

**BEFORE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

**INDUSTRIAL ENERGY USERS-OHIO'S
MEMORANDUM CONTRA APPLICATIONS FOR REHEARING**

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September 17, 2012

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	4
A.	AEP-Ohio's application for rehearing improperly claims that the disadvantage of the as-approved Modified ESP identified in the ESP II Order should be reduced, offers a modification that still causes the as-approved Modified ESP to fail the ESP versus MRO test and wrongly ignores the total cost of the as-approved Modified ESP.....	4
B.	AEP-Ohio's rehearing request that the ESP II Order be modified to increase the RSR and authorize a conditional automatic increase in the price CRES providers pay for generation capacity service is unreasonable and unlawful.....	10
1.	It would be unreasonable and unlawful to increase the already unreasonable and unlawful RSR by using a higher ROE to compute the RSR revenue.	11
2.	AEP-Ohio's rehearing request for a modification to the ESP II Order establishing a conditional and automatic retroactive price increase is unreasonable and unlawful.....	11
a.	The Commission is without authority to invent and apply a cost-based ratemaking methodology and therefore cannot authorize AEP-Ohio to recover the above-market prices for generation-related service either through the RSR or the Backstop Mechanism.	13
b.	The Backstop Mechanism is unreasonable and unlawful because it results in prohibited retroactive ratemaking.....	13
3.	AEP-Ohio's requests that the ESP II Order be modified or clarified so that: (a) AEP-Ohio is guaranteed that the Capacity Deferral will not be modified in the future; and, (b) AEP-Ohio will not have to recognize the excessive generation capacity service compensation AEP-Ohio receives from SSO customers for purposes of calculating the Capacity Deferral should both be rejected.....	15
a.	AEP-Ohio's request that the ESP II Order be modified to prevent future modification to the Capacity Deferral is unreasonable and unlawful.....	15
b.	AEP-Ohio's request that the ESP II Order be clarified so that the excessive generation service capacity compensation provided by SSO customers is ignored for purposes of determining the total generation capacity service compensation available to AEP-Ohio is unreasonable and unlawful.....	17

4.	AEP-Ohio's rehearing requests to modify the ESP II Order so as to retain and increase the RSR are unreasonable and unlawful.....	19
C.	The portion of AEP-Ohio's application for rehearing requesting that the ESP II Order be modified on rehearing so as to consolidate the <i>ESP II Case</i> with the <i>Capacity Case</i> is unlawful and unreasonable	22
D.	The portions of the applications for rehearing by FirstEnergy Solutions Corp. ("FES") and OCC/APJN requesting that the FAC should be blended between the CSP and OP rate zones are without merit and, if sustained on rehearing, would produce other problems.	25
E.	The portions of the applications for rehearing of OCC/APJN and Ohio Energy Group ("OEG") that assert that the ESP II Order must be modified on rehearing to eliminate separate PIRR zones for OP and CSP are unreasonable or unlawful.....	28
F.	The Commission should reject AEP-Ohio's request to not adjust the DIR to reflect ADIT.	29
G.	The portions of AEP-Ohio's application for rehearing that rely upon settlements from other proceedings to resolve contested issues in these proceedings are unreasonable and unlawful.	30
H.	The portion of AEP-Ohio's application for rehearing that claims that the ESP II Order is unreasonable or unlawful for failing to unconditionally approve AEP-Ohio's corporate separation application in another proceeding is without merit.....	32
III.	CONCLUSION	38

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**INDUSTRIAL ENERGY USERS-OHIO’S
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I. INTRODUCTION

The applications for rehearing of the August 8, 2012 Opinion and Order (“ESP II Order”)¹ modifying and approving AEP-Ohio’s² application for a Modified Electric Security Plan (“as-approved Modified ESP”) confirm that the ESP II Order is unlawful and unreasonable.

More specifically and on the threshold question regarding the authority of the Public Utilities Commission of Ohio (“Commission”) to approve an ESP, the applications for rehearing identify that the ESP II Order unlawfully and unreasonably violated Section

¹ Hereinafter, references to the instant case are referred to as the “*ESP II Case*”.

² AEP-Ohio is used to designate the electric distribution utility (“EDU”) resulting from the merger of Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”).

4928.143(C), Revised Code, because it sanctions an ESP that is not more favorable in the aggregate than the expected results of a market rate offer (“MRO”). In recognition of this fundamental error, AEP-Ohio’s application for rehearing improperly portrays the as-approved Modified ESP as providing other benefits and, in doing so, still leaves AEP-Ohio’s reinvented as-approved Modified ESP several hundred million dollars worse than the expected results of an MRO. Among other things, AEP-Ohio’s application for rehearing points out the excessive electric price increases that the ESP II Order’s expanded energy auctions will deliver during the term of the ESP and thereafter. As the Industrial Energy Users-Ohio (“IEU-Ohio”) and most other parties have pointed out throughout this proceeding, the expanded energy auctions make the as-approved Modified ESP more burdensome for customers.

Second, AEP-Ohio’s application for rehearing concedes that the ESP II Order provides it with a new opportunity to recover transition revenue through the deceptively-named Retail Stability Rider (“RSR”). The unreasonableness and unlawfulness of the ESP II Order’s RSR is so obvious that AEP-Ohio’s application for rehearing asks the Commission to approve a “backstop” transition revenue recovery mechanism to replace the non-bypassable RSR when it is found illegal. The applications for rehearing filed by most of the other parties identify that the parade of non-bypassable riders³ authorized in the ESP II Order also unreasonably and unlawfully allow AEP-Ohio to collect transition

³ These include the Generation Resource Rider (“GRR”), the Pool Termination Rider (“PTR”), and the Capacity Shopping Tax, the non-bypassable rider designed to recover any remaining difference between the price of capacity used to serve shopping customers based on PJM Interconnection, LLC’s (“PJM”) Reliability Pricing Model price (“RPM-Based Price”) and \$188.88/megawatt-day (“MW-day”) not recovered from Competitive Retail Electric Service (“CRES”) providers and from all retail customers through the \$1/megawatt-hour (“MWh”) “credit” embedded in the RSR. Herein, the term “Capacity Deferral” is used to refer to the entire difference between a price of \$188.88/MW-day for generation capacity service and the amount billed to CRES providers for generation capacity service reduced by the \$1/MWh RSR offset.

revenue beyond the time period provided by Ohio law and cannot, in any event, be approved as a part of an ESP or an MRO.

Third, AEP-Ohio's application for rehearing concedes that the ESP II Order is unreasonable and unlawful because it lacks the basic factual support that is necessary to sustain the Order.⁴ In recognition of this rather fundamental problem (no record support for the results in the ESP II Order), AEP-Ohio's application for rehearing suggests that the Commission should, on rehearing and contrary to AEP-Ohio's prior advocacy on this subject, consolidate these proceedings with the *Capacity Case*.⁵ The consolidation suggested by AEP-Ohio in its application for rehearing and also requested in a separate motion filed on September 11, 2012 is, in any event, unlawful and unreasonable at this late stage.

For the reasons previously provided, including those contained in the applications for rehearing, the Commission must grant rehearing, terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the as-approved Modified ESP, and issue such orders as are necessary to continue the provisions, terms, and conditions of AEP-Ohio's most recent standard service offer ("SSO") until a subsequent SSO is lawfully authorized pursuant to Section 4928.142 or 4928.143, Revised Code. The Commission's restoration of the most recent SSO must require that AEP-Ohio's compensation for generation capacity service available to CRES providers be determined based on the capacity valuation and pricing method that

⁴ AEP-Ohio Application for Rehearing at 48 ("As it stands, portions of the decision in each respective case rely on portions of the decision from the other case, ***including the record.***") (emphasis added).

⁵ Hereinafter, "Capacity Order" shall refer to the July 2, 2012 Opinion and Order in *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC and "Capacity Case" shall refer to Case No. 10-2929-EL-UNC.

is part of PJM's RPM. Further, IEU-Ohio requests that the order granting rehearing direct that any revenue increase collected by AEP-Ohio pursuant to the ESP II Order or pursuant to the Stipulation and Recommendation ("Stipulation ESP"), filed September 7, 2011 that was approved and then rejected on February 23, 2012, be refunded.

