BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO POWER COMPANY'S MEMORANDUM CONTRA INTERVENORS' APPLICATIONS FOR REHEARING

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On behalf of Ohio Power Company

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INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"); the Appalachian Peace and Justice Network ("APJN"); the Kroger Co. ("Kroger"); Industrial Energy Users – Ohio ("IEU"); the Ohio Energy Group ("OEG"); the Ohio Association of School Business Officials, Ohio Schools Council, Buckeye Association of School Administrators, and Ohio School Board Association (collectively, "Schools"), FirstEnergy Solutions Corp. ("FES"); the Ohio Manufacturers Association and the Ohio Hospital Association (collectively, "OMA/OHA"); and Ormet Primary Aluminum Corporation ("Ormet") filed applications for rehearing of the Commission's August 8, 2012 Opinion and Order in this case (the "*ESP II Opinion and Order*"). Ohio Power Company ("AEP Ohio" or the "Company") hereby files this memorandum in opposition. For the convenience of the Commission, the Company attempted to jointly address the arguments in Intervenors' Applications for Rehearing on a topical basis in roughly the same order that they were addressed within the text of the Commission's Opinion and Order.

ARGUMENT

I. Intervenors' objections to the SSO base generation rates included in the modified ESP are meritless.

A. The Commission correctly found that freezing SSO base generation rates for the ESP term is a substantial benefit of the modified ESP.

The Commission found that AEP Ohio's proposal under the modified ESP to freeze base generation rates was reasonable. (*ESP II Opinion and Order* at 15-16.) OCC/APJN argue on rehearing, as they contended in post-hearing briefs, that frozen base generation rates are not a benefit to customers, because the prices for electricity offered by CRES providers have declined and may continue to decline during the term of the ESP. (OCC/APJN AFR at 21.) OCC/APJN argue, apparently, that when competitive retail generation service prices from CRES providers decline, SSO rates should automatically adjust downward to match declines in competitive market prices. OCC/APJN do not say whether it would be supportive of SSO rates that automatically increase to mirror competitive prices when those prices are increasing, but AEP Ohio has little doubt about what OCC/APJN's position would be in that scenario. Undoubtedly, they would object to allowing SSO rates that would mirror increases in competitive prices. In the end, OCC/APJN's argument is simply that, during a period when competitive prices are relatively low, they prefer the MRO alternative.

OCC/APJN also contend that, because frozen SSO base generation rates would provide compensation that "roughly and approximately" compensates AEP Ohio for its cost of capacity, the benefit of a rate freeze inures to the Company, not the SSO customers. (OCC/APJN AFR at 23.) But OCC/APJN miss the point. The fact that the SSO base generation rates enable AEP Ohio to obtain rough and approximate compensation for its actual capacity costs from the SSO customers is, of course, relatively beneficial to AEP Ohio, at least compared to compensation that does not permit AEP Ohio to recover its capacity costs. But the Commission correctly found, as further discussed more extensively below in connection with the RSR, that having frozen base generation rates for the duration of the ESP benefits both SSO and shopping customers by providing a stable and reasonably priced default generation service during the ESP that will be available to all customers, no matter what happens to competitive pricing during the term of the ESP. Moreover, that reasonably priced alternative will remain available even as all retail customers evaluate and exercise their option to shop.

B. Maintaining the current rate design for SSO generation rates does not adversely affect the provision of comparable and non-discriminatory service in compliance with Section 4928.141, Revised Code.

OCC/APJN also assert that AEP Ohio's SSO base generation rates are not properly unbundled into their energy and capacity components and, consequently, it is difficult, if not impossible, for the Commission to ensure that SSO customers are receiving comparable and non-discriminatory generation service, as required by Section 4928.141, Revised Code. (OCC/APJN AFR at 25.) This criticism is also misguided. First, AEP Ohio unbundled its rates into their functional components of distribution, transmission, and generation in Case Nos. 99-1729 and 99-1730-EL-SSO. The Commission approved that unbundling and found that it was done in accordance with Chapter 4928, Revised Code. There was not then, and there is not now, a requirement by any provision of Chapter 4928, including Section 4928.141, Revised Code, to unbundle the generation component into the "capacity" and "energy" components that OCC suddenly appears to prefer. Nevertheless, as a result of the establishment of a fuel adjustment clause (FAC) in Case Nos. 08-917 and 08-918-EL-SSO and its reiteration in this proceeding, along with the integration of the Environmental Investment Carrying Cost Rider (EICCR) into the base generation rates in this proceeding, there is a correlation between the FAC and energy costs, on the one hand, and the base generation rate and capacity costs, on the other hand. In any case, there is no detailed analysis or cost study done in this record that attempts to methodically unscramble the base generation rate "egg" to precisely determine what SSO customers are charged for capacity. Intervenors do not rely on evidence of testimony in this regard but simply attempt to extrapolate and over-extend the Commission's findings in the *Capacity Pricing* decision.

C. The SSO base generation rates are not discriminatory.

OCC/APJN next argue that the approved SSO base generation rates result in discriminatory pricing of capacity between shopping customers, CRES providers, and non-shopping customers. (OCC/APJN AFR at 28, 74.) This criticism also is misguided. AEP Ohio offers capacity service to CRES providers. It offers an SSO – a bundled supply of generation service – to non-shopping customers, not capacity service. Consequently, there is no discrimination possible between the wholesale capacity service that AEP supplies to CRES providers, on the one hand, and the SSO generation service that it offers to non-shopping customers, on the other hand, because they are not the same or even similar services.

In addition, AEP Ohio does not provide a separate/discrete capacity service to either shopping or non-shopping customers. Nor does it provide SSO generation service to shopping customers. Accordingly, there is no basis for a statutory claim of discriminatory pricing of capacity (or SSO generation service) by AEP Ohio as between shopping and non-shopping customers. Moreover, as AEP Ohio explained in its Reply Brief, at 53, the retail rate restrictions set forth in R.C. 4905.33 and 4905.35 do not provide a statutory basis for a claim of discriminatory pricing because those statutory provisions do not apply to wholesale charges such as capacity rates. Nonetheless,even if they did, it is well established that Ohio law " 'does not prohibit rate discrimination *per se*; rather, it prohibits charging different rates when the utility is performing " *** a like and contemporaneous service under substantially the same circumstances and conditions." ' " *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 23, *quoting AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 86-87, 765 N.E.2d 862 and *Mahoning Cty. Twps. v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 40, 43-44, 388 N.E.2d 739.

R.C. 4905.33 prohibits discriminatory pricing for "like and contemporaneous service" rendered "under substantially the same circumstances and conditions." If, however, "the utility services rendered to customers are different or if they are rendered under different circumstances or conditions, differences in the prices charged and collected are not proscribed by R.C. 4905.33." *Weiss v. Pub. Util. Comm*., 90 Ohio St. 3d 15, 16, 734 NE 2d 775 (2000). Similarly, although R.C. 4905.35 prohibits a utility from making or giving an "undue or unreasonable" preference or advantage or from imposing an "undue or unreasonable" prejudice or disadvantage, it "does not prohibit all preferences, advantages, prejudices, or disadvantages—only those that are undue or unreasonable." *Weiss* at 15-17. "Thus, a discriminatory classification is not prohibited if it is reasonable." *Id*. at 16. For example, if the utility services rendered to similarly situated customers are different, or if they are rendered under different circumstances or conditions, then differences in the prices charged and collected are not proscribed. *Id*.

Here, as discussed above, both the services rendered to customers are different. AEP Ohio supplies CRES providers (in a wholesale transaction) with capacity. Conversely, it provides SSO base generation service to non-shopping customers (in a retail transaction), which encompasses more than simply capacity. Moreover, the services are rendered under different circumstances or conditions (to CRES providers for resale versus to non-shopping customers as one component of a larger, negotiated, rate for electric service). Additionally, shopping customers and non-shopping customers are not similarly situated – non-shopping customers take retail electric service from AEP Ohio, while shopping customers take service from a CRES provider. (*See* Oral Argument Tr. at 114-115 (explaining that a comparison between a wholesale capacity charge and the price for SSO service is an "apples to oranges" comparison).)

OCC/APJN's complaint that SSO base generation rates result in discriminatory pricing of capacity, therefore, is without merit.

D. The Commission's determination in the capacity pricing proceeding that the cost of capacity furnished to CRES providers is $189/MW-day has no relevance to the appropriate level of SSO base generation rates for non-shopping customers.

OCC/APJN and OMAEG/OHA further contend that the frozen SSO base generation rates should be reduced to reflect the Commission's determination that $189/MW-day is AEP Ohio's cost of capacity. (OCC/APJN AFR at 30; OMAEG/OHA AFR at 18.) There is no basis for such a reduction to the frozen base generation rates. Even if the $189/MW-day figure represented the actual cost of AEP Ohio's capacity (and AEP Ohio maintains that its cost of capacity is well in excess of that figure), there is no requirement under the statutes that govern the pricing of an ESP's SSO generation rates (Sections 4928.143 and 4928.141, Revised Code) to base the price of the SSO generation rate on the electric utility's cost of service. Rather, the pricing of SSO generation rates is governed by R.C. 4928.143(B). That section does not dictate <u>any</u> specific approach or standard – let alone a cost-based method – that must be followed to set the price of SSO generation rates. Instead, ESP pricing is subject simply to the requirement that the entire ESP, including its pricing, is more favorable in the aggregate as compared to the expected results of an MRO, R.C. 4928.143(C)(1). In addition, the argument that pricing for capacity to CRES providers should determine or otherwise influence the pricing of SSO base generation rates is wholly without any legal or other basis. In any event, even if there <u>were</u> a requirement that SSO generation rate be cost-based, there also is no basis for the conclusion that SSO base generation rates recover only capacity costs. For each of these reasons, OCC/APJN's and OMAEG/OHA's arguments that the Company's SSO base generation rates should be reduced to a level equivalent to the wholesale capacity cost determined in the Capacity Case are without merit and should be rejected on rehearing.

II. Intervenor claims that the adopted RSR is unlawful and unreasonable are without merit

A. Intervenor claims that the adopted RSR is unlawful are without merit

1. The *ESP II Opinion and Order* correctly concludes that the modified RSR is authorized by the ESP statute.

Various parties challenge the legal basis for the RSR, wrongly claiming that the RSR does not fit within division (B)(2)(d) of the ESP statute. As further demonstrated below, the Commission properly found that the RSR is authorized under division (B)(2)(d) and the Commission should reinforce that conclusion on rehearing and also recognize the other provisions within the ESP statute that support adoption of the modified RSR. Indeed, the Commission has already adopted a similar charge for Duke Energy Ohio; though Duke's financial stability charge was part of a Stipulation, the Commission would not have been able to adopt it if it were unlawful. Once the Commission reinforces its conclusion that the RSR is authorized under the ESP statute, it follows that the Commission should also reject intervenor arguments that a phased recovery of the capacity deferral component of the RSR is not authorized under R.C. 4928.144, as explained below. Finally in this regard, the intervenor arguments about the wholesale service classification of capacity being provided by AEP Ohio to support retail shopping are misguided and have no bearing on the lawfulness of the RSR.

Regarding the statutory basis for the RSR. intervenors generally contest the applicability of division (B)(2)(d) of the ESP statute to the RSR. OCC/APJN maintain (AFR at 40-41) that the Commission failed to clarify which specific category listed in division (B)(2)(d) is being relied upon and go on to contend (AFR at 41-42) that none of the categories apply.[1] In this regard, OCC/APJN conclude that the *ESP II Opinion and Order* ignores language in division (B)(2)(d) and, thus, violates R.C. 1.47 and the plain meaning of the statute.[2] Other intervenors make less detailed arguments to the same effect. (OCC/APJN AFR at 36-45; Schools AFR at 7-11; FES AFR at 10-12; IEU AFR at 36-45.) As further discussed below, however, OCC/APJN, Schools, FES and IEU are incorrect in asserting that the RSR is not properly considered to be within the scope of division (B)(2)(d). OCC/APJN proceed to second-guess the Commission's factual findings supporting the conclusion that the RSR provides stability and certainty. IEU (AFR at 37-46) also challenges the basis for concluding that the RSR promotes certainty and stability. These transparent challenges are also without merit and merely illustrate that intervenors would like to second-guess the Commission's factual findings.

As a related matter, OCC/APJN argue (AFR at 61-66) that the capacity deferral relating to wholesale capacity charges cannot be phased in through ESP rates under R.C. 4928.144 because the underlying costs must first be authorized by the ESP statute prior to being phased in.

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[1] At odds with OCC/APJN's argument that the Commission failed to specify which of the categories in division (B)(2)(d) applies to the RSR, the Schools suggest (alone among intervenors) that the Opinion and Order inextricably links the RSR to the "limitations on customer shopping" category under (B)(2)(d) in a manner that is inconsistent with the statute and against the manifest weight of the evidence. (Schools AFR at 8-11.) The Opinion and Order's passing reference (at 31) to the "limitations on customer shopping" language does not bind or restrict the Commission's findings to that one category. The key finding regarding the legal authority for the RSR in the Opinion and Order (at 31) was that "the RSR meets the criteria of Section 4928.143(B)(2)(d)" and that finding did not limit the holding to the "limitations on customer shopping" strand of the statute.

[2] OCC/APJN separately argue (at 38) that the RSR should be considered unlawful since there is no statutory provision that explicitly permits recovery of generation revenue lost due to shopping and the General Assembly has provided in other circumstances that lost revenue is permitted. This position is flawed because it is based on an inaccurate characterization of the RSR as being tied to lost revenue from shopping. (*See* AEP Ohio Reply Brief at 13-17.) Moreover, the principle of *inclusio unius exclusio alterius* relied upon by OCC does not apply here, since the statutes cited in support of its argument (R.C. 4905.30 and 4928.143(B)(2)(h)) do not apply to the RSR, are provisions in separate chapters of the Revised Code unrelated to one another, and do not convey any common point let alone imply any general restriction. In any case, the dispositive issue in this regard is whether (B)(2)(d) authorizes the RSR.

Other intervenors make similar arguments. (*See* OMAEG/OHA AFR at 15-17; Schools AFR at 11-13; IEU AFR at 48-50.) But these arguments are premised on the intervenors' position that the RSR is not authorized by the ESP statute. Once it is determined that the RSR is authorized by the ESP statute, these claims are also rendered invalid.

In sum, there are three key points for the Commission to clarify and address on rehearing in response to the intervenor arguments that the RSR is permitted by the ESP statute. First, the Commission should confirm applicability of division (B)(2)(d) to the RSR and further clarify the specific category/categories being relied upon as well and the basis for doing so. As part of that determination, the Commission should address whether there are additional provisions within R.C. 4928.143(B)(2) it is alternatively relying on in parallel to adopt the modified RSR such as divisions (B)(2)(e) and/or (B)(2)(i). Second, the Commission should reinforce application of the phase-in statute, R.C. 4928.144, to the phased recovery of the capacity deferrals through the RSR. Finally, the Commission should confirm that the service classification of AEP Ohio's capacity resources being used to support retail shopping, whether wholesale or retail or competitive or non-competitive, does not undermine the legality of the RSR under the ESP statute.[3]

[3] Intervenors also challenge the legal authority for the RSR based on language in the Reliability Assurance Agreement (RAA) that was cited and discussed in the Capacity Pricing decision as one of the bases for addressing the wholesale capacity price. (*See e.g.,* OCC AFR at 68-70; FES AFR at 9; OEG at 8-9, 30-31.) While the RAA is pertinent to the discussion of the wholesale capacity charge (and has been raised as a rehearing issue in the Capacity Pricing case), it does not govern the retail SSO rates being addressed in this decision. Interestingly in this regard, FES agrees (at 31) with AEP Ohio's position on rehearing that the State Compensation Mechanism established in the Capacity Pricing decision has no application to SSO customers. In any case, the Commission's adoption of the RSR was premised on Ohio law; FERC (and the RAA by extension) has no jurisdiction or interest in such retail rate design matters. And while the RAA clearly contemplates, and makes an accommodation for, a retail capacity charge option for State commissions like Ohio that have retail shopping, it is Ohio law (not the RAA) that governs the non-bypassability of AEP Ohio's retail RSR.

a. Division (B)(2)(d) of the ESP statute supports adoption of the RSR

The Opinion and Order is correct in concluding that the modified RSR is authorized for inclusion in an ESP by virtue of division (B)(2)(d) of the ESP statute. The narrow and restrictive view of division (B)(2)(d) advanced by a few of the intervenors is misguided and should not be entertained by the Commission.[4] These intervenors place heavy reliance on the Supreme Court's remand decision involving the Commission's decision in AEP Ohio's initial ESP case, but they overplay that hand. (*See e.g.*, Schools AFR at 7-11; IEU AFR at 36; OCC/APJN AFR at 61-66.) The Supreme Court of Ohio has not vacated or invalidated any provision included in an ESP to date – including the POLR charge adopted in *ESP I*; rather it was the Commission that re-evaluated the propriety of the POLR charge and decided that it was not adequately supported by evidence. Notwithstanding the intervenors' attempt to straightjacket the Commission here, the fact remains that the ESP statute conveys broad discretion and flexibility to the Commission in crafting ESP provisions.

Division (B)(2)(d) provided the Commission with a great amount of discretion to authorize a term of an ESP with an expansive list of permissible rate adjustments. The language in division (B)(2)(d) explicitly authorizes the Commission to include within an ESP the following:

> <u>Terms, conditions, or charges</u> relating to [1] limitations on customer shopping for retail electric generation service, [2] bypassability, [3] standby, back-up, or supplemental power service, [4] default service, [5] carrying costs, amortization

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[4] Many intervenors that challenged the RSR during the hearing process have dropped out of the pack in opposing the RSR on rehearing. Moreover, some intervenors like RESA and OEG have advocated use of a modified RSR on brief. (*See e.g.*, OEG Br. at 7-11; Exelon Br. at 11-14; WalMart Br. at 4-7; Staff Br. at 23; Ormet Br. at 7-13.) Thus, only a few intervenors remain opposed to the RSR and some of those who most ardently challenged the RSR during trial continue do so on rehearing only in a cursory manner. (*See e.g.*, FES AFR at 10-15.)

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;

R.C. 4928.143(B)(2)(d) (numbered brackets and emphasis added). Thus, there are three inquiries to be satisfied in confirming that a particular ESP provision is encompassed by division (B)(2)(d):

- First, is the proposed ESP feature a term, condition or charge?
- Second, does it fall within one or more of the five listed categories? and,
- Third, would it have the effect of stabilizing or providing certainty regarding retail electric service?

With respect to the RSR, the answer is a resounding "yes" for all three queries.

Regarding the first query, the overall scope of division (B)(2)(d) allows terms, conditions or charges to be included in an ESP. The RSR is obviously a charge. Because it enables the other parts of the ESP to exist and is part of a package, the RSR is also a term and condition of the ESP. There can be no question that the first criterion is met.

Whether the RSR fits into one or more of the five categories[5] under the second query is the subject of some disagreement. OCC/APJN goes through each of the categories in summary fashion and concludes (AFR at 41-42) that each is inapplicable. AEP Ohio disagrees with the OCC/APJN superficial gloss and, in fact, submits that most if not all of the categories can

[5] OCC/APJN agree with this method of interpreting division (B)(2)(d) as involving three inquiries, though they place the brackets in a slightly different position and come up with six categories rather than five. (OCC/APJN AFR at 41.)

rationally be applied to the RSR. The Schools also attempt (AFR at 9-11) to demonstrate that the "limitations on customer shopping" category does not apply. Of course, only one of the categories needs to apply in order for the second part of the provision to be satisfied. As further demonstrated below, AEP Ohio submits that the Commission was more than justified in finding (*ESP II Opinion and Order* at 31) that the RSR meets the criteria of division (B)(2)(d).

Regarding the category of limitations on customer shopping for retail electric generation service, the RSR affects shopping as a non-bypassable generation charge. For example, FES argues (AFR at 12) that the RSR reduces "headroom" or margin for suppliers, which it alleges will reduce the opportunity for shopping. In a similar vein, FES and other intervenors claim that the RSR unduly discriminates against shopping customers and unreasonably burdens shoppers with an anti-competitive subsidy – claims which are false as demonstrated above. Of course, the Commission found in the *Capacity Pricing* case that the below-cost RPM pricing, which drove creation of the capacity deferrals being recovered under the RSR, would stimulate significant retail shopping in AEP Ohio's service territory. (*Capacity Pricing*, Opinion and Order at 23.) In any case, the non-bypassability of the RSR arguably places a (reasonable) limitation on retail shopping. As such, the "limitation on customer shopping" category can be rationally applied to the RSR.

The second category of bypassability is also applicable. Specifically, the adopted RSR – as a non-bypassable charge – is plainly a charge "relating to … bypassability." The Commission affirmatively addressed bypassability in adopting the RSR and, thus, the second category can be rationally applied to the RSR.

It is not obvious whether the third category relating to standby, back-up or supplemental power service applies to the adopted RSR but could be deemed relevant.

The fourth category of default service clearly applies, given financial stability component of the RSR that is needed in order for AEP Ohio to fulfill the provider-of-last-resort obligation and offer frozen base generation SSO rates. The SSO itself is default service and must be offered to current and future non-shopping customers during the entire ESP term. The RSR clearly relates to default service and satisfies the fourth category under the second query.

The fifth category of carrying costs, amortization periods and accounting or deferrals also applies to the RSR. The capacity deferral component of the RSR integrally relates to amortization and recovery of deferrals with recovery of carrying costs during the period of delayed recovery. There can be no question that the fifth category applies to the RSR. In sum, most if not all of the categories in division (B)(2)(d) apply to the RSR and the second query is abundantly satisfied.

The third and final query to confirm applicability of division (B)(2)(d) is whether the RSR has the effect of stabilizing or providing certainty regarding retail electric service. The Commission found that it does, setting forth extensive record-based findings in support of that conclusion:

> We believe the RSR meets the criteria of Section 4928.143(B)(2)(d), as [1] *it promotes stable retail electric service prices and ensures customer certainty regarding retail electric service*. Further, [2] *it 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 opportunities that will become available as a result of the Commission's decision in the Capacity Case.
>
> In addition, we find that *the RSR freezes any non-fuel generation rate increase* * *

> * *allowing current customer rates to remain stable throughout the term of the modified ESP*. While we understand that the non- bypassable components of the RSR will result in additional costs to customers, we believe any costs associated with the RSR are mitigated by the effect of stabilizing non-fuel generation rates, as well as [3] *the guarantee that, in less than three years, AEP-Ohio will establish its pricing based on energy and capacity auctions, which this Commission again maintains is extremely beneficial* by providing customers with an opportunity to pay less for retail electric service than they may be paying today.
>
> Therefore, we find that the RSR provides certainty for retail electric service, as is consistent with Section 4928.143(B)(2)(d), Revised Code. Until May 31, 2015, [4] *AEP-Ohio's SSO rate, as a result of this RSR, will remain available for all customers, including those who are presently shopping, as well as those who may shop in the future. The ability for AEP-Ohio to maintain a fixed SSO rate is valuable, particularly if an unexpected, intervening event occurs during the term of the ESP, which could have the effect of increasing market prices for electricity*. The ability for all customers within AEP-Ohio's service territory to have the option to return to AEP-Ohio's certain and fixed rates allows customers to explore shopping opportunities. This is an *extremely beneficial aspect of the RSR and is undoubtedly consistent with legislative intent in providing that electric security plans may include retail electric service terms, conditions, and charges that relate to customer stability and certainty*.

