived from an auction.[43] Although

[43] *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Application (Nov. 15, 2010) ("*Duke MRO 1*").

ultimately the Commission denied Duke's application[44] the Commission's Opinion and Order[45] and Entry on Rehearing[46] extensively discussed whether the five-year blending period under R.C. 4928.142(D) was mandatory or subject to alteration. The Commission concluded that, in accordance with R.C. 4928.142(E), the blending proportions of subsection (D) are essentially fall back or default blending provisions that can be altered in two ways.[47] First, a "party" could come forward and request that the PUCO alter prospectively the proportions specified in subsection (D) in order to mitigate any effect of an abrupt or significant change in the SSO price that would otherwise result. Second, the Commission could make a determination on its own.

The Commission went on to affirm its holding in the Entry on Rehearing.[48] The PUCO also determined that the time to alter an MRO filing is not at the outset of an MRO filing, but in the second year of the MRO.[49]

Thus, the Commission in *Duke MRO 1* made it quite clear that an MRO can get to 100% blending after year two. It need not take five years under R.C. 4928.142 to get to full market priding, because "[b]eginning in the second year of the blended price ***the commission may alter prospectively the proportions specified [in subsection (d)]."[50]

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[44] The PUCO found that Duke's failure to present in information and testimony in support of a five year blending plan, in compliance with Ohio Adm. Code 4901:1:35-03(D), rendered the application fatally deficient and unable to be considered as filed. Id. Opinion and Order at 23; Entry on Rehearing at ¶20. The PUCO thus did not consider altering the blending proportions.

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

[46] Id. Entry on Rehearing (May 4, 2011).

[47] Id. Opinion and Order at 23.

[48]Id. Entry on Rehearing (May 4, 2011).

[49] Id. Opinion and Order at 18; Entry on Rehearing at ¶25.

[50] R.C. 4928.142(E).

On the basis of its statutory analysis in the *Duke MRO 1* case, it was an error for the PUCO to conclude that AEP Ohio's market pricing of energy and capacity would occur "significantly earlier" than under an MRO. The *Duke MRO 1* case is precedent that the PUCO should have acknowledged and followed, but it did not.

In particular, where the PUCO issues a decision departing from precedent, it has a heightened responsibility to explain its decision, in order to comply with R.C. 4903.09.[51] This responsibility is created because predictability is valued in administrative law. Yet the PUCO here failed to respect its interpretation of R.C. 4928.142(D) and (E). It failed to explain why its prior determination in the *Duke MRO 1* case was in error, and why a change was needed. This is an error that the Ohio Supreme Court will not tolerate.[52]

A potential full transition to market is possible under an MRO faster than the five years under R.C. § 4928.142(D). Under an MRO, the Commission has the authority to alter any blending after two years. Because the transition to market could occur in

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[51] See e.g. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431-432, 71 O.O. 393, 330 N.E.2d 1, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302, appeal after remand (1976), 46 Ohio St.2d 105, 75 O.O.2d 172, 346 N.E.2d 778 (citing *State ex rel. Automobile Machine Co. v. Brown* (1929), 121 Ohio St. 73,75, 166 N.E. 903 -- "It has been held in this state that 'administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative to do so.'" (Citation omitted).

[52] See e.g. *OCC v. Pub. Util. Comm., et al.* (1984), 10 Ohio St.3d 49, 51 (the Ohio Supreme Court reversed the Commission after finding that the Commission "failed to justify" its decision to cut short a previously ordered four-year phase-in period). Accordingly, the Commission must explain changes in its precedent.

approximately two years under an MRO, there is no qualitative benefit vis-à-vis an MRO that exists under the Company's proposed ESP, let alone a "significant benefit."

Moreover, there is no record evidence that supports the PUCO's conclusion that "it is not feasible to conclude that energy would be at market prices prior to June 1, 2015, even if the commission were to accelerate the percentages set forth under Section 4928.142, Revised Code."[53] The Commission fails to meet the requirements of R.C. 4903.09 when it draws conclusions that lack any foundation in evidence. In its opinions the Commission must provide evidentiary support and must thoroughly explain the rationale for its decisions.[54] It did neither here.

Thus, the Commission should hold a rehearing on this issue and should re-conduct the test adjusting the non-quantifiable benefits it found under the ESP. Then a new MRO/ESP analysis should be conducted, in compliance with R.C. 4928.143(C)(1). Rehearing should be granted on this issue.

2. There is a safe harbor for consumers under an MRO.

As explained *supra*, under an MRO the Commission may order, or a party may seek to adjust the blending of market prices in order to mitigate any effect of an abrupt or significant change in the EDU's standard service offer price. This is the safe harbor that customers have under an MRO. While it is different than the protection offered by an ESP, it is nonetheless a harbor.

Notably this harbor was described by the Commission as primarily aimed at the "goal" of safeguarding ratepayers from the risk of abrupt or significant increases in

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[53] Opinion and Order at 76.

[54] See e.g. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 91.

price.[55] Indeed it expressly rebuffed Duke's claim that the PUCO was given the authority to alter the blending proportions "solely for the purpose of moving the company expeditiously to a fully competitive market."[56]

But the Commission fails to recognize that comparable consumer protections exist under an MRO and an ESP and thus, in this respect, there is little if any qualitative benefit of the ESP over the MRO. Its analysis is unreasonable in this respect.

3. There is financial security for an EDU under an MRO.

Under an MRO, a utility may adjust the ESP price up or down as the Commission determines is reasonable for certain costs which are reflected in the utility's most recent ESP price, i.e. fuel costs, purchased power, supply and portfolio requirements, and environmental compliance.[57] This provision provides security for the Company -- security not necessarily found in an ESP.

Additionally, there is another provision in an MRO, not found in the ESP statutes,[58] that provides financial stability to an EDU. The Commission "may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to

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[55] *Duke MRO 1*, Entry on Rehearing at 59-60.

[56] Id.

[57] See R.C. 4928.142(D) (1)-(4).

[58] Curiously, the Company argues that this standard, R.C.4928.142(D), applies to the offering of an ESP. AEP Ohio Brief at 40-46. This notion is contrary to the rule of statutory construction that governs Ohio. Under the doctrine of *expressio unius est exclusio alterius*, if the General Assembly wanted to give the Commission authority to establish provisions in an electric security plan that ensure the Company's financial stability it would have expressly done so. But the General Assembly did not. Neither the Commission nor the Companies can rewrite the law.

result, directly or indirectly, in a taking of property without just compensation***."[59] Conversely, the Commission has no authority to approve measures such as the Retail Stability Rider to assure an EDU's financial security in an ESP case. Hence, properly viewed, the MRO arguably provides a greater measure of security (even if strictly limited under law), for the utility than that found under an ESP, tipping the scales again in favor of an MRO for what should have been the result in this case.

Yet the Commission ignored these facts, and concluded that the ESP provides significant non-quantifiable benefits that outweigh the $386 million price differential between the MRO and ESP. This analysis was unreasonable and unlawful because it failed to properly compare the expected results of the MRO as compared to the ESP. Had the complete expected results of the MRO been properly compared to the results of the ESP, the Commission would not have determined that the non-quantifiable benefits of the ESP "significantly outweigh any of the costs." That is because the MRO provides similar, and in some cases greater, non-quantifiable benefits than the ESP. The Commission should grant rehearing on this basis.

ASSIGNMENT OF ERROR 2:

The Base Generation Rates For Standard Service Offer ("SSO") Customers Are Not Just Or Reasonable, And Do Not Provide A Benefit To Customers.

The Commission in its Opinion and Order found that AEP Ohio's proposed base generation rates are reasonable.[60] Although the Commission noted that OCC and APJN contend the SSO generation rates do not benefit customers, the Commission found that "OCC and AJPJN failed to justify their assertion and offer no evidence within the record

[59] R.C. 4928.142(D).

[60] Opinion and Order at 15.

other than the fact that the modified ESP contains several riders."[61] This finding is however, contrary to the record in this proceeding and is inconsistent with the Commission's holding in the Company's Capacity Case. [62]

OCC Witness Duann testified that the base generation rate plan does not benefit customers.[63] Witness Duann explained this conclusion:

> Second, keeping the base generation rate at the current level is not a benefit to AEP Ohio's customers when the auction prices of generation service or prices of electricity service by CRES providers in Ohio have generally declined and are expected to decline further over the next few years. One AEP Ohio witness has indicated there were significant reductions in forward energy prices in the PJM markets recently.[64]

OCC Witness Duann relied, in part, on the uncontroverted testimony of Company Witness Allen that "[o]ver the last seven months, forward energy prices in the PJM market for the balance of 2012 have decreased by approximately $10/MWh or 25%."[65] Notably, OCC Witness Duann was not challenged in cross-examination on this point. Nor was Mr. Allen's testimony on this point controverted. Thus, contrary to the Commission's assertions otherwise there *was* evidence offered establishing that freezing the base generation rates at current levels is not a benefit because the rates would be frozen at a rate higher than what the result would produce in the alternative.

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[61] Id.

[62] Capacity Charge Case, Opinion and Order at 25, 33 (July 2, 2012)(finding that the record supported $188.88/MW-day as an appropriate charge to enable AEP-Ohio to recover its capacity costs for its fixed resource requirement obligations -- and acknowledging that AEP Ohio's testimony that $355/MW-day is received from its SSO customers for capacity through base generation rates).

[63] OCC Ex. 111 at 15 (Duann).

[64] Id. Citing AEP Ohio Ex. 116 at 4 (Allen).

[65] Company Ex. 115 at 4 (Thomas supplemental).

The Commission's decision in this regard is directly contradicted by Mr. Duann's and Mr. Allen's testimony. Its Order thus fails to comply with R.C. 4903.09 altogether and must be considered "unlawful" under R.C. 4903.13.[66]

Moreover, the Commission's determinations in the Company's Capacity Charge Case also belie the conclusion that freezing base generation rates at current levels benefits customers. In the Company's Capacity Charge Case, the Commission found that compensating the Company for its capacity at $188.88/MW-day would enable it to collect capacity costs for its fixed resource requirement ("FRR") obligations from CRES providers.[67] In doing so it rejected the Company's proposed charge of $355.72/MW-day, finding that it does not fall with "the zone of reasonableness."[68]

And yet, as the PUCO correctly noted, the Company presented testimony in that case purporting to show that its proposed cost based pricing ($355.72/MW-day) approximates the revenues the Company receives from its SSO customers for capacity through base generation rates.[69] This means, that the Company itself acknowledges that the revenues produced under base generation rates charged to SSO customers "roughly and approximately"[70] compensate it for the "full cost" of capacity ($355/MW-day).

[66] See *Ideal Transportation Co. v. Pub. Util. Comm.* (2008), 885 N.E.2d 195 (reversing the PUCO because certain of its findings were directly contradicted by witness testimony in the record).

[67] Id., Opinion and Order at 33 (July 2, 2012).

[68] Id.

[69] See id at 25, citing to Mr. Allen's Rebuttal Testimony at 19-20, where, in responding to FES Witness Lesser, he presented graphs illustrating that the Company's base generation rates are essentially equivalent to the full cost capacity rate ($355.MW-day). The Capacity Charge Opinion and Order also cites to Tr. II at 304, 350, where Company witness Pearce, being cross examined, stated that the implicit capacity rate charged to standard service offer customers is equivalent to the $355/MW-day rate AEP proposed for capacity. Company Witness Pearce confirmed this under questioning by Commissioner Porter. Tr. II at 350.

[70] Capacity Charge Case, Tr. II at 350.

If the Company's admission is accepted, and the Commission's holding in the Capacity Charge Case is correct and upheld, then it stands to reason that the base generation rates that the Company is freezing in the ESP case ARE OVERSTATED and "outside the zone of reasonableness." They are overstated because embedded in the SSO generation rate is a component[71] that, in conjunction with other components, produces revenues that approximate the $355/MW-day rate for capacity that the Company requested in the Capacity Charge Case.

If the rates are overstated *vis-à-vis* what the Commission determined was an appropriate capacity charge, then the "benefit" of a rate freeze inures to the Company, and not the SSO customers. This is because continuation of an overstated SSO rate will enable the Company to collect much more than its costs of providing generation service to SSO customers. The MRO/ESP comparison examines the expected price of each option in order to determine what is best for the customer, not what is best or beneficial to the Company; and not what is best for marketers. Such benefits should not and cannot be considered part of the ESP/MRO comparison.

The SSO generation rates, due to the explicit findings of the Commission in the Capacity Charge Case, are de facto not just or reasonable. And they do not ensure that consumers are provided reasonably priced retail electric service, a policy of the state under R.C. 4928.02(A). Rehearing should be granted.

[71] In this proceeding, the Company claims the generation rate is not based on cost, and thus it cannot identify discrete components of the generation rate. Tr. V at 1438-1441.

A. The Commission erred in permitting base generation rates that are not unbundled between energy and capacity. In doing so, the Commission failed to ensure the comparable and non-discriminatory retail rates are available to customers, in violation of R.C. 4928.141 and 4928.02(A) and (B).

In its ESP the Company proposed base generation rates that are frozen until all rates are established through a competitive bidding process. The base generation rates offered beginning with the term of the ESP are to include a component for environmental investment carrying costs so that a rider (EICCR) will no longer be needed. For residential customers of CSP the base generation rate is $0.0296458 cents per kwh; for residential customers of OP the base generation rate is $0.0278195 cents per kwh.[72] The Commission approved this part of the Company's ESP.[73]

Although these rates are not based on a current cost study,[74] the Company testified that the rates were established at a level to ensure that Company recovers its costs of capacity and other costs.[75] According to Company Witness Allen, the base generation rate produces revenues that are equivalent to rates the Company proposed to charge CRES providers for capacity at $355/MW-day.[76]

But the bundling of the base generation rate (energy and capacity) by the Company makes it difficult, if not impossible, for the PUCO to ensure that customers of the Company are receiving comparable and non-discriminatory service, a policy of the

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[72] Compliance Tariff Sheet, Ohio Power Rate Zone Schedule RS, rate for first 800 KWh used per month; Columbus Southern Power Rate Zone Schedule RR, rate for first 800 KWh used per month.

[73] Opinion and Order at 15.

[74] See Tr. V at 1438.

[75] See Tr. V at 1440-1441.

[76] Tr. V at 1438.

State[77] and a requirement of R.C. 4928.141.[78] Moreover, under R.C. 4928.02(B), it is a policy of the State to "ensure the availability of *unbundled and comparable* retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their prospective needs." (Emphasis added).

Under R.C. 4928.06, the Commission has a duty to ensure that the policy specified in R.C. 4928.02 is effectuated. According to the Commission, the policy specified in R.C. 4928.02 is "more than a statement of general policy objectives."[79] Indeed the Ohio Supreme Court expressly held that the Commission may not approve a rate plan that violates the policy provisions of R.C. 4928.02.[80] Accordingly, the Commission has held that an electric utility should be deemed to have met the "more favorable in the aggregate" standard "only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in section 4928.02, Revised Code."[81]

In this regard, it was incumbent upon the Company to meet its burden of proving[82] that its standard service offer, including its base generation rate, provides customers with electric services on a comparable and non-discriminatory basis, as

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[77] R.C. 4928.02(A) states that it is the "policy of the state to do the following throughout this state: (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, *nondiscriminatory* and reasonably priced retail electric service." (Emphasis added).

[78] R.C. 4928.141 states that, beginning January 1, 2009 "an electric distribution utility shall provide consumers, *on a comparable and nondiscriminatory basis* within it service territory, a standard service offer of all competitive electric services necessary to maintain essential electric service to consumers***." (Emphasis added).

[79] *In the Matter of the Application of Ohio Edison Companies, the Cleveland Electric Illuminating Companies, and the Toledo Edison Companies for Approval of a Market Rate Offer to Conduct a Competitive bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 5 (Nov. 25, 2008) ("*FirstEnergy MRO Order*").

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

[81] *FirstEnergy MRO Order* at 14.

[82] See R.C. 4928.143(C)(1), establishing that the burden of proof shall be on the utility.

required by R.C. 4928.141. It was also incumbent upon the Company to prove that the provisions under the ESP, including base generation pricing, do not violate the policy provisions of R.C. 4928.02.

But the Company did not meet its burden. In fact, the Company in the Capacity Charge case claimed that if CRES suppliers were given RPM-based capacity prices (which they were) it would discriminate against non-shoppers.[83] We agree.

The Commission erred when it approved the bundled base generation rates without specifically determining that AEP Ohio had met its burden of showing the base generation rates are comparable and non-discriminatory. Rehearing should be granted.

B. The Commission erred in failing to reduce the SSO generation rates, consistent with its findings in the Capacity Charge Case that AEP Ohio's capacity cost is not $355/MW-day but $188/MW-day.

The General Assembly required electric distribution utilities to provide customers "on a comparable and nondiscriminatory basis" a standard service offer of all competitive electric services necessary to maintain essential services to customers.[84] State policy ensures that the standard service offer provided by a utility will be based on reasonably priced electric service.[85]

The Commission approved base generation rates in this proceeding, as part of the Company's standard service offer. The base generation rates will be paid by customers who choose not to shop, or are prohibited from shopping. Statistically, the majority of those customers that are most likely to pay SSO base generation rates are the residential

[83] See Capacity Charge Order at 15.

[84] R.C. 4928.141(A).

[85] See R.C. 4928.02(A).

customers. This is because residential customers have generally not shopped, but have stayed with AEP Ohio. Indeed the latest shopping levels reported by the Company for residential customers is only 15.57 %,[86] much less than the robust shopping that industrial and commercial customers are engaged in.[87]

So when the Commission is establishing base generation rates it must closely consider the needs of residential customers. But here the Commission did not. Rather it placed inordinate emphasis on the expected benefits to be achieved from competition, to the potential detriment of residential non-shopping customers. And while competition may be a means to achieve "reasonably priced electric service" it is not the ultimate goal. Rather the goal is "reasonably priced electric service."

But on the way, the Commission erred. It erred in numerous ways when it came to pricing base generation rates. One of the errors was that the Commission did not reduce the base generation rates consistent with its finding in the Company's Capacity Charge case. This was unreasonable, and unlawful, as explained below.