Below, IEU-Ohio further discusses the applications for rehearing that were filed on September 7, 2012.⁶

II. ARGUMENT

A. AEP-Ohio's application for rehearing improperly claims that the disadvantage of the as-approved Modified ESP identified in the ESP II Order should be reduced, offers a modification that still causes the as-approved Modified ESP to fail the ESP versus MRO test and wrongly ignores the total cost of the as-approved Modified ESP.

Of the parties seeking rehearing in these cases, only AEP-Ohio supports the view that the Commission properly found the as-approved Modified ESP to be more favorable in the aggregate than an MRO. Dissatisfied by the ESP II Order's analysis, however, AEP-Ohio's application for rehearing claims that "the \$386 million quantifiable advantage of the MRO that the Opinion and Order calculated is substantially overstated."⁷ In support of its related assignment of error, AEP-Ohio argues that the ESP II Order should have limited the revenue effect of the RSR to the period of June 2013 to May 2015, the same period used in the ESP II Order to calculate its Price Test,⁸

⁶ IEU-Ohio's failure to address a claim made in another party's application for rehearing should not be construed or implied to suggest that IEU-Ohio agrees with such claim.

⁷ AEP-Ohio Application for Rehearing at 45.

⁸ In the ESP II Order, the Commission applied a modified version of AEP-Ohio's three-step approach to the ESP versus MRO test contained in Section 4928.143(C)(1), Revised Code. The first step, the Price Test, compares some of the provisions of the ESP to the expected result of an SSO under Section 4928.142, Revised Code, the MRO.

and thereby reduced the amount of the RSR included in the ESP versus MRO test by \$120 million.⁹ Alternatively, AEP-Ohio argues that the Commission should recalculate the period of the RSR to recognize that the recovery period is 33 months, not 36 months.¹⁰

AEP-Ohio's application for rehearing, like that of IEU-Ohio, identifies a fundamental problem with the ESP II Order: it attributes inconsistent time periods to the terms and conditions of the as-approved Modified ESP. For the calculation of the RSR revenue effect, the ESP II Order used 36 months. For the calculation of the ESP versus MRO "Price Test," the ESP II Order used 24 months. The term of the as-approved Modified ESP was set at 33 months. In other words, the ESP II Order unreasonably and unlawfully fails to identify and use a consistent period for the length of the as-approved Modified ESP for purposes of conducting the ESP versus MRO test. However, this fundamental defect in the ESP II Order cannot be corrected by understating the cost disadvantage of the as-approved Modified ESP as AEP-Ohio's application for rehearing urges.

Section 4928.143(C)(1), Revised Code, requires the ESP, including its pricing and all other terms, to be more favorable than an MRO. The term of the as-approved Modified ESP is from September 1, 2012 to May 31, 2015. Having set the term to 33 months and approved an RSR for the full term of the as-approved Modified ESP, the ESP II Order cannot be revised to ignore any portion of the as-approved Modified ESP

⁹ AEP-Ohio Application for Rehearing at 46.

¹⁰ *Id.* According to AEP-Ohio, using 33 months as the term reduces the RSR revenue effect by \$30 million. *Id.*

term in applying the ESP versus MRO test.¹¹ Thus, AEP-Ohio's claim that the Commission should limit consideration of the effects of the RSR to 24 months must be rejected.

Even if the Commission agreed on rehearing to adjust the RSR revenue effect to a term of 24 months (which it should not), the as-approved Modified ESP would remain quantitatively worse than an MRO by over \$260 million under the first alternative presented by AEP-Ohio to correct the internal inconsistency of the ESP II Order.

As previously mentioned, AEP-Ohio argues in the second alternative that the amount attributable to the RSR should be reduced by \$30 million because "[t]he \$508 million recovery amount is based upon 36 months of collections, while the RSR will only be recovered over a 33 month period from September 2012 through May 2015."¹² However, making this this change would still result in the as-approved Modified ESP failing the ESP versus MRO test by over \$300 million.

In either case, AEP-Ohio (and the ESP II Order) cannot point to anything that offsets this quantitative disadvantage of the as-approved Modified ESP.¹³

By omission, AEP-Ohio's application for rehearing materially understates the quantitative disadvantage of the as-approved Modified ESP. The ESP II Order authorizes several non-bypassable riders, but has not included the full cost of these riders in its ESP versus MRO test. These additional provisions include the GRR, the PTR, and the Capacity Shopping Tax. When the necessary corrections are made to the

¹¹ IEU-Ohio Application for Rehearing at 22-25.

¹² *Id.* at 46.

¹³ IEU-Ohio Application for Rehearing at 29-34.

ESP II Order's math, the as-approved Modified ESP is worse than the MRO by over \$1.7 billion.¹⁴

Like the ESP II Order, AEP-Ohio asserts that the qualitative benefits of the as-approved Modified ESP offset the substantial quantitative disadvantage of the ESP. The so-called qualitative benefits cited by the ESP II Order, however, are undermined by the fact that the generation supply price attributed to the MRO by the ESP II Order is overstated because the ESP II Order uses an excessive and wrong price for capacity to portray the expected results of the MRO. AEP-Ohio's application for rehearing ignores this defect.

In the ESP II Order, the price of capacity in the MRO is set at the compensation level established by the Capacity Order based on an incorrect assumption that winning bidders in the MRO competitive bidding process ("CBP") would pay the same capacity price payable by CRES providers serving retail customers.¹⁵ The assumption is legally defective because, as AEP-Ohio agrees,¹⁶ to the extent the Commission has any authority to invent and apply a cost-based methodology to develop a price for generation capacity service under Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement ("RAA"), that price does not apply to SSO rates.¹⁷ That Section of the RAA deals only with the generation capacity service compensation available from an alternative load serving entity (in Ohio, a CRES provider) that is serving a retail

¹⁴ IEU-Ohio Application for Rehearing at 17.

¹⁵ As IEU-Ohio noted in its application for rehearing, if that statement were correct, the terms of the Capacity Order dictate that bidders would pay the RPM-Based Price, not \$188.88/MW-day. *Id.* at 20.

¹⁶ AEP-Ohio Application for Rehearing at 16-18.

¹⁷ IEU-Ohio Application for Rehearing at 18-22.

shopping customer.¹⁸ In contrast to CRES sales to shopping customers, the wholesale generation supplier bidding in the MRO's CBP auctions is free to secure capacity by contract with AEP-Ohio, provide its own capacity, or enter into a bilateral transaction for capacity with a third party.¹⁹ It is unreasonable for the ESP II Order to assume that a winning bidder in the MRO CBP would pay above-market prices for capacity.²⁰ Thus, the ESP II Order overstates the price of the capacity component that it then used to conduct the ESP versus MRO test, thereby overstating the expected result of the MRO.

Additionally, AEP-Ohio's application for rehearing confirms that the timing and structure of the energy-only auctions as well as how the cost associated with these auctions will be passed on to customers will likely increase the price of the as-approved Modified ESP. According to AEP-Ohio's testimony, SSO customers are paying the equivalent of \$355/MW-day in the non-fuel base generation price.²¹ AEP-Ohio proposed as part of the Modified ESP application that base generation rates be reduced to a level that is equivalent to \$255/MW-day for capacity for the last five months of the Modified ESP to support the energy-only auction.²² As part of the Modified ESP application, however, AEP-Ohio would have been protected from revenue erosion by the "decoupled" RSR that, as proposed, would have contributed \$284 million over the three years of the Modified ESP to generate \$929 million in annual non-fuel generation

¹⁸ Capacity Order at 39.

¹⁹ IEU-Ohio Ex. 125 at 64.

²⁰ *Id.*

²¹ AEP-Ohio Ex. 116 at 9.