(*ESP II Opinion and Order* at 31-32 (emphasis and numbered brackets added).) Thus, the Commission found that the RSR promotes retail rate stability and certainty in at least *four distinct ways*, which are further elaborated below.

First, the Commission findings confirm that the RSR enables AEP Ohio to promote stable retail electric service prices and ensure customer certainty regarding retail electric service, specifically concluding that the additional cost of the RSR is offset by the mitigating impact of frozen base generation rates during the ESP term.[6] The Commission went on to state that the freeze on non-fuel generation rate increases allows current customer rates to remain stable

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[6] AEP Ohio notes that the base generation rates will be truly frozen for the entire ESP term under the Company's rehearing request I.A.

throughout the term of the modified ESP. Each of those findings are based on the record and supports the stability branch of the third query. This conclusion is based on the record.

As AEP Ohio witness Dias testified, "[y]ou have to think about the RSR in context of the whole ESP. You can't just look at it by itself. It ties in, it strikes that balance." (Tr. VI at 1896-97.) Further, when asked how the RSR on a stand-alone basis would provide certainty and stability for customers, Mr. Dias testified as follows:

> It would still get the company to the end state, which is auction-based SSO pricing, it will provide competitive choices for customers. I'm not recommending the Commission approve the RSR by itself. It is proposed as a balance towards all the other provisions that have been proposed also in this modified ESP."

(*Id.* at 1899.) Even assuming, solely for the sake of argument, that the RSR itself does not directly maintain rate certainty to customers (which it does), the language in division (B)(2)(d) of the ESP statute is nonetheless broad enough to encompass the RSR because it has the effect of stabilizing and providing certainty by enabling the entire Modified ESP package to be implemented (which provides rate certainty and stability).

As the Company testified repeatedly on the record, the RSR was proposed to enable the Company to avoid the adverse financial impacts of offering the Modified ESP as a whole. The RSR is not linked exclusively to discounted or below-cost capacity charges. The fixed base generation rates are among the chief features of the modified ESP and they do provide certainty and stability for a large portion of SSO total rates. This is demonstrated by AEP Ohio witness Roush's Exhibit DMR-1, which shows low single digit rate increases for the major customer classes (*i.e.*, excluding outdoor lighting rates) during each year of the ESP term. (AEP Ohio Ex. 111.) Further, division (B)(2)(d) of the ESP statute is not limited to providing stability to retail customers but also enables the Commission to adopt a charge that promotes stability for the

Company; the statute merely requires the effect to stabilize or provide certainty for retail electric service.

Regarding the second finding in support of the stability and certainty criteria, the Commission found that the RSR 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 opportunities that will become available as a result of the Commission's decision in the Capacity Case. This is an astute and intentional observation by the Commission, revealing the Commission's coordinated and strategic plan for deciding the two cases. Specifically, the Commission indicated that the *Capacity Pricing* decision to create a deferral based on the provision of RPM pricing to CRES providers works in combination with the *ESP II* decision to adopt the modified RSR – with the intended result being to enable CRES providers to offer RPM-based generation service (which CRES service also constitutes "retail electric service" under the third query) to be offered to AEP Ohio's customers as a competitive alternative to the SSO. In other words, the RSR's capacity deferral component directly enables RPM pricing for CRES providers and that, in turn, drives pricing benefits for customers as an alternative to SSO pricing throughout the entire ESP term. AEP Ohio agrees that the retail electric service being stabilized and providing certainty under division (B)(2)(d) does not necessarily have to be that service provided by the EDU whose ESP is being considered – and the positive effects of the RSR definitely extend beyond SSO customers to benefit shopping customers. As the Commission found, this feature of the RSR promotes both stability and certainty in retail electric service pricing.

Regarding the third distinct finding, the Commission found, consistent with the Company's characterization of the RSR as the "glue" for the entire modified ESP proposal,[7] that the RSR enables "the guarantee that, in less than three years, AEP-Ohio will establish its pricing based on energy and capacity auctions, which this Commission again maintains is extremely beneficial by providing customers with an opportunity to pay less for retail electric service than they may be paying today." The ultimate goal of this ESP is to transition AEP Ohio to a fully competitive SSO environment and the Commission correctly acknowledges that it is "extremely beneficial" in fulfilling the vision of SB 3 and SB 221 in a fashion that is much quicker than could be achieved under the statute and simply could not be done without the Company's consent and cooperation. While some parties want to terminate the RSR based on the connection to the capacity deferrals or based on the proposition that it provides a financial buffer to the loss of non-fuel generation revenue, these parties ignore the Commission's key findings of why the RSR holds the plan together and conveys significant benefits in both the short and long term. As the Commission indicated, those benefits provide certainty into the future regarding retail electric service rates.

With respect to the fourth finding in support of the RSR's certainty and stability benefits, the *ESP II Opinion and Order* notes that "AEP-Ohio's SSO rate*, as a result of this RSR,* will remain available for all customers, including those who are presently shopping, as well as those who may shop in the future." (Emphasis added.) Thus, not only did the Commission again acknowledge that the RSR enables the plan as a whole including the fixed SSO rates, but it focused on the provider-of-last-resort obligation being met by the SSO and characterized the

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[7] Oral Argument, Tr. at 15-17.

price certainty benefit to customers as being "valuable, particularly if an unexpected, intervening event occurs during the term of the ESP, which could have the effect of increasing market prices for electricity." In this regard, the Commission made a cogent finding that the ability for all customers within AEP-Ohio's service territory to have the option to return to AEP-Ohio's certain and fixed rates "is an *extremely beneficial aspect of the RSR and is undoubtedly consistent with legislative intent in providing that electric security plans may include retail electric service terms, conditions, and charges that relate to customer stability and certainty*." (Emphasis added.) This fourth factual finding obviously supports the certainty benefit of the RSR in a manner consistent with the third query under division (B)(2)(d) of the ESP statute.

In short, the opposing intervenors have no legal plausible basis to challenge the Commission's fact-intensive finding and have only demonstrated in their rehearing applications that they disagree with the Commission's findings regarding stability and certainty benefits that flow from the RSR. While the Commission's findings regarding the first and third queries under division (B)(2)(d) were more than adequate, there could be a benefit on rehearing of clarifying and further addressing the second query regarding which of the five categories are being relied upon in adopting the RSR – consistent with the above discussion of those categories.

Even beyond division (B)(2)(d), there are additional bases within the ESP statute to justify the RSR from a legal standpoint. Division (B)(2)(e) of the ESP statute also permits automatic increases or decreases relating to SSO service and would encompass a pre-determined increase such as the adopted RSR. Further, to the extent that RSR also promotes economic development and job retention, as discussed above, division (B)(2)(i) also provide an additional source of authority for the RSR. While the *ESP II Opinion and Order* focuses on division (B)(2)(d) of the ESP statute, as further discussed below, the Commission could expand its bases for adopting the RSR on rehearing to include division (B)(2)(e) and/or division (B)(2)(i).[8] In addition, the 12% earnings/SEET cap discussed on page 37 of the Opinion and Order in conjunction with establishing the RSR can be considered an automatic rate increase/decrease under division (B)(2)(e), to the extent it is clarified in rehearing to be an integrated feature of the RSR such that the \$3.50/MWh and \$4/MWh RSR rates automatically apply unless they produce an ROE exceeding 12% in a particular year, which would result in an automatic decrease to the incremental amount, to the extent the resulting ROE exceeded 12% – as was advocated by OEG. (*See* OEG AFR at 3-4.)

Notwithstanding rehearing objections by a few of the intervenors concerning the RSR, the Commission has already adopted a similar charge for Duke Energy Ohio in its recent SSO case. *See* Case Nos. 11-3549-EL-SSO *et al*., November 22, 2011 Opinion and Order (adopting a non-bypassable Electric Service Stability Charge (ESSC) that conveys \$330 million to Duke Energy Ohio). As Exelon witness Fein stated in his testimony, Duke's ESSC was a "similar construct" to AEP Ohio's proposed RSR. (Exelon Ex. 101A at 9.) Although Duke's financial stability charge was part of a Stipulation, the Commission may only approve lawful mechanisms even when part of a stipulation. Intervenors' position that the Commission lacks authority to adopt the RSR is without merit as demonstrated above and through the *ESP II Opinion and Order*.

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[8] Even though the ESP II Opinion and Order (at 32) rejected the proposed decoupling feature of the RSR (which would have clearly triggered applicability of the automatic rate increase/decrease concept), the automatic increase provision of (B)(2)(e) could still be relied upon in adopting the fixed RSR. For example, it is reasonable to characterize the recovery of the capacity deferrals to be incurred under the RPM pricing as driving an automatic increase for recovery of those dollars through the RSR. Similarly, the Commission's additional basis of relying on cost information and projected earnings levels in developing the financial stability component of the RSR, it is also fair to characterize that feature as authorizing an automatic increase. Finally, the *ESP II Opinion and Order* indicated (at 36) that the \$0.50/MWh RSR increase in the third year is based on the additional risk and cost of the early energy auctions and that is easily characterized as an automatic increase as well. As a separate matter, the RSR as a whole is to promote rate stability and can be reasonably considered an economic development tool that can be recovered from all customers pursuant to division (B)(2)(i) of the ESP statute.

b. The Commission should avoid establishing confiscatory rates on rehearing.

AEP Ohio submits that the "laundry list" of permissible rate adjustments found in division (B)(2) of the ESP statute should be applied to the facts in this case so as to reach a lawful and constitutional outcome, without question. Indeed, AEP Ohio submits that the Commission has a duty to avoid imposing a rate plan that, in tandem with the recent decision in the *Capacity Pricing* docket, would result in confiscatory rates through an unconstitutional taking of the Company's property without adequate compensation. Regarding the potential for confiscatory rates in this regard, the Supreme Court of Ohio has stated:

> [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. * * * By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Ohio Edison Co. v. Public Util. Comm, 63 Ohio St. 3d 555, 562-563 (1992), *quoting Fed. Power Comm. v. Hope Natural Gas Co*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333, 345 (1944). As the Company presented in testimony and argued on brief, adoption of the RSR also helps avoid the negative outcome of an unlawful taking of Company property. Ensuring that the Company is not substantially harmed financially through an ESP plan is a legitimate and compelling consideration – and is certainly consistent with the design of SB 221.

Division (D)(4) of the MRO statute, R.C. 4928.142, provides:

> Additionally, 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 result,

> directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution.

Thus, if the market-SSO rate blend involved in an MRO would result in a financial emergency or an unconstitutional taking without compensation, the Commission should avoid such an unjust result by making an adjustment to the authorized rates.

The same concept should also apply in the context of adopting the RSR as part of AEP Ohio's ESP, because: (i) the Commission has ample authority to adopt the RSR under the ESP statute; (ii) the effect of the financial emergency/taking without compensation provision in the MRO statute would result in a corresponding increase in the MRO price test (the MRO test impact of this provision is discussed in greater detail below); and (iii) it makes no sense to conclude that the General Assembly intended to remedy a confiscatory MRO rate but would not provide for a similar remedy in an ESP. The Company's projected ROE for 2013 without the financial stability portion of the RSR (*i.e.*, even assuming full recovery of the $188/MW-day capacity rate) is only 5.9%. (AEP Ohio Reply Br. at 29; Oral Argument Tr. at 22-23, 60.) As Mr. Allen explained in his rebuttal testimony and at hearing, the company's ROE projections absent an RSR involve negative or barely positive returns on a generation function basis. (AEP Ohio Ex. 151 at 11-13; Tr. XVII at 4879.) Ultimately, explicit language was not needed in the ESP statute to avoid such a result, because an ESP is a consensual integrated plan and is not a permanent path toward market rates like the MRO. Thus, it is also appropriate to avoid imposing a result in an ESP that would result in a financial emergency or unconstitutional taking. The Commission wisely avoided that outcome in its *ESP II Opinion and Order* and should do so on rehearing, perhaps emphasizing and explaining this additional legal rationale to better explain the strong legal support for the RSR.

c. With respect to the capacity deferral component of the RSR, the Commission properly invoked R.C. 4928.144 to implement a phased recovery.

Certain intervenors argue that the Commission erred in invoking the phase-in statute, R.C. 4928.144, when addressing the capacity deferrals and permitting a phased recovery of the deferrals through the RSR, because OMAEG/OHA maintain that the capacity deferral recovery component of the RSR is not authorized under the ESP statute. (*See* OMAEG/OHA AFR at 16-17; IEU at 48; OCC at 61; Schools at 12-13.) Since intervenors object to the use of R.C. 4928.144 based on the false premise that the RSR is not permitted under the ESP statute, it follows that their objection to the capacity deferral phase-in should be rejected in tandem with the conclusion (see above) that the RSR is authorized by the ESP statute. In other words, as the intervenor objections to the RSR being authorized by the ESP statute must fall based on the authority in the ESP statute to adopt the RSR (discussed above), so too must the intervenor objections to using R.C. 4928.144 as the basis to phase in recovery of the capacity deferral component of the RSR.

A separate matter raised by OMAEG/OHA (AFR at 17) is the argument that the Commission cannot authorize a deferral under its traditional regulatory ratemaking authority, citing *Columbus Southern Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535. The *Columbus Southern Power* decision held that, under the R.C. 4909.15 traditional ratemaking formula, the Commission cannot phase-in a revenue requirement by increasing rates over a period of years to achieve the full level of revenue increased merited by the ratemaking formula; rather, the entire amount had to be authorized immediately. Thus, it is not clear why OMAEG/OHA would offer this argument since it would follow that the entire $189/MW-day would have to be paid by CRES providers instead of RPM pricing – which is contrary to

OMAEG/OHA's litigation position in the *Capacity Case*. Moreover, the deadline for raising rehearing requests in the *Capacity Case* has come and gone and OMAEG/OHA cannot raise new issues now in this case concerning matters determined in that case.

In any event, the *Columbus Southern Power* decision is inapplicable here and does not support the proposition that the Commission lacked authority to either create the capacity deferrals in the *Capacity Pricing* case or authorize recovery of them as part of the RSR in this *ESP II* proceeding. One crucial distinction is that the capacity deferrals are expense deferrals, not revenue deferrals like the phase-in approach addressed in the *Columbus Southern Power* decision. This is obvious from the language in the *Capacity Pricing* decision:

> [T]he Commission will authorize AEP Ohio to modify its accounting procedures, pursuant to Section 4905.13, Revised Code, *to defer incurred capacity costs* not recovered from CRES provider billings during the ESP period to the extent that the total incurred capacity costs do not exceed the capacity pricing that we approve below. * * * Additionally, the Commission directs that the state compensation mechanism that we approve today *shall not take effect until our opinion and order is issued in 11-346, or until August 8, 2012, whichever is sooner*.

(*ESP II Opinion and Order* at 23-24 (emphasis added.) Thus, the Commission authorized a deferral of incurred costs, not revenues, and the deferrals did not commence until August 8, 2012. In other words, the expense deferrals began contemporaneously as the recovery of the deferrals commenced on a prospective basis.

In addition, the traditional ratemaking formula found in R.C. 4909.15 was not triggered in the *Capacity Case* or the *ESP II* case and was not applied by the Commission in either case. Rather, the *Capacity Pricing* decision specifically relied upon R.C. 4905.04, 4905.05, 4905.06, and 4905.22. (*ESP II Opinion and Order* at 22.) The Opinion and Order in this *ESP II* proceeding relied (at 31-32) upon R.C. 4929.143(B)(2) in adopting the modified RSR.

Accordingly, the holding in the *Columbus Southern Power* decision regarding R.C. 4909.15(B) does not govern this case.

The Commission's decision to create the deferral in the *Capacity Pricing* decision, as referenced in the above quotation from the Opinion and Order, was explicitly based on R.C. 4905.13. In the context of implementing R.C. Chapter 4928, the Commission has previously authorized expenses stemming from wholesale costs authorized under the authority of the Federal Energy Regulatory Commission (FERC). *See Ohio Edison Company*, Case No. 04-1931-EL-AAM, May 18, 2005 Finding and Order (R.C. 4905.13 authorizes the Commission to create an accounting deferral of expenses relating to charges incurred in connection with FERC's authority for subsequent recovery in retail rates). The *Ohio Edison* decision was upheld by the Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384. The *Columbus Southern Company* decision cited by OMAEG/OHA is not applicable and *Ohio Consumers' Counsel* case cited by AEP Ohio, in addition to the above analysis under the ESP statute, shows that the Commission had authority to prospectively create the deferral in the *Capacity Pricing* decision and authorize recovery of the capacity deferral in the ESP II case. Finally in this regard, AEP Ohio notes that OMAEG/OHA's objection (AFR at 14-17) to the Commission's decision to create the deferral as part of the *Capacity Pricing* decision amounts to an untimely rehearing request. As referenced above, the creation of the deferral was a matter decided in the *Capacity Pricing* decision and that decision should be finalized through rehearing in accordance with the issues raised in timely-filed rehearing applications in that proceeding.

Accordingly, OMAEG/OHA's objection to the creation of the capacity deferral are not properly raised in this *ESP II* case and should not be addressed herein.[9]

d. Classification of AEP Ohio's capacity service as wholesale does not undermine the legality of the RSR.

OMAEG/OHA object (AFR at 15-17) to the wholesale capacity costs being recovered from retail customers, arguing that the Commission's decisions in the *Capacity Charge* case (which concludes that capacity service is wholesale) and the *ESP II* case (which authorizes a retail charge to recover the deferrals) conflict with one another. Similarly, the Schools argue (AFR at 11) that R.C. 4928.141 provides that an SSO be comprised only of retail electric services; the Schools maintain that the recovery of deferred wholesale capacity costs as part of an ESP is unlawful. The intervenors are wrong: even though the capacity deferrals relate to a wholesale service and regardless of whether the service is considered competitive or non-competitive, the capacity deferrals can be recovered through a retail charge adopted in an ESP.

Section 4928.141(A), Revised Code, requires an electric distribution utility to provide "a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Moreover, division (B)(1) of the ESP statute, R.C. 4928.143, provides that "[a]n electric security plan shall include provisions relating to the supply and pricing of electric generation service." In this context and given that any CRES that will compete with the SSO during the ESP will necessarily

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[9] AEP Ohio's motion filed on September 11, 2012, requesting that the Commission consolidate the *Capacity Pricing* and *ESP II* rehearing decisions does not alter the scope of the two separate sets of rehearing issues raised separately in those cases. R.C. 4903.10 and 4903.11 are jurisdictional prerequisites for issues to be decided in the separate cases and potentially raised on appeal by applicants. The purpose of AEP Ohio's motion was to enable the Commission to jointly address the two cases in a comprehensive and cohesive manner, given the interconnected issues and common factual bases. Thus, only those issues timely and properly raised on rehearing in the *Capacity Pricing* docket can be decided on rehearing in that case and, likewise, only those issues timely and properly raised in this *ESP II* case can be decided on rehearing in this case. By contrast, issues raised in this *ESP II* case on rehearing that relate to matters determined in the *Capacity Pricing* case cannot be addressed at all on rehearing, because they are untimely and not properly raised in this case.

rely upon AEP Ohio's capacity resources, it is understandable that the Commission would like to ensure the provision of capacity to support shopping at the same time it addresses the baseline SSO offering against which CRES providers will compete. Although capacity service is provided to CRES providers in its certified territory on a wholesale basis (and not directly to retail customers), the wholesale provision of capacity service is necessary in order for customers to be able to shop for generation service during the next three years – given AEP Ohio's unique FRR status extending only through the end of the current ESP term.

Of course, the ultimate safeguard for establishing reasonable SSO rates is to ensure that customers have comparable options to shop through CRES providers. In noting one of the significant benefits of the capacity deferral recovery component of the RSR, the Commission found that the RSR:

> … *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 opportunities that will become available as a result of the Commission's decision in the Capacity Case.

(*ESP II Opinion and Order* at 31.) Thus, under the ESP statute, the impact of wholesale revenues on retail services offered by CRES providers is relevant and can help support adoption of a charge that will provide stability and certainty to the provision of such competitive retail electric services. Regardless of whether AEP Ohio's wholesale capacity service is considered competitive or non-competitive, the impact of RPM pricing on the Company can be considered in adopting rate adjustment provisions under the ESP statute.

Moreover, retail rates routinely reflect wholesale charges and costs, whether those rates are established under traditional ratemaking or the ESP statute's alternative ratemaking approach. With respect to traditional ratemaking, wholesale revenues such as off-system sales revenues from generating plants being recovered in rate base are often credited against the cost of service that would otherwise be collected. Similarly, third-party revenues associated with transmission services are factored into the net cost of service. On the side of cost recovery, costs incurred under the authority of FERC must be recognized in retail rates as a binding matter of federal law. *See e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *PJM Interconnection, LLC*, 135 FERC ¶61,022 (2011). In short, traditional ratemaking often incorporates both wholesale costs and revenues when setting retail rates associated with plant in service and expenses used for both wholesale and retail sales.

Likewise, the ESPs contain a variety of charges beyond just firm generation service for non-shopping customers – some of which involve wholesale costs or third-party revenues in approving the level of the charge. These include: (1) single-issue distribution charges under division (B)(2)(h) (the Commission approved funding for gridSMART Phase I based on a residual revenue requirement after receiving federal and corporate grants); (2) charges for new generation capacity under divisions (B)(2)(b) and (B)(2)(c) (establishing a revenue requirement incorporate consideration of wholesale revenues and addresses the fact that any power plant makes wholesale sales); (3) the Transmission Cost Recovery Rider (as approved in the *ESP II* Opinion and Order (at 64), the TCRR incorporates FERC-approved charges and third-party revenues in creating retail charges); and (4) the Fuel Adjustment Clause approved under division (B)(2)(a) (the FAC incorporates the cost of wholesale power purchases and sets the level of the retail charge after allocating fuel costs to wholesale power transactions).[10]

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[10] Division (B)(2)(a) also explicitly permits inclusion within an ESP of "the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate." This provision also helps justify the Commission's decision to address as part of the ESP the wholesale provision of generation services by AEP Genco during more than half of the ESP term to support the SSO offering

The RSR itself, adopted under division (B)(2)(d), incorporates a total non-fuel generation revenue target in establishing the RSR charge by crediting wholesale capacity revenues from CRES providers as well as an energy credit based on additional wholesale energy sales made from freed-up energy. Incorporating consideration of wholesale revenues and costs in establishing retail rates is not uncommon or inappropriate. Thus, it is appropriate to recognize the wholesale capacity revenues in establishing the RSR.