1. Under the SSO base generation rates approved there is discriminatory pricing of capacity between shopping customers, CRES providers and non-shopping customers, which is unreasonable and violates R.C. 4905.33, 4905.35, 4928.02(H), and 4928.141(A).

In the Company's Capacity Charge Case, the Commission determined that the state compensation mechanism is to be based on the costs incurred by the Company for its fixed resource requirement capacity obligations.[88] The Commission identified the

[86] See AEP Ohio Ex. 150 at 10 (Allen rebuttal).

[87] Commercial customer shopping data over the same time frame (as of May 31, 2012) shows 48.69% shopping while industrial customers shopping is at 33%. Overall, total shopping for AEP is 32.4%. Company AEP Ohio Ex. 150 at 10 (Allen rebuttal).

[88] Capacity Charge Order at 23.

"costs incurred" as $188.88/MW-day. In reaching this conclusion the Commission determined that the Company had failed to demonstrate that its proposed charge of $355.72/MW-day "falls within the zone of reasonableness."[89] Further, the Commission directed the Company to charge CRES providers the adjusted PJM RPM rate in effect for the current PJM delivery year, with the rate changing annually to match the current PJM RPM rates.[90] And the Company was authorized to defer incurred capacity costs not recovered from CRES provider billings during the ESP term to the extent that the total incurred capacity costs do not exceed $188/MW-day. The Commission noted that it would establish an appropriate recovery mechanism for such cost in the Company's ESP proceeding. In the end, what this means is that CRES providers will receive discounted capacity from AEP, which they can choose to pass on to their customers (or not), and SSO customers will continue to pay the Company's full embedded cost of capacity. This scheme, however, is unreasonable and unlawful.

R.C. 4928.02(A) requires that consumers have "nondiscriminatory" retail electric service. R.C. 4928.141 requires the utility to provide consumers a standard service offer on a "comparable and non-discriminatory basis." Further, 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, firm, or corporation.

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[89] Id at 33.

[90] Id. at 23.

The capacity that the Company provides to CRES providers, in carrying out its FRR obligations, is a "like and contemporaneous service" that it provides as well to its standard service offer customers. And the service is provided under substantially the same circumstances and conditions. Capacity is capacity whether it is supplied (on a wholesale basis) to CRES providers or supplied (on a retail basis) to non-shopping customers.

Non-shopping or standard service offer customers pay capacity charges that enable the Company to recover its "embedded costs" of $355/MW-day. Yet, under the Commission's decision in the Capacity Charge Case, CRES providers will pay capacity rates at RPM pricing, which is much lower than the $355/MW-day. And CRES providers will then be able to serve shopping customers, using much lower capacity charge pricing, based on receiving capacity at RPM prices. That is discriminatory. It violates R.C. 4928.141, 4928.02(A), R.C. 4905.33, and 4905.35.

Such an approach also fails to provide correct price signals to all customers (not just shoppers). This approach facilitates vastly different capacity prices for the same or comparable services. This is unreasonable as well as discriminatory. Rehearing should be granted.

2. The PUCO's failure to reduce the standard service offer rate was unreasonable and inconsistent with its findings in the Capacity Charge Case. As a result the generation rates for SSO customers are not just and reasonable and are not reasonably priced under R.C. 4928.02 (A).

While the Commission clearly determined that the Capacity Charge Case findings were to control the pricing of capacity in the Company's ESP, and were controlling when it came to collecting deferred capacity charges, it failed to consistently apply those very holdings to other portions of the Company's ESP, including the base generation rates. To ignore the effects of the Commission's Capacity Charge decision on other elements of the Company's ESP, including base generation rates, is unreasonable, inconsistent, and unjust. It is a decidedly biased application of precedent that is unreasonable and detrimental to SSO customers.

The Commission failed to reduce the Company's base generation rates for SSO customers consistent with its determination that the cost of capacity for AEP Ohio is $188/MW-day, instead of the $355/MW-day "roughly and approximately" being charged in the base generation rates. OCC specifically requested that the Commission reduce base generation rates, consistent with its *Capacity Charge* Order, a request made during the oral arguments[91] and in its Reply Brief in this case.[92] Additionally, OCC argued this issue as well in its Application for Rehearing in the Capacity Charge Case.[93]

The Commission should have responded to the arguments made by OCC and others.[94] But it did not. This was an error. The Ohio Supreme Court has recognized that the Commission's failure to address a material issue in its Opinion and Order is reversible error.[95]

The Commission should grant rehearing and address this issue. Ultimately it should rule that the base generation rates charged to SSO customers should be reduced to

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[91] See Oral Argument Transcript at 107 (July 13, 2012).

[92] OCC and APJN Reply Brief at 26-27 (July 9, 2012).

[93] *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, Application for Rehearing at 20-21 (Aug. 1, 2012). The Commission found that "sufficient reason" "to warrant further consideration" had been set forth in the numerous applications for rehearing made in that case. It granted the applications for further consideration. Entry at 2 (Aug. 15, 2012).

[94] See e.g. Ohio Manufacturing Association Reply Brief at 12 (July 9, 2012).

[95] *In re Application of Columbus. S. Power Co.*, 2011 Ohio 1788 at ¶71.

reflect its determination that $188/MW-day is the appropriate cost of capacity for the Company. Otherwise, the base generation rates will not be just and reasonable and retail electric service for non-shopping customers will not be reasonably priced.

3. The Commission abused its discretion in denying administrative notice of the Capacity Charge Case materials.

On July 20, 2012, OCC/APJN filed a motion to take administrative notice of several items contained within the record of the Capacity Charge Case. Specifically OCC/APJN sought administrative notice of portions of the direct testimony of AEP Ohio Witness Munczinski, portions of the rebuttal testimony of AEP Ohio witness Allen; portions of the hearing transcripts; and AEP Ohio's briefs and reply briefs. Although both the Company and FES filed responsive pleadings against OCC/APJN, FES' memorandum contra was appropriately struck as untimely.[96]

The Commission, however, denied OCC/APJN's motion. The PUCO found that OCC's motion to be "troublesome" and "problematic" from a timing perspective.[97] Characterizing the materials as a "narrow window of information" it found that if the request was allowed it would supplement the record "in a misleading manner."[98] The Commission further found that "to exclusively select narrow and focused items in an attempt to supplement the record is not appropriate."[99]

The Commission's denial of administrative notice of selected materials from the Capacity Charge pleadings was an error that constitutes abuse of discretion. This is an

[96] Opinion and Order at 12.

[97] Id.

[98] Id at 12-13.

[99] Id. at 13.

unreasonable and arbitrary ruling that is strikingly inconsistent with the otherwise heavy reliance upon the Capacity Charge Case record by the Commission.

For instance the Commission acknowledged in its Capacity Charge Order that "11-346 [the instant proceeding] and the present proceeding are intricately linked."[100] That linkage went so far as to make findings in the Capacity Charge proceeding which would supersede portions of the Company's filed ESP. The Capacity Charge pricing scheme was incorporated into the rates set in the ESP proceeding, displacing the Company's proposed two tier capacity pricing proposal.[101] This scheme was developed after the evidentiary record in the ESP case had closed. In fact the Capacity Charge Order was issued on July 2, 2012, after initial ESP briefs were filed on June 29, 2012. And, under the Capacity Case proceeding, the Commission created deferrals which were then punted into the ESP proceeding. Specifically, the Commission expressly ruled, in the Capacity Charge Case, that it would establish in the Company's ESP an appropriate recovery mechanism for the Capacity Charge Case deferrals.[102]

Yet despite the late evidentiary maneuvering that the Commission engaged in, whereby significant findings in the Capacity Charge Case were incorporated into the decision in this case, the PUCO declined to allow administrative notice of other portions of the very same evidentiary record. This was, on its face, an arbitrary decision with no rational basis provided. While the Commission found the timing of OCC/APJN's request to be "troublesome" and "problematic," those concerns are ironic in light of the

[100] See Capacity Charge Order at 24.

[101] See id. at 38.

[102] Id. at 23.

Commission's own belated actions[103] which caused the need for OCC to seek administrative notice.

In authorizing deferrals and shifting issues from the Capacity Charge Case into the ESP case, the Commission created an evidentiary problem because the 11-346 record had no evidence in it to determine what an appropriate recovery mechanism is for the newly created deferrals. OCC/APJN's motion was not untimely but was an appropriate and timely response to the PUCO's Capacity Charge Order.

Moreover, the Commission arbitrarily ignored the standard of review for administrative notice. The key to determining whether administrative notice can be taken is not whether the timing of a motion is "awkward," as alleged by the Company. Rather the Commission should have considered whether the parties to the ESP proceeding had knowledge of and an opportunity to explain and rebut the evidence.[104] And the Commission should have examined whether parties would have suffered prejudice from the taking of such administrative notice. But the Commission could not find prejudice or harm and so it ignored those requirements and improvised. Instead it described OCC/APJN's request as "troublesome" and "problematic" not ever finding that it would cause harm and prejudice. Such an analysis was unreasonable and biased.

Indeed, had the Commission examined these issues in a reasonable and appropriate way -- the way the Supreme Court has dictated -- it would necessarily come to the conclusion that there was no harm or prejudice to any party from what OCC/APJN was requesting. The Company did not dispute that it knew of the evidence. And the

[103] The Commission determined on July 2, 2012 that it would create deferrals and address a recovery mechanism for the deferrals in its to be decided ESP decision. At the time –July 2, 2012, the evidentiary record in the ESP case was closed and initial briefs had been filed.

[104] See e.g., *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 186.

Company had the opportunity to explain it and rebut it not just once (in the Capacity Charge Case) but again through its Memorandum Contra in this case. Considering that a significant part of the noticed material are the Company's own words, there was not much more explaining the Company could have done.

And with respect to the Commission finding that it was concerned that the record would be supplemented in a "misleading" manner,"[105] the Commission's concerns could easily have been addressed if it had taken the more reasonable and less draconian measure of incorporating the whole record from the Capacity Charge Case into this proceeding. Interestingly enough, part of the information it characterized as "misleading" was information that the Commission reported in its Opinion and Order when it summarized the Company's position: "AEP Ohio contends that its proposed cost-based capacity pricing roughly approximates and is, therefore, comparable to the amount the Company receives from its SSO customers for capacity through base generation rates (AEP-Ohio Ex. 142 at 19-20; Tr. II at 304, 350)." [106]

To top it all off, the Commission's approach, not permitting selective materials to be noticed, is inconsistent with its ruling in the recent FirstEnergy ESP proceeding.[107] There the Attorney Examiner denied the Company's request to administratively notice the entire record of a proceeding, requiring the utility instead to tailor its administrative

[105]AEP Ohio did not characterize this as "misleading." That characterization was supplied by FES. But, FES' pleading was untimely, and stricken. See Opinion and Order at 12. This raises the issue of whether the Commission unreasonably and unlawfully relied upon information or arguments that were not specifically before it.

[106] Capacity Charge Order at 25.

[107] See In *the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 17-21(affirming the Attorney Examiner's ruling that administrative notice be taken of selected documents, and not the whole record, as requested by FirstEnergy).

notice request to a secure and narrower window of information.[108] That approach was followed by OCC/APJN here and yet the result was disparately different for OCC/APJN than it was for the utility seeking administrative notice. These disparate rulings cannot be easily explained.

The Commission's Order in the *FirstEnergy case* is precedent that the PUCO should have acknowledged and followed but it did not. The Ohio Supreme Court has ruled that prior determinations of the PUCO should not be disregarded and set aside unless the need to change is clear and the prior decisions are in error.[109] Yet the PUCO here failed to respect its earlier decision and failed to explain why its prior determination in the FirstEnergy case was erroneous, and needed to be changed.

This is an additional error that the PUCO made constituting abuse of discretion. The effect of the Commission's ruling is that OCC/APJN is prejudiced by the Commission's action. OCC cannot rely upon the statements made and testimony given to support its argument in this case that base generation rates should be reduced to prevent discriminatory pricing. For all the reasons set forth above the Commission should grant rehearing on this issue and reverse its ruling.

ASSIGNMENT OF ERROR 3:

The Commission Erred In Allowing the Company to Collect hundreds of millions of dollars from customers through a Retail Stability Rider That Guarantees a steady source of Non-Fuel Base Generation Revenues For The Company.

In its modified ESP, the Company proposed a non-bypassable charge called the "Retail Stability Rider." As OCC Witness Hixon testified, this charge was intended to guarantee that the Companies collect a pre-determined level of non-fuel generation

[108] See id, Tr. I at 29 (Price) (June 4, 2012).

[109] See e.g. *In re: Application of Columbus S. Power*, 128 Ohio St.3dd 512, 523.

revenue during each year of the modified ESP.[110] This guarantee would exist to protect the revenues the Company will lose as more and more of its customers shop.

The Company itself refers to the Retail Stability Rider as a way to "protect the financial integrity of the Company during the transition period to market-based SSO pricing."[111] Mr. Allen testified that RSR is a proposal by the Company to replace a portion of lost revenues associated with providing capacity to CRES providers at a discount.[112] Thus, in the Company's own words, the retail stability rider is essentially a lost revenue mechanism for the Company. As more customers shop, the Company loses revenues. Recouping these lost revenues is important, from the Company's perspective, to ensure it does not suffer severe financial harm from its "discounted" pricing of capacity and its willingness to offer market-based pricing of capacity and energy under a series of auctions. OCC, APJN, and numerous other intervenors vehemently opposed the Retail Stability Rider.

But, despite the strong opposition and the arguments presented against this charge, the Commission nonetheless approved the charge[113] to the detriment of the Company's customers. In doing so, the Commission made a number of changes to the rider. The most significant of those changes, from the customers' perspective, was that the Commission determined that the Company was entitled to collect \$504 million, instead of \$284 million the Company had proposed for collection through the rider. The

[110] OCC Ex. No. 114 at 7-8 (Hixon).

[111] See Company Ex. 119 at 1 (Dias supplemental).

[112] Company Ex. 116 (Allen).

[113] Opinion and Order at 31-38.

Commission's Order approving the Retail Stability Rider was unreasonable and unlawful for the numerous reasons set forth below.

A. There is no statutory basis to allow the Company to be made whole for revenues lost due to competition from Competitive Retail Electric Service Providers.

S.B. 221 does not guarantee that electric distribution utilities ("EDUs") such as AEP Ohio will be made whole for sales of generation lost to CRES providers. There is no such provision in Chapter 4928 for this theory.

Indeed, where the General Assembly wanted to allow utilities to recoup lost sales opportunities or foregone revenue, it has expressly provided for such. For example, R.C. 4905.30 permits the Commission to approve the collection of "revenues foregone" with regard to economic development arrangements. Additionally, under R.C. 4928.143(B)(2)(h), a utility's ESP may include "lost revenues" as part of the EDU's distribution infrastructure and modernization plans.

That the General Assembly provided limited conditions under which costs may be collected from customers for lost or foregone revenues reflects the legislative intent to otherwise disallow costs to be collected under other conditions not specified. The legislative canon expressio unius exclusio alterius applies -- the inclusion of one thing implies exclusion of the other.[114] Including authority to allow lost revenues for economic development and for distribution infrastructure and modernization plans, and not for other purposes, was intended.

The General Assembly, in its wisdom, enacted no provision, for collecting lost generation revenues through R.C. 4928.143(B)(2). There are no provisions within R.C.

[114] See *Crawford-Cole v. Lucas Co. Dept. of Jobs & Family Services*, 121 Ohio St.3d 560, 566, 2009-Ohio-1355, ¶42.

4928.143(B)(2) under which lost generation revenues fit, and thus the Commission may not authorize the collection of these lost generation revenues in the ESP.[115] Such a finding is in keeping with the Supreme Court's precedential ruling interpreting R.C. 4928.143(B)(2) to be an exclusive list that the ESP provisions must qualify under.[116] Rehearing should be granted on this.

B. The Commission erred in unreasonably and unlawfully determining there is a statutory basis for including a Retail Stability Rider in the Company's electric security plan under R.C. 4928.143.

In discussing the Retail Stability Rider, the Commission correctly noted that there was a dispute as to whether the rider is statutorily justified.[117] Yet, despite the dispute, the Commission failed to address the merits of numerous parties' arguments detailing how the rider lacked any statutory basis.[118] Instead it went straight to the Company's claim that the rider is justified under R.C. 4928.143(B)(2)(d). And it found that the rider "meets the criteria of Section 4928.143(B)(2)(d), as it promotes stable retail electric service prices and ensures customer certainty regarding retail electric service."[119] It also determined that the rider "also provides rate stability and certainty through CRES services, which clearly fall under the classification of retail electric service, by allowing customers the opportunity to mitigate any SSO increases through increased shopping

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[115] See *In re Application of Columbus Southern Power Company, et al.*, 2011 Ohio 1788, 31-35.

[116] Id. at ¶31-32.

[117] Id. ¶31.

[118] While it regurgitated the intervenors' arguments in three pages, the Commission failed to explain why those arguments were wrong. This is an error and violates R.C. 4903.09, because the Commission must explain its rationale as to why it chose to accept the Company's arguments and found other arguments to be lacking. See e.g. *General Telephone Co. v. Pub. Util. Comm*. (1972), 30 Ohio St.2d 271, 59 Ohio Op.2d 125.

[119] Opinion and Order at 31.

opportunities***"[120] The Commission also found that the retail stability rider "freezes any non-fuel generation rate increase that might not [sic] otherwise occur absent the RSR, allowing current customer rates to remain stable throughout the term of the modified ESP."[121]

But the Commission's statutory analysis is wrong for a number of reasons. First, it ignores all of the preceding language of R.C. 4928.143(B)(2)(d), and instead focuses on the end of the section containing the language "as would have the effect of stabilizing or providing certainty regarding electric retail service." And second, it construes the statute as being met where the term, condition, or charge only indirectly stabilizes or provides certainty regarding retail electric service.

1. The Commission failed to give effect to all the words in the statute, violating R.C. 1.47.

The Commission's analysis is wrong. It ignores the six preceding lines of Subsection (B)(2)(d) and focuses only on part of the statute. The first six lines of Subsection (B)(2)(d) establish the parameters that must be met in order for a provision to be part of a utility's electric security plan. R.C. 4928.143(B)(2)(d) reads as follows:

> (2) The plan may provide for or include, without limitation, any of the following:
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> ***
>
> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

[120] Id.