²² AEP-Ohio Ex. 101 at 19.

base revenue.²³ The ESP II Order, however, expanded the energy-only auctions and did not authorize a “decoupling” of the RSR.²⁴

In its application for rehearing, AEP-Ohio has requested that the Commission “clarify” the ESP II Order to provide that base generation rates will be frozen for the entire term of the ESP rather than be reduced as originally proposed by AEP-Ohio’s application because the Commission expanded the energy-only auctions and did not authorize a “decoupled” RSR.²⁵ Further, it states that it “makes sense” to flow through the winning “energy procurement costs” through the fuel adjustment clause (“FAC”).²⁶ As IEU-Ohio witness Mr. Murray testified²⁷ and AEP-Ohio’s evidence confirmed,²⁸ wholesale energy prices are expected to increase in the latter part of the as-approved Modified ESP term. The combination of frozen non-fuel base generation prices and increasing energy prices will result in an expected increase in the cost of the as-approved Modified ESP.²⁹ The ESP II Order, however, failed to account for that quantitative disadvantage of the as-approved Modified ESP in the ESP versus MRO test.³⁰

²³ AEP-Ohio Ex. 116 at WAA-6.

²⁴ ESP II Order at 32. On the other hand, the ESP II Order does permit AEP-Ohio to file an application to adjust the RSR under certain conditions. *Id.* at 37-38.

²⁵ *Id.* at 8.

²⁶ *Id.* at 11.

²⁷ IEU-Ohio Ex. 125 at 70.

²⁸ AEP-Ohio Ex. 114 at LJT-2 (simple swap increases in each planning year).

²⁹ IEU-Ohio Ex. 125 at 70.

³⁰ IEU-Ohio Application for Rehearing at 29-34.

Contrary to AEP-Ohio's application for rehearing, the ESP II Order does not "underestimate the relative benefits"³¹ of the as-approved Modified ESP. As AEP-Ohio's own application for rehearing demonstrates, the as-approved Modified ESP, including its pricing and all other terms and conditions including deferrals and their collection, is less favorable than an MRO by several hundred million dollars, and the "less readily quantifiable benefits"³² carry costs that the ESP II Order does not acknowledge.

B. AEP-Ohio's rehearing request that the ESP II Order be modified to increase the RSR and authorize a conditional automatic increase in the price CRES providers pay for generation capacity service is unreasonable and unlawful.

AEP-Ohio's application for rehearing claims that the ESP II Order should be modified to increase and guarantee the collection of above-market revenue for AEP-Ohio's benefit. To this end, AEP-Ohio makes several arguments. First, AEP-Ohio requests the Commission use a higher hypothetical return on equity ("ROE") for purposes of calculating the revenue subject to collection through the RSR thereby increasing the RSR (and the disadvantage of the as-approved Modified ESP).³³ Second, AEP-Ohio requests the Commission conditionally authorize a retroactive rate increase in the price CRES providers pay for generation capacity service to take effect if the RSR or Capacity Shopping Tax is struck down.³⁴ Third, AEP-Ohio argues that a deferral created under Section 4928.144, Revised Code, is sacrosanct and cannot be

³¹ AEP-Ohio Application for Rehearing at 44.

³² *Id.* at 45.

³³ *Id.* at 21-29.

³⁴ *Id.* at 25-26.

reduced; AEP-Ohio claims a deferral authorized under this Section is “money in the bank” for AEP-Ohio.³⁵ As discussed below, the Commission must reject each of these unlawful and unreasonable requests.

1. It would be unreasonable and unlawful to increase the already unreasonable and unlawful RSR by using a higher ROE to compute the RSR revenue.

As to AEP-Ohio’s request (in AEP-Ohio’s assignment of error II.A) to increase the RSR revenue by using a higher ROE (10.5% rather than 9%), AEP-Ohio has not presented anything new³⁶ on rehearing and the request should be rejected. The ESP II Order addressed AEP-Ohio’s preferred ROE and found that AEP-Ohio’s ROE “is too high.”³⁷ In its application for rehearing, AEP-Ohio offers nothing new; AEP-Ohio merely restates and relies upon the testimony of its two witnesses the Commission has already rejected. Because AEP-Ohio offers nothing new, the Commission should reject AEP-Ohio’s assignment of error.

2. AEP-Ohio’s rehearing request for a modification to the ESP II Order establishing a conditional and automatic retroactive price increase is unreasonable and unlawful.

Through its assignment of error II.C, AEP-Ohio seeks a modification of the ESP II Order that, if made, would guarantee its above-market compensation for generation service through an automatic retroactive increase in the price CRES providers pay for

³⁵ *Id.* at 22-25.

³⁶ AEP-Ohio’s application for rehearing points to the testimony of AEP-Ohio witness Allen and the rebuttal testimony of AEP-Ohio witness Avera in its rehearing effort to move the RSR-related ROE from 9% to 10.5%. *Id.* at 22.

³⁷ ESP II Order at 33.

generation capacity service (the “Backstop Mechanism”). More specifically, AEP-Ohio’s application for rehearing requests that:

the Commission should provide up front that CRES providers will automatically be responsible for the full \$188.88/MW-day (to be reconciled back to the date of the rehearing decision in this case), in the event that either the establishment of the capacity deferrals or the deferral recovery mechanism is reversed or vacated.³⁸

The Commission must reject AEP-Ohio’s rehearing request because:³⁹ (a) AEP-Ohio is not entitled to charge the \$188.88/MW-day price either from CRES providers solely or CRES providers and all retail customers collectively, as IEU-Ohio demonstrated in its application for rehearing in these proceedings as well as in the *Capacity Case*,⁴⁰ and (b) the Backstop Mechanism, if approved, would result an unlawful retroactive rate increase.

³⁸ AEP-Ohio Application for Rehearing at 26 (emphasis added).

³⁹ As IEU-Ohio has previously identified, AEP-Ohio has contested and continues to contest the authority of the Commission to establish wholesale prices for generation capacity service available to CRES providers. Thus, the Backstop Mechanism sought by AEP-Ohio through its application for rehearing would be unreasonable and unlawful based on AEP-Ohio’s views regarding the Commission’s authority. Also, the RAA, which governs the price CRES providers pay AEP-Ohio for capacity, dictates that RPM-Based Pricing is the default price for capacity. As discussed in IEU-Ohio’s application for rehearing and herein, the Commission is without authority to invent and apply a cost-based ratemaking methodology to develop a price for generation capacity service, and therefore the Commission is precluded from approving the “Backstop Mechanism,” inasmuch as the \$188.88/MW-day price is unlawful and unreasonable.

⁴⁰ The joint application for rehearing of OMA Energy Group (“OMA-EG”) and the Ohio Hospital Association (“OHA”) suggests that the Commission has authority to invent and apply a cost-based methodology to develop a wholesale price for generation capacity service under its general supervisory authority. OMA-EG/OHA Joint Application for Rehearing at 16-17. IEU-Ohio’s prior pleadings demonstrate, however, that the Commission may not establish rates under its general supervisory authority; regardless of whether they are labeled wholesale or retail. See IEU-Ohio Application for Rehearing at 57-62; *Capacity Case*, Industrial Energy Users-Ohio’s Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support 22-25 (Aug. 1, 2012); see also *Columbus S. Power Co. v Pub. Util. Comm.*, 67 Ohio St.3d, 535, 620 N.E.2d 835, 840 (1993).

- a. The Commission is without authority to invent and apply a cost-based ratemaking methodology and therefore cannot authorize AEP-Ohio to recover the above-market prices for generation-related service either through the RSR or the Backstop Mechanism.**

AEP-Ohio's request that the ESP II Order be modified to include its proposed Backstop Mechanism presumes that the Commission can invent and apply a cost-based ratemaking methodology to develop a price for generation capacity service. As IEU-Ohio and other parties have previously shown, the Commission lacks that authority, and the resulting Capacity Order concluding that AEP-Ohio is authorized to obtain compensation for generation capacity service based on a price of \$188.88/MW-day is therefore unlawful. Because the Commission is without authority to invent and apply a cost-based ratemaking methodology to establish the compensation which AEP-Ohio collects for generation capacity service, the Commission is similarly without authority to authorize such compensation through the Backstop Mechanism.

IEU-Ohio would also note that the Commission has already found that compensation based on RPM-Based pricing is supported by Ohio's policy.⁴¹ Thus, the Backstop Mechanism proposed by AEP-Ohio as part of its application for rehearing invites the Commission to violate the policy it is obligated to effectuate.

- b. The Backstop Mechanism is unreasonable and unlawful because it results in prohibited retroactive ratemaking.**

The Backstop Mechanism advanced by AEP-Ohio in its application for rehearing is also unreasonable and unlawful because it would retroactively⁴² modify the price for

⁴¹ Capacity Order at 23.