In this regard, the net effect of the Commission's decision in the *Capacity Pricing* case is that CRES providers will pay RPM prices for the entire period of the ESP term (and beyond). That was the default position under the prior State Compensation Mechanism before the *Capacity Pricing* decision was issued[11] and remains the case today going forward (subject to the outcome of the rehearing issues currently pending in that case). Both components of the RSR, the capacity deferral recovery and the financial stability revenue, were approved in the *ESP II* decision and are fully justified under the ESP statute, as discussed above. That the capacity deferral component of the RSR originated in the *Capacity Pricing* case based on pricing of a wholesale service is of no moment.

2. The RSR is not unduly discriminatory and does not constitute an unlawful or unreasonable subsidy.

OCC/APJN argues (AFR at 66-68) that shopping customers are the cost-causers that should pay for the capacity deferrals. OCC/APJN similarly asserts (AFR at 71-72) that the RSR amounts to an unlawful and anti-competitive subsidy prohibited by R.C. 4928.02(H). Likewise, OCC/APJN alleges (AFR at 72-74) that SSO customers will pay twice for capacity through base

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being agreed to by AEP Ohio, as well as the pass through of related generation revenues including pass through of revenue from the non-deferral component of the RSR. *See* Section X.D., *supra*.

[11] This statement refers to the SCM in effect from December 2010 through the end of 2011 and sets aside, for purposes of this discussion, the two-tiered pricing under the September 7, 2011 Stipulation and the Commission's subsequent decisions to temporarily extend that pricing pending a merit decision.

generation rates and the RSR. These arguments were previously made on brief and rejected by the Commission in the Opinion and Order – intervenors do not raise anything new and their arguments should again be rejected.

The Commission has the authority to address the bypassability of a charge authorized under division (B)(2)(d) of the ESP statute, meaning it can determine whether a charge should be bypassable or non-bypassable. The Commission explained its rationale for making the RSR non-bypassable in the Opinion and Order. Thus, the language in division (B)(2)(d) supports the Opinion and Order's determination to make the RSR non-bypassable.

As to the cross-subsidy allegation, a cross-subsidy either involves paying for something without receiving anything or receiving a payment without paying anything. Neither situation applies to the RSR. As discussed above, the Opinion and Order discussed the "extremely beneficial" features of the RSR which benefit shopping and non-shopping customers alike. (*ESP II Opinion and Order* at 31-32.) More to the point here, the Opinion and Order explicitly considered the arguments against non-bypassability and rejected them:

> Finally, we find that the RSR should be collected as a non-bypassable rider to recover charges per kWh by customer class, as proposed. We note that several parties pitched reasons as to why certain customers classes should be excluded, but we believe these arguments are meritless.

(*ESP II Opinion and Order* at 37.) Elsewhere in the RSR discussion of the Opinion and Order, the Commission repeatedly found that *all customers* – not just shopping customers – benefit from the RPM pricing and other features of the ESP plan that are enabled by the RSR. *See ESP II Opinion and Order* at 32 (it is "extremely beneficial" for all customers, not only current shoppers but everyone that is able to shop, to have the ability to shop and return at fixed base generation rates); *id*. at 36 (the RSR allows for AEP Ohio to continue to provide certainty and stability through the SSO plan while competitive markets continue to develop as a result of RPM priced capacity … allowing all customers to realize savings that may not have otherwise occurred without the development of the competitive retail market); *id*. at 36-37 (the RSR will help facilitate a financially healthy Genco to compete after corporate separation to the benefit of customers). Intervenors simply second-guess and disagree with the Commission's policy determinations that all customers should pay the RSR charge and the Commission properly exercised its discretion and made explicit findings supporting the non-bypassability.

Regarding the alleged cross-subsidy, the RSR is not a distribution or transmission rate recovering generation-related costs, as is prohibited by R.C. 4928.02(H). Any argument asserting a subsidy exists in this manner does not properly apply the statutes. The RSR is not a distribution rate. There is a difference between a charge relating to distribution and a non-bypassable SSO-related charge. Just because the EDU has the duty to provide SSO service, that does not make SSO charges distribution charges. Every EDU in Ohio has generation-related SSO charges. Though some may refer to non-bypassable charges as "wires charges," that label is a misnomer as such charges do not relate to transmission or distribution (aka wires) service. (*See ESP I*, October 3, 2011 Remand Order at 18; *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 340, 346.) Any notion that the RSR is a distribution charge being collected for a generation service is a misguided attempt to take advantage of the colloquial (and imprecise) "wires charge" terminology – and should be rejected as superficially attempting to hold form over substance.

Likewise, OCC/APJN's argument that the RSR would involve customers paying twice for generation service is another misguided and incorrect assertion. As discussed above, the ESP statute explicitly allows stability charges and permits the Commission to make them non-bypassable. R.C. 4928.143(B)(2)(d). The Commission repeatedly made factual findings that all customers benefit from the RSR, including the financial stability component and the capacity deferral component. OCC/APJN is simply arguing against the wisdom of the General Assembly and the language of division (B)(2)(d) of the ESP statute and, in reality, disagreeing with that explicit statutory authority granted to the Commission by the General Assembly. OCC/APJN's disagreement with the statute is not relevant to the debate about the legality of the RSR.

Contrary to FES's flawed premise that the RSR is unrelated to generation service and that shopping customers do not rely on AEP Ohio for generation service, the fact is that AEP Ohio provides a critical generation service to support shopping customers: it is the exclusive seller of capacity to support shopping load in its service territory (by virtue of its existing FRR obligation) and there are no other alternatives at this point for CRES providers and their shopping customers. Moreover, to the extent that the proposed RSR reflects the financial impacts of all features of the modified ESP (including the capacity charge discounts), the RSR itself is a charge related primarily to generation service and achieves rate stability and certainty for retail electric service, as the Commission found. As the *ESP II Opinion and Order* recognized (at 36), AEP Ohio's provision of capacity in support of shopping load is clearly essential to retail shopping in the Company's service territory – to the benefit of all customers.

3. The RSR does not constitute unlawful "above-market" pricing or untimely recovery of stranded generation cost.

Some of the intervenors, most prominently IEU, maintain that the Commission is required to implement market pricing in the context of this ESP and the related *Capacity Pricing* docket.[12] For example, IEU argues that the Commission lacks statutory jurisdiction to authorize AEP Ohio to collect an above-market price for capacity and authorize AEP-Ohio to defer for future collection the difference between RPM and $189 – according to IEU, the rider guarantees above-market compensation for competitive generation-related service. (IEU AFR at 57.) (*See also* OCC/APJN AFR at 61; FES AFR at 10-12.) Similarly, IEU contends that the RSR and other approved riders[13] violate state policy in 4928.02 in favor of market-based pricing. (IEU AFR at 65.) Finally, IEU maintains that the RSR and other approved riders unlawfully provide AEP Ohio with the ability to collect transition revenue, allowing AEP Ohio to evade its Commission-approved settlement obligation to forego such collections. (IEU AFR at 50-56.) Whereas, other intervenors focus their stranded cost arguments on the RSR alone. (*See* Schools AFR at 14-18; FES AFR at 12-14.) None of these arguments have merit, as the Commission has already determined.

IEU and its cadre want to focus on SB 3 and hearken back to the deregulatory vision and goals of that legislation, while conveniently ignoring that the basic purpose of SB 3 (to complete the transition to market pricing by 2006) failed and that SB 3 had to be replaced by a hybrid re-regulatory approach adopted under SB 221. That fix, necessitated by the failure of SB3, substantially changed the SSO pricing regime in 2009. That hybrid regulatory regime is effective today and SB 3's requirement for "market-based" SSO pricing was repealed in 2008.

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[12] As previously noted, any new arguments regarding determinations made in the *Capacity Pricing* docket that were not timely and properly raised in that docket cannot be addressed in this *ESP II* proceeding. But AEP Ohio may herein discuss both related dockets in responding to the arguments raised, in order to provide context and help explain the issues relating to both cases.

[13] Many of IEU's duplicitous arguments regarding above-market pricing, anti-competitive pricing, state policy and stranded cost are broadly applied to the RSR, the PTR, GRR, the "Capacity Shopping Tax" and the PIRR. Accordingly, AEP Ohio's response directed at the RSR in this context should also be applied to, and diospose of, IEU's objections as to the other riders.

Both the law and the facts have changed since the passage of SB 3 and there are other intervening developments that make a flash-cut extrication from regulated to market pricing difficult and complex. While the passage of SB 221 was not a U-turn in regulatory policy, the reality is that the General Assembly provided a serious course correction for the regulatory path in Ohio when it passed SB 221; most notably, the singular provision in RC 4928.14 requiring market-based SSO rates was repealed and was replaced by two very different options.

Under SB 221, the utility alone has the choice (not a requirement) to pursue the market rate offer (MRO) option, under which there is a new and extended period of transition required to reach fully market-based rates. Thus, even the MRO option does not involve a flash-cut to fully competitive market rates, but involves a 6-10 year transition. Alternatively, the utility may consent to an Electric Security Plan (ESP), which is more regulatory in nature, with flexible pricing such as automatic (but regulatory-prescribed) rate increases. While flexible, the ESP rate plan must be more favorable in the aggregate than the expected results under an MRO; thus, while it is not a mechanical or purely quantitative comparison, an ESP rate plan is indirectly subject to roughly the same pricing parameters as an MRO while also considering qualitative factors. And neither an MRO or an ESP mirrors market rates.

Unlike the prevailing assumption during passage of SB 3 that market rates would be lower than regulated rates, the General Assembly's new regime in passing SB 221 was premised upon market rates being higher than existing rates. Based on the projections of high market rates with relatively lower legacy SSO rates, SB 221 established a new and extended transition period to very gradually subject customers to market rates over a period of several years. The General Assembly could not have envisioned the lower prices driven by shale gas or the major economic recession, both of which are significant events that developed after passage of SB 221. In light of these current market conditions that have combined to dramatically reduce both capacity and energy market prices, it is understandable that the Commission, the CRES providers, and customer groups all want to get to market prices as quickly as possible. That result, however, is not required under law or under Ohio energy policies and there are existing legal obligations that practically need to be unwound before AEP Ohio can make the transition to fully competitive SSO rates that avoids undue financial harm to the Company. Nonetheless, the Commission is presently embracing an aggressive move toward fully competitive SSO pricing that is allowed for by the *ESP II Opinion and Order*.

Though IEU (and other intervenors) now feverishly advocate the redeeming qualities of the RPM capacity market, that self-serving admiration is a product of recent market developments and has not been the case for long. The RPM price, in effect at the time that this modified ESP was filed, was the result of a Base Residual Action (BRA) conducted in May 2008, which was also when Governor Strickland signed SB 221. (Tr. X at 3050.) Just a few months prior to that, a document presented on behalf of IEU complained that "PJM is pushing its *very expensive* RPM (reliability pricing model) proposal and contending with strong opposition from almost every stakeholder sector," lamenting that RPM should be renamed the "*revolting* pricing model." (Tr. X at 3052-53 (emphasis added).) As with many of its positions, IEU's pejorative moniker and perspective on RPM has flip-flopped.

In 2008, competitive markets had still not developed as contemplated in the 1999 law. The General Assembly passed SB 221 to change Ohio's regulatory framework once again. During the legislative debates leading up to passage of SB 221, IEU advocated for re-regulation and partially succeeded. As reflected in IEU's "Electricity Post 2008: A Common Sense Blueprint for Ohio," IEU recommended that the statutory declaration that generation service is competitive be repealed, so that generation could be classified as a noncompetitive service which "would better align Ohio law with reality" and would make generation service subject to traditional cost-based standards for pricing. (AEP Ohio Ex. 136 at 2, 10-11.) IEU's Common Sense Blueprint also successfully advocated for reversal of R.C. 4928.17(E)'s declaration that generation assets could be freely transferred, in order to avoid "schemes like those of Monongahela Power," who "threatened to go to market" to competitively procure generation supply at market prices. (*Id.* at 2, 5.) The Common Sense Blueprint also stated that "[t]he term 'market-based' is not defined by Ohio law or PUCO regulations" and suggested that the Commission should assert control to avoid "rate shock" that would be caused by going to higher market prices. (*Id.* at 4-7.) IEU's Common Sense Blueprint also concluded that "[t]here is nothing in SB 3 that requires an auction or competitive bidding process to be used to establish a 'market-based' price for the SSO." (*Id.* at 7.) IEU's prior advocacy reveals a more accurate view of reality and severely undercuts IEU's present conjuring up of a blanket prohibition of "above market" cost recovery.

While the Commission has not explicitly addressed IEU's misguided theories in this regard, the *Capacity Pricing* decision did adopt a cost-based state compensation mechanism for capacity and the *ESP II* decision adopted several cost-based riders. Thus, it is obvious that IEU's drumbeat for market pricing is properly being ignored. IEU has presented nothing new in this regard and there is no reason for the Commission to modify its approach on rehearing.

As indicated above, IEU has also raised its tired claim again that the RSR and other approved riders unlawfully provide AEP Ohio with the ability to collect transition revenue, allowing AEP Ohio to evade its Commission-approved settlement obligation to forego such collections. (IEU AFR at 50-56.) Whereas, other intervenors focus their stranded cost arguments on the RSR alone. (*See* Schools AFR at 14-18; FES AFR at 12-14.) The Company has thoroughly addressed the stranded cost argument on brief (AEP Ohio Initial Brief at 63-78) and will not repeat the response here, since the Commission has rejected and ignored the argument in recent decisions. Most recently, the Commission held:

> [W]e reject the claim that the RSR allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010 pursuant to Senate Bill 3, as AEP-Ohio does not argue its ETP did not provide sufficient revenues, and, in light of events that occurred after the ETP proceedings, including AEP-Ohio's status as an FRR entity, AEP-Ohio is able to recover its actual costs of capacity, pursuant to our decision in the Capacity Case. Therefore, anything over RPM auction capacity prices cannot be labeled as transition costs or stranded costs.

(*ESP II Opinion and Order* at 32.) In the Capacity Pricing case, IEU made the same argument and the Commission ignored it. In the *ESP II Stipulation* proceeding, the Commission also rejected a similar argument:

> Further, we reject the Non-Signatory Parties' claims that SB 3 or the ETP cases foreclosed or conflicts with AEP-Ohio's ability to pursue cost-based capacity rates, at this time. We agree with the Signatory Parties that the ETP cases affected retail transactions rather than wholesale transactions.

(*ESP II Stipulation*, December 14, 2011 Opinion and Order at 55.) IEU presents nothing new in its present stranded cost claims and the Commission should again reject or ignore the misguided theory on rehearing in this case.

B. Intervenor attacks regarding the *ESP II Opinion and Order's* record support for the adopted RSR charge should be rejected.

Intervenors challenge the record basis for the adopted RSR, with multiple arguments relating primarily to the record support for the $508 million non-fuel generation revenue target used to develop the RSR. The specific objections are addressed below. The Commission's development of the RSR charge is reasonable and supported by the record.

Initially, OCC/APJN argues that the Commission erred in using the $508 million to establish the appropriate level of the RSR, instead of the Company's original proposal of $284 million over the ESP term. (OCC/APJN AFR at 45-54.) FES (AFR at 15) and OMAEG/OHA (AFR at 22) briefly make similar allegations. Similarly, OMAEG/OHA again argues (AFRat 21-22) that the RSR is not needed beyond the Company's expected recovery of the $188.88/MW-day capacity cost (though the vehicle for such capacity deferral recovery is not clear under OMAEG/OHA's argument). As a related matter, the Schools allege (at 13) that the Commission failed to make a complete record regarding the mechanism to recover the capacity deferral and thereby violated the due process rights of the Schools.

OCC/APJN makes three additional arguments challenging the $508 million non-fuel generation revenue target used to develop the modified RSR. First, OCC/APJN argues (AFR at 45) that the Commission should not have used RPM-based revenues for the "CRES capacity revenues" row on the table found at the top of page 35 of the Opinion and Order, claiming that otherwise customers will overpay for capacity. *See also* OEG AFR at 4-5 (the Commission should have used revenue from the total $188.88/MW-day capacity rate to be collected over time in developing the RSR rate that is to apply during the ESP term and that doing otherwise would cause customers to pay twice for capacity – once through an increased RSR charge and then again when AEP Ohio's deferred capacity costs are recovered). Second, OCC/APJN claims (AFR at 50-51) that the Commission unreasonably excluded capacity revenues associated with the Company's original proposal for a January 2015 SSO auction. Third, OCC/APJN claims (AFR at 52-54) that the Commission erred in incorporating the Company's $3/MWh energy credit in developing the RSR.

1. **The RSR is necessary to ensure AEP Ohio's financial health during the ESP period, above and beyond receiving the $188.88/MW-day capacity charge.**

OCC/APJN, FES and OMAEG/OHA are wrong in arguing that the RSR is not needed in light of the decision in the Capacity Pricing decision to permit AEP Ohio to eventually recover $188.88/MW-day for capacity supporting retail shopping load. This argument was already made on brief and advanced at oral argument by the intervenors. As the Company explained on brief:

> At this point, given that AEP Ohio would only be permitted to charge RPM pricing to CRES providers under the 10-2929 decision, the impact (excluding consideration of the additional accounting deferral that may end up providing net cost recovery of up to $188/MW-day) of RPM pricing without the RSR yields a projected 1.1% ROE total company in 2013, with a loss to the generation function. (AEP Ohio Ex. 151 at 11.) Further, the comparable projected ROE associated with the $188/MW-day rate adopted in the 10-2929 decision (absent an RSR) would be only 5.9% for 2013. AEP Ohio has already addressed additional financial harm scenarios in its initial brief (at pages 43-46). Even more disturbing, as discussed in its initial brief, is that these projections involve negative or barely positive returns on a generation function basis. (AEP Ohio Ex. 151 at 11-13; Tr. XVII at 4879.)
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> This shows that the RSR is needed not only to recover the difference between the $188/MW-day and RPM rates, but also to provide additional financial stability to AEP Ohio during the ESP term. Adoption of an RSR that is larger than proposed (larger than $2.MWh but still enough produce $929 million annually in non-fuel generation revenue) is needed. As referenced above, using the RSR only for recovery of the deferral (as Staff suggests) would only yield an unacceptably low ROE of 5.9% in 2013; adopting the $929 non-fuel generation revenue target for the RSR would yield the 7.5% marginal ROE in 2013 projected as part of AEP Ohio witness Sever's testimony. (AEP Ohio Ex. 108 at Ex. OJS-2.)

(AEP Ohio Reply Brief at 29 (notes omitted).) As explained in footnote 3 on that same page of the Company's brief, the 5.9% earnings projection is based on the existing evidentiary record. In addition to being addressed on brief, the residual need for the RSR in the wake of the *Capacity Pricing* decision was pointedly debated during the July 13, 2012 oral arguments conducted before the Commission. (*See e.g.*, Oral Argument Tr. at 21-22, 60.) Because all parties, including the Schools, had the opportunity to address these issues on brief and during oral argument, there is no due process violation.[14] The Commission was well aware of its decision in the *Capacity Pricing* decision and, based on the arguments and record in this case, determined that the RSR is still needed at the approved level.

2. The Commission should not reduce the RSR based on higher imputed revenues associated with the $188.88/MW-day capacity rate but could adopt the alternative argument of OCC/APJN and OEG to include the "paper earnings" associated with the capacity deferrals as part of the earnings subjected to SEET.

OCC/APJN and OEG fail to present a valid reason why the RSR should be reduced through imputing higher capacity revenues associated with the $188.88/MW-day rate. In support of its position, OEG wrongly states (AFR at 4) that "AEP Ohio will book as revenue the entire $188.88/MW-day as capacity service is provided to the CRES providers." This statement is not accurate. As the Commission provided in the *Capacity Pricing* decision that created the deferrals, the regulatory asset deferrals are tied to *incurred costs* and are not booked as revenues during the deferral period. (*Capacity Pricing*, Opinion and Order at 23.) The revenue collected from CRES providers is based on RPM and the deferral does not change the revenues received or booked during that period. The deferrals do support earnings and, as discussed further below, could be adequately accounted for through the SEET.

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[14] The Schools briefly claim that incorporating the *Capacity Pricing* decision into the *ESP II* decision somehow violated their due process rights. The RSR was always presented as a decoupling formula that would incorporate future revenue developments and the capacity pricing was certainly the most prominent topic of discussion in that regard. Moreover, the specific arguments relating to application of the *Capacity Pricing* decision to the RSR were raised on brief and discussed at oral argument. The Schools cannot blame others if they decided not to address the issues in the case are the only party that raised this misguided due process claim. It is well established that only due process a party is entitled to in a ratemaking proceeding is that which is provided in the applicable statute. *See Consumers' Counsel v. Pub. Util. Comm.* (2006) 111 Ohio St.3d 300, 856 N.E.2d 213; *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 248–249, 638 N.E.2d 550; *Armco, Inc. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 401, 409, 23 O.O.3d 361, 433 N.E.2d 923; *Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 446, 453, 21 O.O.3d 279, 424 N.E.2d 561.

The Commission did not adopt the Company's ROE-based revenue decoupling method. Rather, in modifying the Company's proposed RSR, the Commission adopted a revenue target approach, stating as follows:

> [W]e find it more appropriate to establish a revenue target that will allow AEP-Ohio the opportunity to earn a reasonable rate of return. *We note that our analysis of an ROE is not to guarantee a rate of return*, as evidenced by the removal of the decoupling components *but rather to determine a revenue target that adequately ensures AEP-Ohio can keep its base generation rates frozen and maintain its financial health*.

(*ESP II Opinion and Order* at 32-33 (emphasis added).) Thus, the Commission clearly utilized a revenue target approach in developing the modified RSR charge. Conceptually, an expense deferral is not relevant to the revenue target approach and should not be incorporated into the RSR charge development as proposed by OCC/APJN and OEG.