[121] Id.

The statute quite clearly requires that the provision be a term, condition, or charge relating: (1) limitations on customer shopping for retail electric generation service,(2) bypassability, standby, back-up or supplemental power service; (3) default service; (4) carrying costs (5) amortization periods, and (6) accounting or deferrals, including future recovery of such deferrals. And if it is determined that the provision falls within one of these six categories, then the provision must also "have the effect of stabilizing or providing certainty regarding retail electric service."

But the Commission skipped the first step of the statutory analysis altogether. It never determined that the Retail Stability Rider is a "term, condition or charge" that fits the description of one of the six categories. In doing so, the Commission erroneously construed the statute, ignoring the bulk of the language found there. Construing the statute this way is inconsistent with the rules of statutory construction that presume, inter alia, the entire statute is intended to be effective.[122] As noted by the Ohio Supreme Court, "[t]he presumption always is, that every word in a statute is designed to have some legal effect, and putting the same construction on a statute, every part of it is to be regarded and so expounded if practicable, as to give some effect to every part of it."[123]

The Commission erred when it approved the Retail Stability Rider, but failed to identify which one of the six categories the rider satisfies under R.C. 4928.143(B)(2)(d). As OCC/APJN argued on brief, the rider is NOT one of the categories of "terms, conditions, or charges" under R.C. 4928.143(B)(2)(d). The retail stability rider is not related to "limitations on customers shopping for retail electric generation service." In

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[122] See R.C. 1.47.

[123] *Richards v. Market Exch. Bank Co.* (1919), 81 Ohio St. 348.

fact, the Company argues that the RSR will increase customer shopping for retail electric generation service. The RSR does not pertain to bypassability (it is a non-bypassable rider). The RSR does not pertain to "carrying costs," "amortization periods" or "accounting or deferrals."

The closest one can get to the statute is to argue that the RSR relates to "back-up," or "default service." But even that doesn't work. Why? Because the RSR is tied to lost revenues based on shopping, and the lost revenues are tied to "discounted capacity prices" that AEP Ohio charges to CRES providers.

Non-fuel base 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.[124] 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 EDU's SSO rates from service with a CRES provider.[125] Hence, AEP Ohio's proposal -- to collect a certain level of non-fuel base generation revenues from customers, based on the amount of shopping (customer migration) is unrelated to POLR and the provision of back-up or default service.

R.C. 4928.142(B)(2)(d) cannot be construed to cover lost generation revenues. Default service or back up service means capacity and energy costs incurred when the customer must receive default or back up supply service. No more and no less.

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[124] *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 Generation Assets*, Case No. 08-917-EL-SSO et al., Order on Remand at 32 (Oct. 3, 2011).

[125] Id.

2. The Commission erred by unreasonably and unlawfully engaging in statutory construction when the plain meaning of the statute was clear.

In the Order, the Commission's found that the RSR meets the criteria of R.C. 4928.143(B)(2)(d) because it "promotes stable retail electric service prices and ensures customer certainty regarding retail electric service."[126] Looking to the next passage of the Commission Order, it appears that this conclusion is reached on the basis that the RSR *enables* other provisions of the ESP to be implemented. For instance, the Commission notes that the RSR is connected to CRES services[127] which allow customers to "mitigate any SSO increases through increased shopping opportunities that will become available as a result of the Commission's decision in the Capacity Case."[128] And the RSR allows[129] "freezes" to any non-fuel generation rate increase that might otherwise not occur absent the rider.

But R.C. 4928.143(B)(2(d), requires more than an indirect stabilizing or providing certainty for retail electric service. The words of the statute state that the "terms, conditions, or charges must "have the effect of stabilizing or providing certainty regarding retail electric service." But the Commission reads the language to allow any

[126] Opinion and Order at 32. There is no record citation for this statement, and thus R.C. 4903.09 appears to be violated.

[127] The Commission claims that CRES services fall under the classification of retail electric service. This conclusion seems to conflict with the holding the Commission reached in the capacity charge case where it, after much analysis, concluded that the provision of capacity by CRES providers is not a retail electric service. Capacity Charge Order at 13. Further the Commission recognized that the benefits to customers from AEP providing capacity to CRES, come not directly, but "in due course" as customers are "initially one step removed from the transaction." This is another example of the Commission stretching to find some connection between the statutory language and the RSR.

[128] Id.

[129] The Commission states that the "RSR freezes any non-fuel generation rate increase***." This statement is incorrect and not supported by the record, violating R.C. 4903.09, as the provisions of the RSR do not in of themselves require freezes to any non-fuel generation rate increases. Rather, as explained above, the Company argues they enable the rate freezes.

provision[130] that enables other provisions to be implemented -- with the other provisions being the ones which have the effect of stabilizing or providing certainty regarding electric retail service. Such an indirect approach is not sustainable under Ohio rules of statutory construction.

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 enables other charges that" "have the effect of stabilizing or providing certainty regarding retail electric service." 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 a provision in an electric security plan that "enables" other provisions, it would have expressly done so. But the General Assembly did not. The Commission cannot rewrite the law.

According to the Supreme Court of Ohio, where the statute is clear and unambiguous, as is the provision of R.C. 4928.143(B)(2)(d), "[the] only task is to give effect to the words used,"[131] and "not to delete words used or to insert words not used."[132] "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts."[133]

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[130] See discussion *supra*.

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

[132] *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. 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 statute to meet a situation not provided for).

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

The Commission's attempt to add words to the statute to provide a spot for the retail stability rider under R.C. 4928.143(B)(2) is unlawful and unreasonable. Rehearing should be granted on this issue.

C. Assuming arguendo that there is a legal basis for the Retail Stability Rider, the Commission erred in unreasonably determining that $508 million rather than the $284 million requested by AEP Ohio is the appropriate level of the rider. The Commission's calculation of the rider is overstated, making the rates to be collected from customers unjust, unreasonable, and unsubstantiated. If the rider is to be implemented, over the strenuous objections of OCC/APJN and others, rehearing should be permitted to allow parties to examine, on the record, the appropriate calculation of the Retail Stability Rider.

The Commission found that the RSR is justified by statute, a conclusion that is unlawful, unreasonable, and lacks evidentiary support. It also concluded that AEP Ohio had failed to sustain its burden of proving the cornerstone of the retail stability rider -- the revenue target of $929 -- is reasonable.[134] Instead the Commission chose a lower revenue target of $826 million,[135] and on that basis determined that the rider revenue to be collected would have to change as well. The Commission made several adjustments[136] to the calculation of the rider and "highlighted" its adjustments in a chart contained on page 35 of the Opinion and Order. The end results of all the adjustments was to dramatically increase (by almost 79 percent) the amount of the retail stability rider to be collected

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[134] Opinion and Order at 32.

[135] Id. at 34.

[136] The adjustments made by the Commission do not appear to be based on facts contained within the record. This is an additional error that the Commission made. See e.g. *Tongren v. Pub. Util. Comm.* (1997), 85 Ohio St.3d 87.

from customers. Specifically, while the Company had requested a $284 million retail stability rider, the Commission approved a rider of $508 million.[137]

Assuming arguendo that the rider is justified by statute, OCC/APJN request rehearing on the calculation of the rider. The Commission erred in numerous respects, and these errors unreasonably overstated the total amount to be collected from customers under the rider. In other words, the rider is unreasonable and will overcharge customers. This will render it imposible for the Commission to ensure that reasonably priced retail electric service is made available to consumers in the State, conflicting with R.C. 4928.02(A). Rehearing should be permitted to allow parties to examine, on the record, the appropriate calculation of the RSR.

1. In assigning a value for competitive retail electric supplier revenues, the Commission unreasonably assumed capacity revenues are based on Retail Pricing Model ("RPM") pricing, when AEP Ohio was authorized to, and will in fact, collect capacity revenues at the level of $188.88/MW-day.

On page 35 of the Commission's Opinion and Order, the Commission attempted to replicate Company's Exhibit WAA-6, in order to recalculate the Company's Retail Stability Rider for various adjustments the Commission made that impact the rider. A number of these adjustments flowed from the Commission's recent decision in the Capacity Charge Case.

In the Capacity Charge Case, the Commission adopted a state compensation mechanism for AEP Ohio with a capacity charge of $188.88/MW-day.[138] AEP Ohio will collect 100% of its $188.88/MW-day capacity charge, but it will be collected from

[138] Opinion and Order at 36.

different sources and at different times. During the term of the ESP, AEP Ohio will collect capacity charges from CRES providers based on RPM pricing. Additionally, during the term of the ESP, a $1/MW-hour charge for capacity charges will be collected from customers as a part of the retail stability rider. After the ESP terminates, the Company will collect from customers deferred capacity charges, with carrying costs, over a three-year period.[139]

Under the approach derived by the Commission, charging CRES providers RPM prices for capacity causes AEP Ohio to collect less than the PUCO determined cost of capacity ($188.88/MW-day) during the term of the ESP. The incurred costs that will not be collected from CRES providers during the ESP are defined as the difference between RPM prevailing prices and $188.88/ MW-day. The Commission authorized the Company to defer these incurred capacity costs, to the extent that the costs do not exceed $188.88/MW-day.[140] In the decision in this case, the Commission determined that the deferred capacity costs would be collected from customers, over a three-year period beginning in June 2015.[141]

Thus, although CRES providers will be paying RPM-based prices for the capacity supplied by the Company, it is now clear, from the Commission's Order in this case, that the Company will collect *from customers* the full deferred capacity costs up to the value of $188.88/MW-day. For instance, in the first planning year, 2012/2013, CRES

[139] Opinion and Order at 36.

[140] Capacity Charge Order at 23.

[141] Opinion and Order at 36. In the Capacity Charge Case the PUCO granted the Company accounting authority to defer the capacity costs and authorized the Company to collect carrying charges on the deferral based on the Company's weighted average cost of capital, until such time as a recovery mechanism is approved in this case. Thereafter, the Company was authorized to collect carrying charges at its long-term cost of debt. See Capacity Charge Order at 23-24.

Providers will be charged \$20.01/MW-day.[142] That means that \$168.87/MW-day[143] will be the capacity costs subject to deferral and collected from customers. When that deferred capacity cost is multiplied by the shopping load assumed by the Commission[144] a capacity deferral of \$270 million is created.[145] In the second and third years, using the RPM pricing of \$33.71/MW-day (2013/2014), and \$153.89/MW-day (2014/2015)[146] capacity costs subject to deferral will be \$155.171/MW day (2013/2014) and \$34.99/MW-day (2014/2015).[147] When that deferred capacity cost is multiplied by the shopping load assumed by the Commission, capacity deferrals of \$299 million (2013/2014) and \$78 million, (2014/2015) are created.[148] Thus, over the ESP term, \$647 million of capacity deferrals will be created.[149] While some capacity costs will be collected from the RSR (\$144 million), which will be used to offset these deferrals,[150] \$503 million of deferred capacity costs will remain to be collected from customers in 2015 through 2018, plus carrying charges at long term cost of debt, resulting more than \$503 million being collected from AEP Ohio's customers during that time period.[151]

In calculating the Retail Stability Rider, the Commission included CRES capacity revenues based on RPM pricing. These revenues, included in the Commission's

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142 See Capacity Charge Order at 10.

143 \$188.88/MW-day minus 20.01/MW-day.

144 The Commission rejected the Company's shopping load projections and adopted the following assumptions: 52% in year one; 62% in year two; and 72% in year three. Opinion and Order at 34.

145 See OCC Rehearing Ex. 1A.

146 Capacity Charge Order at 10.

147 \$188.88 MW-day minus \$33.71/MW-day equals \$155.17/MW-day. \$188.88 MW-day minus \$153.89/MW-day equals \$34.99/MW-day.

148 See OCC Rehearing Ex. 1A.

149 OCC Rehearing Ex. 1A.

150 See Opinion and Order at 35-36.

151 See OCC Rehearing Ex. 1A.

recalculated RSR, are $441 million. The $441 million of CRES capacity revenues offset the need for a retail stability rider. In other words, the greater the CRES capacity revenues, the lower the Retail Stability Rider collected from customers. But in counting the CRES capacity revenues at RPM price levels, the Commission fails to reflect the reality that the Company is authorized to collect full CRES capacity revenues based on $188.88/MW-day -- not just capacity based at RPM levels.

If the Retail Stability Rider calculation is not corrected to reflect the reality that the Company is authorized to and will collect capacity revenues totaling $188.88/MW-day, then the rider will be overstated and customers will pay twice for the capacity costs (specifically the difference between the $188.88/MW-day and the RPM levels) -- once through an overvalued SSO generation rate (incorporating capacity revenues at $355/MW-day) and the second time though the capacity cost deferrals. This is not just, reasonable, or consistent with the Capacity Charge Order.

The Commission's rider calculation should be corrected, if it is to be the basis for the Retail Stability Rider. Instead of using CRES capacity revenues based on RPM pricing, the Commission should have calculated CRES capacity revenues based on the state compensation mechanism approved in the Capacity Charge Case -- $188.88/MW-day. If this had been done, no Retail Stability Rider would be needed.

Here's how it works.[152] For 2012/2013 the CRES capacity revenue becomes $302 million [153] instead of $32 million.[154] For 2013/2014, CRES capacity revenue is

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[152] See OCC Rehearing Ex. 1B

[153] $270 million is to be collected from all customers after the ESP plus $32 million is collected from the CRES providers.

[154] OCC Rehearing Ex. 1B.

$364 million[155] instead of $65 million.[156] And for 2014/2015, CRES capacity revenues amount to $422 million.[157] Accepting all other assumptions made by the Commission in deriving the rider, and adjusting the CRES capacity revenues to be consistent with what the Commission authorized the Company to collect (from both CRES providers and customers), one can reasonably conclude that over the period of the ESP the RSR is not needed. Rather the RSR becomes a negative amount, indicating that money is due to be returned to customers in the amount of $133 million over the entire ESP period.[158]

Alternatively, if the Commission does not correct its retail stability rider calculation to ensure that customers do not pay twice for capacity through the RSR, the Commission should use all the RSR collections from customers as credit to the future capacity deferrals that have been created as a consequence of charging CRES providers $188.88/MW-day. This alternative would permit the Company to collect cash from customers to be used to offset the $503 million of capacity cost deferrals which will be created and collected from customers after the ESP term is over.

2. In calculating the Retail Stability Rider, the Commission unreasonably excluded revenues that the Company will receive for capacity associated with auctions that occur prior to June 2015.

In calculating the Retail Stability Rider, the PUCO used Company Exhibit WAA-6 as the template. In WAA-6, the Company included "Auction Capacity Revenues" of

[155] $299 million is to be collected from all customers after the ESP plus $65 million is collected from the CRES providers,

[156] OCC Rehearing Ex. 1B.

[157] $78 million is to be collected from all customers after the ESP plus $344 million is collected from the CRES providers.

[158] Id.

$89.6 million in PY 2014/2015.[159] Mr. Allen testified that starting in 2015, the Company had proposed an energy-only auction with a capacity rate of $255/MW-day embedded in the charge to retail customers.[160] The $89.6 million was the capacity revenues associated with the non-shopping load that is subject to auction in 2015. Including such revenues as a line item in the Retail Stability Rider charge decreased the revenue to be collected from customers.

But the Commission, in calculating the Retail Stability Rider, failed to incorporate any auction capacity revenues, despite the fact that under the Commission's modifications to the ESP, there will be energy only auctions (10%, 60%, and 100%). And for these energy-only auctions there will be a capacity rate embedded in the charge to non-shopping customers. As explained earlier that capacity rate approximately and roughly equates to $355/MW-day.[161]

Collecting that capacity rate from the non-shoppers in the energy-only auctions will create capacity revenues for the Company which should be recognized as an offset to the Retail Stability Rider calculation. The failure to recognize such a component of the RSR is unreasonable, because it overstates the rider, and threatens the Commission's ability to ensure reasonably priced electric service is available to consumers in this State. Moreover, the Commission failed to explain its rationale as to why such revenues should be excluded, violating R.C. 4903.09. Rehearing should be permitted to allow parties to examine, on the record, the appropriate amount for auction capacity revenues that should be included in the calculation of the Retail Stability Rider.

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[159] Company Ex. 116 at WAA–6 (Allen).

[160] Tr. V at 1661.

[161] See Capacity Charge Order at 25.

3. Third, the Commission erred when it unreasonably and unlawfully applied too low of a credit for shopped load, without setting forth the reasoning or rationale for adopting that low value.

In calculating the Retail Stability Rider, the Commission determined there should be a credit for shopped load. The larger the credit, the less the RSR collections from customers will need to be. The credit for shopped load was proposed by the Company to recognize that as more customers shop, energy is freed up for potential off-system sales.[162] It appears[163] that the Commission accepted the Company's recommended \$3/MWh credit for shopped load, without explaining the rationale for accepting it. OCC and others had recommend that the credit reflect the actual profits earned from off-system sales and not a mere pittance of the margins expected to be earned by the Companies on such off-system sales.

Had the Commission rejected the \$3/MWh credit and ordered a larger, more reasonable credit, the RSR collections from customers would have been less. The Commission, however, unreasonably failed to accept the recommendations of OCC[164] and others, causing the revenues to be collected under the Retail Stability Rider to be greater than what would otherwise be necessary.

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[162] Tr. II at 677 (Nelson).

[163] The Commission's decision did not discuss the level of the shopping credit other than to state that the credit for shopped load should be adjusted based on the revised non-shopping assumptions. It then lowered the credit without explaining how the new credits for shopped load were derived. See Opinion and Order at 35.

[164] OCC/APJN had argued that the \$3/MW credit was substantially below the margins projected by Company Witness Sever in his pro-forma AEP Ohio financial projections. See OCC Brief at 49-54. OCC/APJN proposed a more realistic credit that would be more than \$3Mwh but less than \$12/MWH. Alternatively, OCC/APJN proposed tracking the actual energy freed up and the actual energy sold to eliminate the guess work in assigning a value to profits from energy sales freed up by shopping load.

It is unreasonable to charge customers millions of dollars to support the Company's lost revenues from shopping when customers are not given complete credit for the profits earned when energy from the shopped load is freed up. This is all the more so unreasonable when customers are expected to pay pool termination costs[165] to collect revenues lost as part of the Company's move to competitive markets.