⁴² AEP-Ohio's Backstop Mechanism would allow it to collect the revenue that would have otherwise been collected from CRES providers if they were paying the \$188.88/MW-day price over the entire term of the

generation capacity service payable by CRES providers to guarantee the collection of revenue which AEP-Ohio is unable to collect because, for example, the Ohio Supreme Court determined that it was unlawful and unreasonable for the Commission to authorize AEP-Ohio to collect the revenue in the first place.

Granting rehearing so that “CRES providers will automatically be responsible” for compensating AEP-Ohio the full amount of revenue produced by a capacity price of \$188.88/MW-day “to be reconciled back to the date of the rehearing decision in this case,”⁴³ will result in the same retroactive ratemaking the Supreme Court found unlawful in its review of the *ESP I Case*.⁴⁴

AEP had sought a rate increase effective January 2009, but the commission did not issue an order until mid-March. Thus, from January through March, AEP collected less revenue than it would have if the application had been approved before January 1. In response to this delay in rate relief, the commission set AEP's rates at a level "intended to permit the companies to recover 12 months of revenue over a 9-month period." The additional increase totaled \$63 million.

This was retroactive ratemaking.⁴⁵

The Court held that the retroactive “rate increase making up for revenues lost due to regulatory delay is precisely the action that we found contrary to law”⁴⁶ Similarly, AEP-Ohio’s proposed Backstop Mechanism would authorize AEP-Ohio to bill and

ESP and to do so over the remaining term of the ESP when the RSR and Capacity Shopping Tax are reversed or vacated.

⁴³ AEP-Ohio Application for Rehearing at 26.

⁴⁴ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.* (“ESP I Case”).

⁴⁵ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶¶ 9-10.

⁴⁶ *Id.* at ¶ 11.

collect for revenue retroactively. As a result, the Commission cannot lawfully grant AEP-Ohio's request for rehearing.

3. **AEP-Ohio's requests that the ESP II Order be modified or clarified so that: (a) AEP-Ohio is guaranteed that the Capacity Deferral will not be modified in the future; and, (b) AEP-Ohio will not have to recognize the excessive generation capacity service compensation AEP-Ohio receives from SSO customers for purposes of calculating the Capacity Deferral should both be rejected.**

AEP-Ohio's application for rehearing invites the Commission to modify or clarify the ESP II Order so that: (a) AEP-Ohio is guaranteed that the Capacity Deferral will not be modified in the future beyond a simple accounting and verification process; and, (b) the "full deferral balance (subject to verification) that is not collected through the \$1/MWh allocation of the RSR during the ESP term will be collected over the three years following the ESP term" ⁴⁷ AEP-Ohio's requests are unreasonable and unlawful; they ask the Commission to guarantee that AEP-Ohio will receive the substantial benefits provided by the ESP II Order even if such benefits are unlawful or unreasonable.

- a. ***AEP-Ohio's request that the ESP II Order be modified to prevent future modification to the Capacity Deferral is unreasonable and unlawful.***

The Commission has held that deferrals authorized under Section 4928.144, Revised Code, are subject to future adjustment beyond just a verification process, e.g., the deferred balance authorized in the *ESP I Case* was reduced to account for

⁴⁷ AEP-Ohio Application for Rehearing at 23.

unreasonable FAC charges.⁴⁸ Although AEP-Ohio has objected to modifying a deferral balance authorized under Section 4928.144, Revised Code, the Commission has rejected AEP-Ohio's arguments in the past, and should reject them again.⁴⁹ Additionally, the Commission has held that a deferral balance is subject to review on appeal.⁵⁰ The Commission has also reduced AEP-Ohio's phase-in deferral balance to account for the unlawfully authorized provider of last resort ("POLR") charges AEP-Ohio had collected while the *ESP I* Case remand hearing was ongoing.⁵¹ Finally, the Commission held that AEP-Ohio's deferral balance was subject to appeals to the Ohio Supreme Court.⁵² Although AEP-Ohio seeks to have this Commission treat the Capacity Deferral as "money in the bank," that is simply not the case. When an order authorizing the amount subject to collection through a phase-in mechanism is

⁴⁸ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion at Order at 12 (Jan. 23, 2012); *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RSR, *et al.* Finding and Order at 20 (Aug. 1, 2012). The Commission has also reduced AEP-Ohio's phase-in deferral balance to account for CSP's significantly excessive earnings for 2009. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order at 35 (Jan. 11, 2011).

⁴⁹ "AEP-Ohio's arguments concerning the applicability of Keco and Lucas County, are likewise unavailing. ... The Commission is not considering modifying a previous rate established by a Commission order through the ratemaking process as the Court considered in Keco. Rather, the Commission, by ordering the Companies to credit more of the proceeds from the Settlement Agreement to OP's deferral balance, is establishing a future rate based upon the real cost of the coal used by the Companies to generate electricity during the 2009 FAC audit period." *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion at Order at 13 (Jan. 23, 2012).

⁵⁰ See Opinion and Order at 59 (Dec. 14, 2011).

⁵¹ *ESP I* Case, Order on Remand at 34 (Oct. 3, 2011).

⁵² "Finally, the Commission clarifies that prior to securitization of the PIRR, if the Commission or the Court issues a decision that impacts the amount of PIRR regulatory assets, AEP-Ohio shall appropriately adjust the book balance of the PIRR regulatory assets or use a mechanism to make the appropriate adjustment ordered by the Commission or the Court that prospectively adjusts rates through a credit or charge of the PIRR." Opinion and Order at 59 (Dec. 14, 2011) (emphasis omitted).

determined to be unlawful, the amount deferred is illegal and this condition cannot be avoided simply because the illegal amount was to be collected in the future.

b. AEP-Ohio's request that the ESP II Order be clarified so that the excessive generation service capacity compensation provided by SSO customers is ignored for purposes of determining the total generation capacity service compensation available to AEP-Ohio is unreasonable and unlawful.

In its application for rehearing, AEP-Ohio states that under Section 4928.144, Revised Code, it is allowed to collect through a non-bypassable surcharge its “[c]osts ‘not collected’ due to a phase-in plan.”⁵³ AEP-Ohio’s statement, however, ignores at least two critical points that the Commission may not lawfully ignore.

First, the Commission is without authority to authorize future collection of unlawful or unreasonable prices regardless of whether such authorization involves a current or phase-in collection mechanism.

Second, neither the Capacity Order nor the ESP II Order identify, according to generally accepted accounting rules, any costs that AEP-Ohio will not collect as a result of a Commission decision pursuant to Sections 4928.141 through 4928.143, Revised Code.⁵⁴ And with regard to the second point, both SSO customers and shopping customers served by CRES providers receive and pay for generation capacity service.

Thus, AEP-Ohio is incorrect, based on generally accepted accounting principles, when it claims that the non-bypassable surcharge that may be available under Section 4928.144, Revised Code, will be calculated as the difference between “\$188.88/MW-

⁵³ AEP-Ohio Application for Rehearing at 23.

⁵⁴ Section 4928.144, Revised Code.

day and RPM pricing” multiplied “by the quantity of capacity sold to support shopping load.”⁵⁵ The ESP II Order authorized AEP-Ohio to collect **total** compensation for generation capacity service totaling \$188.88/MW-day:

AEP-Ohio will not receive any more than the state compensation charge of \$188.88 per MW-day from Ohio customers ...⁵⁶

AEP-Ohio’s rehearing application effectively asks the Commission to ignore the total compensation for generation capacity service that AEP-Ohio will actually collect through the ESP II Order by focusing only on the difference between RPM-Based Pricing and \$188.88/MW-day. Focusing only on the difference between \$188.88/MW-day and the RPM-Based Price ignores the compensation AEP-Ohio shall receive under the ESP II Order from SSO customers through base generation rates and the \$1/MWh portion of the RSR that is associated with the difference between \$188.88/MW-day and the RPM-Based Price.

According to AEP-Ohio, SSO customers pay \$355/MW-day for generation capacity service.⁵⁷ The applications for rehearing of IEU-Ohio and other intervenors correctly point out that AEP-Ohio’s **total** compensation under the invented and applied cost-based ratemaking methodology is driven by a generation service capacity price of \$188.88/MW-day.