Further, the Company submits that it is not reasonable to impute revenue associated with the full \$188.88/MW-day in conjunction with the other modifications made by the Commission in adopting the RSR. For example, AEP Ohio raised a challenge to the Commission's use of a 9% ROE projection in developing the RSR. (AEP Ohio AFR at 21-22.) As argued by the Company, the Commission should have used 11.15% as it did in the *Capacity Pricing* decision. Doing so would have increased the financial stability component of the RSR to approximately \$2.15/MWh, which is only \$0.35/MWh less than the \$2.50/MWh financial stability component. From that point, a modest adder of 25 basis points to use an 11.40% ROE could be justified to compensate the Company for the added risk of a fixed RSR, since the Commission rejected the decoupling proposal.[15] In short, if the capacity deferrals (which are subject to increased risk of

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[15] As a related matter, the *ESP II Opinion and Order* makes multiple references to having rejected the decoupling proposal for the RSR. (Opinion and Order at 32, 33, 36.) Yet, OCC interprets the Opinion and Order as

collection and do not help the Company's cash flows) are counted toward the revenue target, would only serve to aggravate the Commission's use of an unduly low 9% ROE in developing the RSR (as discussed in AEP Ohio's AFR at Prop. II.A).

As an alternative to reducing the RSR based on the imputation of the full $188.88/MW-day charge that is not being fully collected during the ESP term, OCC/APJN suggests that the Commission should use *all RSR collections* as credit to the future capacity deferrals. (OCC/APJN AFR at 50.) This alternative would appear to have an even more harmful financial effect than reducing the RSR because both the financial stability component and the capacity deferral recovery component of the RSR would be used to credit future recovery of the deferrals. As such, OCC/APJN's alternative argument is also unacceptable for the reasons outlined above.

OEG more reasonably offers that, as an alternative to imputing the $188.88/MW-day revenue and reducing the RSR, the Commission should recognize the deferred capacity revenue when enforcing the 12% earnings cap. (OEG AFR at 5.) While the capacity deferrals do contribute to "paper earnings" during the period the expenses are incurred, the Company's cash flow is adversely affected because the costs are actually incurred during the period in question. In any case, including the deferral earnings for purposes of the SEET review is consistent with the Commission's prior decision regarding the Company's fuel deferrals under *ESP I*. (*2009 SEET*, Case No. 10-1261-EL-UNC, January 11, 2011 Opinion and Order at 30-31; March 9, 2011 Entry on Rehearing at 9.) For that reason, AEP Ohio would not object if the Commission

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contemplating future applications to adjust the RSR which it maintains would transfer risks of reduced non-shopping load away from the Company to consumers. (OCC AFR at 54.) As the Company requested in its application for rehearing (at 22-25), the Commission should clarify that the RSR is fixed and the shopping level reports to be filed relate only to verification of the capacity deferral booked by the Company.

adopted OCC/APJN's and OEG's alternative position (instead of reducing the RSR) of including the deferral earnings for purposes of SEET.

3. OCC/APJN's argument for inclusion of capacity revenues associated with the Company's original proposal for the January 2015 energy auction is mis-stated and should no longer be applicable.

OCC/APJN advocates (AFR at 51) for an RSR offset to recognize capacity revenues associated with the Company's original January 2015 energy auction. In particular, OCC/APJN references (note 159) the auction revenues listed on AEP Ohio witness Allen's Exhibit WAA-6 which is part of AEP Ohio Ex. 116. The auction capacity revenues listed on that exhibit relate to the Company's original proposal to provide capacity supporting the January 2015 SSO auction at a discounted rate of $255/MW-day.[16] (Tr. V at 1660.)

As explained in AEP Ohio's application for rehearing, however, the $255/MW-day capacity offer in conjunction with the January 2015 energy auction should no longer apply:

> [I]t would be unfair to selectively apply portions of the Company's original proposal to a substantially different context of the Commission-modified plan. Rather, it is appropriate to clarify and/or reconsider the SSO auction features in light of the additional changes imposed by the Commission to the Modified ESP. * * * [I]t would be unreasonable to adjust SSO base generation rates as part of conducting the 2015 energy auction given the other changes to the early auctions as well as the decision to reject RSR revenue decoupling. Instead, AEP Ohio urges the Commission to order that base generation rates will remain frozen throughout the entire ESP term and that the energy auction costs be flowed through the FAC during that period – such that the energy procured by the auctions would be dedicated to SSO customers and partially displace the Company's existing energy resources that would otherwise be assigned to retail customers and recovered through a continuing FAC mechanism.

(AEP Ohio AFR at 6-7.) Under the Company's proposal, the SSO base rates remain frozen and the Company continues to provide capacity directly to support the SSO offering during the

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[16] OCC (at 51) erroneously refers to this capacity revenue as being equal to $355/MW-day.

January 2015 100% energy only auction delivery period. Consistent with the Company's position, the Commission does not incorporate any reductions in non-fuel generation revenue associated with the 2014/15 PY period in the table on page 35 used to develop the RSR. Thus, the auction revenues listed on Exhibit WAA-6 are not applicable and should not be included in the Commission's table on page 35 used to develop the RSR.

4. It was reasonable and supported by the record for the Commission to incorporate a $3/MWh energy credit in developing the RSR charge.

OCC/APJN complains that the Commission did not explicitly justify its use of the $3/MWh energy credit against the RSR for shopped load and maintains that it is too low. (OCC/APJN AFR at 52-55.) Ormet also alleges that the $3/MWh energy credit for shopped load is understated because it fails to account for the fact that AEP Ohio will no longer be a member of the AEP Pool in that time period and, therefore, will not have to share with other Pool members any proceeds from sales of load freed up by shopping. (Ormet AFR at 9-12.) The Company justified the $3/MWh credit for shopped load on brief based on testimony; it is fully supported by the record. OCC/APJN's objections and Ormet's false speculation do not undermine the validity of the credit or the record basis for the calculation.

While OCC/APJN maintains (AFR at 53) that the lack of explicit discussion of the $3/MWh credit amounts to a violation of R.C. 4903.09, AEP Ohio disagrees as the Commission already adopted and modified the Company's proposal as explained in the Opinion and Order. In any case, this matter can easily be clarified on rehearing if the Commission wishes to address it further. The Company's initial brief (at 51-54) and its reply brief (at 35-38) fully addressed the record support and basis for the $3/MWh credit and the Commission can explicitly discuss or recite that record basis on rehearing should the Commission desire to do so.

Regarding Ormet's complaint (AFR at 9-12) that the Commission did not make an adjustment to the $3/MWh credit in anticipation of the planned termination of the AEP Generation Pool in 2014, the Commission should reject this speculative argument. As discussed above, the Commission rejected the decoupling features of the proposed RSR and presently opted to make a one-time calculation to support a fixed RSR charge – which is in keeping with the traditional ratesetting approach. Under the Commission's modified approach, it would be inappropriate to selectively make future adjustment based on expected changes. Moreover, using normal ratemaking standards, such an adjustment would certainly not be fixed, known and measurable. No witness in the case attempted to make such a calculation. Consequently, there is no evidence in the record that attempts to make such an adjustment.

Instead of offering evidence at the hearing that would be subject to the rigors of cross examination and discovery, Ormet merely offer post-hearing speculation by counsel that the energy margins divided among Pool members would remain at the same level as would be achieved under the Pool and would simply be retained 100% by AEP Ohio. Such simplified, attorney-generated, assumptions ignore the complexities involved with the Pool termination and the resulting financial consequences. For example, as is well-established in the record in this case and others before the Commission, the Amos 3 and Mitchell units will be transferred out of AEP Ohio as part of the corporate separation and Pool termination plan. Consequently, any energy sales margins attributed to those plants would simply not be available after the Pool termination. In addition, shopping levels that drive the level of freed-up energy could be substantially different from those assumed in establishing the fixed RSR, for a variety of reasons. Of course, the economic recovery and demand for power in the 2014-2015 period is another factor that would affect the level of energy sales margins in the future. In sum, there is simply no basis to accept Ormet's sweeping extra-record assumptions; they, instead, should be rejected or ignored.

C. Intervenor challenges to the rate design and other features of the modified RSR should be rejected.

OCC/APJN complains that the Commission failed to accept OCC/APJN's recommendation that the RSR be allocated in proportion to each customer class' relative share of switched kWh sales. As it stands now, residential customers only shop at a rate of 15% but will pay 40% of the RSR. (OCC/APJN AFR at 55.) On the other hand, Kroger and OMAEG/OHA complain that the Commission failed to address their issue regarding whether the RSR should be structured as a demand charge for demand-billed customers; otherwise, they maintain that customers with high load factors will subsidize low load factor customers. (Kroger AFR at 5; OMAEG/OHA AFR at 18.)

Going even further than challenging the rate design, Ormet and the Schools renew their bids for exemption from the RSR. (Ormet AFR at 12-15; Schools AFR at 20-22.) Whereas, Ormet argues that customers who cannot shop cannot cause AEP Ohio's loss of revenues that result from shopping, and the PUCO's failure to apply cost-causation principles to the RSR directly contradicts its decision to apply those principles in other parts of the order. (Ormet AFR at 13.) All of these challenges second-guess the Commission's discretion and expertise with respect to rate design matters. *See e.g. Ohio Consumers' Counsel v. Pub. Util. Comm.* (2010), 125 Ohio St.3d 57, 58; *AT&T Communications of Ohio v. Pub. Util. Comm.* (1990), 51 Ohio St.3d 150, 154.

The Opinion and Order fully considered and addressed the intervenor arguments regarding RSR rate design and exemptions:

> Finally, we find that the RSR should be collected as a non-bypassable rider to recover charges per kWh by customer class, as proposed. We note that several parties pitched reasons as to why certain customers['] classes should be excluded, but we believe these arguments are meritless. Ormet contends that the RSR should not apply to customers like Ormet who cannot shop. Interestingly, Ormet again tries to play both sides of the table, forgetting that it is the beneficiary of a unique arrangement that results in Ormet receiving a discount at the expense of other AEP-Ohio customers. We reject Ormet's argument, and note that while Ormet cannot shop pursuant to its unique arrangement, it directly benefits from AEP-Ohio's customers receiving stability and certainty, as these customers ultimately pay for Ormet's discounted electricity. We also find Ohio Schools' request to be excluded from the RSR to be without merit, as it too would resiilt in other AEP-Ohio customers, including taxpayers that already contribute to the schools, paying significantly higher shares of the RSR. It is unreasonable to make AEP- Ohio's customers pay the schools twice.

(*ESP II Opinion and Order* at 37.) These determinations are reasonable, supported by the record and well within the Commission's sound discretion as rate design matters.

As AEP Ohio demonstrated on brief, intervenors' objections to the rate design and their ill-advised attempts to secure exemptions from the RSR are without merit. Regarding the OCC/APJN proposal that the RSR be based on a respective customer class's shopping customers on the basis of kWh energy sales made to shopping customers, OCC/APJN argue that shopping customers are the cost-causers because they have access to the discounted capacity. As the Commission found, shoppers are not the only cost-causers of the RSR because all customers retain the right to shop and benefit from the capacity pricing on that basis and the RSR is not tied exclusively to capacity pricing. Further, OCC/APJN's recommendation to allocate the RSR revenues based on the customer class's share of shopping customers is unreasonable as it would have the effect of dramatically and unreasonably shifting the RSR cost responsibility away from residential customers and more heavily upon commercial and industrial customers. Similarly, the Kroger/OMAEG/OHA approach of assigning RSR revenue responsibility within each customer class based on demand would unduly burden the low load factor customers in the commercial and industrial classes. As a related matter, the RSR is not entirely driven by the capacity charge discounts but is tied to the total ESP package and reflects benefits for all customers that are associated with more than just demand-related components.

In sum, the Commission fully considered the bypassability and rate design issues related to the RSR and intervenors raised no new issue or argument on rehearing that has not already been decided. Further, intervenor arguments improperly attempt to second-guess the Commission's sound discretion and expertise in deciding such matters. Accordingly, rehearing should be denied.

III. The Commission's interpretation of Section 4928.143(B)(2)(c), Revised Code, is correct and the Commission's approval of the Generation Resource Rider pursuant to that code section should not be disturbed on rehearing.

In their Applications for Rehearing, both FES and IEU argue that R.C. §4928.64(E) prevents the Commission from approving the GRR on a non-bypassable basis, disregarding, once again, the axiomatic maxim of proper statutory interpretation: all statutes must be given meaning. FES and IEU would have the Commission read language into R.C. §4928.143(B)(2)(c) that does not exist in that code section. Specifically, these Intervenors argue that R.C. §4928.143(B)(2)(c) permits the establishment of a non-bypassable surcharge for the life of an electric generating facility so long as the facility is not a renewable generation facility. R.C. §4928.143(B)(2)(c) does not contain this restrictive language. Interpreting R.C. §4928.143(B)(2)(c) as FES and IEU suggest would not only limit the Commission's ability to oversee the electric industry and to avail itself of both statutes as needed, but would also be contrary to the state's promotion of renewable technologies. Very few companies, if any, would take on the risks of constructing renewable generation facilities if FES' and IEU's reading of R.C. §4928.143(B)(2)(c) were adopted. The Commission properly concluded that, given the Company's repeated representations that the benefits of the Turning Point project (energy, capacity, RECs) would be shared with all customers, "the GRR should be non-bypassable" pursuant to R.C. §4928.143(B)(2)(c). (*ESP II Opinion and Order* at 24.)

As part of its Modified ESP, AEP Ohio proposed the GRR to recover the cost of new generation resources, including the costs of renewable and alternative capacity additions, as well as more traditional capacity constructed or financed by the Company and approved by the Commission. FES and IEU seek to overturn the Commission's establishment of the GRR simply because it may be used by the Company to recover the costs of a renewable generating facility, thereby foreclosing a viable cost recovery mechanism made available to the Commission by the General Assembly on that basis alone.

It is important to recognize that the Commission approved the GRR at a rate of zero[17] and explicitly noted "that in permitting the creation of the GRR it is not authorizing the recovery of any costs, at this time." (*ESP II Opinion and Order* at 25.) This is important because, as the Company argued in its Reply Brief, the argument of bypassability versus non-bypassability relates to the issue of cost recovery – an issue which the Commission properly concluded is to be addressed in a future proceeding. The Commission's interpretation of R.C. §4928.143(B)(2)(c) is correct, and the Commission's approval of the GRR mechanism pursuant to that code section should not be disturbed on rehearing.

[17] As the Commission noted on several occasions in its Opinion and Order, "[i]t is not unprecedented for the Commission to adopt a mechanism, with a rate of zero, as a part of an ESP." (Order at 24-25, footnotes 9 and 10).

FES, IEU and OCC/APJN argue in their Applications for Rehearing that the Commission's approval of the GRR pursuant to R.C. §4928.143(B)(2)(c) is unlawful because the Company has failed to satisfy all of that section's requirements for the establishment of a non-bypassable surcharge. These intervenors make this argument despite the Commission's clear pronouncement that "AEP Ohio will be required to address each of the statutory requirements, in a future proceeding, and to provide additional information including the costs of the proposed facility, to justify recovery under the GRR." (*ESP II Opinion and Order* at 24.) This argument elevates form over substance and ignores the Commission's broad discretion to manage its dockets to avoid the unnecessary duplication of processes. It should be rejected accordingly.

The Commission correctly concluded that R.C. §4928.143(B)(2)(c) does not restrict a determination of need to the time an ESP is approved. Section 4928.143(B)(2)(c) provides, in pertinent part, 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." This language is instructive for two reasons. First, as noted above, in approving the creation of the GRR at a rate of zero, the Commission has not yet authorized the recovery of any costs in the surcharge — approval of the GRR as part of the Company's modified ESP merely established the authority for the placeholder mechanism, subject to further proof under this holding before any costs can be added. Second, according to the language of R.C. §4928.143(B)(2)(c), the determination of need is to be based on the resource planning projections of the utility. It is in a utility's long-term forecast proceeding, not in an ESP proceeding, where a utility presents the Commission with its resource planning projections. Indeed, the Commission recognized this fact when it stated in the Order that "it is acceptable for the Commission to determine the need for the Turning Point facility as a part of the Company's long-term forecast case filed consistent with Section 4935.04, Revised Code, wherein the Commission evaluates energy plans and needs." (*ESP II Opinion and Order* at 24.) So long as a determination of need is made by the Commission before it authorizes the recovery of costs in the established mechanism for the Turning Point project, the Commission has not violated R.C. §4928.143(B)(2)(c).

With respect to the other statutory requirements, the Commission appropriately found that "[t]he statutory requirements of Section 4928.143(B)(2)(c), Revised Code, will be addressed in a separate proceeding before any costs can be recovered via the GRR." (*ESP II Opinion and Order* at 23.) It is, therefore, premature to argue, as FES, IEU, and OCC/APJN do, that the Company has not yet satisfied these requirements. Further, to insist, as these Intervenors do, that the Commission must address all of R.C. §4928.143(B)(2)(c)'s requirements at the time an ESP is approved would undermine the broad, undisputed discretion vested with the Commission to manage its dockets.

The Commission's interpretation of R.C. §4928.143(B)(2)(c) is correct, and the Commission's approval of the GRR mechanism pursuant to that code section should not be disturbed on rehearing.

IV. Intervenor recommendations regarding the 12% earnings cap should be rejected.

In the course of modifying and approving a revised RSR for AEP Ohio, the Commission concluded that it would be appropriate to establish a significantly excessive earnings test (SEET) threshold ROE, applicable during the term of the modified ESP, and it then established a SEET threshold ROE of 12 percent for AEP Ohio during the term of the modified ESP. (*ESP II Opinion and Order*, at 37.) At pages 31-34 of its Application for Rehearing, AEP Ohio has explained why a SEET threshold ROE of 12 percent is unreasonable and unlawful.

OEG contends on rehearing that it was unreasonable for the Commission to characterize the 12 percent earnings cap as a SEET threshold. Rather, OEG recommends that the 12 percent earnings cap should be imposed as a provision of the modified ESP. Under OEG's proposal, the 12 percent earnings cap would be applied as an additional earnings test to the annual SEET required by Section 4928.143(F), Revised Code. OEG asserts that such an additional earnings test, imposed as a provision of the ESP, would provide rate stability and certainty under Section 4928.143(B)(2)(d), and that it would avoid litigation as to whether the proper procedures for establishing a SEET threshold were followed. (OEG AFR at 3.) This argument is simply a variation on the theme of the recommendation that OEG made previously in the *Capacity Pricing* proceeding, through the testimony of OEG Witness Kollen, and in its post-hearing briefs in that case. The Commission declined to adopt this recommendation of OEG in its order in the *Capacity Pricing* proceeding, and it should not reverse course now and attempt to impose it in this proceeding through AEP Ohio's modified ESP. Indeed, OEG's recommendation should be rejected because it amounts to an untimely application for rehearing of the Commission's *Capacity Pricing* decision filed in the wrong proceeding.

OEG also argues on rehearing that, if the $188.88/MW-day capacity price is not used in the RSR calculation, then the amount of the capacity deferrals that result from the Commission's method for achieving capacity cost recovery for AEP Ohio should be included in the calculation of the SEET threshold ROE for purposes of enforcing the 12 percent earnings cap. (OEG AFR at 5.) As discussed above, *supra* at Section II.B.2, the full $188.88/MW-day capacity revenue should not be imputed to the RSR calculation. But AEP Ohio submits that OEG's alternative recommendation in this regard is consistent with the Commission's prior SEET rulings and, thus, acceptable to the Company.

IEU argues on rehearing that the Commission should credit the amount of generation service capacity compensation available from SSO customers above the $189 price against the amount of the Capacity Deferral. (IEU AFR at 67.) This argument amounts to a request to reduce the SSO base generation rates, below the frozen levels that the Commission has already approved in the Opinion and Order. There is no basis for such a reduction. Indeed, it would prevent the RSR from achieving its intended purpose, which is to provide support for AEP Ohio's financial integrity during the term of the modified ESP. It would fatally undermine the balance that the Commission attempted to strike through its *ESP II Opinion and Order*.

V. Intervenor challenges relating to the energy-only SSO auctions are without merit.

FES predictably advocates for quicker SSO auctions, even though AEP Ohio proposed an aggressive auction schedule far beyond that required by law or could even be achieved under an MRO – and even though the Commission further expanded and accelerated those energy auctions in the Opinion and Order. Specifically, FES asserts that the Commission could have relied upon FES witness Banks' testimony, concluding that AEP Ohio is capable of holding an auction as of June 2013, to accelerate the SSO energy auctions even more so that SSO customers could receive benefits of competition in just 9 months. FES thus concludes that there is no basis on which to delay fully competitive SSO. (FES AFR at 29-30)

AEP Ohio demonstrated on brief why it is unreasonable to require immediate SSO auctions without a ramp-up period and prior to the corporate restructuring and Pool termination are fully implemented. (AEP Ohio Br. at 54-56; AEP Ohio Reply Br. at 42-48.) While FES continues to disregard these reasons as lacking any basis, the Commission properly recognized the value in AEP Ohio's aggressive transition to a fully competitive SSO, finding the proposal to be "extremely beneficial." FES's final bid to squeeze more value out of the auction schedule is unfounded and raises no new issue for rehearing.

Next, OEG suggests that the energy auctions should be held on a separate rate zone basis, because the "price to beat" for energy is different in each rate zone. Otherwise, OEG maintains that the auction may result in unreasonably high energy charges to OP customers. (OEG AFR at 6.) As a related matter, OEG also recommends that the Commission should clarify that it will not accept energy-only auction results if they lead to rate increases for a particular zone. (OEG AFR at 6.) AEP Ohio submits that details involving the Competitive Bidding Process related to the energy auctions need not be determined at this time and are more appropriately discussed as part of the auction stakeholder process that was recently initiated pursuant to the Opinion and Order, which will lead up to the Company's CBP filing by the end of 2012. Regarding the larger role of conducting the energy auctions and whether the results should be accepted based on their relationship to legacy SSO rates, AEP Ohio disagrees with that condition. It is very similar to the position maintained by OCC in testimony and argued on brief, which the Commission soundly rejected:

> [T]his Commission understands the importance of customers being able to take advantage of market-based prices and the benefits of developing a healthy competitive market, thus we reject OCC's arguments, as slowing the movement to competitive auctions would ultimately harm residential customers by precluding them from enjoying any benefits from competition.

(Opinion and Order at 39.) The Commission and AEP Ohio are fulfilling the General Assembly's plan for transitioning to a fully competitive SSO environment and that path is not conditioned on temporary or short-term market results – it is a permanent goal. The Commission should again reject the position that auction results will only be accepted if they beat a certain price; that approach does not constitute true market pricing.