And using a $3/MWh as a credit for off-system sales is inconsistent with the Commission's finding in the Capacity Charge Case that accepted an energy credit of $147.41/mw-day or $6.14/mwh. This inconsistency stands in stark contrast to the otherwise carte blanche adoption of the Capacity Charge Case findings.

The Commission failed to explain the rationale or reason to support choosing the $3/MWh charge proposed by the Company. Nor did it explain why proposals by others such as OCC/APJN should be rejected. Nor did it explain why the energy credit developed in the Capacity Charge Case should not be utilized in this case. Instead the Commission merely recited what the parties' postions were, but did not explain why the positions were adopted or rejected.

But the Commission has the responsiblitity under R.C. 4903.09 to make findings of fact and issue written decisions setting forth the reasons prompting the decisions arrived at. The Ohio Supreme Court has ruled that the Commission must explain in sufficient detail why it reached conclusions so the the Court may review the reasonableness of the Order.[166] The Commission failed to do so here. Rehearing should be granted and the Commission should fully explain the basis for adopting the $3/MWh

[165] See AEP Ohio Ex. 103 at 22 (Nelson).

[166] *General Telephone Co. v. Pub. Util. Comm.* (1972), 30 Ohio St.2d 271.

credit, or alternatively should reject the $3/MWh in favor of a larger credit consistent with the recommendations of OCC/APJN, or consistent with the energy credit adopted in the Capacity Charge Case.

ASSIGNMENT OF ERROR 4:

The Commission Erred When It Ruled That The Company Is Authorized To File An Application To Adjust The RSR If There Is A Significant Reduction In Non-Shopping Load For Reasons Beyond The Control Of The Company, Other Than Shopping. The Commission's Ruling Unreasonably Transfers The Risks Of Weather, Economic Downturn, And Customer Mobility Away From The Company And Onto Consumers Which Is Unfair, Unjust, And Unreasonable.

In approving the Retail Stability Rider, the Commission noted that its findings are "heavily dependent on the amount of SSO load still served by the Company."[167] The Commission then ruled that if during the term of the ESP, there is a "significant" reduction in non-shopping load "for reasons beyond the control of the Company, other than for shopping," the Company is authorized to file an application to adjust the RSR to account for such changes."[168] The effect of the Commission's ruling is that it essentially transfers the risks of reduced non-shopping load away from the Company and onto the backs of customers. For instance, under this ruling "significant reduction" (which is not defined) in non-shopping load could result from a number of factors including weather, customer mobility, and economic downturn i.e. customers going out of business.[169]

But in Ohio these are risks that the electric utilities, and not customers, have consistently borne. Electric utilities in Ohio do not have weather normalization

[167] Opinion and Order at 37.

[168] Id. at 37-38.

[169] Ormet is one of the largest customers of Ohio Power Company. It presented testimony that it contributes significantly to the Company's non fuel generation revenues. See Ormet Ex. 106 at 13-14 (Russell). According to Mr. Russell, revenues required from other customers under the ESP would be "far greater if Ormet were not to continue operating in Ohio." Id.

protection built into rates. Nor do electric utilities have protection from customer loss due to mobility or economic conditions. Guaranteeing this utility full recovery of sales for non-shopped load irrespective of innumerable factors such as weather, economic conditions, and/or customer mobility, is not appropriate or reasonable. This is a slippery slope that the Commission must avoid. Rehearing should be granted and the Commission should reverse itself.

And if the Commission is insistent on going down this slope, which OCC/APJN do not recommend, it should make the adjustment symmetrical. That is, if non-shopped load increases for reasons beyond the control of the Company, the Commission should permit interested parties the opportunity to file to adjust the RSR to account for those changes. To fully explore the necessary conditions of such a proposal, the Commission should hold rehearing on this issue.

ASSIGNMENT OF ERROR 5:

The Commission Violated R.C. 4903.09 When It Unreasonably And Unlawfully Failed To Allocate The Retail Stability Rider According To The Percentage Of Customers Shopping In Each Class.

After accepting a $508 million Retail Stability Rider, the Commission determined that the RSR should be collected as a non-bypassable rider, to recover charges per kWh by customer class, as the Company proposed.[170] The Commission discussed arguments parties had made as to why certain classes should be excluded from paying the rider, and briefly addressed arguments made as to excluding shoppers or non-shoppers from paying the rider.[171] Nonetheless, the Commission failed to address OCC's recommendation that

[170] Opinion and Order at 37.

[171] Id.

the rider be allocated in proportion to each customer class' relative share of switched kWh sales.

OCC's recommendation was made through the testimony of OCC Witness Ibrahim and was based on principles of cost causation. As OCC witness Ibrahim fully explained, the "need" for the retail stability rider is primarily driven by CRES providers.[172] The rider mitigates the financial impact the Company experiences from discounted capacity pricing made available to CRES providers. CRES providers in turn provide service to retail customers who choose to seek alternative sources of generation besides AEP Ohio's standard service offer. Under the theory of cost causation, the Retail Stability Rider should be allocated among the different classes based on their share of total switched load. For it is the switched load that causes the Company to "lose" non-fuel generation revenues (via discounted capacity).

In an attempt to rationalize pushing cost onto others than the cost causers, the Commission points out the so-called benefits of the RSR to non-shoppers. These "benefits" include "rate stability" and "certainty" coupled with the fact that all SSO rates will be market based on June 2015. But stable and certain rates do not equal reasonably priced retail electric service, which is a policy of the State under R.C. 4928.02(A). And stable and certain rates should not shift the burden from the cost causers to other customers. Indeed, if the stable and certain rates are too high to begin with, they provide little, if any benefit to SSO customers.

And, the findings in the Capacity Charge Case confirm that the SSO rates, which have a capacity component built into them, are too high. In the Commission's Capacity

[172] OCC Ex. 110 at 8-9 (Ibrahim).

Charge Case, the Commission determined that the Company's capacity charge should be no greater than $188.88/MW-day, not the $355/MW-day embedded in the SSO rates. Excessive, albeit stable and certain, SSO rates are not a benefit to non-shopping customers.

Additionally, if customers have no interest in shopping, and in fact do not shop during the ESP, the other benefit -- market based SSO rates -- will only be realized after paying the Retail Stability Rider for the term of the ESP and three years thereafter. This is a hefty price to pay.

In the end, there are no primary and direct benefits to non-shopping customers of the Retail Stability Rider. Thus, if they are to pay for this charge, it's only equitable that the charge be assessed on the basis of the relative share of shopping of each class. Yet, residential customers, whose current shopping is around 15%, will pay approximately 40% of the RSR.[173] This is disproportionate, unfair, unjust, and unreasonable. The Commission should grant rehearing on this issue.

ASSIGNMENT OF ERROR 6:

The Commission Unreasonably and Unlawfully Ruled That, After Corporate Separation Is Implemented, The Retail Stability Rider Revenues Which Are Not Allocated To Recovering The Capacity Charge Deferrals, Should Flow To Company's generating affiliate, GenResources, Inc., Which Violates R.C. 4928.02(H). In Failing To Explain The Rationale Or Reasons For Its Ruling, The Commission Also Violated R.C. 4903.09.

Under the Commission's Order, after corporate separation is implemented, the retail stability rider revenues will be remitted to GenResources, Inc., the Company's unregulated generation subsidiary.[174] While the Commission characterized the pass-

[173] AEP Ohio Ex. 111 at Ex. DMR-3 (Roush).

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

through as “appropriate and reasonable,”[175] it failed to explain itself or indicate the facts or rationale upon which its conclusion was based.

R.C. 4903.09 requires that, in all contested cases, “the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” The Ohio Supreme Court has recognized that complying with this statute is important because otherwise the Court cannot fulfill its responsibility to review the order being appealed.[176] By not explaining why the retail stability rider revenues should be remitted to the AEP Ohio’s affiliate, and how customer funding of the affiliate is lawful, the Commission violated R.C. 4903.09. Without sufficient detail, the Court will be unable to determine how the Commission reached its decision. Thus, the purpose of R.C. 4903.09 will be thwarted and the review that OCC is entitled to, under R.C. 4903.09 and 4903.10 cannot occur. The Commission should therefore, hold rehearing on this matter, and abrogate its Order on this issue. The Commission should reverse itself and preclude the RSR revenues from being transferred to the GenResources, Inc.

But the problems with the Order do not stop there. OCC Witness Duann testified that, through the Retail Stability Rider, AEP Ohio’s SSO customers are being asked to subsidize the shortfall between non-fuel generation revenue actually collected and the annual revenue target set by AEP Ohio. Thus, when the RSR is remitted to GenResources, Inc. the Company’s customers (shopping and non-shopping) will be subsidizing the Company’s unregulated generation business. That unregulated subsidiary will be engaged in offering competitive generation service (selling excess generation

[175] Opinion and Order at 60.

beyond that which is needed for SSO service) and noncompetitive (SSO) service to customers.

Though the Company maintains that generation assets that are transferred need financial support from the Retail Stability Rider, such a subsidy is unlawful and inconsistent with the state policy of R.C. 4928.02(H). R.C. 4928.02(H) prohibits anti-competitive subsidies. That statute also requires the PUCO to ensure effective competition by avoiding anti-competitive subsidies flowing from a non-competitive retail service (SSO generation native load) to a competitive retail service.

Under R.C. 4928.06, the Commission has a duty to ensure that the policy specified in R.C. 4928.02 is effectuated. Thus, according to the Commission, the policy specified in R.C. 4928.02 is "more than a statement of general policy objectives."[177]

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[176] See e.g., *Allnet Communications v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202, 209.

[177] *In the Matter of the Application of Ohio Edison Companies, the Cleveland Electric Illuminating Companies, and the Toledo Edison Companies for Approval of a Market Rate Offer to Conduct a Competitive bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 5 (Nov. 25, 2008) ("*FirstEnergy MRO Order*").

Indeed the Ohio Supreme Court expressly held that the Commission may not approve a rate plan that violates the policy provisions of R.C. 4928.02.[178] The Commission thus, cannot approve this portion of the rate plan. Retail stability rider revenues cannot flow to AEP GenResources Inc. under the law.

Besides being unlawful, the subsidy is also unreasonable. It is unreasonable because it assumes that all customers of the Company (shopping and non-shopping) should involuntarily support the unregulated operations of the Company.

Moreover, the Commission assumes that the unregulated operations of AEP GenResources Inc. will be in need of financial support, which has not been supported by any record evidence. If the Company's own analysis is correct, the AEP East generating assets will produce a healthy, positive cash flow value, on a net present value basis, of $22 billion over the next thirty years.[179] Notably, a significant portion of the $22 billion cash flow is attributable to AEP Ohio generating assets.[180] The total actual cash flows on a non-discounted basis are much higher. That positive cash flow from AEP Ohio units is several billion dollars greater than the net book value of those same assets that the Company proposes to transfer to its affiliate.[181] Requiring the Company's customers to contribute even more to the returns of shareholders is unlawful and unreasonable. Rehearing should be granted.

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

[179] Tr. Vol. III at 851 (Mitchell); OCC Ex. 105.

[180] Id. at 856-857; see also IEU Ex. No. 121 (confidential).

[181] Id.

ASSIGNMENT OF ERROR 7:

In Permitting The Company (As Part Of The Retail Stability Rider), To Collect From Customers The Difference In Revenues Between The RPM-Based Wholesale Capacity Rate And The Company's State Compensation Mechanism For Wholesale Capacity, The Commission Unreasonably And Unlawfully Acted, Without Jurisdiction.

In the Company's Capacity Charge Case the PUCO authorized the Company to defer its incurred capacity costs that it does not collect from CRES providers.[182] In authorizing the deferral, the PUCO set the stage for the Company to collect what the PUCO determined were "wholesale capacity costs"[183] from customers under some provision of the Company's electric security plan. The Commission assumed that deferrals created in the Capacity Charge Case, under its regulatory authority in R.C. Chapters 4905 and 4909,[184] can be incorporated into the Company's ESP.

But, as explained below, the Commission has no authority to permit the Company to collect wholesale capacity costs from the Company's retail customers through the ESP. Rehearing should be granted for the reasons that follow.

A. There is no statutory basis under R.C. 4928.143 or 4928.144 to allow the Company to collect revenues for wholesale capacity service to CRES providers from rates charged to retail customers.

The Commission stated in the Capacity Charge Order that "[a]lthough Chapter 4928, Revised Code, provides for market-based pricing for retail electric generation service, those provisions **do not apply because**, as we noted earlier, capacity is a

[182] Capacity Charge Order at 23.

[183] Opinion and Order at 13 (although the capacity service benefits shopping customers "in due course, they are initially one step removed from the transaction, which is more appropriately characterized as an intrastate wholesale matter between AEP-Ohio and each CRES provider operating in the Company's service territory.").

[184] Capacity Charge Order at 22.

wholesale rather than a retail service."[185] Sales of electric capacity for resale to retail customers are wholesale transactions, according to the PUCO.

Wholesale transactions fall under the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). However, the PUCO explained that it had limited jurisdiction "for the sole purpose of establishing an appropriate state compensation mechanism," consistent with the governing section of the PJM Reliability Assurance Agreement ("RAA").[186] The Commission expressly determined in the Capacity Charge Case that the provision of capacity for CRES providers is not a "retail electric service" under R.C. 4928.02(A)(27),[187] but instead is a wholesale service.

This means the deferrals arising from providing this wholesale service created in the Capacity Charge Case cannot be collected as part of the retail service rates established under the electric security plan in this case. The Commission has no jurisdiction to authorize AEP-Ohio to collect **wholesale electric costs** for capacity service made available to shopping customers, from **retail customers- SSO customers and shopping customers**. Retail service is totally unrelated to the wholesale electric charges to CRES providers.

Wholesale capacity costs are the responsibility of the unregulated CRES providers. Customers do not owe the utility for the wholesale capacity costs of CRES for providing retail electric service. CRES providers owe the utility for providing wholesale capacity to them. But the PUCO is authorizing the utility to collect wholesale electric

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[185] Id. at 22. (Emphasis added).

[186] Id. at 13.

[187] Opinion and Order at 13.

costs from retail customers (SSO customers and shopping customers) through the Company's electric security plan. This it cannot do.

Further, 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.[188] 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.[189] Simply put the deferrals are unrelated to providing retail service to SSO customers of the Company though the ESP.

The wholesale capacity charges do not fit under any provision of R.C. 4928.142(B)(2). The Commission cannot transform these unlawful charges into lawful charges by judicial fiat. Although the Commission ordered the recovery of the capacity charge differential[190] as part of the retail stability charge, there is no statutory basis for that rider (as discussed supra). And even if that rider were statutorily permissible (which it is not), there is no basis to conclude that the capacity charge differential in any way shape or form fits within subsection (B)(2)(d) of R.C. 4928.143.

It is not, under R.C. 4928.143(B)(2)(d), a "term, condition or charge relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up or supplemental power service, default service, carrying costs,

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

[189] See also, IEU-Ohio Brief (Case No. 11-346-EL-SSO) at 57-58. Industrial Energy Users of Ohio ("IEU") argued in the AEP ESP case that the lost revenues sought to be collected through the RSR are "transition costs" that cannot be collected. IEU identified the RSR as an "illegal attempt to collect transition revenue." IEU 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 * * *. " OCC agrees that this is another basis under which the Commission could and should reject the RSR.

[190] The capacity charge differential refers to the gap between the RPM based capacity rate and AEP Ohio's state compensation mechanism for capacity ($188.88/MW-day), as determined by the Commission in the Capacity Charge Case.

amortization periods and accounting***." And even it were considered a "deferral" falling under that division, there has been no showing that as such it "would have the effect of a stabilizing or providing certainty regarding *retail electric service.*"

This conclusion is inevitable because the capacity charge being deferred is a *wholesale capacity charge* to CRES suppliers, not SSO customers or shopping retail customers. And CRES suppliers (who are not regulated by the PUCO) ultimately choose how capacity charges enter into generation prices they offer to retail shopping customers. Thus, there is no direct connection between the deferrals associated with the discount given to CRES providers and the ultimate retail electric rates charged to customers under the ESP. Indeed there is no connection at all between the capacity charge deferrals and SSO service since SSO service does not involve purchase of wholesale capacity at a discount by a CRES provider. In this regard there is also no record that establishes the capacity charge deferrals promote rate stability or certainty. Nor was there record evidence establishing that fact that can be drawn upon from the Capacity Charge Case.

In the Capacity Charge Case, 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.[191] The deferral itself was created out of the Commission's concept 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."[192] Thus, instead of creating a deferral that meets the requirements of R.C. 4928.143(B)(2)(d), the Commission went beyond the

[191] Id.

[192] Id. at 23.

statute governing ESPs. The Commission is nonetheless a creature of statute, which has no authority other than that which is expressly given to it by the General Assembly. The PUCO cannot legislate in its own right. And that is precisely what the PUCO has done in this proceeding. It devised a way to give the Company extra money -- which is not part of Chapter 4928, Revised Code.

Nor is the deferral lawful under R.C. 4928.144 as part of a "phase in." Even if the deferred capacity charges are phased-in, and collected over three years beginning in 2015, they do not constitute a "just and reasonable phase-in" under that statute. R.C. 4928.144 requires that the phase-in is 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, instead of phasing in a "rate or price established under sections 4928.41 to 4928.43" the Commission is attempting to phase-in wholesale capacity charges created under different chapters of the Revised Code -- Chapter 4905 and 4909. This does not comport with R.C. 4928.144 because (a) the rate was not established as a retail electric service rate under R.C. 4928.141 to 4928.143, and (b) as mentioned above, the deferral has not been shown to be necessary to ensure rate or price stability for retail electric service to consumers. Accordingly, the Commission should grant rehearing of this issue.

The Commission believes it can create deferrals in one case, under separate and distinct authority allegedly found in Chapter 4909 and 4905, and import those deferrals into a modified ESP plan "on its own motion."[193] To the contrary such an approach

[193] See Opinion and Order at 52.

disregards the statutory boundaries of the Commission's authority. As noted by U.S. Supreme Court Justice William O. Douglas, "[t]hose in power need checks and restraints lest they come to identify the common good for their own tastes and desires***." The check on the Commission's power is that the Commission cannot legislate. That is left to the Ohio General Assembly. Rehearing should be granted.