Once AEP-Ohio’s compensation for generation capacity service is dictated by a cost-based ratemaking method and the Commission authorizes a price of \$188.88/MW-day based on such methodology, the statutory requirements of

⁵⁵ *Id.* at 24.

⁵⁶ ESP II Order at 59.

⁵⁷ Tr. Vol. V at 1438.

comparability and non-discrimination require the Commission to recognize and account for the excessive generation capacity service compensation that the ESP II Order allows AEP-Ohio to obtain from SSO customers. Recognition and accounting can occur in the specification of non-fuel base generation charges payable by SSO customers and as any energy-only auctions may occur in the future. The necessary recognition and accounting can also occur in determining the total amount of capacity generation service compensation that is eligible for future collection by netting the above \$188.88/MW-day compensation AEP-Ohio may collect through the as-approved Modified ESP from SSO customers against the difference between \$188.88/MW-day and the RPM-Based Price as that difference relates to shopping customers. As the ESP II Order and Capacity Order presently stand, the latter approach is the approach that best fits with the determinations made by the Commission.

4. AEP-Ohio's rehearing requests to modify the ESP II Order so as to retain and increase the RSR are unreasonable and unlawful.

As noted above, AEP-Ohio's assignments of error wrongly presume that AEP-Ohio may obtain another opportunity to collect generation-related transition revenue and that such collection may be authorized as a provision of the as-approved Modified ESP. The timeframe to collect transition revenue in Ohio, however, ended long ago. Ohio law prohibits any further collection of transition revenue and AEP-Ohio agreed to forego any opportunity to collect transition revenue beyond that provided by a Commission-approved settlement agreement.⁵⁸ Despite this multi-layered preclusion of any further

⁵⁸ AEP-Ohio agreed to forego collecting above-market transition revenue associated with its generation assets, promising it would not "impose any lost revenue charges (generation transition charges (GTC)) on any switching customer." IEU-Ohio Ex. 124 at 13. That commitment was reaffirmed and incorporated

collection of transition revenue, AEP-Ohio's rehearing application urges the Commission to retain and expand the RSR's role in providing AEP-Ohio with the ability to collect generation-related revenue that might otherwise be lost due to customer migration.

Transition revenue is generation-related revenue that is otherwise unrecoverable in a competitive market.⁵⁹ The RSR (as do the PTR, Capacity Shopping Tax and the Backstop Mechanism) clearly provides AEP-Ohio with the ability to collect generation-related revenue that may otherwise be lost to AEP-Ohio [in its capacity as an EDU and as a result of customer migration] and therefore permits AEP-Ohio to collect transition revenue or its equivalent. Section 4928.38, Revised Code, states that after the period for collection of generation-related transition revenue ends, AEP-Ohio's generation business is required to be fully on its own in the competitive market and bars the Commission from authorizing "the receipt of transition revenues or any equivalent revenues by an electric utility."⁶⁰ Additionally, Section 4928.141, Revised Code, compels the Commission to remove transition revenue from electric rates. AEP-Ohio's application for rehearing confirms that the RSR will collect transition revenue. At page 12 of AEP-Ohio's application for rehearing, it explains that the RSR will permit AEP-Ohio to "recapture some of the lost non-fuel generation revenue." Again at pages 21-22 of its application for rehearing, AEP-Ohio argues that the ROE embedded in the RSR

into AEP-Ohio's Rate Stabilization Plan ("RSP") proceeding. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 9 (Jan. 26, 2005).

⁵⁹ See Section 4928.39, Revised Code.

⁶⁰ Section 4928.38, Revised Code.

should have been higher because the RSR deals with generation-related risks which it asserts are greater than distribution-related risks.⁶¹

The transition revenue purpose of the RSR has also been confirmed by the “additional messages” portion of the electric bills that contain the RSR and describe the purpose of the RSR as follows:

The Public Utilities Commission of Ohio of August 8, 2012 in Case No. 11-346-EL-SSO et al. approved the Company’s application to implement its standard service offer with some modifications. This plan includes a new rider, the Retail Stability Rider, which will allow the Company stability while transitioning to a fully competitive market in an expedited manner.

The applications for rehearing filed by other parties⁶² also confirm that the RSR cannot be lawfully authorized under Section 4928.143(B)(2)(d), Revised Code.⁶³ As described by IEU-Ohio and others, the RSR does not “have the effect of stabilizing or providing certainty regarding retail electric service.”⁶⁴ Thus, not only is the RSR prohibited by the bar against transition revenue collection mechanisms, the non-bypassable RSR may not lawfully be included in an ESP.

In total, AEP-Ohio’s application for rehearing seeks to increase and guarantee collection of the above-market generation-related revenue that the ESP II Order

⁶¹ AEP-Ohio Application for Rehearing at 21-22.

⁶² The Office of Ohio Consumers’ Counsel (“OCC”), Ormet Primary Aluminum Corporation (“Ormet”), and the Ohio School Board Association and Ohio Schools Council and Ohio Association of School Business Officials and Buckeye Association of School Administrators (“Schools”) challenge the ESP II Order’s approval of the RSR. As a secondary attack, they also suggest that the burden of the RSR should be reallocated so as to reduce its impact on certain populations. However, reallocating the burden of an illegal charge will not cure its illegality.

⁶³ The above quoted language from AEP-Ohio’s electric bills also makes it clear that the RSR is not a provision that fits within Section 4928.143(B)(2)(d). The RSR as explained by AEP-Ohio to its customers has nothing to do with stabilizing or providing certainty regarding retail electric service.

⁶⁴ Section 4928.143(B)(2)(d), Revised Code.

unreasonably and unlawfully permits AEP-Ohio to collect through non-bypassable charges. AEP-Ohio's assignments of error are without merit and must be rejected.

C. The portion of AEP-Ohio's application for rehearing requesting that the ESP II Order be modified on rehearing so as to consolidate the ESP II Case with the Capacity Case is unlawful and unreasonable

AEP-Ohio's application for rehearing improperly requests that the *ESP II Case* and the *Capacity Case* be consolidated.⁶⁵ AEP-Ohio's request is untimely. An order on rehearing granting the consolidation would run afoul of the law and would cause additional confusion between the two separate and distinct records. As recently as July 24, 2012, AEP-Ohio agreed that such consolidation is improper.⁶⁶

On July 20, 2012, OCC and the Appalachian Peace and Justice Network ("APJN") filed a joint motion to take administrative notice of parts of the *Capacity Case* record in the *ESP II Case*. AEP-Ohio filed a memo contra stating:

[AEP-Ohio] does not support the motion filed by OCC/APJN because it is inappropriate, raises due process concerns, and fails to recognize that the present proceeding has already been submitted to the Commission for decision.

...

OCC/APJN's request for administrative notice at this point in the proceeding is awkward at best. The modified ESP proceeding is now submitted to the Commission for decision and the record is established. The Commission held public hearings, an evidentiary hearing, entertained two rounds of post hearing briefing and held an oral argument before all of the Commissioners. **The time for procedural maneuvers and argumentation is now complete and the record is in the hands of the Commission for determination.**⁶⁷

⁶⁵ On September 11, 2012, AEP-Ohio also filed a motion to consolidate in both proceedings.

⁶⁶ AEP-Ohio's Memorandum Contra the Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network's Motion to Take Administrative Notice at 1-2 (July 24, 2012).

⁶⁷ *Id.* (emphasis added).

Similarly, in AEP-Ohio's application for rehearing in the *Capacity Case*, AEP-Ohio stated:

Although this case and Case No. 11-346-EL-SSO address interrelated issues, the Commission may not assign an issue that must be decided in this proceeding to another proceeding with an independent case schedule and rehearing and appeal processes.⁶⁸

While AEP-Ohio's application for rehearing indicates that it has changed its position and now thinks it is reasonable and lawful for the Commission to consolidate the *ESP II Case* and the *Capacity Case*, the law and the Commission's precedent hold otherwise.

Commission proceedings are to be conducted in the same manner as civil actions unless otherwise provided by law. Section 4903.22, Revised Code, provides:

[e]xcept when otherwise provided by law, all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4927. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions. (emphasis added).