VI. The Modified ESP Does Not Contain Anti-Competitive Barriers To Shopping.

A. Switching Practices, Charges, and Minimum Stay Provisions.

Citing page 42 of the Commission's *ESP II Opinion and Order*, FES contends that the Order "approves, with little to no analysis or justification, AEP Ohio's request to maintain anti-competitive barriers to shopping, including minimum stays and uniquely harmful switch fees." (FES AFR at 33.) FES asserts that the "only" record evidence establishes that these serve simply as barriers to shopping by "limiting customers from freely moving into or out of the competitive market and charging customers directly if they do." (*Id.*) FES raises similar anti-competitive claims about "AEP-Ohio's new 'process' to return shopping customers to SSO service if they have a 60-day delinquency of more than $50 *** [.]" (*Id.* at 34.) Multiple intervenors, including FES, raised similar arguments in their testimony and post-hearing briefs, so these assertions by FES in support of rehearing are nothing new. (*E.g.,* FES Ex. 105 at 31; RESA Ex. 101 at 12-13.)

As the Commission properly found, after analyzing intervenors' criticisms, the modified ESP "includes a continuation of current operational switching practices, charges, and minimum stay provisions related to the process in which customers can switch *** [.]" (*ESP II Opinion and Order* at 40.) As the Commission further noted:

> AEP-Ohio points out that the application *includes beneficial modifications for CRES providers and customers* *** [.]
> ***
> AEP-Ohio witness Roush testified that AEP-Ohio also eliminates the 90-day notice requirement prior to enrolling with a CRES provider, the 12 month stay requirements for commercial and industrial customers that return to SSO rates beginning January 1, 2015, and requirements for residential and small commercial customers that return to SSO rates be required to stay on the SSO plan until April 15th of the following year, beginning on January 1, 2015.
> ***
> The Commission concludes that the modified ESP's modification to AEP-Ohio's switching rules, charges, and minimum stay provisions that are set to take effect

> on January 1, 2015 are *consistent with AEP-Ohio's previously approved tariffs*. Further, as we previously established in our original opinion and order in this case, *these provisions are not excessive or inconsistent with other electric distribution utilities, and will further support the development of competitive markets* beginning in January 1, 2015. Therefore, we find these provisions to be reasonable.

(*Id.* at 41-42; emphasis added.) The record fully supports these findings by the Commission regarding switching rules, charges, and minimum stay provisions.

For example, FES relies primarily on the speculative testimony of Mr. Banks regarding the impact of minimum stays and switching fees on competition. (FES AFR at 33, n.110, 111, & 112.) But Mr. Banks confirmed on cross-examination that the 12-month minimum stay provision was based on a Commission-approved tariff, and that other providers besides AEP Ohio also have minimum stay provisions in their tariffs as well. (Tr. Vol. XVI at 4518-19.) FES also cites the testimony of RESA witness Ringenbach, who similarly conceded on cross-examination that other EDUs share similar provisions of service, and that EDUs have legitimate concerns about customers "gaming the system" by switching during the off-season and switching back during the on-season. (Tr. Vol. XIII at 3707-08.) Ms. Ringenbach also conceded that she did not know what the current level of shopping was in AEP Ohio's territory. (*Id.* at 3738.) And Mr. Roush testified about specific modifications to the Company's terms of service that benefit both customers and CRES providers, including: (1) the addition of customer Peak Load Contribution (PLC) and Network Service Peak Load (NSPL) information to the Master Customer List; (2) the elimination of the current 90-day notice requirement that certain customers must provide before enrolling with a CRES provider; (3) the elimination on January 1, 2015 of the current 12-month minimum stay requirement that applies to certain large commercial and industrial customers that return to the SSO, and (4) the elimination on January 1, 2015 of the current requirement for residential and small commercial customers that return during the summer to remain on the SSO until April 15th of the following year. (AEP Ohio Ex. 111 at 4.) Based on this record, and these competition-friendly *improvements* in the Modified ESP to the stay/switching terms of service that were previously approved by the Commission, it is apparent that rehearing is not warranted on these issues. Far from containing barriers to shopping, the modified ESP will facilitate the transition to a fully competitive market. Indeed, counsel for OMAEG/OHA has said so on their law firm's website, summarizing the Commission's August 8 Opinion and Order as one that "removed the barriers by providing incentives to shopping, removing caps on the percentage of customers that may shop, and pushing AEP-Ohio to price the default service through market mechanisms faster than otherwise achievable under Ohio law."[18]

B. Transparency In PLC Values.

IEU complains that the Commission declined to adopt what IEU describes as the "uncontested recommendation" of its witness, Kevin Murray, for AEP-Ohio to immediately disclose how it assigns a Peak Load Contribution ("PLC") factor to customers. (IEU AFR at 69.) IEU asserts that the ESP II Order will "allow AEP-Ohio's PLC allocation process to remain a mystery for another two years" and that "[c]alculating the difference between RPM-Based Pricing and $188.88/MW-day requires a transparent and proper identification of PLCs." (*Id.* at 70.) IEU posits that "without disclosure of the means by which the PLC is disaggregated from AEP East down to AEP-Ohio and then down to each AEP-Ohio customer, it is not possible to test AEP-Ohio's specification of PLCs, determine whether Ohio customers are disproportionately covering the AEP East FRR capacity obligation, or determine whether certain customers or customer classes within AEP-Ohio's territory are unfairly being assigned their

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[18] *PUCO Decision in AEP-Ohio Rate Case Presents Opportunity to Shop for Competitive Electricity Rates* (Aug. 31, 2012), *available at*: http://www.bricker.com/publications-and-resources/publications-and-resources-details.aspx?Publicationid=2476 (last visited Sept. 12, 2012).

PLCs." (*Id.* at 69, n. 192.) This is entirely kicking up dust, the Company has been providing customer PLC information for years and without issue both for Ohio customers that shop and Ohio customers that participate in PJM Emergency Demand Response Programs. There is no disaggregation from AEP East down to AEP-Ohio, AEP Ohio load is and has always been tracked because it is needed for the AEP Pool (which IEU is quite aware of). When Customer Choice was implemented in Ohio, we held workshops, have posted information on our website, included information in our tariffs, etc. which collectively discuss how the load information for shopping customers is determined.

As a threshold matter, this contention of IEU's about transparency in the PLC allocation process is simply a re-hash of arguments previously contained in IEU's post-hearing brief. (IEU Initial Br. at 91) ("Customers have a right to know what their PLC is, and both customers and CRES providers have a right to know the method that AEP-Ohio uses to assign PLC values to each customer.") More fundamentally, because the PLC value is provided by AEP Ohio to CRES providers, which is in turn used by CRES providers to bill their customers, IEU's concern about transparency in the PLC allocation process is more appropriately an issue that IEU can raise with any CRES provider from which it or its customers purchases energy. In any event, if IEU is truly concerned about some kind of manipulation of PLC values by either a CRES provider or the Company, then IEU's customers can verify any assigned PLC value simply by requesting their interval meter from the Company in conjunction with information that is publicly available from PJM.

In sum, IEU's request for rehearing based on the PLC allocation process is a non-issue that has already been presented to the Commission. The Commission has already directed AEP Ohio "to develop an electronic system to provide CRES providers access to pertinent customer data, including, but not limited to, PLC and NSPL values and historical usage and interval data no later than May 31, 2014." (*ESP II Opinion and Order* at 41.) The Commission has also directed representatives of the Company to schedule a meeting with members of the Ohio EDI Working Group ("OEWG") to "develop a roadmap towards developing an EDI that will more effectively serve customers, and promote state policies *** [.]" (*Id.*) And the Commission has made it clear that the Company is expected to follow OEWG standards "and work within the group to implement solutions which are fair and reasonable, and do not discriminate against any CRES provider." (*Id.*) As such, there is simply no need for the Commission to grant rehearing on this non-issue raised yet again by IEU regarding transparency in PLC values.

VII. The Distribution Investment Rider is lawful and reasonable.

A. The Commission Properly Applied Section 4928.143(B)(2)(h), Revised Code, To Approve The Distribution Investment Rider As Justified By The Record In This Case And As Outlined In Its Opinion And Order.

OCC/APJN raises two arguments concerning the Commission's application of R.C. 4928.143(B)(2)(h) in its 17th assignment of error. OCCAPJN asserts that the Commission applied a non-existent standard and understated the change in service quality. OCC/APJN's analysis fails to properly apply the statute and ignores large parts of the factual record.

The Commission properly applied the statute to approve the DIR in this case. OCC/APJN accuses the Commission of not properly applying the statute and that the Commission's interpretation of the statute is incorrect. First, OCC/APJN argues that the statute requires that customer and company expectations be aligned at the present time. (OCC/APJN AFR at 100.) OCC/APJN treats this as some type of immediate, on-the-spot analysis, stating that it is not in the past or in the future but at the present time. OCC/APJN asserts that the Commission's finding that customers have high expectations is not adequate or even the right standard. The Commission relied on the most recent survey data and the Company statements in the record, which constitutes the best evidence to make the determination.

OCC/APJN further argues that the Commission uses a non-existent standard to adopt the DIR by misapplying the Commission's analysis concerning the reliability standards and customer surveys in the record. (OCC/APJN AFR at 103.) OCC/APJN misunderstands the purpose of the Commission's order in this area. (*ESP II Opinion and Order* at 46.) The Commission discussed the different standards proposed by its Staff and by the Company to determine if expectations were aligned. As pointed out by the Commission, the Staff used the overall reliability standard performance, while the Company used the actual surveys answered by customers sharing their first-hand expectations. The Commission language cited by OCC/APJN involves the discussion about how the surveys relied upon by the Company are part of the process to set the standards relied upon by Staff. The Commission finds that both the Company and the Staff's standard show that customers have high expectations of reliable service and any difference in the Company's expectations by either standard offered is slight. This finding supports the conclusion that the customer and company expectations are sufficiently aligned.

OCC/APJN argues with the record, attempting to reoffer its argument that the majority of customers are not interested in increased service reliability and therefore the DIR should be denied. OCC/APJN's argument ignores the testimony and record in this case concerning the purpose of the DIR. OCC/APJN attempts to use the 71% of residential and 73% of commercial customers' expectations that service reliability would remain the same as proof that the DIR is unnecessary, but in fact it is a major component of showing the need for the DIR. (OCC/APJN AFR at 102.) The record is clear that the DIR will assist in the replacement of aging infrastructure important at the outset for maintaining the quality of service customers are used to in the service territory. (*ESP II Opinion and Order* at 42 and 46.) So, in fact, when you combine the previously mentioned expectations with those that want even a higher level of reliability, the record shows that 90% of residential and 93% of commercial customers want the same or better level of reliable service, and the Company testified that the DIR is necessary to deliver that level of service. Taken together, this shows the need for the DIR and the meeting of the expectations of the Company and the customer, to ensure that the Company can deliver what the customer expects. The evidence of record shows that AEP Ohio's expectation that it must continue to invest in its distribution system, and customers' expectations for increased and maintained reliability, are in sync and support future investment in the system to improve and maintain service reliability. That is the core of the Commission's finding that should be reiterated, and the ground for rehearing should be denied.

OCC/APJN parses words and attempts to undermine the statute and the relationship between the customers and the Company by examining the word "expectation." First, OCC/APJN argues that the statute has no real meaning because ensuring that the expectations of the Company and customers align is not a real standard because everyone wants reliable service. OCC/APJN oversimplifies the purpose of the statute in an attempt to attack it. The statute is actually very clear and is focused on ensuring that the actions being taken by the utility are commensurate with the customers' expectations for the design and cost of the system. If the customers were sharing an expectation for less reliable service, or for the Company to not replace aging assets and let the system degrade over time, then the DIR may not be appropriate. But the customers expect the level of service to stay the same or get better and the DIR is necessary for the Company to deliver on that expectation. It is clear that when the Commission found that the DIR would better align expectations, the Commission's meaning was that the DIR will allow the Company to provide the level of service customers have come to expect in this age of aging infrastructure. The proper analysis for the Commission is to ensure that the DIR is intended to meet customer expectations and that the Company is not expecting to go so far beyond those expectations that the system is not representative of what is expected. The Commission made that finding and can reiterate on rehearing that the record supports its conclusion that the actions and expectations of the Company are aligned with the customers to maintain or increase service reliability and the DIR is an important tool to help deliver those reasonable expectations as a factual matter.

OCC also takes issue with the Company's performance in relation to the reliability standards and incorrectly characterizes the Company's results as poor reliability performance. The Commission can review the extensive discussion on the reliability standards performance by the Company at page 91-95 of the post hearing brief and page 68 of the reply brief. In summary, the Company only missed one of the four reliability standards in the most recent year and none in the previous year. As the Commission is aware, it takes missing a standard two years in a row for a violation to occur. There is no rule violation. In addition, the fact that the annual performance can fluctuate is a statistical reality, but that does not mean that the Company is providing "poor reliability service" when still meeting the defined standard. Even missing the standard in a given year may be understandable due to conditions outside of the control of the Company. As the record in this case shows, external factors like weather were extreme, causing an expected change in the final performance numbers. (AEP Ohio Ex. 146.) The Company's performance was actually at an increased level compared to the conditions and obstacles faced in prior years. OCC/APJN ignores the record, hard work of AEP Ohio restoration employees and the reality of the underlying statistical basis for standards to create a misimpression that there is a poor level of service. The Commission should affirmatively recognize the record evidence explaining the swing in the reliability performance based on weather and not allow OCC/APJN to misrepresent the Company's performance in the presence of the extreme circumstances.

OCC/APJN's argument that the Commission's order violates Section 4903.09, Revised Code, because it did not address the information requested by Staff on the DIR plan or the impact on rates is also without merit. (OCC/APJN AFR at 105-110.) OCC/APJN recites its preferences for what it would like to see in a plan to develop the DIR and what the Staff put in its testimony in the case. Yet nowhere does OCC/APJN recognize the part of the Commission's Order that discusses the Commission oversight of the plan when put into action and the directive to work with Staff and develop a plan to file with the Commission. The Commission has the broad discretion over its dockets and has the authority to address the issues raised by Staff, by ordering the Company to work with Staff and file an updated plan at a later date for consideration. OCC/APJN's attempt to finalize a plan in the Opinion and Order in this case minimizes the type of effort that can now be applied cooperatively, between AEP Ohio and Staff, to develop an appropriate plan. OCC/APJN's attempts to dictate this action now also infringes upon the Commission's exclusive oversight of utility actions. OCC/APJN's argument that the case violates R.C. §4928.143(B)(2)(h) because it does not include a modernization plan also ignores the plain language of the order that states this incentive ratemaking plan need not include a modernization plan. (*ESP II Opinion and Order* at 46.) The case as a whole was a consideration of the rate impacts of the entire electric security plan and the different policy sections of the statute. OCC/APJN's argument that the Commission did not address a subpart of the affordability, when it *did* address the overall balance of the plan and impact on customers, is not a valid argument. The Commission considered the necessary elements in compliance with

Section 4903.09, Revised Code, and the arguments raised by OCC/APJN are already covered in the opinion.

The record supports the Commission's approval of the DIR. Customer and Company expectations are aligned to ensure that the efforts undertaken will be in line with what the customers expect. The aging infrastructure can be addressed to ensure that greater than 90% of customers' expectations are in line with the efforts of the Company. The Commission should also reject OCC's attempt to stand in the shoes of the Commission and dictate what parts of the plan are required to be defined at this point and what can be developed at a later time. The Commission should deny OCC's ground for rehearing.

B. Kroger's Objections To The DIR Lack Merit.

Kroger's argument that the Commission failed to address its concern about assigning the cost of the DIR to individual rate zones also ignores the record. The Commission explicitly held where the merged company should maintain separate charges in its order. In other areas it is unreasonable to expect a single company to maintain separate charges. The Commission established an audit process and Staff oversight of the DIR plan to review accuracy, prudency and compliance. The concern raised by Kroger on inequitable investment is an area for the Staff to consider. It is unreasonable for a merged company to set up a plan for an all encompassing effort like the DIR through separate accounts and efforts. The Commission should deny Kroger's ground for rehearing and allow the plan to be implemented on the AEP Ohio system as a single system whose merger was recently approved by the Commission.

VIII. The Commission correctly adopted the zero placeholder Pool Termination Rider requested by the Company.

FES, OCC/APJN, and IEU each seek rehearing on the basis that the Commission should not have approved a non-bypassable Pool Termination Rider ("PTR"), initially set at zero, to recover lost revenue associated with termination of the Pool Agreement, in the event that the Company's corporate separation plan is denied or modified. These Intervenors raise three different objections to the PTR that was approved by the Commission. First, all of these Intervenors contend that a PTR cannot be included in an ESP SSO under Section 4928.143(B)(2), Revised Code. (IEU AFR at 46; OCC/APJN AFR at 89; FES AFR at 23.) Next, FES complains that there was "no description of any such [PTR] in AEP Ohio's Application" and that the Commission thus "erred in finding that AEP Ohio was seeking approval of a PTR." (FES AFR at 22.) Finally, FES contends that there is "no justification for providing pool modification revenue to AEP GenCo after corporate separation, and any pool modification provision would be an improper cross-subsidy." (FES AFR at 23-24.)

There is a critical threshold problem with these intervenors' objections to the PTR placeholder rider. AEP Ohio has already indicated the PTR will not be triggered or applicable if the Commission approves AEP Ohio's proposed corporate separation plan without modification. Because corporate separation is a critical and necessary prerequisite for the modified ESP, and without its concurrent approval the modified ESP proposal unravels, intervenors' PTR-related grounds of rehearing are utterly baseless and should be rejected by the Commission. With that threshold point in mind, the Company will address the intervenors' arguments as follows.

A. As The Commission Has Previously Decided, A Pool Termination Rider May Indeed Be Approved Pursuant To Section 4928.143(B), Revised Code.

Intervenors' complaints that a pool termination rider is unlawful under the Ohio Revised Code are nothing new. As the Commission expressly noted in its Order, it has already rejected this contention on the merits in an earlier stage of AEP Ohio's *ESP* proceeding. (*ESP II Opinion and Order* at 48.)

> The Company dispels the assertion that there is no statutory basis for a pool termination cost recovery provision in the ESP on the basis that the Commission has already rejected this argument in its December 14, 2011 Order on the ESP 2, where the Commission determined a pool termination rider may be approved "pursuant to Section 4928.143(B), Revised Code," and further concluded that establishing a rider "at a zero rate does not violate any regulatory principle or practice."

(*Id.*, citing *In re AEP-Ohio*, Case No. 11-346 EL-SSO et al., Order at 50 (December 14, 2011).) Thus, the statutory argument raised here by Intervenors is simply a re-hash of an argument that has been raised before and properly rejected by the Commission.

The statutory argument is not merely repetitive but also misplaced. As the Commission went on to note in its Opinion and Order, there is indeed statutory support for the adoption of the PTR in Section 4928.143(B)(2)(h), Revised Code. (*ESP II Opinion and Order*, at 49.) That statute provides that an ESP may include, *without limitation*, provisions regarding "any other *incentive ratemaking*…[.]" R.C. 4928.143(B)(2)(h) (emphasis added). As the Commission concluded:

> 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.

(*ESP II Opinion and Order*, at 49) (Emphasis added). The PTR is incentive ratemaking that is plainly authorized by Section 4928.143(B)(2)(h), Revised Code. Moreover, there is additional justification within the Ohio Revised Code for the PTR. As noted by the Signatory Parties to the Stipulation previously approved by the Commission in this *ESP* proceeding, a PTR may also be authorized by Section 4928.143(B)(2)(d), Revised Code. (Joint Reply Br. of Signatory Parties, Nov. 18, 2011, at 55.) Division (B)(2)(d) of the ESP statute permits ESPs to include, *without limitation*:

> (d) 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*[.]

R.C. 4928.143(B)(2)(d) (Emphasis added). The nature of the Pool has always been to *stabilize rates for Ohio ratepayers*, and division (B)(2)(d) of the ESP statute thus supports the contingent recovery of Pool costs embodied in the placeholder PTR.[19] As such, the PTR is indeed an authorized component of the Company's ESP under Ohio law.

B. FES's Assertion That AEP Ohio's Application Did Not Request Or Describe Any Rider Like The PTR Is A Red Herring.

In its Application for Rehearing, FES makes multiple misleading assertions about the Company's ESP Application in order to cast unwarranted aspersions on the PTR, saying:

> AEP Ohio did not request approval of a "Pool Termination Rider" or any other rider associated with the purported costs that AEP Ohio anticipates it may incur as a result of termination of the AEP Pool. There is no description of any such "Pool Termination Rider" in AEP Ohio's Application.

(FES AFR at 22.) This assertion by FES erroneously focuses only on the text of the Company's March 30, 2012 Modified ESP Application. That 17-page Application did not, of course, set forth each and every detail of the many terms and conditions proposed in the Modified ESP. On the contrary, the Application expressly noted that the Company's Modified ESP was intended to be "as described in this application *and in supporting Company testimony*." (Application at 2;

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[19] In conjunction with their statutory argument, OCC/APJN complain that "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." (OCC/APJN AFR at 90.) But OCC/APJN fail to cite any legal authority for the proposition that Section 4928.143, Revised Code, allows the Commission to approve only those ESP provisions for which there is specific Commission precedent.

emphasis added.) The Application included a chart identifying Philip Nelson as the Company witness who would provide a "more complete description of and support for" the "Pool termination & modification" provisions of the proposed Modified ESP, as well as "Cost Recovery Mechanisms for fuel, renewable energy credits, new capacity, and *pool termination*." (*Id.* at 4; emphasis added.) As promised, Mr. Nelson indeed provided a detailed explanation of the pool termination provision in his written testimony, upon which he was subject to cross-examination by intervenors. (AEP Ohio Ex. 103 at 21-23.)

The Commission, unlike FES, had no trouble connecting the dots and discerning the existence and description of the zero placeholder PTR sought by AEP Ohio and ultimately approved by the Commission. As the Commission expressly found in its August 8 Opinion and Order, "[t]he modified ESP application includes the planned termination of the AEP East Pool Agreement (Pool Agreement). As a provision of this ESP, AEP-Ohio requests approval of a Pool Termination Rider (PTR), initially set at zero." (*ESP II Opinion and Order*, at 47.) As such, FES's complaint that the Company failed to request or describe the proposed PTR is simply false and provides no basis for rehearing.

C. The PTR, If Triggered, Will Not Result In An Improper Cross-Subsidy.

As the Commission has noted, the PTR is merely a placeholder rider, initially set at zero, and several important contingencies must occur before it would ever actually be implemented. These contingencies include the denial or modification of AEP Ohio's corporate separation plan, followed by an entirely separate filing by the Company within the *ESP* case, in which the Company would maintain the burden of demonstrating the extent to which the Pool Agreement benefitted Ohio ratepayers, the extent to which the costs and/or revenues should be allocated to Ohio ratepayers, and the prudency and reasonableness of those costs. (*ESP II Opinion and*

Order at 47, 49.) Despite the zero value and mere placeholder status of the rider, and despite the fact that none of the above-described contingencies have yet occurred, FES nevertheless persists in arguing that the PTR will surely result in an illegal cross-subsidy, saying:

> AEP Ohio admitted that, at the time the AEP Pool terminates, the generating assets will be held by a separate, competitive affiliate. Therefore, any revenue "losses" would be the losses of a competitive generation provider. The competitive generation provider has no "distribution service" and there is no provision in R.C. 4928.143, or in any other Ohio law, that would entitle a competitive generation provider to recover "lost revenues" from EDU customers on a non-bypassable basis. Such cross-subsidies are expressly prohibited. There is no justification for providing pool modification revenue to AEP GenCo after corporate separation, and any pool modification provision would be an improper cross-subsidy.