B. CRES providers should be responsible for paying the difference in revenues as they are the cost causers.

In the Capacity Charge Case the Commission determined $188.88 per MW-day is the appropriate charge to enable the Company to collect its capacity costs under its FRR obligations from CRES providers.[194] This cost of capacity was calculated based on the cost of service.[195] The Commission also determined that the Company should charge CRES providers RPM based capacity rates in order to promote retail competition.[196]

In the Order in this proceeding, the Commission adopted a mechanism to collect the difference between the RPM-based capacity rate and the state compensation mechanism. It determined that the difference should be collected from retail customers (SSO and shopping customers) and not the cost causer, the CRES providers. This was unreasonable.

There is no factual dispute that CRES providers are receiving a discount from the Company's wholesale cost of capacity. The parties who benefit from this are primarily the CRES providers who will receive a substantial subsidy from retail customers and whose business expenses will be decreased significantly. Shopping customers may

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[194] Capacity Charge Order at 33-36.

[195] Id. at 22.

[196] Id. at 23.

receive an indirect benefit if the discount given to CRES providers is passed through to those customers. But there is no requirement that the discount, or any portion of it, be passed through to customers. And the Commission lacks jurisdiction to order CRES providers to pass through the discount to their customers. Rather, CRES providers can choose whether to pass along the discount to shopping customers. Non-shopping customers are even further removed from any benefit from discounted capacity given to CRES providers. And yet the Commission pushed nearly $500 million of deferred capacity costs onto customers,[197] creating an undue burden for customers.

The principle of cost causation is sound public policy that requires cost causers to pay the cost they caused. The PUCO has in fact recognized in the past that one of the goals of regulation is that the cost causer is the cost payer.[198] Indeed in a recent FirstEnergy case, the Commission confirmed its stalwart adherence to principles of cost causation when it determined that revenue shortfalls associated with a residential rate should be recovered solely from the residential class, not other classes.[199]

When the cost causation principle is followed the responsibility for costs falls on those causing the costs. But here retail customers (both shopping and non-shopping) will

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[197] See OCC Rehearing Ex. 1A.

[198] See, e.g., *In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Revise its General Exchange Tariff PUCO No. 7,* Finding and Order at ¶6 (Jan. 24, 1989*).* See also *In re Duke Energy Ohio*, Case No. 07-589-GA-AIR, Opinion and Order at 17-19; (May 28, 2008); *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, Opinion and Order at 22-24 (Oct. 15, 2008); *In re Vectren Energy Delivery of Ohio*, Case No. 07-1080-GA-AIR, Opinion and Order at 11-14 (Jan. 7, 2009) (cases holding that SFV rate design would assure more equitable allocation of distribution system costs to cost-causers); *In the Matter of the Commission Investigation into the Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-119-TP-COI, Opinion and Order at 25-27 (noting the Commission policy of favoring measured service rates to local resellers as a means of assessing the cost of service to the cost causers rather than spreading it among all ratepayers.).

[199] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA , Opinion and Order at 62-63 (May 25, 2011).

be subsidizing private business enterprise, the CRES providers' business. Non-shoppers will be charged for a service they are not receiving. This is unlawful, unjust, and unreasonable. Rehearing should be granted on this issue.

C. It is unlawful, unreasonable, and inconsistent with the terms of the RAA and Section 201 of the Federal Power Act to impose wholesale capacity costs on Standard Service offer customers.

The PUCO found in its Capacity Charge Case that Ohio Power's cost of capacity is $188.88/MW-day for its FRR obligations to CRES providers.[200] But the PUCO ordered Ohio Power to charge CRES providers a discounted capacity charge set at the RPM market-based rate of $20.01/MW-day.[201] The PUCO then authorized Ohio Power to defer the difference between Ohio Power's cost and the RPM capacity rates charged to CRES providers, ultimately finding in this case, that these deferrals could be charged to retail customers.[202] The Commission in the Opinion and Order in this case determined to collect those deferrals from all customers, including non-shoppers.

This decision directly conflicts with the plain language of the PJM RAA. The RAA is a rate schedule on file with FERC that contains an alternative method for meeting the RPM capacity obligation, the FRR alternative, which applies to entities, like AEP Ohio, that choose not to participate in the RPM auctions. This rate schedule has been approved by FERC, and thus, has the effect of law. The RAA does not permit the PUCO

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[200] Capacity Charge Case, Case No. 10-2929-EL-UNC, Opinion and Order at 33 (July 2, 2012). CRES providers will pay $20.01/ MW-day for planning year 2012/2013, $33.71 for planning year 2013/2014, and $153.89 for 2014/2015.

[201] Id. at 23.

[202] See *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., Opinion and Order at 36 (Aug. 8, 2012).

to require non-shopping retail customers to compensate the Ohio Power for its FRR obligations.[203] To this end, Section D.8 of Schedule 8.1 of the RAA provides:

> [i]n the case of load reflected in the FRR Capacity Plan that switches to an alternative LSE, where the state regulatory jurisdiction requires **switching customers or the LSE to compensate the FRR Entity** for its FRR capacity obligations, such state compensation mechanism will prevail. (Emphasis added).

The PJM RAA language is clear. The state compensation mechanism can only require load serving entities (CRES providers) or switching (shopping) customers to compensate the FRR Entity (in this case, Ohio Power). The RAA does not authorize a state compensation mechanism in which non-shopping customers are responsible for compensating Ohio Power for its FRR obligations. As such, there is no circumstance contemplated by the RAA under which non-shopping customers can be made responsible for paying capacity deferrals associated with wholesale service to CRES providers. Indeed, because non-shopping customers already have capacity charges built into their rates, at a level to allow Ohio Power to cover its costs, the PUCO is forcing double payments from non-shopping customers. This result is unduly preferential, unduly discriminatory, unjust and unreasonable.

OCC does not support the $355/MW-day cost-based price suggested by Ohio Power. But the $188.88/MW-day cost-based price adopted by the PUCO could potentially be acceptable, provided CRES providers or shopping customers are responsible for paying the deferrals associated with these wholesale charges. That outcome would be consistent with the language of the RAA. However, an end result in which non-shopping retail customers are responsible for paying wholesale capacity

[203] Id.

charges is in direct violation of the plain language of the RAA. And it causes an unduly preferential, unduly discriminatory, unreasonable and unlawful double payment of charges by non-shopping customers.

The PUCO noted in a July 30, 2012 pleading filed at FERC that "[m]anifestly the public interest is served by preserving the RAA not by altering it."[204] The PUCO further commented "the provisions [of the RAA] are unambiguous. The words say what they say and mean what they mean."[205] But the PUCO itself ignores the plain language of the RAA. Quite simply, the PUCO over-stepped its authority by authorizing the collection of deferrals for wholesale charges from non-shopping customers in violation of the RAA.

The PUCO also lacks the authority to do this under Section 201 of the FPA. That section of the FPA contains broad language establishing federal jurisdiction over the "transmission of electric energy in interstate commerce."[206] Congress thus preserved this area for federal regulation, putting it beyond the reach of state supervision.[207] Here though the PUCO attempts to exercise jurisdiction over who must ultimately pay for wholesale capacity charges when FERC has, by approving the RAA rate schedule, definitively limited the collection of such charges to switching customers or the CRES providers. The PUCO cannot do so. It is preempted from exercising such jurisdiction.

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[204] PUCO Response, Docket No. EL11-32-000, EL11-2183-000, at 6-7 (July 30, 2012).

[205] Id. at 3.

[206] Section 201(b) of the Federal Power Act; 16 U.S.C.A. Section 824(b)(1).

[207] *Connecticut Light & Power Co.* (1945), 324 U.S. 515, 524; 65 S.Ct. 749; *Jersey Central Power & Light Co.*, 319 U.S. 61, 70-71.

D. The Commission unlawfully created an anti-competitive subsidy of a product or service other than retail electric service that flows from a competitive retail electric service, thus violating R.C. 4928.02(H).

The PUCO's approach has created a subsidy for CRES providers, whereby third parties will pay AEP Ohio to make it whole so that it can charge CRES providers less than the PUCO-determined cost of AEP Ohio's capacity. This below-cost pricing is an anti-competitive practice that is a subsidy of CRES providers by shoppers and non-shoppers. And this below cost pricing is not made available to the Company's SSO customers. It is unjust, unreasonable, and unlawful.

R.C. 4928.02(H) states:

It is the policy of this state to do the following throughout this state:

> * * *
>
> (H) *Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service* or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates***. Emphasis added.

In Commissioner Roberto's concurring and dissenting opinion, she refers to this payment as a "significant, no-strings-attached, unearned benefit" to entice more sellers into the market.[208] She further states that the deferral mechanism is "an unnecessary, ineffective, and costly intervention into the market" that she cannot support.[209] OCC agrees, as there is no basis to extend this benefit to CRES providers at the expense of retail customers, and especially no basis to make non-shopping customers pay for this

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[208] Id., Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4.

[209] Id.

anticompetitive subsidy. This is ineffective competition, as noted by Commissioner Roberto.

OCC recommended that AEP Ohio's charge for capacity be set at the market price, through the use of the Reliability Pricing Model.[210] If this had been done, there would have been no discount for capacity, no subsidy to CRES providers, no deferrals, and competition would have been furthered. But the PUCO's decision seemed to be an attempt to find a point in-between what AEP Ohio wanted and what CRES providers wanted. Customers are caught in the middle, where the middle is defined as paying AEP Ohio hundreds of millions of dollars (approximately $500 million plus carrying charges) in deferred capacity costs.

R.C. 4928.02(H) prohibits anticompetitive subsidies from noncompetitive retail electric service to competitive retail service. Under this statute, it is unlawful to collect the capacity costs (whether or not deferred) from retail customers. Rehearing should be granted.

E. Collecting deferrals from customers will cause customers, both shopping and non-shopping, to pay twice for the capacity -- a result that is unlawful, unjust, unreasonable, contrary to public policy, and has no statutory basis.

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 capacity costs (i.e., subsidy amounts) are in fact directly collected from customers, instead of from the CRES providers, hundreds of millions of dollars will be added to customers' bills.[211] Adding these hundreds of millions of dollars

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[210] Opinion and Order at 19.

[211] See OCC Rehearing Ex 1A (estimating that deferrals created will amount to over $500 million, without considering carrying charges).

of costs to customer bills will impair the Commission's ability to ensure the policies of R.C. 4928.02(A) and (L) are met.

Additionally, a double payment for capacity will likely ensue, which is unjust unreasonable, and contrary to public policy. Moreover, there is no statutory basis that would permit double payments for capacity service provided to customers.

Commissioner Roberto first noted the double payment issue in her Concurring and Dissenting Opinion in the Capacity Charge Case. There she concluded that shopping customers may pay twice for the capacity unless the CRES providers directly pass through RPM market-based prices:

> 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.[212]

But it gets worse, especially for the non-shopping SSO customers. Under AEP Ohio's proposed Modified ESP, SSO customers (non-shopping customers) WILL certainly and inevitably pay twice for the discount granted to CRES providers. SSO customers are currently paying and will continue to pay what AEP Ohio claims is its embedded cost of capacity ($355.72/MW-day) through base generation rates which remain frozen during the term of the ESP.[213] That is the first payment for the capacity

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[212] Capacity Charge Order, Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4. (Emphasis added).

[213] See Tr.. III at 716, where Company Witness William Allen stated: "What I did is I compared the SSO revenues that the company is collecting today and I compared that to the revenues the company would recover if we were charging that -- all that load $355 a megawatt day. **Those rates are**

service the Company provides specifically to them. Then the deferral, with carrying costs, will come due (in three years) and non-shoppers will pay a second time for the capacity provided to non-shoppers during the ESP -- plus interest.

Double payments for the same service are not reasonable or lawful. It makes for bad public policy and is something the Commission has consistently prohibited over the years.[214] Moreover, there is no provision in the Ohio Revised Code that permits an electric distribution utility to charge customers twice for the same service. This is simply unjust and unreasonable. Rehearing should be granted.

F. Charging non-shopping SSO customers a higher capacity charge than shopping customers violates the anti-discrimination provisions of R.C. 4928.141, 4928.02(A), R.C. 4905.33, and 4905.35.

Under R.C. 4928.141, an electric distribution utility must provide consumers, *on a comparable and nondiscriminatory basis*, a standard service offer of all competitive electric service necessary to maintain essential electric service. (Emphasis added). R.C. 4928.02(A) also establishes as a policy of the state ensuring the availability of "adequate, reliable, safe, efficient, *non-discriminatory*, and reasonably priced retail electric service." (Emphasis added). There are also other provisions of the code which reinforce this policy by specifically prohibiting discriminatory pricing. For instance, R.C. 4905.33

equivalent."(Emphasis added.) See also, Tr. II at 247, where Company Witness Kelly Pearce states: "As far as just comparing the strict level of the charges, again, is what they look like within a rough approximation, they appear to be equal."

[214] *In the Matter of the Amendment of Chapter 4901:1-14, Ohio Admin. Code, Concerning the Exclusion of Unreasonable Amounts of Unaccounted for Gas from the Gas Cost Recovery* Rates, Case No. 86-2011-GA-ORD, Entry on Rehearing at ¶4 (Apr. 27, 1988) (The Commission "would never consider a 'double recovery' *** to be prudent and reasonable"); *In the Matter of the Complaint of AT&T Communications of Ohio, Inc. v. Ameritech Ohio,* Case No. 96-336-TP-CSS, Opinion and Order at 55 (Sept. 18, 1997) (denying a line termination charge from access customers since the utility was already recovering the same charge from local customers); *In the Matter of Adoption of Rates for SSO,* Case No. 08-777-EL-ORD, Entry on Rehearing at ¶28 (Feb. 11, 2009) (no intention to permit double recovery of costs (transmission rider)) under S.B. 221.

prohibits providing special rates that collect greater or lesser compensation for service rendered to persons for a like and contemporaneous service under the same circumstances or conditions. R.C. 4905.35 precludes a public utility from giving any undue or unreasonable preference or advantage to any person, firm, corporation, or locality.

But here the Commission's action facilitates exactly what the statutes prohibit -- discriminatory pricing. The Commission does so by approving overstated base generation rates for SSO customers while at the same time allowing discounted capacity pricing for CRES providers. These actions taken together violate these statutes. Here's why. The non-fuel base generation rates that are charged to SSO customers are bundled rates. They are bundled in the sense that the generation rate for SSO is not separated out into its components, which include capacity and energy.

In the testimony presented in this proceeding and in the Capacity Charge Case, the Company itself testified that its bundled SSO generation rates were set in order to recover its costs, including capacity costs.[215] The Company also testified that its cost of capacity is \$355/MW-day, not the \$188.88/MW-day the PUCO determined.[216] The Company submitted testimony in the Capacity Charge Case that its proposed cost-based capacity pricing roughly approximates and is therefore, comparable to the amount that the Company receives from its SSO customers for capacity through base generation rates.[217]

Unless the Commission orders the Company to reduce these base generation rates for non-shopping customers, as recommended by OCC/APJN, the SSO customers will be

[215] Tr. V at 1440-1441 (Allen).

[216] Tr. V at 1455 (Allen).

[217] Capacity Charge Order at 25, citing to AEP-Ohio Ex. 142 at 19-20; Tr. II at 304, 350.

overpaying (at approximately $355/MW-day) compared to what the PUCO determined was AEP Ohio's capacity cost ($188.88/MW-day). And there is an extreme discrepancy when comparing $355/MW-day to what the PUCO determined to charge CRES providers for capacity (RPM market-based rates). SSO customers would also pay more for capacity through SSO rates than shopping customers (whose capacity could be priced at some discount depending on the CRES providers' pricing of such service).

This will mean that SSO customers are not receiving the "comparable and non-discriminatory" SSO rates the utility must offer under law.[218] It also means that customers will not receive the "nondiscriminatory" and "reasonably priced" retail electric service that the Commission must ensure under R.C. 4928.02(A). Indeed the Ohio Revised Code clearly prohibits such discriminatory pricing under R.C. 4905.33 and 4905.35. Rehearing should be granted.

G. The Commission unreasonably and unlawfully failed to provide a basis for determining that the capacity revenues could be collected through a Retail Stability Rider, thus violating R.C. 4903.09.

In the Order, the Commission summarily adopted, as part of the Retail Stability Rider, the recovery of the difference between the RPM-based capacity rate and AEP-Ohio's state compensation mechanism for capacity as determined by the Commission.[219] While many parties, including OCC/APJN, made numerous arguments[220] as to why this could not be done, the Commission did not address the numerous and detailed arguments.

[218] See R.C. 4928.141.

[219] Opinion and Order at 52.

[220] OCC/APJN argued there was no record evidence to determine an appropriate mechanism to collect deferred capacity charges and the lack of due process; the capacity charges are not permissible under R.C. 4928.143(B)(2); that capacity charges are not permissible under R.C. 4928.144; that recovery of deferred capacity charges violates R.C. 4928.02 (A),(H), and (L).

Rather, the Commission merely relied upon its general authority to modify or approve an ESP.[221] It noted that the Company had proposed certain capacity charges as part of its plan, and further asserted that nothing in R.C. 4928.144 limits the Commission's authority to modify the ESP to include deferrals on its own motion.[222]

Yet, the Opinion and Order in conveying these concepts, fails to adequately set forth the findings of fact on this issue and the reasons prompting the decision to allow the capacity deferrals to be collected through the RSR. This is an error which violates R.C. 4903.09.

R.C. 4903.09 requires that, in all contested cases, "the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Ohio Supreme Court has recognized that complying with this statute is important because otherwise the Court cannot fulfill its responsibility to review the order being appealed.[223] By not explaining why the capacity charge deferrals should be collected through the RSR, and how these charges are an appropriate provision of R.C. 4928.143(B)(2), and failing to address detailed and numerous arguments to the contrary, the Commission violated R.C. 4903.09. Without sufficient detail, the Ohio Supreme Court will be unable to determine how the Commission reached its decision. Thus, the purpose of R.C. 4903.09 will be thwarted and the review that OCC is entitled to, under R.C. 4903.09 and 4903.10, cannot occur. Rehearing must be granted. It is warranted.

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[221] Opinion and Order at 52.

[222] Id.

[223] See e.g. *Allnet Communications v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202, 209.