Civil Rule 42(A) governs consolidation and provides:

[w]hen actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (emphasis added).

First, Civil Rule 42(A) clearly contemplates that cases may be consolidated to develop a joint record when the cases involve common questions of law or fact. However, because the cases were not consolidated before the individual records were developed, it would be unlawful and unreasonable to consolidate the *ESP II Case* and the *Capacity Case* now. The Commission has also held that it is inappropriate to

⁶⁸ *Capacity Case*, AEP-Ohio Application for Rehearing at 6 (July 20, 2012).

consolidate cases after the close of the evidentiary record.⁶⁹ In fact, the ESP II Order denied OCC/APJN's motion to take administrative notice of parts of the record from the *Capacity Case*, finding "the timing of OCC/APJN's request [was] troublesome and problematic."⁷⁰

Second, consolidating cases after the evidentiary records in the proceedings have closed would violate parties' due process rights. The parties in the *ESP II Case* and the *Capacity Case* are not the same. The witnesses in the *ESP II Case* and the *Capacity Case* are not the same. The issues in the *ESP II Case* and the *Capacity Case* are not the same. The Capacity Order states (wrongly) that the Commission's general supervisory authority and Chapter 4909, Revised Code, are controlling, while the ESP II Order must be valid, if it can be valid, based on Sections 4928.141 and 4928.143, Revised Code. Using the record in one proceeding to support decisions in another proceeding prevents parties from putting on evidence in the form of testimony and exhibits, cross-examining other witnesses on the issues, and addressing the issues on brief, as required by due process.⁷¹

⁶⁹ See *In the matter of the application of The Ohio Bell Telephone Company to revise its exchange and network services tariff*, PUCO No. 1, to establish Automatic Callback which is a new Advanced Custom Calling Service Feature, Case No. 93-343-TP-ATA, Entry at 2-3 (April 29, 2012) ["Upon review of Rule 42(A) and contrary to ODVN's definitive statement that such a motion would be granted in the court system, it is evident that, while consolidation of issues is permissible, it is not required as stated by ODVN. Final orders have been issued in the three cases which ODVN requested be consolidated with this case. In fact, two of the cases, 90-467 and 90-471, have already been appealed to the Ohio Supreme Court."].

⁷⁰ ESP II Order at 12.

⁷¹ *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599; 2006-Ohio-1386 at ¶ 53; see also *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 465 (1952); *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937).

Third, Section 4903.09, Revised Code, requires the Commission to base its orders upon the record in front of it.⁷²

[I]n order to meet the requirements of R.C. 4903.09, * * * the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion. ... [A] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.⁷³

Were the Commission to consolidate the cases at this point, its entries on rehearing modifying the ESP II Order or the Capacity Order would not be based on their individual records.

Consolidating the two proceedings at this point would violate Civil Rule 42(A) and will not aid the Commission in reaching its decisions on rehearing. Consolidation would also violate parties' due process rights. Further, each proceeding must be decided upon the separate and distinct records. Therefore, the portion of AEP-Ohio's application for rehearing requesting that the ESP II Order be modified on rehearing so as to consolidate the *ESP II Case* with the *Capacity Case* is unlawful and unreasonable.

D. The portions of the applications for rehearing by FirstEnergy Solutions Corp. ("FES") and OCC/APJN requesting that the FAC should be blended between the CSP and OP rate zones are without merit and, if sustained on rehearing, would produce other problems.

FES' application for rehearing asserts that the ESP II Order is unlawful and unreasonable because it authorized AEP-Ohio to continue separate FACs for the OP

⁷² See also *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶¶ 70-71; *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937); *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 92-93 (1999).

⁷³ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 30 (internal quotes and citations omitted).

and CSP zones.⁷⁴ FES argues that by failing to consolidate FACs, OP customers will pay “artificially reduced” fuel costs that will dissuade competition.⁷⁵ FES’ application for rehearing also asserts that consistent treatment with the Phase-In Recovery Rider (“PIRR”) is “meaningless.”⁷⁶ With regard to the FAC-related assertions, FES’ application for rehearing lacks merit and should not be accepted by the Commission.

First, by continuing a separate FAC for each zone, OP customers will be subjected to the same fuel cost recovery mechanism that previously was designed to identify actual prudently incurred fuel costs associated with service to OP’s SSO customers. There is nothing in the record to suggest that continuing the separate FAC zones will result in some artificial reduction in the fuel costs paid by OP’s SSO customers.

Second, the ESP II Order finds that other considerations, such as other pending Commission cases that will affect the FAC for each rate zone, warrant continuation of separate FAC zones.⁷⁷

Finally, during the briefing phase of this proceeding, the proposal to maintain separate FAC zones was unopposed.

OCC/APJN’s application for rehearing also advances arguments in favor of FAC consolidation. First, OCC/APJN’s application for rehearing argues that the ESP II Order is unreasonable or unlawful because it delays unification of the FAC zones until June 2013 and this delay is inconsistent with the ESP II Order’s treatment of other riders such

⁷⁴ FES Application for Rehearing at 31.

⁷⁵ *Id.* at 32.

⁷⁶ *Id.*

⁷⁷ ESP II Order at 17.

as the Transmission Cost Recovery Rider (“TCRR”).⁷⁸ OCC/APJN’s application for rehearing also asserts that the decision to not consolidate the FAC zones is inconsistent with the approval of the proposed Alternative Energy Rider (“AER”) and will cause a negative impact on OP customers.⁷⁹

OCC/APJN’s first claim misinterprets the ESP II Order since the ESP II Order does not provide for consolidation of the FAC zones in June 2013. The FAC zones are retained by the ESP II Order for the purposes stated therein.⁸⁰ OCC/APJN’s application for rehearing does not contest the legitimacy of retaining the separate FAC zones for the purposes expressed in the ESP II Order. Although the design of the FAC during the term of a new ESP was a contested issue,⁸¹ no party objected to maintaining separate FAC zones in their initial or reply briefs. Similarly, as recognized in the ESP II Order, no party objected to AEP-Ohio’s proposal to establish a separate AER.⁸² Finally, the claim in OCC/APJN’s application for rehearing that OP’s customers will see a \$0.02/MWh increase as a result of the separate FAC zones is simply incorrect. Maintaining separate FAC zones will result (at least initially) in the FAC rates continuing at present levels. While there are many things in the ESP II Order that cause unreasonable and unlawful increases in electric bills for shopping and non-shopping customers, maintaining separate FAC zones will not.

⁷⁸ OCC/APJN Application for Rehearing at 110-11.

⁷⁹ *Id.* at 112.

⁸⁰ ESP II Order at 17.

⁸¹ See Post Hearing Brief of Ormet Primary Aluminum Corporation at 13-15 (June 29, 2012).

⁸² ESP II Order at 18 (“No party took exception to the implementation of the AER mechanism.”).

E. The portions of the applications for rehearing of OCC/APJN and Ohio Energy Group (“OEG”) that assert that the ESP II Order must be modified on rehearing to eliminate separate PIRR zones for OP and CSP are unreasonable or unlawful.

The applications for rehearing of OCC/APJN and OEG both assert that the ESP II Order must be modified on rehearing to eliminate the separate PIRR zones and establish a uniform PIRR applicable to all of AEP-Ohio’s customers. OCC/APJN’s application for rehearing claims that the separate PIRR zones must be eliminated immediately.⁸³ OEG’s application for rehearing suggests that the ESP II Order should be modified on rehearing to allow the PIRR zones to be eliminated after the term of the as-approved Modified ESP.⁸⁴

The ESP II Order discusses and addresses the merits of proposals to establish a uniform PIRR.⁸⁵ Because neither OCC/APJN nor OEG raises any new argument on rehearing, the portions of their applications for rehearing urging the Commission to provide for a uniform PIRR are unreasonable and unlawful.

While IEU-Ohio is not unsympathetic to concerns about the impact of the PIRR on electric bills, there is a much more direct and efficient way to address these concerns. If, as IEU-Ohio has repeatedly urged, the Commission would act on the several open FAC and other cases in which warranted relief would properly operate to reduce the amount of the phase-in deferral that is eligible for collection from customers and take full advantage of the opportunity to offset the revenue AEP-Ohio collected from

⁸³ OCC/APJN Application for Rehearing at 110-111.