(FES AFR at 24; internal citations omitted.)

There are multiple problems with this argument from FES, not the least of which is that it is not yet ripe for adjudication by the Commission. FES's objection to the PTR would more appropriately be addressed if, and only if, the Company actually pursues recovery of any pool termination impacts at some point in the future, upon the occurrence of the above-described contingencies. Putting aside those issues, FES's depiction of the PTR as an illegal cross-subsidy is simply wrong on the merits. As Company witness Nelson testified, rather than being a "subsidy" to benefit the GenCo, any proposed adjustment to the ESP rates pursuant to the PTR would be to compensate the Company for the loss of earnings associated with termination of the AEP Pool – earnings that the Company uses to recover the prudent and reasonably incurred costs of its generating assets:

> A significant portion of AEP Ohio's total revenues come from sales of power to other Members of the AEP Pool. With the termination of the AEP Pool, the Company will need to find new or additional revenue to recover the costs of its generating assets, or reduce the cost of those assets. The Capacity payments received by AEP Ohio cannot be mitigated by opportunity sales in the market alone.
> ***

> If the Corporate Separation plan is denied or amended then the Company would be permitted to charge a non-bypassable rate to compensate it for any loss of earnings associated with the AEP Pool termination. That compensation would be determined in a subsequent filing made under this ESP. In general, the Company will compare the lost AEP Pool capacity revenue to increases in net revenue related to new wholesale transactions or decreases in generation asset costs that result from the AEP Pool termination. If there is substantial decrease in net revenue then the Company may avail itself of this provision and seek recovery of the lost net revenue from retail customers.

(AEP Ohio Ex. 103 at 22-23.) Accordingly, and as discussed in greater detail *infra*, the PTR requested by the Company and approved by the Commission will not – *if it is ever implemented* – result in an illegal cross-subsidy. In any event, FES or other Intervenors would have more than adequate opportunity to advance those substantive concerns about the PTR at a later date, when and if the Company ever makes the subsequent filing expressly required by the Commission's *ESP II Opinion and Order*. There is simply no need to grant rehearing to address FES's entirely speculative and unripe concerns about a rider that may never be implemented.

IX. The Commission already addressed issues relating to the *PIRR* in the *ESP I* orders and is not required to reconsider those arguments in this proceeding.

IEU argues that the Commission's *ESP II Order* is unreasonable and unlawful based on IEU's attempts to present arguments on adjudicatory matters previously decided and not ripe for consideration in this proceeding.

A. The Commission should reject IEU's due process arguments.

IEU first asserts the same argument it raised on rehearing in the 11-4920 and 11-4921 cases ("*PIRR Docket*"); that it is denied due process with the absence of a hearing on its ADIT argument. Again, IEU's argument ignores the extensive history of these expenses and the proceedings establishing them and delaying the collection pursuant to the Commission's authority under Section 4928.144, Revised Code. This case did not involve the increase of a rate; this case merely formalized the collection of a charge established in the *ESP I* proceeding and delayed for the public good.

As indicated in the Finding and Order in the PIRR Docket, the Commission established the recovery of these deferred expenses in the *ESP I* Order on a phased-in collection schedule under Section 4928.144, Revised Code. The unavoidable surcharge was actually created with the approval of *ESP I* as required when the Commission exercises its rights under R.C. § 4928.144. The statute states:

> The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order *shall authorize the collection of those deferrals through a non-bypassable surcharge on any such rate or price so established* for the electric distribution utility by the commission.

(*Emphasis added*). The statute makes it clear that the order shall authorize the collection of the non-bypassable surcharge on the rate or price established at that time the Commission is exercising the phase-in rights. The statute recognizes the rate or price is already being established by the Commission and it is only the collection that is being phased in over time.

The Commission's recitation of the history of these expenses reinforces that the Commission applied Section 4928.144, Revised Code, approving the charge as a part of the *ESP I* case, and delaying only the full recovery of the charges. In the PIRR Docket Finding and Order the Commission noted that "[t]he Commission authorized AEP-Ohio to establish a regulatory asset to recover and defer fuel expenses, with carrying costs at the pre-tax WACC rate of 11.15 percent, and recovery through a non-bypassable surcharge to commence on January 1, 2012, and continue through December 31, 2018." (PIRR Docket Finding and Order at ¶ 35.) The Commission reiterated in the PIRR Docket order that the right to rate recovery was established in the *ESP I* proceeding, where the underlying facts and rights to due process were considered in establishing the standard service offer. The Commission went on to point out that "[a]s required by the statute, the Commission ordered that any deferred FAC expense balance remaining at the end of 2011 would be recovered through the unavoidable surcharge, thereby approving recovery of the regulatory asset." (*Id*.) It is inappropriate for IEU to claim that the consideration of the underlying charge is now the matter at issue when it was established in *ESP I*.

The Supreme Court of Ohio has repeatedly held that there is no constitutional right to a hearing in rate-related matters if no statutory right to a hearing exists. *See Consumers' Counsel v. Pub. Util. Comm.* (2006) 111 Ohio St.3d 300, 856 N.E.2d 213; *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 248–249, 638 N.E.2d 550; *Armco, Inc. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 401, 409, 23 O.O.3d 361, 433 N.E.2d 923; *Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 446, 453, 21 O.O.3d 279, 424 N.E.2d 561. IEU discusses general due process rights in a number of different circumstances but in no way provides any authority for why a hearing is required in this situation. There is no statutory right to a hearing for the application of the Commission's phase-in of this previously approved matter. No hearing is required.

The due process sought by IEU was already provided as part of the *ESP I* proceeding and the subsequent appellate and additional Commission proceedings. IEU specifically challenged many of these same issues previously in the *ESP I* proceeding and even participated in an appeal of the *ESP I* Order to the Supreme Court of Ohio. IEU is again challenging many of the same arguments in a second appeal to the Court. The Commission can be sure that IEU has had due process related to its arguments with the phase in recovery of the deferred fuel expenses established by the *ESP I* Order and phased-in by the Commission. The Commission should deny IEU's ground for rehearing.

B. IEU is estopped from advancing its ADIT-related objections.

IEU reargues another argument provided to the Commission in the *PIRR docket* and arguments previously made in other records; that the Commission has a duty to reconsider its previous factual determination on the accumulated deferred income tax in this case. IEU is estopped from rearguing this point in this proceeding at this time by the doctrine of *res judicata*. This matter was raised, considered, and decided as part of the order appealed to the Supreme Court of Ohio. In *Office of the Consumers' Counsel v. Pub. Util. Comm*. (1984), 16 Ohio St.3d 9, OCC challenged the Commission's decision to limit the refund of over recovered system loss costs to the specific audit period under review. The Court held that OCC was barred from raising this argument because the Commission previously had reviewed the electric utility's fuel procurement practices, including the computation of system loss costs, during the period of time for which OCC sought a refund and found them proper. The Court stated: "The inevitable conclusion from these facts is that OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate the issue of the RFC rate which was previously determined to be proper. * * * * This question was directly at issue in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question." *Id*. at 10.

IEU is using the Commission order to take yet another bite at the final and unappealable apple in this case. The Commission should deny IEU's attempt to relitigate this already determined argument in this case as an improper argument. IEU fails to raise new positions not already considered by the Commission in this proceeding or in the prior proceedings where IEU makes the same arguments.

X. The Commission's findings regarding generation divestiture and related matters are lawful and reasonable.

At pages 57-60 of its *ESP II Opinion and Order*, the Commission evaluated how the divestiture of generation assets and the proposed SSO agreement between AEP Ohio and AEP Genco would impact SSO rates under the Modified ESP. As AEP Ohio asserts in its Application for Rehearing, the Commission should have gone a step further in this section and tied the modified ESP in the *ESP II Opinion and Order* to approval of AEP Ohio's application for approval of its corporate separation plan and related asset transfers in Case No. 12-1126-EL-UNC ("corporate separation proceeding"). Specifically, the Commission should rule on the corporate separation case prior to issuing its *ESP II* rehearing decision.

Intervenors, alternatively, argue that rehearing is necessary because (1) the Commission lacks jurisdiction to conditionally approve the asset transfer in the *ESP II* docket and approval, nonetheless, is unlawful for the same reasons already advanced in the corporate separation proceeding; and (2) it is unlawful and unreasonable to permit certain revenues to pass through AEP Ohio to AEP Genco after corporate separation is effective. The Commission should deny rehearing based on these arguments for the following reasons.

A. The Commission Has Jurisdiction To Act On AEP Ohio's Corporate Separation Request In This Proceeding.

IEU alleges that rehearing is necessary because the Commission lacks jurisdiction to conditionally approve the transfer of generation assets in this proceeding. Specifically, IEU contends that because AEP Ohio did not move to consolidate the corporate separation proceeding and, according to IEU, the Commission limited its review in the ESP docket to how the divestiture of the generation assets and the agreement between AEP Ohio and AEP Genco will impact rates, the Commission lacks jurisdiction to conditionally approve the transfer of generation assets in this proceeding. (IEU AFR at 83-84). In IEU's view, "the conditional approval is beyond the scope of the issues the Commission said it would address in this proceeding and evades the requirements that must be satisfied prior to approval." (*Id.*)

This argument is without merit. The Commission has jurisdiction to evaluate and approve components of the Company's application for structural legal separation (*i.e.*, generation divestiture) in the context of the ESP proceeding under R.C. Sections 4928.02, 4928.06, 4928.141, 4928.142, 4928.143, and 4928.17. Corporate separation is a critical and necessary prerequisite for the Modified ESP to transition toward and implement an auction-based SSO. Thus, approval of corporate separation invokes the Commission's authority under R.C. 4928.06 to ensure that R.C. 4928.02's policies are being advanced. Also, because structural legal separation is the pillar upon which the modified ESP is built, and without its concurrent approval the Modified ESP proposal unravels, it is within the Commission's jurisdiction under R.C. Sections 4928.141, 4928.142, and 4928.143, to evaluate full corporate separation's effect on SSO rates under the Modified ESP and issue relevant approvals. Thus, the Commission is completely within its jurisdiction under these Sections of the Revised Code, and the Commission should reject IEU's jurisdictional claim.

B. It Is In The Public Interest To Promptly Approve Corporate Separation.

Prompt action on corporate separation is required and, contrary to IEU's suggestion, it is in the public interest because it is instrumental in fulfilling both long-overdue statutory mandates and existing state policy. The corporate separation plan for Ohio Power Company has been based on functional separation since 2001. R.C. 4928.17(C) only permits functional separation "for an interim period" and otherwise mandates structural separation. The decade-long interim period should end, and the Commission should fulfill the statutory mandate by swiftly approving full legal separation for OPCo. Doing so promotes the public interest by permitting AEP Ohio to restructure in a way that will pave the path to a competitively bid SSO and more competitive choice for electric service in Ohio.

The objective and purpose of the proposed generating asset transfer is to fulfill the mandate of R.C. 4928.17, and terminate the "interim" plan of functional separation for AEP Ohio. AEP Genco will receive the legacy generating assets and can provide competitive retail generation services, as well as engage in sales for resale as regulated by the FERC. The impact of corporate separation on the current and future SSO is clear in that it will ultimately lead to full market-based pricing of generation service for retail customers and will promote retail shopping in Ohio. Transforming AEP Ohio's business model through corporate separation is critical to facilitating an auction-based SSO, similar to other electric utilities in Ohio. Contrary to IEU's concerns, this progression is in the public interest and helps fulfill the competitive policies in Revised Code Chapter 4928, which R.C. 4928.06 provides the Commission the jurisdiction to ensure.

C. IEU's Other Arguments Do Not Present A Valid Basis For Rehearing As They Have Already Been Rejected By The Commission (Case No. 11-5333-EL-UNC) And Are Before The Commission Again In The Current Corporate Separation Proceeding (Case No. 12-1126-EL-UNC).

IEU's Application for Rehearing repeats many of the same arguments it advanced in the corporate separation proceeding concerning AEP Ohio's plan to transfer its generation assets and associated liabilities to AEP Genco. That 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, and now as a basis for rehearing in the Modified ESP docket. The Company will respond to IEU's claims, but it is important to keep in mind when considering IEU's grounds for rehearing that the overwhelming majority of these issues have been considered and rejected by the Commission when it approved the Company's similar application in Case No. 11-5333-EL-UNC. Thus, AEP Ohio's response and the Commission's rehearing denial should be similar to the exchanges in the past (11-5333) and current (12-1126) corporate separation proceedings.

1. Waiver of market value study continues to be appropriate.

IEU argues that even if the Commission had jurisdiction, the Commission conditionally approved a transfer of generating assets without making the findings required by R.C. 4928.17 and 4928.02, as well as O.A.C. 4901:1-37. (IEU AFR at 84.) IEU asserts that AEP Ohio failed to provide the Commission with the net book and market value of the generation assets, making it impossible for the Commission to determine whether the transfer is just, reasonable, and in the public interest, which, IEU contends, approval of the RSR has only exacerbated. (IEU AFR at 86-87.)

The Commission should reject IEU's position that insists on a market valuation study being conducted and litigated before approving transfer of assets. The position that market valuation is needed rests on false assumptions that have no basis in Ohio law. R.C. 4928.17, requires corporate separation but does not indicate any need for a market valuation. Under SB 3, all of these generation assets were subjected to market and EDUs, therefore, were given a temporary opportunity to recover stranded generation investments during a transition period. The market valuation concept is reflected in the Commission's rules, but it has no statutory basis, and has never been enforced against any electric utility. These factors not only provide a supporting rationale as to why a waiver of the rule is necessary, but they also illustrate why IEU's notion that transferring assets at net book value somehow creates a profit is artificial and inaccurate. There is no reason to believe that market value is above book value – indeed, this notion conflicts with the positions taken by IEU, OCC, and FES in the 10-2929-EL-UNC case that AEP Ohio's cost-based rate was substantially "above market." (*e.g.*, OCC Initial Post Hearing Br. in Case No. 10-2929-EL-UNC at pp. 2, 9.)

Contrary to IEU's desires (IEU AFR at 88-89), future transactions or disposition of the generation assets upon or after corporate separation from the EDU are not matters of concern under R.C. 4928.17, or the Commission's rules. The statute and the Commission's rules are concerned with the divestiture of generation assets from the EDU. They are not concerned with future performance of those assets, future environmental rules or market conditions that may affect the value of the assets, or whether there are subsequent transactions (known or unknown) that would alter the ownership or economic value of the assets. Accounting for such potential future gains or losses would be inappropriate because it is without basis under the corporate separation statute or rules. In addition, it would be inconsistent with the Commission's application of those rules to other electric utilities.

Furthermore, IEU's opposition to a net book value transfer should be rejected because it did not timely object to OPCo's waiver request in the corporate separation proceeding, and it should be equitably estopped because IEU lobbied (successfully) for Duke Ohio to be permitted to transfer its assets at net book value. (Stipulation and Recommendation in Case Nos. 11-3549-EL-SSO, *et al*., at pages 3 and 25-26.) The Commission determined based on similar information that it was in the public interest to waive Rule 4901:1-37-09(C)(4) and allow Duke Ohio to transfer its generation assets at net book value. If that treatment was in the public interest for Duke Ohio, it is also in the public interest to grant AEP Ohio's similar waiver request. Further, it is not in the public interest for the Commission to apply the same rule to similar facts in an inconsistent manner. Doing so creates an unfair and unlevel playing field for competition.

As a threshold matter, R.C. 4928.17 – the controlling statute regarding corporate separation matters – requires the Commission to ensure that an approved corporate separation plan does not extend an undue advantage or preference in the provision of competitive electric services. *See* R.C. 4928.17(A)(3.) Granting Duke Ohio's affiliate full and final approval for generation divestiture up front and waiving the filing and process rules, while simultaneously deferring approval of AEP Ohio's transfer of assets to AEP Genco and possibly subjecting it to market valuation studies and protracted litigation, serves to provide Duke Ohio with an undue preference and advantage in violation of this statute. The better approach is to grant AEP Ohio the same relief afforded to Duke Ohio.

An inconsistent application of the corporate separation statutory provisions and rules would be anticompetitive and would provide one entity a competitive advantage in violation of R.C. 4928.02. If Duke Ohio is able to transfer its generation assets at net book value and AEP Ohio is subject to greater scrutiny and a different valuation methodology, then Duke Ohio would be receiving an unfair benefit from the truncated process, which would allow Duke Ohio to avoid the costs associated with complying with O.A.C. 4901:1-37-09(C)(4), and potentially transfer its assets at a different valuation level. Nowhere is the direct difference more obvious than in the case of the jointly owned utility assets. If Duke Ohio were able to transfer those assets at net book value to its competitive generation affiliate, but AEP Ohio was required to transfer its assets to AEP Genco at a potentially greater cost, over a greater period of time, and in some cases to even transfer the same assets under a different methodology, then Duke's competitive generation company would be receiving a competitive advantage over AEP Genco.

IEU relies on an accounting analysis performed in late 2011 by AEP in conjunction with the (now-rejected) 11-346 Stipulation, in an attempt to support its speculation that the market value of the generation assets is greater than the book value. (IEU AFR at 87-88.) The internal AEP accounting memorandum performed a long-term analysis of the entire AEP-East generation fleet to determine whether the total expected net revenue stream for the life of the assets exceeds the net book cost. The accounting memorandum makes clear that the recoverability analysis of the generation fleet was done through a 30-year long-term view and from the aggregated perspective of AEP East (versus a narrow view of RPM pricing just for the shopping portion of AEP Ohio's load in Ohio.) (OCC Ex. 104.) In other words, the memorandum merely concludes that the combination of net revenue streams from all of the AEP East regulated rates over 30 years exceeded the net book value of the plants. For purposes of this accounting recoverability study, the generation plants outside of Ohio were presumed to be cost-based regulated for the entire life of the facility. In reality, the accounting analysis was done for a completely unrelated purpose and it does not support the IEU notion that market value of the generating assets should be explored or required as part of corporate separation.

In sum, there is no requirement that generation assets be transferred at market value and there is no reason why OPCo should not be permitted to transfer its assets at net book value – especially given that the criticisms of the waiver request have no basis under Ohio law, are speculative, and without record support. Contrary to IEU's position, the Commission has not required any EDU to produce market valuation studies in order to obtain corporate separation approval under R.C. 4928.17, and doing so here would create an unfair and unlevel playing field in violation of Ohio law.

2. The secondary transfers of Amos and Mitchell to AEP Ohio affiliates are distinct transactions after the initial divestiture and are beyond this Commission's authority and jurisdiction.

IEU also argues that the Commission should condition the secondary transfer of Amos/Mitchell on any subsequent owner bidding the units into all future RPM auctions, under R.C. 4928.18 (IEU AFR at 85-86; 88-89) and require AEP Ohio's affiliates to submit to jurisdiction under Section 4928.18, Revised Code (IEU AFR at 88-89). These arguments are without merit and should be rejected as a basis for rehearing.

In the interest of being completely transparent with the Commission, Company witnesses Powers and Nelson explained that, immediately after transferring the assets and liabilities to AEP Genco, Appalachian Power Company (APCo) will obtain the transferred interest in Unit No. 3 of the Amos generating plant and appurtenant interconnection facilities and related assets and liabilities (APCo already owns the remaining interest in Amos Unit No. 3) and an interest in the Mitchell generating plant and appurtenant interconnection facilities and related assets and liabilities (collectively, "Mitchell"), and Kentucky Power Company (KPCo) will obtain the remaining interest in Mitchell. (AEP Ohio Ex. 103 at 4.)[20] Mr. Powers' direct testimony provides the rationale that APCo and KPCo have long relied on AEP Ohio generating assets through the Pool Agreement to supply part of the capacity and energy needed to meet their respective load requirements (and APCo and KPCo have long paid for using those assets through capacity equalization charges.) (AEP Ohio Ex. 101 at 22.) The applicable Amos and Mitchell

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[20] AEP Ohio notes that, while the original plan for dividing Mitchell was 80%/20% between APCo and KPCo, the Company subsequently indicated that the precise division of Mitchell as between APCo and KPCo was still being determined and reserved the right to incorporate changes into the final plan to be filed for FERC approval. *See* Case No. 12-1126-EL-UNC, AEP Ohio August 3, 2012 Reply Comments at 4.

units are physically located in West Virginia and are of sufficient capacity to cover the expected shortfall (including the required reserve margin) for those FRR companies after the existing pool agreement is terminated. (*Id.*) Thus, the secondary transfers to APCo and KPCo are logical and appropriate. But contrary to IEU's position, the planned secondary transfers are distinct transactions after the initial divestiture and are beyond this Commission's authority and jurisdiction under Section 4928.17, Revised Code, to implement corporate separation.

D. The Commission's Decision To Permit Certain Revenues To Pass Through AEP Ohio To AEP Genco After Corporate Separation Is Lawful And Does Not Merit Rehearing.

The Commission determined at page 60 of its *ESP II Opinion and Order* that certain generation-related revenues should pass through AEP Ohio to AEP Genco after corporate separation is effective by stating as follows:

> The Commission finds, that once corporate separation is effective and AEP-Ohio procures its generation from GenResources that it is appropriate and reasonable for certain revenue to pass-through AEP-Ohio to GenResources. Specifically, the revenues AEP-Ohio receives, after corporate separation is implemented, from the RSR which are not allocated to recovery of the deferral, revenue equivalent to the capacity charge of $188.99/MW-day authorized in Case No. 10-2929-EL-UNC, generation-based revenues from SSO customers, and revenue for energy sales to shopping customers, should flow to GenResources.

FES argues that this decision is unlawful and requires rehearing because: (1) AEP Ohio has not shown that the costs of its purchased power and capacity from AEP Genco is prudently incurred; and (2) the decision permits AEP Ohio to pass numerous above-market revenue streams (non-deferral RSR revenues, embedded cost-based capacity revenue, generation-based revenues from SSO customers, and revenues associated with energy sales to shopping customers) along to its competitive affiliate, which results in AEP Ohio providing an unlawful subsidy to its affiliate. (FES AFR at 25-29.) IEU and OCC echo this cross-subsidy claim. (IEU AFR at 62; OCC AFR at 57.)