ASSIGNMENT OF ERROR 8:

The Commission Erred In Ordering Separate Phase-In Recovery Rider Rates For The CSP And OP Rate Zones, Instead Of One Unified Phase-In Recovery Rider.

In this proceeding, the Company proposed that the phase-in recovery rider of CSP and OP be combined.[224] According to the Company, it is appropriate for all AEP Ohio customers to pay the PIRR, as the PIRR regulatory asset is on the books of OP. OP is the surviving entity post-merger, which will assume all the other assets and liabilities of the former CSP.[225] The PUCO Staff also advocated for the PIRR (and the FAC) to be unified.[226]

The use of a unified PIRR was also part of the Stipulation signed earlier in this proceeding, where the Signatory Parties proposed consolidated transmission and generation rates.[227] The Commission, at that time, accepted the merged PIRR finding that through the merger of CSP and OP, OP as the surviving entity, would succeed to all the restrictions, disabilities, liabilities, and duties of CSP.[228] According to the Commission "[i]t is not uncommon or unreasonable for the new entity to levelize the liabilities and benefits of the merger across all former CSP and OP customers."[229]

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[224] Company Ex. 111 at 6 (Roush Direct).

[225] Id.

[226] PUCO Staff Ex. 109 at 5 (Turkenton).

[227] See *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO et al., Opinion and Order at 57 (Dec. 14, 2011).

[228] Id.

[229] See e.g. *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, Case No. 05-765-EL-UNC, Order at 18-20 (Nov. 9, 2005) (where Monongahela Power was merged into CSP and the litigation termination rider and the power acquisition rider were charged to all post-merger CSP customers).

But, in a turn-around, the Commission here reversed its earlier ruling and instead found that separate PIRR rates for CSP and OP rate zones should be maintained.[230] Apparently, the Commission is now concerned that the PIRR balance was incurred primarily by OP customers and according to "cost causation principles" the recovery of the balance should be from OP customers.

But such an approach is inconsistent with how numerous riders were treated in this case, and thus, the Commission's Order is unreasonable in this respect. For instance, the Commission allowed a merged transmission cost recovery rider;[231] a unified Energy Efficiency and Peak Demand Rider;[232] a unified Economic Development Rider;[233] and extended the GridSmart rates to OP as well as CSP customers.[234] All of the costs associated with these riders are separable between OP and CSP. If cost causation principles are to be followed, there should not be merged rates for any of these riders as well. Yet, there appears to be no consistency or reason as to why certain rates should be separate and others merged. The Commission's approach is inconsistent in this respect, and therefore unreasonable.

Moreover, the Commission's order maintaining separate rates for the PIRR is inconsistent with its ruling in December of 2011, which approved merged PIRR rates. R.C. 4903.09 requires the PUCO to set forth "findings of fact and written opinions setting

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[230] *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO et al., Opinion and Order at 55 (Aug. 8, 2012).

[231] Id. at 63-64.

[232] Id. at 65-66.

[233] Id. at 67.

[234] Id. at 63. GridSmart expenditures to date have only been incurred with respect to the CSP rate area. The GridSmart rider on a unified basis will recover from OP customers (and CSP customers) past GridSmart expenditures made solely for CSP customers.

forth the reason prompting the decisions arrived at, based upon said findings of fact." Where the PUCO does not set forth detailed findings, it fails to comply with the requirements of this section and its Order is unlawful.[235]

In particular, where the PUCO issues a decision departing from precedent, it has a heightened responsibility to explain its decision, in order to comply with R.C. 4903.09.[236] This responsibility is created because the Ohio Supreme Court values predictability in administrative law. Such predictability is assured when precedent set by an administrative body, such as the PUCO, is followed. Indeed, the Court has noted that prior determinations of the PUCO should not be disregarded unless the prior decision is shown to be in error and the Commission explains why the previous Order must be overruled. Here though, the Commission failed to explain itself. This is unlawful and rehearing should be granted on this issue.

ASSIGNMENT OF ERROR 9:

The Commission's Approval Of The Generation Resource Rider Without A Showing Of Need For The Turning Point Facility Violated R.C. 4928.143(B)(2)(C).[237]

In its Modified ESP, AEP Ohio proposed a new non-bypassable Generation Resource Rider ("GRR") to collect from customers the cost of new generation resources, including renewable capacity that the Companies own or operate for the benefit of Ohio

[235] *Ideal Transportation Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 195, 71 O.O.2d 183, 326 N.E.2d 861.

[236] See e.g. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431-432, 71 O.O. 393, 330 N.E.2d 1, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302, appeal after remand (1976), 46 Ohio St.2d 105, 75 O.O.2d 172, 346 N.E.2d 778 (citing *State ex rel. Automobile Machine Co. v. Brown* (1929), 121 Ohio St. 73,75, 166 N.E. 903 -- "It has been held in this state that 'administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative to do so.'" (Citation omitted).

[237] APJN does not join in Assignment of Error 9.

customers.[238] The GRR is designed to collect costs of renewable and alternative capacity additions, as well as "more traditional capacity" constructed or financed by the Companies and approved by the Commission.[239] The Companies assert that the only project expected to be included in the rider during the term of the Modified ESP is the proposed Turning Point solar generating facility.[240]

Two statutes are pertinent to the collection of costs for generating facilities through an ESP. R.C. 4928.143(B)(2)(b) allows EDUs to collect, on a non-bypassable basis, a reasonable allowance for construction work in progress on an electric generating facility. The Commission must first determine "in the proceeding" that there is need for the facility based on the EDU's resource planning projections, and the facility's construction must be sourced through a competitive bid process. R.C. 4928.143(B)(2)(c) also requires that the new generation projects must be "used and useful" and "dedicated to Ohio consumers." Further, if a surcharge is authorized for a facility in an ESP and as a condition of the continuation of the surcharge, the EDU must dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. AEP Ohio sought approval of the GRR under R.C. 4928.143(B)(2)(c).[241]

In the Order, the Commission approved the GRR as proposed by AEP Ohio.[242] The Commission asserted that it has "broad discretion to manage its dockets to avoid undue delay and duplication of effort***."[243] Based on the inclusion of the Turning

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[238] AEP Ohio Ex. No. 103 at 20 (Nelson).

[239] Id.

[240] See id.

[241] See AEP Ohio Brief at 29.

[242] Opinion and Order at 23-25.

[243] Id. at 24.

Point issue in AEP Ohio's long-term forecasting case,[244] the Commission interpreted the statute "not to restrict our determination of the need and cost for the facility to the time an ESP is approved but rather to ensure the Commission holds **a proceeding** before it authorizes any allowance under the statute."[245] The Commission, however, ignored Ohio Supreme Court directives regarding statutory construction and thus misinterpreted R.C. 4928.143(B)(2)(c).

The Ohio Supreme Court has stated that "[w]hen statutory language is plain and unambiguous and conveys a clear and definite meaning, this court need not invoke rules of statutory interpretation."[246] Such a practice "would constitute 'not interpretation but legislation, which is not the function of courts.'"[247] In other words, "[t]he plain language of the statute controls***."[248]

In the Order, the Commission did not follow the plain language of R.C. 4928.143(B)(2)(c). Instead, the Commission revised the statute by substituting the phrase "a proceeding" for the term "*the* proceeding" which the General Assembly wrote into the law. The term "the proceeding" does not refer to any proceeding other than the proceeding involving the ESP application that is required under R.C. 4928.143(A).

In fact, the term "the proceeding" appears only three times in R.C. 4928.143. In addition to (B)(2)(b) and (c), the only other section in which the term appears is section (C)(1). That section discusses the timeframes for reviewing an ESP application and the

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[244] *In the Matter of the Long-Term Forecast Report Submitted by Columbus Southern Power Company and Ohio Power Company*, Case No. 10-501-EL-FOR, et al.

[245] Opinion and Order at 24. (Emphasis added.)

[246] *Campbell v. City of Carlisle*, 127 Ohio St. 3d 275, 277, 2010 Ohio 5707, 939 N.E.2d 153 citing *State v. Muncie* (2001), 91 Ohio St.3d 440, 447, 2001 Ohio 93, 746 N.E.2d 1092.

[247] Id. quoting *Iddings v. Jefferson Cty. School Dist. Bd. of Edn.* (1951), 155 Ohio St. 287, 290, 44 O.O. 294, 98 N.E.2d 827.

standards for approving or denying an ESP application. R.C. 4928.143(C)(1) places "[t]he burden of proof in *the proceeding*" on the EDU. (Emphasis added.) Thus, the term "the proceeding" as used in R.C. 4928.143 refers only to the proceeding involving an ESP application filed by an EDU. No other proceedings are therefore contemplated under R.C. 4928.143(B)(2)(c). The law required the Commission to determine whether there is a need for the Turning Point facility in this proceeding, and the Commission's failure to make the determination was unlawful.[249]

In approving the GRR, the Commission engaged in legislation, not interpretation. The Commission overstepped its authority, and thus the Order unlawfully approved the GRR. The Commission should abrogate the Order on this issue.

ASSIGNMENT OF ERROR 10:

The Commission's Approval Of The Generation Resource Rider As A "Placeholder" Rider With A Zero Value Unlawfully Skewed The Commission's ESP-MRO Comparison.[250]

The Commission approved the GRR as a placeholder rider with a zero rate.[251] Thus, the GRR is part of AEP Ohio's ESP, and thus is relevant to the comparison between the ESP and an MRO that is required by R.C. 4928.143(C)(1).

But in making the statutorily required comparison between the ESP and an MRO, the Commission could not quantify the costs associated with the GRR. The absence of costs associated with the GRR -- that will be charged to customers during the term of the

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[248] *In re Columbus Southern Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 34.

[249] It would have been unlawful for the Commission to determine in this proceeding that there is a need for the Turning Point facility, since there is no record support for such a determination. See OCC/APJN Initial Brief at 84.

[250] APJN does not join in Assignment of Error 10.

[251] Opinion and Order at 24-25.

ESP -- makes the ESP/MRO comparison flawed, and thus inconsistent with R.C. 4928.143(C)(1). The Commission thus erred in approving the rider.

In the Order, the Commission noted some costs associated with Turning Point, in the form of a revenue requirement for the project.[252] The Commission, however, ignored the fact that other costs associated with Turning Point will likely be incurred during the term of the ESP as the project progresses. Indeed OCC Witness Hixon testified that the costs associated with Turning Point were significant -- $346.4 million.[253] These costs should have been included as a cost of the ESP in conducting the ESP/MRO comparison. When these costs are included the ESP rates result in additional quantifiable costs to customers of $638.9 to $997.8 million, rendering the ESP much more costly than the MRO.[254] Yet the Commission ignored these costs in its ESP/MRO comparison. Thus, the Commission's ESP-MRO comparison is distorted in favor of the ESP.

By including this rider in the ESP, the Commission's ESP-MRO comparison is unreasonable and unlawful. The Commission should modify the Order by removing the GRR from the ESP. The Commission would also need to reevaluate the ESP-MRO comparison. Rehearing should be granted.

[252] Id. at 20.

[253] OCC Ex. 114 at 17.

[254] Id. at 4.

ASSIGNMENT OF ERROR 11:

The Commission's Approval Of The Generation Resource Rider As A Surcharge For Collecting Costs Specifically For The Turning Point Solar Facility Violated R.C. 4928.143(B)(2)(C) Because AEP Ohio Did Not Make The Showing The Statute Requires To Establish A Non-bypassable Surcharge For Collecting Costs Associated With An Electric Generating Facility.[255]

In the Order, the Commission established the GRR as a surcharge for collecting costs for the Turning Point solar facility, on a non-bypassable basis. In so doing, the Commission determined that "[b]efore authorizing recovery of a surcharge for an electric generation facility, the Commission must determine there is a need for the facility and to continue recovery of the surcharge, establish that the facility is for the benefit of and dedicated to Ohio consumers."[256] The Commission's reading of R.C. 4928.143(B)(2)(c) is erroneous.

R.C. 4928.143(B)(2)(c) plainly states that "no *surcharge* shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility."

[255] APJN does not join in Assignment of Error 11.

[256] Id. at 23-24.

(Emphasis added.) Authorizing the surcharge and authorizing recovery of the surcharge are two different functions. According to Webster, "authorize" means "to establish by or as if by authority."[257] Webster defines "establish" as "to institute" or "to bring into existence."[258] The statute thus addresses only the institution, or the bringing into existence, of the surcharge itself.

Thus, under the statute, before the surcharge itself can be authorized, the Commission must determine "in the proceeding"[259] "that there is a need for the facility based on resource planning projections submitted by the electric distribution utility." The Commission did not make this determination, in part because of its misreading of R.C. 4928.143(B)(2)(c).

In this regard, the Commission failed to meet R.C. 4928.143(B)(2)(c) in other ways. The statute contains other criteria that must be met before a surcharge to collect costs of a generating facility can be established in an ESP:

- The facility must be owned or operated by the EDU.
- The facility was sourced through a competitive bid process subject to any such rules as the Commission adopts under R.C. 4928.143(B)(2)(b).
- The facility is newly used and useful on or after January 1, 2009.
- The EDU must dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of the facility.

The statute makes clear that the criteria must be met before the "establishment" of the surcharge. The meaning of "establishment" is not defined in the statute, so the

[257] See http://www.merriam-webster.com/dictionary/authorize?show=0&t=1346347854.

[258] See http://www.merriam-webster.com/dictionary/establish?show=0&t=1346346539.

[259] See Assignment of Error 9, above.

Commission is required to read the phrase in context and construe it according to the rules of grammar and common usage.[260] The plain meaning of the word "establishment" is "the act of establishing,"[261] which, as noted above, means "to institute" or "to bring into existence." Thus, before the Commission could bring the surcharge into existence, as the Commission did in the Order, the statutory criteria had to be met. Not all of the criteria have been met to establish the surcharge, however.

As discussed above, a need for the Turning Point solar facility was not demonstrated in this proceeding. In addition, AEP Ohio did not show that the facility was constructed through a competitive bidding process, or that it is used and useful.[262] AEP Ohio thus did not make the showings required by R.C. 4928.143(B)(2)(c), and the Commission could not lawfully establish the GRR in this proceeding.

In establishing the GRR, the Commission did not follow Ohio law. The Commission should therefore abrogate the Order and reject the GRR.

ASSIGNMENT OF ERROR 12:

The Commission's Order Regarding The Companies' Collection Of The Deferrals On Capacity Charges Is Unlawfully Vague.

In the Order, the Commission allocated $1.00 per MWh of the rate collected through the RSR toward AEP Ohio's collection of deferrals from the Capacity Charge Case.[263] The Commission stated that, at the conclusion of the ESP, the Commission "will determine the deferral amount and make appropriate adjustments based on AEP-Ohio's

[260] R.C. 1.42.

[261] See http://www.merriam-webster.com/dictionary/establishment.

[262] See OCC/APJN Initial Brief at 84; IEU Initial Brief at 75; FES Initial Brief at 89; IGS Reply Brief at 5-6.

[263] Opinion and Order at 36.

actual shopping statistics and the amount that has been collected towards the deferral through the RSR, as necessary."[264] Not only has the Commission unlawfully included these deferrals in an ESP case, as discussed in Assignment of Error 3, above, but the Commission's Order is unlawfully vague.

A Commission order must be sufficiently detailed to allow for judicial review of the decision.[265] Here, however, the Commission's decision is unclear and raises many questions. Does the decision allow AEP Ohio to increase the deferrals if shopping during the ESP does not meet the Commission's expectations in developing the RSR? Over what period of time will any additional deferrals be collected? Would interest on these additional deferrals be calculated at WACC or cost of long-term debt, and how would the Commission prevent AEP Ohio charging interest on top of interest? Also, what is the meaning of "as necessary?"

In addition, the Commission's plan for keeping track of the deferral balance remaining at the conclusion of the ESP is problematic. Although the Commission required AEP Ohio to file monthly shopping data by stating that "AEP-Ohio *shall* file its actual shopping statistics in this docket,"[266] the frequency of the Companies' filings was not required. The Commission stated that "[t]o provide complete transparency as well as to allow for accurate deferral calculations, AEP-Ohio *should* maintain its actual monthly shopping percentages on a month-by-month basis throughout the term of this modified ESP, as well as the months of June and July of 2012."[267] Thus, the monthly filings

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[264] Id.

[265] See *General Telephone Co.*, 30 Ohio St.2d 271.

[266] Opinion and Order at 36. (Emphasis added).

[267] Id. (Emphasis added).

envisioned by the Commission are permissive, not mandatory. The Commission needs to ensure that AEP Ohio files its shopping percentages monthly.

The Commission should also specify how shopping will be measured, i.e., by number of customers, by load, or by some other means. This is needed in order to avoid confusion and disagreement over the amount of shopping in AEP Ohio's service territory.

The capacity charge deferrals are unlawful. But if the Commission allows these deferrals, it must clarify the process for adjusting the deferrals at the end of the ESP.

ASSIGNMENT OF ERROR 13:

There Is No Statutory Basis For The Pool Termination Rider, And Thus The Commission's Approval Of The Rider Is Unlawful.

In the Order, the Commission approved the pool termination rider as a placeholder mechanism, initially set at zero value.[268] The rider is designed to offset revenue losses caused by the termination of the generation pooling agreement among AEP subsidiaries.[269] Under the Companies' proposal, if AEP Ohio's corporate separation plan is approved as proposed by the Company,[270] and the Amos and Mitchell generating plants are transferred as proposed to AEP Ohio affiliates, then the Companies will not seek to implement the rider. If the corporate separation plan is denied or modified, however, then AEP Ohio would file to collect lost revenue associated with termination of the Pool Agreement, through the non-bypassable Pool Termination Rider.[271]

Several parties, including OCC and APJN, opposed the Pool Termination Rider. Among other things, OCC/APJN pointed out that there is no legal basis to include a pool

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[268] Id. at 49.

[269] See AEP Ohio initial brief at 80.

[270] The corporate separation plan was filed in Case No. 12-1126-EL-UNC.