⁸⁴ OEG Application for Rehearing at 7-8.

⁸⁵ A uniform PIRR would cause CSP customers to take on responsibility for a phase-in deferral balance associated with a phase-in specifically structured and applied to the OP zone. This would result in a phase-in deferral responsibility disproportionate to any benefit received by CSP customers and trigger, under Section 4928.20, Revised Code, avoidance opportunities for CSP zone aggregation programs.

illegally authorized ESP charges against the phase-in deferral balance, it could remove much of the current PIRR's significant impact from the bills of OP's customers.

F. The Commission should reject AEP-Ohio's request to not adjust the DIR to reflect ADIT.

The Commission should reject AEP-Ohio's claim that it was unreasonable to adjust the Distribution Investment Rider ("DIR") for accumulated deferred income taxes ("ADIT"). Notably, AEP-Ohio's application for rehearing does not claim that the ADIT offset required by the ESP II Order violated sound regulatory practices and principles or precedent. AEP-Ohio's failure to make this claim not only implicitly concedes that an ADIT offset is the appropriate regulatory practice, but it also lends further support to IEU-Ohio's application for rehearing with respect to calculation of carrying charges in the PIRR.

Because AEP-Ohio cannot claim sound regulatory practices and precedent favor its desired outcome, AEP-Ohio claims that it would have held out for more money prior to agreeing to the stipulation in its distribution rate case, stating:

If AEP Ohio had known that there was risk that an ADIT offset to the DIR existed, it could have taken measures to protect itself in the distribution rate case settlement. In particular, it could have included in that settlement a reduced DIR credit.⁸⁶

In other words, what AEP-Ohio is really seeking in its application for rehearing is effectively a retroactive rewrite of the distribution rate case stipulation to produce a result more favorable to AEP-Ohio. Such a result would be fundamentally unfair to other signatory parties to the distribution rate case stipulation and have a chilling effect

⁸⁶ AEP-Ohio Application for Rehearing at 30 (emphasis added).

on parties' willingness to enter into future stipulations for fear of similar retroactive revisions. AEP-Ohio's request for rehearing must be denied.

G. The portions of AEP-Ohio's application for rehearing that rely upon settlements from other proceedings to resolve contested issues in these proceedings are unreasonable and unlawful.

AEP-Ohio's application for rehearing claims that the ESP II Order's adoption of a 12% significantly excessive earnings test ("SEET") threshold is unlawful and unreasonable and urges the Commission to grant rehearing and instead establish the SEET threshold through the annual SEET process to be conducted during the term of the ESP. AEP-Ohio's application for rehearing argues that the ESP II Order is not consistent with statutory requirements. Additionally, AEP-Ohio's application for rehearing points to the decisions regarding ESPs for Duke Energy Ohio, Inc. ("Duke"), in Case Nos. 08-920-EL-SSO and 11-3549-EL-SSO, both of which provided for a SEET threshold of 15%.⁸⁷

The portions of AEP-Ohio's application for rehearing that reference the SEET thresholds established for Duke are improper. Both the ESP established in Case No. 08-920-EL-SSO and the ESP established in Case No. 11-3549-EL-SSO were the products of settlements approved by the Commission. The settlement in Case No. 08-920-EL-SSO specifically provided that it was not to be relied upon for precedent in any other proceeding:

Except for dispute resolution purposes, neither this Stipulation, nor the information and data contained therein or attached, shall be cited as precedent in any future proceeding for or against any Party, or the Commission itself. This Stipulation and Recommendation is a reasonable compromise involving a balancing of competing positions, and it does not

⁸⁷ AEP-Ohio Application for Rehearing at 33.

necessarily reflect the position which one or more of the Parties would have taken if these issues had been fully litigated.⁸⁸

The settlement in Case No. 11-3549-EL-SSO has a similar provision:

This Stipulation is submitted for purposes of these proceedings only, and neither this Stipulation nor any Commission Order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation.⁸⁹

The second assignment of error in AEP-Ohio's application for rehearing also improperly relies on settlements in other proceedings for purposes of resolving contested issues in these proceedings and is similarly improper.⁹⁰ In seeking to increase the revenue collectable through an RSR inflated through the use of a higher hypothetical ROE, AEP-Ohio's application for rehearing cites a settlement in AEP-Ohio's distribution rate case.⁹¹ Similar to the quoted sections of the settlements provided above, the settlement in AEP-Ohio's distribution rate case contained a clause prohibiting its use in other cases for the purpose of resolving contested issues or as precedential support in other cases.⁹²

⁸⁸ *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO, *et al.*, Stipulation and Recommendation at 2 (Oct. 27, 2008).

⁸⁹ *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.*, Stipulation and Recommendation at 2, 36 (Oct. 24, 2011) ("Duke ESP Stipulation").

⁹⁰ AEP-Ohio Application for Rehearing at 21-22.

⁹¹ *Id.*

⁹² *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, *et al.*, Joint Stipulation and Recommendation at 14-15 (Nov. 23, 2011).

In fact, in the *Capacity Case*, AEP-Ohio argued that Staff had improperly relied upon the ROE from that very stipulation.⁹³ The Capacity Order agreed with AEP-Ohio and held that the ROE contained in the stipulation from AEP-Ohio's distribution rate case was part of a settlement agreement and could not be used for precedent.⁹⁴ Despite AEP-Ohio's own objections to using this ROE for precedential support, and despite the Commission findings that this specific ROE cannot be used in future cases for precedential support, AEP-Ohio's application for rehearing cites to the same ROE in the distribution rate case settlement for the purpose of resolving a contested issue in these proceedings (how much transition revenue, if any, may lawfully and reasonably be authorized for collection through the non-bypassable RSR).⁹⁵

The portions of AEP-Ohio's application for rehearing that rely upon settlements from other proceedings to resolve contested issues in these proceedings are unreasonable and unlawful.

H. The portion of AEP-Ohio's application for rehearing that claims that the ESP II Order is unreasonable or unlawful for failing to unconditionally approve AEP-Ohio's corporate separation application in another proceeding is without merit.

In assignment of error VIII, AEP-Ohio's application for rehearing claims that the ESP II Order must be modified on rehearing so as to approve AEP-Ohio's corporate separation application in Case No. 12-1126-EL-UNC (hereinafter "*Corporate Separation Case*"). It also asserts that the ESP II Order is unreasonable or unlawful because it

⁹³ *Capacity Case*, Ohio Power Company's Reply Post-Hearing Brief at 40-42; see also Capacity Order at 34.

⁹⁴ Capacity Order at 34.

⁹⁵ AEP-Ohio Application for Rehearing at 21-22.

requires AEP-Ohio to hold customers harmless for Pollution Control Revenue Bonds (“PCRBs”) and generation-related debt. AEP-Ohio’s arguments in support of its application for rehearing on these issues are without merit and should be denied.

AEP-Ohio’s application for rehearing effectively asks that these proceedings be used, at the rehearing stage, to grant the relief AEP-Ohio has requested in the separate *Corporate Separation Case* and it is therefore inappropriate. As is recognized in the ESP II Order, AEP-Ohio failed to timely request consolidation of the *Corporate Separation Case* and the *ESP II Case*. Thus, the *Corporate Separation Case* must be considered separately and on its own record.⁹⁶

Regardless, AEP-Ohio’s application for rehearing fails, on its face, to show that the relief AEP-Ohio is seeking in the *Corporate Separation Case* should be approved without modification. AEP-Ohio claims “[t]hat docket is ripe for decision as the relevant issues have been raised and were considered by the Commission when it approved AEP Ohio’s corporate separation as part of the 2011 ESP Stipulation, and those same issues have been raised again as part of the current comment cycle.”⁹⁷ But the issues in the *Corporate Separation Case* are very different than the issues that were before the Commission when it initially approved AEP-Ohio’s corporate separation as part of the Stipulation ESP. And even if it was proper at the rehearing stage to inject in these proceedings the request for relief that AEP-Ohio has submitted in the *Corporate Separation Case*, these differences prevent the Commission from now approving AEP-Ohio’s application in the *Corporate Separation Case*.