First, it is highly ironic and disingenuous that FES is complaining about the prudency of purchased power and capacity costs under the SSO agreement, because FES supported the FirstEnergy operating companies' SSO for several years under an identical approach. As it relates to AEP Ohio, however, the key point is that AEP Ohio is a captive seller of capacity to support shopping load, given its FRR obligations, and must fulfill its obligations throughout the term of the ESP even after corporate separation. Thus, there needs to be an arrangement to provide SSO service supporting the same retail rates being agreed to by AEP Ohio during the entire ESP term. Thus, FES's objection is without merit.

Second, as the Company has explained in its testimony, during the hearing, and in its briefs, AEP Ohio will pass through generation-related revenues to AEP Genco for providing capacity and/or energy for the SSO load. AEP Ohio will pay AEP Genco the non-fuel generation charges billed to AEP Ohio's SSO customers under applicable retail rate schedules, as well as AEP Genco's actual fuel costs. (AEP Ohio Ex. 103 at 7.) AEP Ohio will also reimburse AEP Genco, on a dollar-for-dollar basis, for any transmission, ancillary, and/or other service charges that AEP Genco may be billed by PJM in connection with the SSO Contract. (*Id.*) In addition, as it stands now, AEP Ohio will pay $188.88/MW-day to AEP Genco for providing capacity to support shopping load of CRES customers. (*Id.*) Energy costs displaced by the auction would get adjusted out of the FAC and AEP Ohio would not pay Genco for any energy supplied by the auction; the Genco would receive SSO base rate revenue and FAC revenue (excluding the costs/revenues related to the energy auction). Any revenues related to moving to a competitive generation market in Ohio, such as the non-deferral portion of the Retail Stability Rider, will also be remitted to AEP Genco as compensation for the fulfillment of its obligations. (*Id.* at 8; Tr. II at 519, 614.)

There are four primary reasons why these payments are not illegal cross subsidies and why it is appropriate for AEP Ohio to pass through these revenues to AEP Genco during the latter portion of the ESP term following corporate separation: (1) the Commission has approved functional separation for AEP Ohio at every step of the process during the past 12 years, and AEP Ohio presently remains a vertically-integrated utility in a lawful manner; (2) for part of the ESP term, AEP Ohio will (according to plan) be legally separated but remain obligated to provide SSO service at the agreed rates for the entire ESP term; (3) during this latter period, AEP Genco will be obligated to support SSO service through the provision of adequate capacity and energy, and it is only appropriate that it receives the same generation revenue streams agreed to by AEP Ohio for doing so; and (4) there will be an SSO agreement between AEP Ohio and AEP Genco covering this arrangement, which is subject to approval by the FERC and is subject to FERC's jurisdiction. The intervenors fail to acknowledge these key points. Nor do they accept the fact that, without these generation revenues, the deal will not take place. Specifically, the assets being transferred need the financial support that comes with these revenues. The revenues allow OPCo to pay AEP Genco for capacity to meet its FRR commitment. Without the certainty of the revenues, AEP Genco cannot credibly proceed with the transaction. Notably, the Intervenors do not cite any law that requires AEP Genco to lose millions of dollars, which would be the effect of not allowing OPCo to pass through these revenues to AEP Genco. Indeed, the law does not require AEP Genco to wither on the vine; rather, it needs revenues associated with the generating assets to become a competitive sustainable business, which will further benefit Ohio consumers. Their cross-subsidy allegations are not based in reality and do not provide a basis for rehearing.

XI. The *ESP II Opinion and Order* appropriately merged the Energy Efficiency and Peak Demand Reduction Rider rates of the Ohio Power Company rate zones as contemplated in the Commission's 10-2376-EL-UNC merger order.

OCC/APJN argues that the Commission's merging of the Energy Efficiency and Peak Demand Reduction Rider ("EE/PDR") in the *ESP II Opinion and Order* adversely affects the rights of the parties to the Stipulation in the 11-5568, *et al* proceeding approved by the Commission on March 21, 2011. The argument is without merit as the Stipulation provided the rate structure on an initial basis and did not include any specific provision that locked in the rate zone division in a post merged company setting. Any requirement envisioned by OCC/APJN from the Stipulation was not enumerated in the Stipulation, leaving the typical merging of Company terms and rates open as requested and approved in the modified ESP. In fact, the Commission even contemplated the idea that subsequent cases could amend the Company tariffs in its Entry recognizing the merger of Columbus Southern Power Company and Ohio Power Company. In considering the existing tariffs of the Company in light of the merger order, the Commission stated:

> Any tariff amendments will be reviewed by separate entry in the ESP 2 case before the Commission. The Companies' ESP 2 case is the proper proceeding to consider and resolve rate matters.

March 7, 2012 Entry, 10-2376-EL-UNC at 6-7. The appropriate time to merge the different rate zones was during the *ESP II* proceeding. The Commission approved the merger as requests in its Opinion and Order. (*ESP II Opinion and Order* at 66-67.) The Commission should support its finding on rehearing and deny OCC/APJN's ground for rehearing by reiterating the appropriateness of the merged rate for the merged Company.

XII. Intervenors' Criticisms of the Commission's Conclusion that the Modified ESP Is More Favorable in the Aggregate, as Compared to the MRO Alternative Are Meritless.

In its *ESP II Opinion and Order*, at 70-77, the Commission concluded, correctly, that the modified ESP that it approved in its Order is more favorable in the aggregate, as compared to an MRO alternative. R.C. 4928.142. The Commission agreed with AEP Ohio's position that, in order to properly conduct the statutory test, the proposed ESP must be viewed in the aggregate, which includes the statutory price test comparison, other quantifiable benefits of the modified ESP, and a consideration of non-quantifiable benefits of that ESP. In their applications for rehearing, various Intervenors have raised a number of objections to the manner in which the Commission conducted its ESP/MRO Aggregate Test. For the following reasons, however, Intervenors' criticisms are meritless.

A. The Commission did not improperly create or rely upon extra-record evidence to find that the modified ESP is more favorable than the MRO alternative.

OMAEG/OHA contend that the Commission concluded that AEP Ohio's ESP/MRO test was flawed and "precluded [it] from accurately determining the results that would otherwise apply under a market rate offer," but then improperly created new, extra-record evidence to prove that the modified ESP is more favorable. (OMAEG/OHA AFR at 10.) This objection is without basis. The Commission used only record evidence to make its decisions and computations. It did use that evidence to arrive at a different result than any individual party recommended. However, reaching a different result than any particular party to a case has advocated is not unusual, and it certainly does not mean that the Commission improperly went outside the record to reach its conclusion.

B. The Commission correctly determined that the Company's actual cost of capacity should be used to develop the price for the capacity component of the competitive benchmark price used to calculate the cost of the MRO alternative in the ESP/MRO price test comparison.

IEU, FES, and OMAEG/OHA argue that it was unreasonable and unlawful/ for the Commission to use $189, the amount that it had found in the Capacity Pricing proceeding is AEP Ohio's actual cost of capacity, as the capacity component of the CBP used to calculate the MRO alternative. These Intervenors argue that the much lower RPM price should be used as the capacity component of the CBP. (IEU AFR at 18; FES AFR at 7; OMAEG/OHA AFR at 4.) The Commission considered and rejected these arguments in the course of concluding, at page 74 of the *ESP II Opinion and Order*, that it should use AEP Ohio's actual cost of capacity, which the Commission determined in the Capacity Pricing proceeding to be $188.88/MW-day.

> [W]e are not persuaded by parties who argue the capacity component should be market based and reflect RPM prices. These parties fail to consider that AEP-Ohio, as an FRR entity, will be supplying capacity for its customers throughout the term of this ESP, whether the customer is an SSO customer or the customer takes service through a CRES provider. Thus, even under the results that would otherwise apply consistent with Section 4928.142, Revised Code, due to AEP-Ohio's remaining FRR obligations, it would still be supplying capacity to all of its customers through 2015. We find it is inappropriate to consider market prices in establishing this capacity component, even though RPM prices are consistent with the state compensation mechanism, as AEP-Ohio is and will remain an FRR entity for the immediate future. In conducting the statutory price test, we shall use AEP-Ohio's cost of capacity of $188.88, as supported by Case 10-2929, for the competitive benchmark.

Accordingly, the Commission has already addressed and rejected in its *ESP II Opinion and Order* the arguments that these Intervenors have raised on rehearing.

C. The Commission's decision to compare the price components of the modified ESP with the results that would otherwise apply under an MRO alternative over a period when the MRO alternative realistically could be implemented was reasonable.

IEU, OCC, FES, and OMAEG/OHA contend that it was unreasonable and unlawful for the Commission to evaluate the ESP/MRO price test comparison starting in June 2013, ten months from when the Commission issued its decision. They argue that by doing so, the Commission excludes costs of the modified ESP for over 25 percent of its term. (IEU AFR at 22; OCC AFR at 5; FES AFR at 6; OMAEG/OHA AFR at 5.) This argument is baseless. The Commission conducted its comparison over the two-year period that it selected because it concluded, in its judgment, at page 74 of its *ESP II Opinion and Order*, that it was necessary in order to develop a reasonably accurate prediction of the relative costs of the modified ESP and an MRO alternative:

> For the Commission to appropriately predict the results that would occur under this section, we cannot, in good conscience, compare prices during a time period that has elapsed prior to the issuance of this order. Nor can we, by statute, compare this modified ESP price with what would otherwise apply under Section 4928.142, Revised Code, beginning today, as it would be impossible for AEP-Ohio to immediately establish an alternate plan under Section 4928.142, Revised Code, that meets all the statutory criteria. Therefore, for the Commission to appropriately compare the price components of its modified ESP with the results that would otherwise apply under Section 4928.142, Revised Code, we must determine the amount of time it would take AEP-Ohio to implement its standard service offer price with what would otherwise apply under Section 4928.142, Revised Code.

Notably, in the course of its ESP/MRO Price Test comparison, the Commission assumed that AEP Ohio collected RSR revenue over the entire 36-month period of the ESP. Yet, it still found that the value and benefits of the modified ESP exceeded those of the MRO alternative. *ESP II Opinion and Order* at 76; R.C. 4928.143(C)(1). AEP Ohio pointed out this overstatement of the cost (due to the inclusion of 36 months, instead of 24 months, of RSR revenue in the comparison) of the modified ESP, at pages 44-46 of its Application for Rehearing. Consequently, the intervenors have nothing to complain about in regard to this aspect of the Commission's ESP/MRO Aggregate comparison. If any party has been disadvantaged by the manner in which the Commission made its computations over the two-year period of the Commission's Price Test comparison, it is AEP Ohio, not the intervenors.

OCC/APJN also assert that the Commission's approach to conducting the ESP/MRO Price Test, using the two-year June 2013 through May 2015 period, amounts to "unilaterally" modifying the term of the proposed ESP. (OCC/APJN AFR at 6.) It does not. OCC/APJN have confused the manner in which the Commission conducted it ESP/MRO Price Test with the determination of the modified ESP's term. The Commission did not improperly reduce the term of the modified ESP.

OCC/APJN also argue that the Commission's exclusion of first ten months of the ESP term from the ESP/MRO comparison is an improper departure from precedent and, so, should be reversed. (OCC/APJN AFR at 8.) The short answer to this criticism is that this ESP proceeding is entirely *sui generis*. No prior proceeding has traversed a course similar to it, and therefore no prior ESP/MRO Price Test is controlling for this proceeding. In any event, though, the Commission adequately explained its reasons, at pages 73-74 of its *ESP II Opinion and Order*, for conducting the test in the manner it found to be appropriate. Accordingly, to the extent that the Commission conducted its evaluation in a manner different from the approach it has used in other proceedings, it has provided more than sufficient reason for doing so.

In a creative variation on the theme of intervenors' objection to using the June 2013 through May 2015 period as the basis for the Price Test comparison, OCC contends that the modified ESP term should not start until the date that the Price Test comparison starts, June 2013. (OCC/APJN AFR at 11.) This proposal, like OCC's inconsistent argument that the Commission "unilaterally" shortened the term of the ESP to 24 months, must be rejected. There is no basis for delaying the commencement of the modified ESP until June 2013. Certainly OCC/APJN's objection to the manner in which the Commission conducted the ESP/MRO Price Test provides no rationale for doing so.

OMAEG/OHA for its part, complains that the Commission mistakenly cites FES witness Banks' testimony in support of its conclusion that the period for the ESP/MRO comparison should be limited to the two-year period, June 1, 2013 through May 31, 2015. (OMAEG/OHA AFR at 5.) Notably FES, on whose behalf Mr. Banks testified, did not make this claim, and the argument is meritless in any event.

D. Intervenor criticisms of the manner in which the Commission considered the potential cost of the GRR in the ESP/MRO aggregate test are meritless.

IEU and OCC/APJN contend that the Commission understated costs of the modified ESP by failing to include the full cost of the GRR. (IEU AFR at 25; OCC AFR at 12; OCC AFR at 83.) This contention is also meritless. The Commission thoroughly addressed and included the potential cost of the GRR in the ESP/MRO comparison, at page 75 of its *ESP II Opinion and Order*:

> As we previously established in the December 14, 2011 Opinion and Order, we believe AEP-Ohio must address costs associated with the GRR, as it is non-bypassable pursuant to Section 4928.143(B)(2)(c), Revised Code, and thus would not occur under an MRO. Therefore, the costs of approximately $8 million must be considered in our quantitative analysis. We understand that the GRR is a placeholder rider, but we find that the costs associated with the GRR are known and should therefore be included in the quantitative benefits.

Accordingly, arguments that the Commission did not include the potential cost of the GRR in its analysis of the aggregate comparison of the modified ESP and an MRO alternative are simply wrong, and arguments that the potential costs of the GRR that the Commission should include in the comparison are greater than the amount that the Commission found to be appropriate are likewise unpersuasive.

E. Claims that the Commission did not properly consider the costs of the RSR, Pool Termination Rider, and capacity are baseless.

IEU's claim that the Commission did not appropriately factor the costs of the RSR, PTR and Capacity into the ESP/MRO Aggregate Test, (IEU AFR at 26), is baseless. The

Commission certainly did factor the costs of the RSR into the ESP/MRO Aggregate Test, along with its estimate of the potential cost of the GRR. *ESP II Opinion and Order*, at 75. It quantified the cost of the RSR to be approximately $388 million (which AEP Ohio contends is overstated by $120 million, as explained in its Application for Rehearing, at 45-47).

With regard to the placeholder Pool Termination Rider (PTR), the Commission properly declined to estimate a cost for that rider. That is the correct treatment of that rider. The record demonstrates that it would be completely speculative to predict that the PTR would produce *any* costs, let alone predict that it would produce any specific amount of costs, during the term of the modified ESP. (*See ESP II Opinion and Order* at 49) ("The Commission notes that in permitting the creation of the PTR, it is not authorizing the recovery of any costs for AEP-Ohio, but is allowing for the establishment of a placeholder mechanism, and any recovery under the PTR must be specifically authorized by the Commission.")

The Commission also found that it was not necessary to include any capacity deferral costs in the analysis, because any such deferrals would be recovered even under an MRO pursuant to the Commission's decision in the Capacity Pricing proceeding. (*Id.* at 75.)

IEU simply disagrees with the manner in which the Commission evaluated and considered the potential costs of the RSR, PTR, and Capacity in its ESP/MRO Aggregate Test. But its criticisms are meritless.

F. The Commission properly considered the costs and benefits of the Distribution Investment, gridSMART, and Enhanced Service Reliability Rider.

OMAEG/OHA asserts that there is no record evidence demonstrating that the benefits of the distribution-related riders (DIRR, gridSmart, Enhanced Service Reliability) outweigh the costs, and that, as a result, the Commission did not properly account for the costs of those riders in the Aggregate Test. (OMAEG/OHA AFR at 6.) Again, OMAEG/OHA's argument is unpersuasive.

At page 75 – 76 of its *ESP II Opinion and Order*, the Commission found that, while the potential costs of the modified ESP's distribution related riders, including the gridSMART and ESRR, are currently not readily quantifiable, any such costs are significantly outweighed by the non-quantifiable benefits of the modified ESP. The Commission observed first that, although these riders may end up having costs associated with them, benefits in the form of reliability improvements, which benefit all of AEP Ohio's customers, and in the form of increased opportunities for customers to utilize efficiency programs, which lead to lower usage and, thus, lower costs, would also result from the riders.

Second, the Commission also found that any such costs that might materialize as a result of the riders during the ESP would be mitigated by the benefits of the slice-by-slice energy-only auction that the modified ESP includes, which the Commission increased to 10 percent. *ESP II Opinion and Order* at 76. In addition, the costs of distribution-related riders could also result under an MRO alternative, through separate base distribution rate cases. Consequently, any costs that result from such riders would not result in any <u>net</u> additional costs for the modified ESP in any event.

The Commission correctly concluded that the distribution-related riders do not produce net costs for the modified ESP, as compared to an MRO alternative.

G. The Commission correctly found that the 10% and 60% energy auctions would offset the impacts of the modified ESP.

IEU also argues that the Commission erroneously concluded that the 10 percent and 60 percent energy-only auctions would reduce or mitigate the impact of the as-approved Modified ESP and that, in fact, the auctions will increase the modified ESP's costs. (IEU AFR at 30.)

As noted above, after reviewing the record, the Commission found that the 10 percent slice-of-system energy-only auction will provide benefits that offset some of the costs of the ESP. *ESP II Opinion and Order* at 76. Moreover, it also found that the "acceleration to 60 percent of AEP-Ohio's energy only auction by June 1, 2014, not only enables customers to take advantage of market based prices, but also creates a qualitative benefit which, while not yet quantifiable, may well exceed the costs associated with the GRR and RSR." (*Id.* at 76.)

It is IEU's contention, on rehearing, that the early 10 percent and 60 percent energy-only auctions will create additional net costs for the modified ESP and will, thus, amount to a detriment. (IEU AFR at 30.) But this contention has no record basis and is speculative. The Commission reviewed the record evidence, considered the policy rationale in support of accelerating the transition to competition through the early auctions, and in its judgment struck a balance by requiring the 10 percent and 60 percent auctions. IEU's quarrel is with how the Commission struck that balance, based upon the record and the policy objectives provided by the General Assembly. IEU's objection is meritless.

Again, IEU simply disagrees with the manner in which the Commission evaluated and considered the potential costs and benefits of the 10 percent and 60 percent energy auctions in its ESP/MRO Aggregate Test. Once again, IEU's criticisms are meritless.

H. The Commission correctly found that qualitative benefits of the modified ESP that are not readily quantifiable, including the accelerated transition to a competitive market that it enables, have very significant value.

Several intervenors, including the Schools, OMAEG/OHA, IEU, and OCC/APJN argue that benefits of the modified ESP that are not quantifiable, such as the quicker transition to a competitive market place that it permits, in comparison to the results of an MRO, do not have significant value. The Schools claim that enabling AEP Ohio to transition to a competitive marketplace in two and half years, which is two years and three months earlier than under an MRO, is not worth $388 million to customers. The Schools say that they would rather wait two years and three months for market rates than pay $388 million for this "benefit." (Schools AFR at 19). Similarly, OMAEG/OHA contend that there is no record evidence demonstrating that going to market in the timeframe required by the Commission's Opinion and Order will provide any benefits. Accordingly, they argue that what the Commission deems to be the most significant of the non-quantifiable benefits is actually not a benefit at all (OMAEG/OHA AFR at 7.) IEU complains that the Commission failed to explain its subjective belief about how qualitative benefits were weighted and is, in effect, simply saying "trust me." (IEU AFR at 34.)

In the first instance, these arguments insist upon a purely quantitative rationale for decisions that inherently involve qualitative judgments. Secondly, these arguments are simply the parochial views by individual parties about why each of them would assign a value of zero to the accelerated transition to a competitive market place. The argument that the accelerated transition to competition, which the modified ESP enables, has no value is one that the Commission has considered and, appropriately, has rejected. Once the Commission has determined that the accelerated transition to completion does have significant value, the issue is whether it offsets other quantifiable costs of the ESP. That is a judgment that the General Assembly has entrusted to the Commission's discretion. While certain parties may object to the weight that the Commission assigns to that very significant benefit, and might make a different judgment about it than the Commission, in the end it is the Commission's responsibility to make the decision. The criticisms of these Intervenors are without merit.

I. Other intervenor criticisms of the manner in which the Commission conducted the ESP/MRO aggregate test are also unpersuasive.

OCC claims that the Commission erred by concluding that AEP Ohio's market pricing of energy and capacity would occur "significantly earlier" pursuant to the modified ESP than would occur under an MRO. (OCC AFR at 18.) This criticism is difficult to fathom. The course to competition through the MRO alternative is at least five years, while under the modified ESP it will be completed in about two and a half years. In addition, under the modified ESP, the Commission has ordered 10 percent and 60 percent early energy auctions, which will further accelerate the transition. OCC's contention that the path to competition would not occur "significantly earlier" under the modified ESP is simply incorrect.

OCC also contends that the Commission failed to address benefits under MRO, such as safe harbor for consumers and financial security for EDUs. (OCC AFR at 19.) There is no record support for the proposition that the MRO alternative offers an advantageous "safe harbor" for consumers, when compared to the modified ESP. Nor is there any support for the proposition that the MRO alternative would provide greater financial security for AEP Ohio than the modified ESP.

The Schools assert that if the Commission added a provision to the modified ESP excluding them from having to pay the RSR, that would be a non-quantifiable benefit which would tip the balance of support (at least for the Schools) in favor of the modified ESP, over the MRO alternative. (Schools AFR at 22.) Without the RSR, though, the modified ESP would not be possible. The Schools' suggestion that excusing them from participating in the ESP's linchpin provision, while other customers remain subject to it, is not tenable.

XIII. Intervenors' remaining objections do not merit rehearing.

A. The Commission correctly affirmed the Attorney Examiner's denial of IEU's May 4 & May 11, 2012 Motions To Strike.

The very last argument advanced by IEU in its lengthy Application for Rehearing relates to the Commission's denial of certain motions to strike, which IEU filed shortly before the hearing commenced on the Modified ESP. (IEU AFR at 89-92.) Specifically, on May 4, 2012, IEU filed a motion to strike portions of the Company's Application, as well as portions of the testimony of eight hearing witnesses (Allen, Dias, Graves, Hawkins, Nelson, Powers, Roush, & Thomas). In this motion, IEU contended that the Company's Application and testimony "contain numerous passages that attempt to present irrelevant evidence to the consideration of an ESP that will unnecessarily delay the hearing and confuse the record." (IEU May 4, 2012 Motion to Strike at 3.) One of the seven arguments advanced within IEU's motion – an argument to which IEU devoted just a single paragraph – was that "references in the Application and Testimony to various stipulations previously approved by the Commission should be stricken." (*Id.* at 14.)