[271] See Opinion and Order at 47.

termination provision in a utility's ESP because the rider is aimed at guaranteeing a level of revenue for AEP Ohio, which is not part of the General Assembly's plan for competitive generation service.[272] In addition, the Commission can only include in ESPs those items enumerated in R.C. 4928.143(B)(2),[273] and no provision in the statute authorizes a charge guaranteeing a level of revenue for an EDU.[274] Further, there is no Commission precedent for the Pool Termination rider, because transactions within the AEP Pool have been disregarded for purposes associated with the Companies' ESP.[275]

Nevertheless, the Commission approved the rider. The Commission first pointed to its now-vacated December 14, 2011 Order in this proceeding which found a statutory basis for the Pool Termination Rider in R.C. 4928.143(B).[276] But that finding did not point to a specific portion of R.C. 4928.143(B) that allows the Pool Termination Rider.

Undaunted, the Commission now bases approval of the rider on R.C. 4928.143(B)(2)(h).[277] In finding support under R.C. 4928.143(B)(2)(h), the Commission stated:

> The PTR serves as an incentive for AEP-Ohio to move to a competitive market to the benefit of its shopping and non-shopping customers, without regard to the possible loss of revenue associated with the termination of the Pool Agreement with the full transition to market for all SSO customers by no later than June 1,2015. Therefore, we approve the PTR as a placeholder mechanism, initially established at a rate of zero, contingent upon the Commission's review of an application by the Company for such costs.

[272] See OCC/APJN Initial Brief at 86.

[273] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶¶ 31-35.

[274] OCC/APJN Initial Brief at 86.

[275] Id.

[276] Opinion and Order at 48-49, citing December 14, 2011 Opinion and Order at 50.

[277] Id. at 49.

The statute, however, does not support the Commission's rationale and thus the Commission's approval of the Pool Termination Rider is unlawful.

Contrary to the Commission's view, R.C. 4928.143(B)(2)(h) does not support the notion that incentives for an EDU to move to a competitive market are to be included in an ESP. Instead, the provision allows an ESP to include:

> Provisions regarding the utility's *distribution* service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions 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.)

The statute makes no mention of incentives to move to a competitive market. In addition, the Pool Termination Rider is a *generation* rider, not a distribution rider, and thus is not authorized by R.C. 4928.143(B)(2)(h) for inclusion in an ESP.

In fact, no provision of R.C. 4928.143(B)(2) allows for incentives for an EDU to move to a competitive market. The only provision referencing shopping is (B)(2)(d), which has the opposite effect; that statute allows an ESP to include "[t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service***.

The Commission still has not found a statutory provision that supports approval of the Pool Termination Rider in an ESP. Indeed, there is none. The Commission's decision is thus unlawful, and the Commission should abrogate the Order by rejecting the Pool Termination Rider.

ASSIGNMENT OF ERROR 14:

By Approving Merged Rates For The Energy Efficiency And Peak Demand Reduction Rider, The Commission Adversely Affected The Rights Of Signatory Parties To The Stipulation In The Companies' Program Portfolio Case.

In the Order, the Commission approved AEP Ohio's plan to merge the Energy Efficiency and Peak Demand Reduction Rider ("EE/PDR") rates for OP and CSP into a single company-wide rate to be collected for the term of the ESP.[278] The Commission's decision, however, conflicts with the Stipulation and Recommendation the Commission approved in the Companies' 2011 Program Portfolio case.[279] In that proceeding, the signatory parties to the Stipulation agreed that there would be separate EE/PDR rates for OP and for CSP.[280]

The Stipulation was entered into more than a year after the Companies filed their merger case,[281] and nearly three months after the September 7, 2011 stipulation in this ESP proceeding, which recommended that the Commission approve the merger.[282] Thus, the parties to the Program Portfolio Stipulation envisioned that separate EE/PDR rates for OP and CSP would continue even after the Companies merged. The Commission

[278] Opinion and Order at 66.

[279] *OP and CSP Program Portfolio Plans*, Case No. 11-5568, et al., Finding and Order (March 21, 2011).

[280] See id., Stipulation and Recommendation (Nov. 29, 2011), Attachment A.

[281] *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company For Authority to Merge and Related Approvals*, Case No. 10-2376- EL-UNC, Application (Oct. 18, 2010).

[282] See September 7, 2011 Stipulation at 24.

approved that stipulation, and cannot overturn its decision in that case without explaining why.

The Commission's Order in this proceeding has an adverse affect on the rights of signatory parties to the Program Portfolio Stipulation. The Commission should modify the Order and keep separate rates for the EE/PDR until the signatory parties are able to discuss the issue of combined EE/PDR rates for OP and CSP.

ASSIGNMENT OF ERROR 15:

The Commission's Failure to Provide Partnership With Ohio Funding Was Unjust, Unreasonable and Unlawful. The Partnership with Ohio Was a Key Component of the Economic Development Proposal in the Companies' First ESP and Should be Maintained.

In 2009, the Commission approved AEP Ohio's First ESP. In its Opinion and Order the Commission stated:

> While the Partnership with Ohio is a key component of the economic development proposal in light of the modifications made to the ESP pursuant to this Opinion and Order, we find that the Companies' shareholders should fund the Partnership with Ohio Fund, at a minimum of $15 million, over the three-year period, with all of the funds going to low-income, at-risk customer programs. Accordingly, we direct AEP-Ohio to consult with the staff to administer the program established herein.[283]

In the original application in this case, AEP Ohio proposed not only continuing the Partnership With Ohio ("PWO"), but increasing the funding from $5 million per year to $6 million per year.[284] Unfortunately, the PWO did not find its way into the Companies' proposed Modified ESP. When AEP Ohio witness Dias was asked repeatedly on cross-examination as to why the Modified Application contained no

[283] ESP 1 Order at 48.

[284] See Tr. VI at 1921.

provision for the PWO, he was at a loss to provide any explanation regarding its absence.[285]

In our initial brief, OCC and APJN urged the Commission, as part of any modified ESP for AEP Ohio, to require the Companies to fund 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).[286] OCC and APJN also urged the Commission to require AEP Ohio to designate at least $2 million for the Neighbor to Neighbor fund, even if the PWO was not fully funded.[287] OCC and APJN also recommended that the funding come from shareholder dollars, as it did in the ESP 1 Order.[288]

The Commission did not address PWO funding in the Order. As discussed elsewhere in this Application for Rehearing, the Commission's failure to address the PWO argument is unlawful under R.C. 4903.09.

In addition, it was unjust and unreasonable for the Commission to refuse to order PWO funding, while at the same time ordering the Companies to reinstate the Ohio Growth Fund ("OGF") that was part of the original application in this proceeding but not the modified application.[289] According to the Order, the OGF "creates private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio."[290] The Commission ordered the Companies to reinstate the OGF "in light of the extenuating economic

[285] See id. at 1927-1931.

[286] OCC/APJN Initial Brief at 57.

[287] Id. at 58.

[288] Id.

[289] Order at 67.

[290] Id.

circumstances…."[291] The Commission did not elaborate on the extenuating economic circumstances that necessitates the OGF.

"Extenuating economic circumstances" are also adversely affecting the at-risk populations who are to be protected under R.C. 4928.02(L). In fact, the circumstances and the need for relief that compelled creation of the PWO in 2009 are essentially unchanged three and one-half years later.

The at-risk populations that are intended to be protected by the policy objective in R.C. 4928.02(L) remain at risk. Although most would agree that the economy in Ohio (and the nation) is recovering, no one is declaring victory and/or that the recovery is complete. This is especially true in Southeast Ohio, or Appalachia, much of which is served by AEP Ohio. That economic struggles persist in Southeast Ohio, a reality that permeated the region long before the Great Recession arrived, is really not a matter of dispute. The real question is what can be done to help alleviate the hardships.

Sadly, if one were to read the Opinion and Order in this case, one would be no closer to an answer. Not one provision of this ESP targets low-income populations or seeks to advance state policy as stated in R.C. 4928.02(L). The lack of relief provides stark contrast to the first ESP, where AEP Ohio provided $5 million per year to address the needs of low-income, at-risk populations, of which a significant portion found its way into fuel funds for customers who had problems keeping current in their payments.[292]

So what has changed? As noted above, little, if anything, has changed regarding the need for bill assistance. Consequently, the change must be the commitment to assist

[291] Id.

[292] Id. at 48.

vulnerable populations of both AEP Ohio, who proposed no funding for the PWO in its modified application, and the PUCO, which failed to address this crucial need when it modified AEP Ohio's application in its Order.

Significantly, in contrast, the Commission did order AEP Ohio to reinstate the OGF at $2 million per year, despite the fact that the Companies did not include the OGF in their modified application.[293] The compelling rationale to order such a modification: the Commission found it necessary "in light of the extenuating economic circumstances." It is apparent from this statement that the Commission is cognizant of present economic circumstances <u>and</u> that such circumstances justify certain decisions they make.

OCC and APJN agree that the OGF is important and supports the efforts "to attract new investment and improve job growth in Ohio."[294] We believe it is no less important to provide funding to low-income, at-risk customers who undoubtedly will experience bill increases, but not necessarily any more income to address these and other increases in household expenses, when they are already living paycheck to paycheck or on a fixed income.

AEP Ohio now stands in stark contrast to all of the other EDUs in Ohio. Dayton Power & Light continues to provide $400,000 per year to its fuel fund.[295] Duke currently provides $350,000 per year to low-income customers (200% of poverty) for bill payment assistance in years 2012–2014 plus another $1 million annually to support low-income

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[293] Opinion and Order at 67.

[294] Id.

[295] *In the Matter of Application of the AES Corporation, Dolphin Sub, Inc., DLP, Inc. and the Dayton Power and Light Company for Consent and Approval for a Change of Control of the Dayton Power & Light Company*, Case No. 11-3002-EC-MER, Finding and Order (November 22, 2011) at 8.

weatherization efforts.[296] FirstEnergy filed a stipulation in its most recent ESP that was modified in the Commission order on July 18, 2012, where FirstEnergy will continue providing fuel funds in the amount of $4 million annually in years 2015 and 2016, plus another $1 million in those two years to Ohio Partners for Affordable Energy to administer another fuel fund program.[297] AEP Ohio is the sole EDU in Ohio to turn its back on low-income customers, while simultaneously raising the rates residential customers must pay.

Today is not the day to abandon low-income, at-risk customers. It was unfortunate that AEP Ohio chose to defund its Partnership with Ohio entirely in its Modified ESP Application. It was more unfortunate that the Commission chose to ratify this choice by remaining silent on this issue in its Opinion and Order, a sharp contrast to the corrective action it took to restore the Ohio Growth Fund when it modified the ESP.

The Commission's action is unjust, unreasonable and contrary to R.C. 4928.02(L). The Commission should order AEP Ohio to reinstate the Partnership with Ohio to be funded for at least $5 million per year (the amount in the first ESP) out of shareholder dollars with a further commitment to setting aside a significant portion for bill assistance. In addition to doing the right thing, the Commission would be ensuring that AEP Ohio fulfilled its mandate to advance the state policy of protecting at-risk populations pursuant to R.C. 4928(L).

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[296] *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, Opinion and Order, (November 11, 2011) at 23-24.

[297] *In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 16.

ASSIGNMENT OF ERROR 16:

The Commission's Decision Regarding The Rate Cap Is Unlawfully Vague.

In order to ease the burden of unexpected rate impacts on customers, the Commission directed AEP Ohio to "cap customer rate increases at 12% over their current ESP I rate plan bill schedules for the entire term of the ESP***.[298] The Commission cited its authority under R.C. 4928.144,[299] which allows the Commission to "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." Under the Order, the 12% limit will be determined on an individual customer-by-customer basis, and applies to items approved within the modified ESP.[300] Rate changes that "arise as a result of past proceedings, including any distribution proceedings, or in subsequent proceedings are not factored into the 12% cap."[301] The cap "shall be normalized for equivalent usage to ensure that at no point any individual customer's bill impacts shall exceed 12%."[302]

The Commission also ordered AEP Ohio to file, on May 31, 2013 in a separate docket, a detailed accounting of its deferral impact created by the 12 percent rate cap.[303] Upon the Companies' filing of deferral calculations, a procedural schedule will be

[298] Id. at 70.

[299] Id.

[300] Id.

[301] Id.

[302] Id.

[303] Id.

established to consider the deferral costs created, and the PUCO will maintain the discretion to adjust the 12 percent limit as necessary, throughout the term of the ESP.[304]

Many aspects of the Commission's decision regarding the rate cap are unlawfully vague and need elaboration. For example, "normalized for equivalent usage" is not defined. In addition, it is unclear what the Commission means by "past and subsequent proceedings." There is also no requirement for calculating carrying charges (OCC and APJN advocates that the charges should be calculated using AEP Ohio's cost of long-term debt). Further, the Order lacks detail as to the process for addressing situations where an individual customer's bill is increased by more than 12 percent. Who is responsible for monitoring the percentage of increase, the customer (who may be unaware of the limitation) or AEP Ohio (which has the means for keeping track of bill increases)? What is AEP Ohio's obligation to notify customers of the cap, and how are bill increases that are over the cap to be addressed?

The Commission's Order regarding the cap on customer bill increases is unlawful, as described above. The Commission should modify the Order by providing more detail on the cap to address the issues raised by OCC.

ASSIGNMENT OF ERROR 17:

The PUCO's finding that the Distribution Investment Rider was warranted is Unreasonable and Unlawful.

A. In approving the Distribution Investment Rider the Commission failed to apply the appropriate statutory standard as set forth in R.C. 4928.143 (B)(2)(h).

R.C. 4928.143 (B)(2)(h) requires that prior to authorizing a distribution investment rider ("DIR"), the Commission must "examine the reliability of the electric

[304] Id.

distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned * * *." It is worth noting that the statutory standard is not that expectations were aligned in the past, or might be aligned in the future. Rather, it is that expectations are aligned at the present time. However, rather than ensuring that customers' and the electric distribution utility's ("EDUs") expectations are currently aligned, the Commission instead applied a non-existent future-looking standard.

In approving the DIR the Commission concluded that "the Commission finds that both the Staff and the Company have demonstrated that indeed customers have high expectations of reliable electric service."[305] While this observation may be true -- that customers and the EDU have a high expectation of reliable electric service, the statutory standard for a DIR in an ESP proceeding is not whether customers and the EDU have a high expectation of reliable service, but rather whether the Company's and customers' expectations are aligned.

To be sure, an expectation of reliable electric service is one that is established under the law, and is expected by customers, regardless of whether or not a utility has a DIR. R.C. 4905.22 requires adequate service, and OAC 4901:1-10-26(B)(1) requires utility planning and reporting to "ensure high quality, safe, and reliable delivery of energy to customers***." Even AEP Ohio's own tariffs require "reasonable diligence in delivering a regular and uninterrupted supple of energy to the customer***."[306] Moreover, in response to this statutory reliability requirement, the record indicates that CSP and OP have not provided reliable service based on PUCO standards as noted

[305] Opinion and Order at 46.

below. Despite, this requirement, the Commission's approval of the DIR fails to acknowledge, let alone address this statutory requirement.

R.C. 4928.143(B)(2)(h) permits a utility to include as part of an electric security plan:

> [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.)

The standard in R.C. 4928.143(B)(2)(h) is more specific than the standard cited by the Commission in the Opinion and Order. In fact the standard relied on by the Commission does not exist in the statute.

The manner in which the Commission applied the statutory standard would have the effect of negating the standard because all customers and EDUs have some level of expectation of reliable service. Notwithstanding this rudimentary expectation of service reliability, R.C. 4928.143 (B)(2)(h) obviously requires more. In this case there is a more specific expectation regarding whether service reliability in the future will remain the same, deteriorate or improve, based on what customers and the EDU expect at this time.

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

Moreover, it is clear that the Companies had the burden of proving that the Companies' and customers' expectations are aligned, and not that they might be in the future.[307] Commissioner Roberto stressed this point in her Dissenting Opinion in the recent First Energy ESP Case.[308]

In the face of this burden of proof, the record in this case demonstrates that only 19% of residential and 20% of commercial customers indicated that their expectation was for increased service reliability.[309] The Company proposed the DIR to provide "additional needed investment."[310] Thus only a small minority of customers -- less than 20% -- had an expectation that the Company would take steps to increase service reliability. The DIR was not proposed to maintain the status quo. Yet the vast majority of customers -- 71% of residential customers and 73% of commercial customers had expectations that service reliability would remain the same.[311] Because the Company had no DIR at the time of the customer surveys, it cannot be claimed that customers wanted or supported the DIR as part of the status quo.

The Commission also erred in its finding because the Opinion and Order noted that adoption of the DIR would "better align the Company's and its customers' expectations."[312] By noting that the DIR would better align the Company's and customers' expectations, the Commission is acknowledging that the current expectations

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[307] See R.C. 4928.143(C)(1) (The burden of proof in the proceeding shall be on the electric distribution utility).

[308] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order, Dissenting Opinion of Commissioner Roberto at 5 (July 18, 2012). ("First Energy ESP Case").

[309] AEP Ohio Ex. 110 at 19 (Kirkpatrick).

[310] AEP Ohio Ex. 110 at 13 (Kirkpatrick).

[311] AEP Ohio Ex. 110 at 19 (Kirkpatrick).

are not aligned. The AEP Ohio 2011 customer survey, cited to by Mr. Kirkpatrick, made this point clear[313]

In fact, the Company acknowledged that the DIR was intended to "[e]nable customers' and the distribution utility's expectations to be aligned."[314] If those expectations were already aligned then there would be no need for this stated intent. Also, if those expectations were already aligned, then and only then would the R.C. 4928.143 (B)(2)(h) standard be met. The Company's own admission that its expectations are not currently aligned with those of its customers means that the statutory standard has not been met.

In adopting the DIR, the Commission further relied on a non-existent standard concluding that:

> Given that customer surveys are one component *in the factor* used to establish the reliability indices and the slight reduction in the level of measured performance on which the Staff concludes that reliability expectations are not aligned, we are convinced that it is merely a slight difference between the Company's and customers' expectations."[315]

The only other possible factor that the Commission could be referring to is the two different performance standards.

But the record in this case indicates that CSP failed the Customer Average Interruption Duration Index ("CAIDI") in 2011. In addition, the record also demonstrates that CSP saw a 13% reduction in its CAIDI performance from 2010 to 2011 and a 13% reduction in its System Average Interruption Frequency Index ("SAIFI"), while OP saw

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[312] Opinion and Order at 46.