⁹⁶ Moreover, Section 4928.143, Revised Code, does not authorize the Commission to approve an amendment to a corporate separation plan in an ESP application.

⁹⁷ AEP-Ohio Application for Rehearing at 40.

When the Commission initially approved the Stipulation ESP, it authorized AEP-Ohio to move forward with corporate separation based on the expectation that AEP-Ohio would bid all of its generating assets into future RPM auctions.⁹⁸ Once AEP-Ohio's filings at the Federal Energy Regulatory Commission ("FERC") demonstrated that the Commission's expectation was not shared by AEP-Ohio, the Commission determined, for this and other reasons, that the Stipulation ESP was not beneficial to ratepayers and the public interest, reversing its decision to authorize AEP-Ohio to transfer its generating assets.⁹⁹ AEP-Ohio's current proposal is just an extension of the same bad plan that was initially approved as part of the 2011 ESP Stipulation. Thus, it would be unreasonable and unlawful for the relief AEP-Ohio is requesting in the *Corporate Separation Case* to be granted by the Commission in the rehearing phase of these proceedings. At a minimum, the Commission must place certain conditions upon any approval of AEP-Ohio's application in the *Corporate Separation Case*, such as requiring AEP-Ohio's affiliates receiving generating assets to bid all of the to-be-transferred assets into RPM auctions.

Granting AEP-Ohio's application in the *Corporate Separation Case* through the rehearing phase of these proceedings would also be unreasonable and unlawful in the context created by the portions of the ESP II Order that permit AEP-Ohio to collect additional transition revenue. These portions of the ESP II Order include the RSR, the Capacity Shopping Tax, and the PTR since they all permit AEP-Ohio to collect above-market generation-related revenue.

⁹⁸ Entry on Rehearing at 8 (Feb. 23, 2012).

⁹⁹ *Id.*

When and where transition revenue collection may be authorized by the Commission, Ohio law (Section 4928.39, Revised Code) requires that the above-book market value of generating plants be netted against any transition revenue claim for purposes of determining the amount of transition revenue that may lawfully and reasonably be collected from customers. This issue has been raised in the *Corporate Separation Case*.¹⁰⁰ Unless the transition revenue collection opportunity which the ESP II Order authorizes is eliminated, granting the relief requested by AEP-Ohio in the *Corporate Separation Case* will unreasonably and unlawfully overstate the amount of any transition revenue collection opportunity afforded to AEP-Ohio by the ESP II Order.

AEP-Ohio's application for rehearing also claims that the ESP II Order's initial findings pertaining to PCRBs and generation-related debt require modification on rehearing. While the Commission allowed AEP-Ohio to retain PCRBs, AEP-Ohio's application for rehearing contests the ESP II Order's requirement that:

AEP-Ohio ratepayers shall be held harmless for the cost of the pollution control bonds, as well as any other generation or generation related debt or inter-company notes retained by AEP-Ohio. AEP-Ohio shall file such information with the Commission in this docket no later than 90 days after the issuance of this order.¹⁰¹

More specifically, AEP-Ohio's application for rehearing states that it should not have to hold customers harmless to service the debt obligations associated with PCRBs and generation-related debt.

AEP-Ohio's application for rehearing offers several claims to support its position that it not be required to hold EDU customers harmless from the costs of the

¹⁰⁰ *Corporate Separation Case*, Request to Dismiss and Objections of IEU-Ohio at 8-9 (July 27, 2012).

¹⁰¹ AEP-Ohio Application for Rehearing at 41 (*quoting* ESP II Order at 59).

generation-related PCRBs. It states that: PCRBs provide low-cost, tax-exempt debt; PCRBs are not “directly linked” to generating asset; Staff did not claim that AEP-Ohio should have to hold customers harmless; and, AEP-Ohio cannot attest that customers will be held harmless from having to service the debt from PCRBs. With regard to these claims, AEP-Ohio’s application for rehearing then states that “the Commission should clarify that *the 90-day showing would be limited to demonstrating that customers have not and will not incur any additional costs caused by corporate separation*, and that hold harmless obligation also pertains to additional costs caused by corporate separation.”¹⁰² Finally, AEP-Ohio’s application for rehearing complains that Duke received different treatment in the Commission’s order adopting a settlement regarding Duke’s ESP.

The fact that PCRBs may be relatively low-cost debt instruments is irrelevant. Legally, it does not matter that it is low-cost or high-cost debt. To the extent the debt is related to generation assets, the debt transfer must follow the generating asset transfer. This is the only way to ensure that the EDU’s generation business is fully on its own in the competitive market as required by Ohio law.¹⁰³

Second, contrary to the claim that PCRBs “are not directly linked to the generation assets,” the testimony of Renee Hawkins indicates that the PCRBs represent \$296 million in debt associated with the Gavin, Zimmer, Cardinal, and Amos generating units.¹⁰⁴ When AEP-Ohio eventually transfers its generating assets, the liabilities must follow the assets.

¹⁰² AEP-Ohio Application for Rehearing at 42 (emphasis added).

¹⁰³ Section 4928.38, Revised Code.

¹⁰⁴ AEP-Ohio Ex. 102 at RVH 5.

While IEU-Ohio does not agree that the PCRBs may properly remain with AEP-Ohio, the EDU, if AEP-Ohio, the EDU, is permitted to retain the PCRBs, it must hold distribution customers harmless against any related debt service obligations associated with generation-related liabilities such as the PCRBs. Failure to do so would violate corporate separation requirements contained in Section 4928.17, Revised Code, and evade the requirement that AEP-Ohio's generation business be fully on its own in a competitive market.

Third, AEP-Ohio's claim that Staff did not suggest that customers be held harmless is irrelevant. As explained above, Ohio law requires distribution customers to be held harmless if AEP-Ohio, the EDU, is permitted to retain the PCRBs and not transfer them with the related generating assets.¹⁰⁵ Moreover, Staff claimed that AEP-Ohio failed to demonstrate that it should not have to transfer the PCRBs.¹⁰⁶ Staff's argument is further supported by AEP-Ohio's application for rehearing, which, for the first time, claims that AEP-Ohio will face substantial defeasance costs if it is required to transfer the bonds. Neither the terms of the bonds, nor the magnitude of the defeasance costs mentioned by AEP-Ohio, is in the record. The Commission cannot grant relief based upon non-record evidence.

Fourth, AEP-Ohio's claim that it cannot attest that customers will be held harmless is ludicrous. The ESP II Order requires AEP-Ohio to hold customers harmless. Failure to do so would violate the express terms of the ESP II Order.

¹⁰⁵ Section 4928.38, Revised Code; Section 4928.17, Revised Code; Section 4928.02(H), Revised Code; Rule 4901:1-37-04, Ohio Administrative Code; Rule 4901:1-37-09, Ohio Administrative Code.

¹⁰⁶ Initial Post-Hearing Brief of the Staff of the Public Utilities Commission of Ohio at 13-14.

Finally and for the reasons discussed above regarding the improper use of stipulations from other proceedings, it is improper for AEP-Ohio's application for rehearing to claim that the ESP II Order must be modified to provide AEP-Ohio the result that Duke received, through a settlement, in its ESP proceeding.¹⁰⁷

III. CONCLUSION

For the reasons previously provided including those contained in the applications for rehearing, the Commission must grant rehearing, terminate any authority that may permit AEP-Ohio to bill or collect compensation based on the as-approved Modified ESP, and issue such orders as are necessary to continue the provisions, terms, and conditions of AEP-Ohio's most recent SSO until a subsequent SSO is lawfully authorized pursuant to Section 4928.142 or 4928.143, Revised Code. The Commission's restoration of the most recent SSO must require that AEP-Ohio's compensation for generation capacity service available to CRES providers be determined based on the capacity valuation and pricing method that is part of PJM's RPM. Further, IEU-Ohio requests that the order granting rehearing direct that any revenue increase collected by AEP-Ohio pursuant to the ESP II Order or pursuant to the Stipulation ESP, filed September 7, 2011 that was approved and then rejected on February 23, 2012, be refunded.

¹⁰⁷ See Duke ESP Stipulation.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/17/2012 4:31:46 PM

in

Case No(s). 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

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