In its Memorandum Contra IEU's May 4, 2012 Motion to Strike, the Company demonstrated that none of the testimony at issue in IEU's Motion to Strike sought to offer the stipulations referred to therein as precedent or evidence. "Rather, in each instance, the stipulation(s) referred to are noted either as explanation or by way of example." (AEP Ohio May 9, 2012 Memorandum Contra at 12.) The Company further noted:

> IEU's apparent argument that any Commission ruling that approves all or part of a settlement should be placed in a black box never to be spoken of again is wrong. This is the same argument made in the ESP II Stipulation hearing to consider a partial stipulation in that round of the proceeding related to reliability indices. The Commission rejected that position, finding that the fact that the indices were established in a settlement did not mean that their use in the ESP II case was an attempt to use them "as precedent" against any party to that Stipulation.

(*Id.* at 12-13, citing Case No. 11-346-EL-SSO, *et al.*, Opinion and Order at 11 (Dec. 14, 2012).)

Undaunted, IEU filed yet another Motion to Strike only two days after the Company opposed the first one – again raising the same argument about witnesses' references to prior Stipulations. Specifically, on May 11, 2012, IEU filed a motion seeking to strike certain testimony of Constellation witness Fein, in which Mr. Fein referred to the *Duke ESP* Stipulation. IEU noted that the *Duke ESP* Stipulation provides that "'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.'" (IEU May 11, 2012 Motion to Strike at 6, n.8, quoting the *Duke ESP* Stipulation.)

IEU's motions to strike were addressed (and properly denied) by the Attorney Examiner on multiple occasions during the hearing as the associated witnesses testified. (Tr. Vol. I at 24-25; Tr. Vol. II at 447-448; Tr. Vol. IV at 1253.) IEU briefly raised the issue again in its post-hearing brief (at 93-94), and much of what IEU says now in its Application for Rehearing is taken verbatim from its post-hearing brief. The Commission already addressed the merits of IEU's Motions to Strike at page 10 of its August 8 Opinion and Order, saying:

> The Commission finds that IEU's request to strike portions of the record should be denied. We acknowledge that individual components agreed to by parties in one proceeding should not be binding on the parties in other proceedings, but we find that *references to other stipulations in this proceeding were limited in scope and did not create any prejudicial impact on parties that signed the stipulations*. Consistent with our Finding and Order in Case No. 11-5333-EL-UNC, we also note that, while parties may agree not to be bound by the provisions contained within a stipulation, these limitations do not extend to the Commission.

(Emphasis added.)

IEU's arguments seeking rehearing are nothing new – they are a re-hash (often verbatim) of arguments IEU already (and unsuccessfully) presented to the Commission in its motions to strike and post-hearing briefing. IEU has failed to demonstrate that the references to prior Stipulations had any binding or prejudicial impact in this proceeding, or that the prior Stipulations were ever offered into evidence or relied upon by the Commission in any substantive manner. IEU's Application for Rehearing does not identify a single instance within the text of the Commission's August 8 Opinion and Order when the Commission actually relied upon a specific witness's reference to a prior Stipulation to make any finding of fact, or any instance when the Commission deemed any prior Stipulation to be binding precedent on any conclusion of law. (*See generally* IEU AFR at 89-92.)

Moreover, IEU does not come to the Commission with clean hands when it objects to others' references to the content of prior Commission-approved stipulations. IEU *itself* refers to the content of prior stipulations when doing so suits its own agenda and arguments. In its own Application for Rehearing, for example, IEU asserts that "the commitments AEP Ohio made as part of a Commission-approved settlement in AEP-Ohio's *ETP* proceedings prohibit AEP-Ohio from collecting transition revenue." (IEU AFR at 50.) The merits of this erroneous contention have been addressed on multiple occasions before.[21] But the Commission-approved stipulation from the *ETP* proceedings to which IEU refers here contains the same limitations on future use that IEU relies on to challenge *other* parties' and witnesses' references to stipulations.[22]

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[21] *See supra* at Section II(A)(3); *see also* August 3, 2012 Reply Comments of Ohio Power Company, Case No. 12-1126-EL-UNC, at pp. 9-13 & 21-22.

[22] *See* Stipulation and Recommendation, *In the Matter of the Application of Columbus Southern Power Company for Approval of Electric Transition Plan and Application for Receipt of Transition Revenues,* Case Nos. 99-1729-EL-ETP & 99-1730-EL-ETP (May 8, 2000) at 13 ("This Stipulation is submitted for purposes of this proceeding only, and is not deemed binding in any other proceeding, except as expressly provided herein, nor is it to be offered or relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation.")

There is simply no merit to IEU's overblown claim that the Commission's failure to grant IEU's motions to strike "renders the *ESP II* Order unlawful and unreasonable and otherwise evades the Commission's obligation to address contested issues on the merits based on the evidence properly admissible and applicable law." (IEU AFR at 91.) The Commission here *did* address contested issues on the merits and did so based on admissible evidence. As such, there is no basis for the Commission to grant rehearing on this issue.

B. The Commission correctly denied OCC/APJN's belated request, made after the close of evidence and oral argument, to take administrative notice of certain items filed in the *Capacity Pricing* case.

OCC/APJN seek rehearing based on the Commission's denial of their motion to take administrative notice of several items from the docket in the capacity case, 10-2929-EL-UNC. (OCC/APJN AFR at 32-36.) This request for rehearing lacks merit.

On July 20, 2012, after the record in this proceeding had already been closed, after oral arguments had already been held the week before, and after this matter had been submitted to the Commission for decision, OCC/APJN belatedly asked the Commission to take administrative notice of certain items submitted in the capacity case docket, Case No. 10-2929-EL-UNC, including witness testimony and post-hearing briefs. (OCC/APJN Motion to Take Administrative Notice at 1-2.) In support of this request, OCC/APJN conceded that there is no absolute right for the taking of administrative notice, but cited precedent from the Ohio Supreme Court and Commission approving of administrative notice being taken under certain circumstances. (*Id.*, Mem. in Supp. at 2.) Although their motion was submitted after the record had been closed and oral argument completed, OCC/APJN contended that "there should be no prejudice to the parties if administrative notice is taken at this stage. Parties presumably had knowledge of and an opportunity to explain the materials in [the capacity] case. Moreover, no decision has been rendered yet in this case." (*Id.* at 5.)

In response, AEP Ohio noted that by the time OCC/APJN filed its motion to take administrative notice, the record in the ESP proceeding had already been established and the matter submitted to the Commission for decision. (AEP Ohio July 24, 2012 Memorandum Contra at 1.) AEP Ohio argued that the request for administrative notice was ill-timed and inappropriate, given that the evidentiary record was complete and the next official action in the case would be a Commission decision on the merits of the Company's Application. (*Id.* at 2.) Notably, AEP Ohio confirmed that *the Commission* could exercise *its own* discretion to consider portions of the Capacity Case record if it wished to do so, but that it was inappropriate for OCC/APJN to "place itself in the shoes of the Commission and determine that only the small subset of items it highlights are appropriately noticed *** [.]" (*Id.* at 2-3.)

In its *ESP II Opinion and Order*, the Commission agreed with the Company and denied OCC/APJN's belated motion.[23] The Commission concluded that the timing of OCC/APJN's request was "troublesome and problematic," and that if the Commission were to take notice of the narrow subset of information submitted by OCC/APJN after the record was closed, "we would be allowing a party to supplement the record in a misleading manner." (*ESP II Opinion and Order* at 12-13.)

OCC/APJN now assert (AFR at 34) that the Commission "arbitrarily ignored the standard of review for administrative notice," but nowhere in OCC/APJN's Application for Rehearing do they actually articulate any such standard. In the *Allen* case cited by OCC/APJN (at 34, n.104), although the Supreme Court approved the Commission's taking of administrative notice in a

[23] In doing so, the Commission properly declined to consider an untimely memorandum contra submitted by FES. (*ESP II Opinion and Order* at 12.)

later proceeding of certain facts that were decided in a prior proceeding, there is no indication that the Commission did so upon request of a party made after the record in the later proceeding had already closed. *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988). Indeed, the Commission's approach in the *Allen* case is consistent with the approach described in AEP Ohio's memorandum contra OCC/APJN's motion; that is, *the Commission itself* deciding to take notice of certain facts that were actually adjudicated in the prior proceeding – not the Commission permitting individual parties or Intervenors to wait until the record is closed in order to self-select a small subset of facts they deem worthy of administrative notice. *Allen*, 40 Ohio St.3d at 185 ("The commission emphasizes that the *Continental* case was considered three months prior to the filing of Sandridge's application and that it may take administrative notice of the *Continental* record.")

OCC/APJN's Application for Rehearing on this topic also fails to identify how they or any other parties were actually prejudiced by the Commission's denial of their request to take administrative notice of the specific testimony and briefs listed in OCC/APJN's motion. *See Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 466 N.E.2d 848 (declining to reverse an order of the Commission where no prejudice was shown to result from taking administrative notice of a fact). Merely by way of example, OCC/APJN first asked the Commission to take administrative notice of five pages from the March 23, 2012 written testimony of Company Witness Munczinski in the capacity case. (OCC/APJN Motion to Take Administrative Notice at 1.) Those excerpts from Mr. Munczinski's testimony addressed topics relevant to the issues pending before the Commission in the capacity case. While complaining about the Commission's failure to take "administrative notice" of this capacity-case testimony here in the *ESP* proceeding, OCC/APJN fail to discuss in their Application for Rehearing how administrative notice of *any* of these topics was actually necessary in order for the Commission to approve the Modified ESP and/or render the findings of fact and conclusions of law set forth in the August 8 Opinion and Order. The same is true for all of the other testimony and briefs for which OCC/APJN sought administrative notice.

OCC/APJN also complain that the Commission's denial of their motion for administrative notice is inconsistent with the Commission's ruling in the recent FirstEnergy ESP proceeding. (OCC/APJN AFR at 35, citing *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for the 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.) According to OCC/APJN, "[t]here 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 notice request to a secure and narrower window of information." (OCC/APJN AFR at 35-36, citing Volume I of the *FirstEnergy ESP* hearing transcript, at 29 (June 4, 2012).) OCC/APJN

What OCC/APJN fail to acknowledge, however, is that the company in the *FirstEnergy ESP* proceeding – <u>unlike OCC/APJN here</u> – did <u>not</u> wait until the hearing had been completed, the evidentiary record already closed, and the case already submitted for decision to submit an untimely request for administrative notice. On the contrary, as the Commission noted in its Opinion and Order in the *FirstEnergy ESP* case, the company's original request for administrative notice was submitted at the very outset of the proceeding, <u>along with the company's application</u>. (July 18, 2012 Opinion & Order in the *FirstEnergy ESP* case at 17.) And it was on the third day of the hearing – not after the hearing finished and the case submitted

– when the company provided a list of specific documents that it asked to be administratively noticed. (*Id.*) That significant distinction between the requests for administrative notice made here and in *FirstEnergy ESP* obliterates the "inconsistency" claimed here by OCC/APJN. Moreover, while relying on the *FirstEnergy ESP* case as precedent, OCC/APJN fail to mention in their Application for Rehearing that OCC (along with Citizen Power) opposed the request for administrative notice that was submitted by the company in the *FirstEnergy ESP* case, arguing, among other things, that non-signatory parties did not have sufficient notice of the specific documents sought to be noticed, given that they were not identified by FirstEnergy until the third day of the hearing. (*Id.* at 18.) Put another way, in the *FirstEnergy ESP* case, OCC opposed a request for administrative notice of documents that it knew about only three days into the hearing. (*Id.*) Here, in contrast, OCC (along with APJN) requested that administrative notice be taken of information from another proceeding that they did not identify until the hearing was already complete, the evidentiary record closed, and the matter submitted to the Commission for decision. Given OCC's contradictory positions regarding the propriety and timing of requests for administrative notice, one can hardly blame the Commission for rejecting OCC/APJN's untimely request. For all of these reasons, OCC/APJN's arguments regarding the Commission's denial of their untimely request for administrative notice present no valid basis for rehearing.

C. The modified ESP protects low-income populations and advances the State policies in Section 4928.02(L), Revised Code.

In their fifteenth Assignment of Error, OCC/APJN assert that it was unlawful and unreasonable for the Commission to fail to provide Partnership With Ohio ("PWP") funding, and contend that "[n]ot one provision of this ESP targets low-income populations or seeks to advance state policy as stated in R.C. 4928.02(L)." (OCC/APJN AFR at 93-97.) OCC/APJN ask the Commission to "order AEP Ohio to reinstate the [PWP] to be funded for at least $5 million per year (the amount in the first ESP) *** with a further commitment to setting aside a significant portion for bill assistance." (*Id.* at 97.)

As a threshold matter, as the Ohio Supreme Court has recently confirmed, the policy statements contained in Section 4928.02, Revised Code, such as the policy in favor of protecting at-risk populations that is set forth in subsection (L), do not actually "require anything." *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 62. Instead, they simply express state policies, and are therefore merely "'guidelines for the Commission to weigh' in evaluating utility proposals to further state policy goals, and it has been 'left to the Commission to determine how best to carry them out.'" *Id.*, quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261, ¶ 39-40. As such, Section 4928.02(L), Revised Code, does not embody a statutory "requirement" that an ESP address at-risk populations. For this reason alone, OCC/APJN's reference to the statute does not justify rehearing.

More importantly, however, OCC/APJN are simply wrong when they assert that no provision of the Modified ESP protects low-income populations or advances the state policy set forth in Section 4928.02(L), Revised Code As the Commission concluded when reviewing the non-quantifiable benefits of the Modified ESP, the reliability improvements to be undertaken as part of the package will benefit *all* of AEP Ohio's customers (including low-income customers) and provide the opportunity for them to utilize energy efficiency programs that can lead to lower usage and lower costs. (*ESP II Opinion and Order* at 76.) The Commission also concluded that all customer costs would be mitigated and moderated by the auctions that are to be implemented pursuant to the Modified ESP, particularly given the increase in auction percentages ordered by the Commission. (*Id.*) The Commission concluded that the modified package:

> ensures not only 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, but also that AEP-Ohio maintains its financial stability necessary to continue to provide adequate, safe, and reliable service to its customers.

(*Id.*) These benefits of the *ESP II Opinion and Order* will inure to *all* customers regardless of income level.

The record that the Commission reviewed before reaching these conclusions in its Opinion and Order included substantial testimony regarding the modified ESP's beneficial impacts on all customers, including low-income customers. Company witness Dias submitted original and supplemental direct testimony regarding the plan's many beneficial impacts on consumers of *all* income levels. In his original testimony, for example, Mr. Dias discussed the Modified ESP's stability for residential customers (AEP Ohio Ex. 118 at 4); fixed non-fuel generation pricing for SSO customers to ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electricity (*Id.*); providing consumers choice (*Id.*); transparency and certainty in SSO pricing, allowing customers of all income levels to make informed decisions (*Id.* at 5); reliability improvements, performance standards and targets for all consumers (*Id.* at 6); modest overall rate increases, along with rate design considerations, that "protect at-risk consumers," (*Id.* at 7), minimizing customer rate impacts due a delay in implementation of the PIRR and unification of the FAC (*Id.* at 8), the elimination of certain riders proposed in its initial ESP II application (*Id.* at 9); robust shopping alternatives for customers (*Id.* at 10); continuation and enhancement of interruptible service to benefit major employers and promote economic development (*Id.* at 12); and continuation of the Economic Development Cost Recovery Rider to support mercantile customers that retain and increase Ohio jobs (*Id.* at 13.)

In his supplemental testimony, Mr. Dias discussed additional details about how the RSR "allows AEP Ohio to meet a number of Ohio policy objectives while protecting the financial integrity of the Company during the transition period to market-based SSO pricing." (AEP Ohio Ex. 119 at 1.) Again, Mr. Dias emphasized the package's moderate pricing for certain at-risk populations. (*Id.* at 3.) At the hearing, Mr. Dias even corrected his direct testimony for the express purpose of inserting multiple references to Section 4928.02(L), Revised Code. (Tr. Vol. VI at 1822-23.)[24] And based upon his own personal experience serving on the board of a community action agency, Mr. Dias also testified about how the Modified ESP's energy efficiency programs are some of the most substantial programs targeting low-income, at-risk populations. (*Id.* at 1939.)

As for the Partnership With Ohio program, OCC/APJN addressed this issue comprehensively during the hearing when counsel cross-examined Mr. Dias. Although OCC/APJN assert (at 94) that Mr. Dias was "at a loss to provide any explanation" regarding why the program was contained in the Company's original application, but not the Modified ESP, that is simply not an accurate summary of the hearing transcript. Specifically, Mr. Dias testified that the Modified ESP was a "different plan" containing "different provisions" and "different proposals" than the original ESP submission. (Tr. Vol. VI at 1919.) He also testified that even though the Partnership With Ohio program was not included in the Modified ESP, there were other potential funding sources for the Neighbor-to-Neighbor program, which had received seed money from Partnership With Ohio. (*Id.* at 1927.) Mr. Dias testified that he supported the decision to remove the Partnership With Ohio program from the Modified ESP, but that it was a

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[24] "On my direct testimony on page 4, line 12 I'd like to add '4928.02(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource.' *** I'd like to add that same passage on page 5, line 11. Then I'd like to add that same passage on page 7, line 27." (*Id.*)

management decision involving several management-level employees of the company who were involved in the development of the Modified ESP. (*Id.* at 1928.) He explained:

> We are in a new plan. And when we looked at all the provisions in the modified ESP and tried to get to striking that balance for the company, for the CRES providers, the customers, this was one provision that did not continue or did not survive.
> ***
> We had to strike a balance between the CRES providers, the customers, the company, in a transitional period of three years, a relatively short period of time, to get to that end state. The PWO fund did not make it in that balance.
> ***
> It was a package that we looked at in totality, holistically to balance the three items I've talked about *** [.]
> ***
> It was a package that was holistically put together that had a lot of other benefits. We looked at all the other benefits that the at-risk population received and we think it's a balanced plan.

(*Id.* at 1929-30.) Based on this testimony, it is simply not accurate for OCC/APJN to assert, as they do in their Application for Rehearing that Mr. Dias was "at a loss to provide any explanation" regarding the absence of the Partnership With Ohio Program in the Modified ESP. (OCC/APJN AFR at 94.) Given the many benefits of the Modified ESP to all Ohio customers, including at-risk customers, the absence of this single program in the balanced package does not justify rehearing.[25]

D. For the reasons described in the Company's application for rehearing, Ormet's request to clarify the capacity rates that AEP must charge non-shopping SSO customers should be denied, and the Commission should confirm that the State Compensation Mechanism adopted in the *Capacity Pricing* case does not apply to SSO customer rates.

[25] At pages 96-97 of their Application for Rehearing, OCC/APJN point to the monetary commitments made by DP&L, Duke, and FirstEnergy to fuel funds and low-income weatherization efforts, but these commitments were made in the context of Commission-approved settlements, not litigated cases.

Ormet raises just three brief arguments in support of rehearing. Two of them, relating to the RSR, are addressed elsewhere in this brief.[26] Ormet's third argument relates to a request for clarification contained in the Company's own Application for Rehearing. Ormet asserts that "the Commission's ruling in the Capacity Case *** did not expressly determine the capacity rates that AEP must charge its non-shopping SSO customers." (Ormet AFR at 15.) Ormet raises the same concern about the Commission's *ESP II Opinion and Order* in this case. (*Id.* at 16.) Ormet asks the Commission to "clarify that the SSO customers will be charged a Tariff Capacity Rate of $188.88/MW-day. Any higher rate would be unjust and unreasonable and any decision by the Commission to charge a higher capacity rate would be unjust, unreasonable, and unlawful." (*Id.*)

For the reasons set forth in the Company's own Application for Rehearing (at 16-18), the Company agrees that rehearing is warranted to clarify certain aspects of the Commission's *ESP II Opinion and Order*. However, contrary to Ormet's assertion, the Opinion and Order (at 59) should be clarified to confirm that the State Compensation Mechanism adopted in Case No. 10-2929-EL-UNC (whereby CRES providers pay RPM-based rates and AEP Ohio is supposed to ultimately receive $188.88/MW-day) does not apply to SSO auctions specifically or to non-shopping customers in general. (AEP Ohio AFR at 16-18.) Any conclusion otherwise (as proposed now by Ormet) would be unlawful and unreasonable. A State Compensation Mechanism applies only to shopping customers under the plain language of Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement ("RAA"), which states:

> In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or

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[26] With respect to Ormet's argument that the Commission inflated the RSR by $121 million by failing to increase the credit for shopped load, see Section II.B.4, *supra.* With respect to Ormet's argument that the Commission violated the concept of cost causation by forcing Ormet to pay RSR that it did not cause or benefit from, see Sections II.A.2 and II.C, *supra*.

> among alternative retail LSEs. *In 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). Thus, a State Compensation Mechanism under the RAA has no application to non-shopping customers or retail SSO rates. Any interpretation of the statement on page 59 of the Commission's August 8 Opinion and Order[27] suggesting that the SCM applies to SSO customer rates or to non-shopping customers is clearly unlawful and unreasonable. Neither the State Compensation Mechanism nor the Commission's 10-2929 decision adopting the State Compensation Mechanism can lawfully be applied to SSO rates. Instead of adopting Ormet's misguided argument to the contrary, the Commission should directly confirm that the State Compensation Mechanism adopted in the 10-2929 docket has no application to the energy auctions in this ESP or to SSO customer rates in general because it applies only to capacity pricing in support of shopping customers served by CRES providers. Alternatively, the Commission could clarify that the statement on page 59 that AEP Ohio would not receive more than $189/MW-day from Ohio customers was limited to *shopping* customers.

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[27] At page 59, the Commission stated that "[w]ith the modification and adoption of the modified ESP, as presented in this Order, the Commission may reasonably determine the ESP rates, including the rate impact of the generation asset divestiture, on the Company's SSO customers for the term of the modified ESP, where upon SSO rates will subsequently be subject to a competitive bidding process. While, AEP-Ohio proposes to enter into an agreement with GenResources to provide AEP-Ohio capacity at $255 per MW-day, we emphasize that based on the Commission's decision in the Capacity Case, AEP-Ohio will not receive any more than the state compensation capacity charge of $188.88 per MW-day from Ohio customers during the term of this ESP."

CONCLUSION

For all of the foregoing reasons, the vast majority of Intervenors' objections to the Commission's August 8 Opinion and Order do not establish any valid basis for rehearing. The Commission should, however, grant rehearing for the reasons set forth in AEP Ohio's Application for Rehearing.

Respectfully submitted,

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On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum in Opposition of Ohio Power Company* was served by electronic mail upon counsel for all other parties of record in this case on this 17th day of September, 2012.

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