[313] AEP Ohio Ex. 110 at 19 (Kirkpatrick).

[314] AEP Ohio Ex. 110 at 11 (Kirkpatrick).

[315] Opinion and Order at 46. (Emphasis added).

an 8% reduction in its SAIFI performance over the same time period.[316] In light of these reductions Staff witness Baker concluded "[M]ost of OP's reliability measures showed worse performance in 2011 [compared to 2010]."[317] Thus the Commission's conclusion that there was only a slight reduction in the level of measured performance, conflicts with the Staff testimony and significantly understates the Companies' poor reliability performance.

In evaluating the Commission's decision, it is clear that the Commission made two errors. First the Commission violated the law by applying a wrong, non-existent standard, and second, the Commission significantly understated the service quality degradation that was recorded, in order to justify approval of the DIR. In light of the Commission's failure to apply the proper statutory standard, the Commission should grant rehearing on this issue.

B. The Commission erred in failing to meet the requirement in R.C. 4903.09 to set forth its findings when it did not address AEP Ohio's failure to include four key categories of information as part of its Application, and was inconsistent with its own precedent.

In the Opinion and Order, the Commission failed to meet the statutory requirement of R.C. 4903.09 which requires:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact *and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.* (Emphasis added.)

[316] PUCO Staff Ex. 106 at 8-9 (Baker).

[317] PUCO Staff Ex. 106 at 7 (Baker).

Where the Commission does not set forth its detailed findings, it fails to comply with the statutory requirements and thus the order is unlawful.[318] More specifically, in this case, the Commission Opinion and Order does not address AEP Ohio's failure to include four key categories of information needed to evaluate the DIR as part of the Application. Staff witness Baker identified the four categories of information[319] -- including a cost-benefit study -- that Mr. Kirkpatrick did not include in his testimony and that were not included in the AEP Ohio Application:

> 1. The quantity of these assets OPC plans to install during each year of the [Modified] ESP;
> 2. The planed cost for each asset class;
> 3. The incremental amount of cost above previous levels; and
> 4. The quantified improvement in reliability performance estimated to result from the incremental expenditures.[320]

The magnitude of the importance of the missing data can best be evaluated through a closer examination of what that data would have provided, and how it could be used to evaluate the proposed DIR. AEP Ohio wants the DIR to replace distribution equipment, but there was no quantification of the specific equipment allegedly to be replaced. Thus there is no assurance that the DIR funds will be used for the purpose intended, that the specific equipment will be replaced.

Second, AEP Ohio provided no quantification for the cost of each class of asset allegedly to be replaced. Again, if the DIR is intended to replace assets -- then a known annual spending level for that equipment should be quantifiable in order to ensure that the DIR spending was targeted to the equipment that was intended to be replaced, and not

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[318] *Ideal Transportation Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 195, 71 O.O.2d 183, 326 N.E.2d 861.

[319] PUCO Staff Ex. 106 at 10 (Baker).

used for other purposes. AEP Ohio failed to do so, and the Commission failed to address this lack of evidentiary support.

A third shortcoming is that AEP Ohio did not quantify the incremental investment -- if any -- above previous spending levels. Because AEP Ohio failed to include this information in its Application,[321] as noted by Staff witness Baker,[322] there is no demonstration in the record that the current spending levels in base rates are insufficient to fund the same goals that are attributed to the proposed DIR -- that is improved service reliability. There is also demonstration in the record that the $365.7 million in proposed DIR spending will actually be greater than prior spending levels. As a result, AEP Ohio also failed to explain how spending that might not be greater than prior spending levels could produce improved service reliability.

AEP Ohio failed to quantify the level of improved service reliability that customers could expect in exchange for their $365.7 million price tag. Likewise, the Commission failed to explain how the DIR would benefit customers and align customers' expectations of service reliability with AEP Ohio's given there is no quantification for improved reliability. Unfortunately, AEP Ohio only defined the DIR by it price tag for customers.

Without any quantification of improvement or a cost-benefit analysis, the Commission is essentially taking it on faith that the DIR spending will have any impact on service reliability. There is no assurance that the spending will improve service reliability and that the spending will be cost effective. Without a cost-benefit analysis,

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[320] PUCO Staff Ex. 106 at 10 (Baker).

[321] Id.

[322] Id.

there can be no finding that expenditures are reasonable and result in reasonably priced electric service.[323]

The Commission also previously noted the importance of a cost benefit study in the context of the rules review docket to establish the rules to govern an ESP Application, stating:

> In an ESP application, the fact that the Commission requests (a) cost savings and rate-impact information for alternative rate mechanisms and (b) a cost-benefit analysis of economic development and energy efficiency programs does not mean that the Commission will impose programs on electric utilities beyond the scope of SB 221. *The cost-savings and rate impact information and cost-benefit analysis are needed for the Commission to determine whether the electric utility's ESP is, on balance, beneficial and whether it is beneficial to include or modify the distribution infrastructure and modernization component of the ESP, given the alternative of addressing similar issues in a distribution rate case*. With respect to 08-777-EL-ORD economic development, job retention, and energy efficiency programs of the electric utility under paragraph (G)(9)(h) of Rule 03, Section 4928.143(B)(2)(i), Revised Code, specifically authorizes the costs of such programs to be allocated to rates charged to other consumers. A reasonable determination regarding whether any such proposal is a beneficial component of an electric utility's ESP requires a comparison of the benefits relative to the costs that will be borne by other consumers. Moreover, such information is helpful in determining whether alternative rate mechanisms or economic development and energy efficiency programs are reasonable.[324]

[323] R.C. 4928.02(A). *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric A Security Plan, an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO, Opinion and Order at 30-34 (March 18, 2009), and *In the Matter of the Application of 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 40-41 (Dec. 19, 2008).

[324] *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14,4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221,* Case No. 08-777-EL-ORD, Entry on Rehearing at 11-12 (Feb. 11, 2009). Emphasis added.

The Commission's failure to address the lack of information, especially the cost-benefit analysis in light of prior Commission precedent, and the Commission's own rules, constitutes a fundamental error in violation of R.C. 4903.09. The statute requires that in all contested cases, "the Commission shall file, with then record of such cases, findings of fact and written opinions setting forth the reasons prompting the decision arrived at, based on said findings of fact." The Commission provided no explanation justifying the lack of data and no explanation for the change from prior precedent.

The lack of this information, especially the lack of a cost-benefit analysis, is particularly significant, because AEP Ohio cannot possibly meet its statutory burden of proof without that data.[325] If AEP Ohio fails to produce the basic data that is necessary to evaluate the DIR proposal, and whether the proposed DIR would in fact produce an effective use of customer provided funding, then the Company fails to meet its burden of proof.

To the extent that AEP Ohio was proposing the DIR as part of the R.C. 4928.143 (B)(2)(h) modernization incentive, the statute specifically requires "a long term energy delivery infrastructure modernization plan***."[326] It is axiomatic that any long term plan that contemplates spending of $365.7 million over a three year period[327] would also include some analysis to quantify the actual reliability improvement anticipated as a result of the spending, and whether the spending provided a sufficient benefit to justify that level of investment. By failing to include the information identified by Staff witness Baker, including a cost benefit analysis, there is no evidence in the record to support the

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

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

[327] AEP Ex. 116 at 11 (Allen).

claim that $36.7 million in spending will actually produce any improvement in service reliability.

Instead, AEP Ohio claimed that the DIR would minimize the regulatory lag associated with recovery of the "important investment that benefits customers."[328] The benefit to AEP Ohio from minimizing the regulatory lag associated with DIR cost recovery is clearly a benefit for AEP Ohio's shareholders. However, the claim that the DIR mechanism will provide a benefit for customers was not proven because the Company failed to provide basic necessary information, including a cost-benefit study.[329] AEP Ohio did not provide basic information and did not meet its burden of proof. The Commission compounded the error by failing to address this omission of data in the Opinion and Order, and in failing to follow its own precedent. The Commission should grant rehearing in order to correct these errors.

C. The Commission erred in failing to meet the requirement in R.C. 4903.09 to set forth its findings when it did not address the issue of basic customer affordability of a Modified ESP that included a $365.7 million Distribution Investment Rider.

In the Opinion and Order, the Commission failed to address the issue of basic affordability of a Modified ESP that included a $365.7 million DIR as well as the other aspects of the ESP case including the RSR, as required by R.C. 4903.09. R.C. 4928.02(A) and (L). R.C. 4928.02 (A) states:

> It is the policy of this state to do the following throughout this state:

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[328] AEP Ohio Ex. 110 at 13 (Kirkpatrick).

[329] *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14,4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, Entry on Rehearing at 11-12 (Feb. 11, 2009).

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

R.C. 4928.02(L) further requires that:

> (L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

Despite this clear statutory requirement, the Commission failed to address how the $365.7 million DIR impacts the basic affordability of rates, especially in light of the fact that the DIR was approved without the benefit of important information, including a cost benefit analysis as detailed above. Residential Consumer Advocates raised this issue in their Initial Brief (pages 96-114), but the Opinion and Order did not address these statutory requirements, This lack of explanation fails to meet the requirement of R.C. 4903.09 and thus the Commission should grant rehearing.

ASSIGNMENT OF ERROR 18:

The PUCO's Decision to Approve the Separation of the Alternative Energy Rider from the Fuel Adjustment Clause but Delay Unification of the Fuel Adjustment Clause Until June 2013 is Unjust, Unreasonable and Inconsistent With How the PUCO Treated Other Elements of the Modified ESP in this Opinion and Order.

The law requires the Commission to be consistent in applying the law, in part because the Ohio Supreme Court values predictability in administrative law. This predictability is assured when the Commission is consistent not only from one case to another, but also from how it rules on different issues in the same case. In fact, the Court has noted that prior determinations of the PUCO should not be disregarded and set aside unless the need to change is clear and the prior decisions are in error.[330]

[330] See for e.g., *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431-432, 71 O.O 393, 330 N.E.2d 1, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 461 L.Ed.2d 302, appeal after remand (1976), 46 Ohio St.2d 105, 75 O.O.2d 172, 346 N.E.2d 778 (citing *State ex. Rel.*

In this case, the Commission was arbitrary and inconsistent with how it dealt with the timing of consolidation of rates for CSP and OP customers. For the Fuel Adjustment clause ("FAC") and the Alternative Energy Rider ("AER") the Commission ruled that consolidation of the CSP and OP rates should not occur until June 2013.[331] Yet in this very same Opinion and Order, the Commission without explanation as to this inconsistency -- approved immediate consolidation of the Transmission Cost Recovery Rider ("TCRR") into a single rate for CSP and OP customers.[332]

As part of the TCRR discussion, the Commission noted that the merger of the CSP and OP was effective as of December 2011, and thus the immediate consolidation of the CSP and OP TCRR was warranted.[333] To the extent that the CSP/OP merger was effective as of December 2011 necessitating the immediate consolidation of the CSP and OP TCRR rate, it cannot be argued that the effective date of the merger was different for purposes of consolidating the FAC for CSP and OP. Yet the Commission delayed the FAC rate consolidation for CSP and OP customers until June 2013.

The Commission explained that the delay in consolidating the FAC rate was necessary to be consistent with the recovery of the Phase-In Recovery Rider ("PIRR").[334] However, in having the FAC consolidation timing be consistent with the PIRR, the Commission was inconsistent with the FAC consolidation timing. This internal

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Automobile machine Co. v. Brown (1929), 121 Ohio St. 73, 75, 166 N.E. 903 -- "It has been held in this state that 'administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative to do so.'" (citation omitted).

[331] Opinion and Order at 16.

[332] Opinion and Order at 63-64.

[333] Opinion and Order at 63-64.

[334] Opinion and Order at 17.

inconsistency in the timing of consolidation of CSP and OP rates does not produce predictability in administrative matters and the Commission should grant rehearing.

ASSIGNMENT OF ERROR 19:

The PUCO Erred by Failing to Meet the Requirements of R.C. 4903.09 When Without Explanation it Failed to Follow its Own Precedent in Approving the Separation of the Alternative Energy Rider from the Fuel Adjustment Clause but Delaying Unification of the Fuel Adjustment Clause Until June 2013, Resulting in an Unreasonable Negative Impact on the Customers of Ohio Power.

The Commission's decision to delay consolidation of the FAC until June 2013, has the effect of unreasonably and negatively impacting OP customers. As a result, OP customers will experience a $0.02 per MWh **increas**e while CSP customers will experience a $0.69 per MWh net **decrease** in rates.[335]

In its decision, the Commission offered no explanation as to why it was appropriate and reasonable to negatively impact OP customers by delaying the consolidation of the FAC rates, while immediately consolidating the TCRR rates. The Commission failed to explain why it needed consistency between the timing of the FAC consolidation and recovery of the PIRR, but not between the timing of the consolidation of the FAC and consolidation of the TCRR.

The lack of explanation is compounded by the fact that delaying the consolidation of the FAC until June 2013 for OP customers, results in a objective and quantifiable negative impact of $0.02 per MWh for OP customers. Because the Commission failed to specifically address this inconsistency in its Opinion and Order as required by R.C. 4903.09, the Commission should grant rehearing on this issue.

[335] Opinion and Order at 16.

ASSIGNMENT OF ERROR 20:

The PUCO Erred by not Stating that Interruptible Power-Discretionary Schedule Credit Cost Will be Collected Only From Non-residential GS 4/IRP Customers and not From Residential Customers, Consistent With the Stipulation in Case No. 11-5568-EL-POR.

As part of the Opinion and Order, the Commission accepted the AEP Ohio proposal that the IRP-D credit be set at $8.21/kwh.[336] As explanation for its decision, the Commission noted that the IRP-D credit is beneficial because it provides flexible options for energy intensive customers to choose the type or quality of service they wish to take as well as being consistent with R.C. 4928.02(N).[337]

The Commission also ruled that the IRP-D credit should not be tied to the RSR because it was more reasonable to permit AEP-Ohio to recover costs related to IRP-D under the Energy Efficiency/Peak Demand Reduction ("EE/PDR") rider because the IRP-D credit would help reduce AEP-Ohio's peak demand and would encourage energy efficiency.[338] However, as part of its decision, the Commission did not make it clear that the cost associated with the IRP-D credit should only be collected from customers in the GS 4/IRP rate schedule.

More specifically, the Commission failed to state that the IRP-D credit costs should not be collected from residential customers consistent with the Stipulation in Case No. 11-5568-EL-POR.[339] The Commission adopted the Stipulation in the 11-5568 case, and discussed the intent of the Stipulation, including:

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[336] Opinion and Order at 25-26.

[337] Opinion and Order at 26.

[338] Opinion and Order at 26.

[339] *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 11-5568-EL-POR, Opinion and Order at 11 (March 31, 2012). ("11-5568 Case").

A. Rate Design and Cost Allocation Methodology

> (1) Program costs will be assigned for collection purposes to the respective rate classes whose customers are eligible for the program. *For example, program costs for customers in a nonresidential customer class will not be collected from residential customers and residential program costs will not be collected from non-residential customers*.[340] (Emphasis added.)

In addition to this language, the 11-5568 Opinion and Order also included footnote 11 to that paragraph which stated:

> Residential customers will not pay, for example, for the programs described in paragraphs 3, 4, 5, 6, 7, 8, and 9 contained in Section X, Miscellaneous Terms and Commitments, of the stipulation.

Moreover, during the evidentiary hearing, counsel for IEU-Ohio specifically asked OCC witness Ibrahim if the Stipulation and ensuing Opinion and Order from Case No. 11-5568 would resolve any issues regarding revenue responsibility for the IRP-D credit.[341] Mr. Ibrahim agreed that it was his understanding that the 11-5568 Case would determine the revenue responsibility for the IRP-D credit.[342]

Thus pursuant to the Stipulation and Opinion and Order in the 11-5568 Case, the OCC requests specifically find (or clarify) that the costs related to IRP-D rider credit should only be collected from non-residential GS 4/IRP customers and not from residential customers.

IV. CONCLUSION

To protect consumers, the Commission should grant OCC and APJN's application for rehearing on the assignments of error raised here.

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[340] 11-5568 Case, Stipulation at 11.

[341] Tr. VII at 2282 (Ibrahim).

[342] Tr. VII at 2282 (Ibrahim).

Respectfully submitted,

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On Behalf of the Appalachian Peace and Justice Network

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 7th day of September 2012.

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Deferred Capacity Costs

OCC Rehearing Ex. 1A

a.	Planning Years within ESP tern	6/2012 - 5/2013	6/2013 - 5/2014	5/2014 - 6/2015	Entire ESP	Actual and Projected Collection Verification
b.	PJM-RPM Price of Capacity	$20.01/mw-day	$33.71/mw-day	$153.89/mw-day		
c.	PUCO-approved Capacity Cost (Case 10-2929 Order)	$188.88/mw-day	$188.88/mw-day	$188.88/mw-day		
d.	AEP Collectino from CRES	$32	$65	$344	$441	$441
e.	Authorized Capacity Cost Collection (in Millions) (Based on $188.88/mw-day*	$302	$364	$422	$1,088	
f.	Capacity Cost Shortfal (e-d, $million)	$270	$299	$78	$647	
g.	Capacity Costs Collected through Retail Stability Rider	$48	$48	$48	$144	$144
h.	Capacity Cost Deferred (f-g, $million)	$222	$251	$30	$503	$503

* Using the same shopping load assumed by PUCO in Aug. 8, 2012 Opinion and Order.

Corrected Retail Stability Rider reflecting Authorized Capacity Costs

OCC Rehearing Ex. 1B

Year	6/2012 - 5/2013	6/2013 - 5/2014	5/2014 - 6/2015	Entire ESP	
Retail Non-fuel Gen Revenue Authorized ($million)	$528	$419	$308	$1,255	$1,255
CRES Capacity Revenue Authorized ($million)*	$302	$364	$422	$1,088	$1,088
Credit for Shopped Load	$75	$89	$104	$268	$268
Subtotal (with authorized capacity cost)	$905	$872	$834	$2,611	$2,611
Revenue Target Revised Per PUCO Order	$826	$826	$826	$2,478	$2,478
RSR Amount (with authorized capacity cost)	-$79	-$46	-$8	-$133	-$133

*based on $188.88/MW-day multiplied by shopping load assumed by PUCO in August 8, 2012 Opinion and Order.