BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC

ENTRY ON REHEARING

The Commission finds:

(1) On March 18, 2009, in Case No. 08-917-EL-SSO, *et al.*, the Commission issued its opinion and order regarding the application for an electric security plan (ESP) for Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or the Company),[1] pursuant to Section 4928.143, Revised Code (ESP 1 Order).[2] The ESP 1 Order was appealed to the Ohio Supreme Court and subsequently remanded to the Commission for further proceedings.

(2) On November 1, 2010, American Electric Power Service Corporation (AEPSC), on behalf of AEP-Ohio, filed an application with the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER11-1995. On November 24, 2010, at the direction of FERC, AEPSC refiled the application in FERC Docket No. ER11-2183 (FERC filing). The application proposed to change the basis for compensation for capacity costs to a cost-based mechanism, pursuant to Section 205 of the Federal Power Act and Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement (RAA) for the regional transmission organization, PJM Interconnection, LLC (PJM), and included proposed formula rate templates under which AEP-Ohio would calculate its capacity costs.

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1 By entry issued on March 7, 2012, the Commission approved and confirmed the merger of CSP into OP, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

2 *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO; *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO.

(3) By entry issued on December 8, 2010, in the above-captioned case, the Commission found that an investigation was necessary in order to determine the impact of the proposed change to AEP-Ohio's capacity charge (Initial Entry). Consequently, the Commission sought public comments regarding the following issues: (1) what changes to the current state compensation mechanism (SCM) were appropriate to determine AEP-Ohio's fixed resource requirement (FRR) capacity charge to Ohio competitive retail electric service (CRES) providers, which are referred to as alternative load serving entities within PJM; (2) the degree to which AEP-Ohio's capacity charge was currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charge upon CRES providers and retail competition in Ohio. Additionally, in light of the change proposed by AEP-Ohio, the Commission explicitly adopted as the SCM for the Company, during the pendency of the review, the current capacity charge established by the three-year capacity auction conducted by PJM based on its reliability pricing model (RPM).

(4) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

(5) On January 7, 2011, AEP-Ohio filed an application for rehearing of the Initial Entry. Memoranda contra AEP-Ohio's application for rehearing were filed by Industrial Energy Users-Ohio (IEU-Ohio); FirstEnergy Solutions Corp. (FES); Ohio Partners for Affordable Energy (OPAE)[3]; and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (jointly, Constellation).

(6) On January 27, 2011, in Case No. 11-346-EL-SSO, *et al.*, AEP-Ohio filed an application for a standard service offer

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3 On November 17, 2011, OPAE filed a notice of withdrawal from this case.

(SSO) in the form of a new ESP, pursuant to Section 4928.143, Revised Code (ESP 2 Case).[4]

(7) By entry dated February 2, 2011, the Commission granted rehearing of the Initial Entry for further consideration of the matters specified in AEP-Ohio's application for rehearing. The Commission noted that the SCM adopted in the Initial Entry would remain in effect during the pendency of its review.

(8) By entry issued on August 11, 2011, the attorney examiner set a procedural schedule in order to establish an evidentiary record on a proper SCM. The evidentiary hearing was scheduled to commence on October 4, 2011, and interested parties were directed to develop an evidentiary record on the appropriate capacity cost pricing/recovery mechanism, including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism.

(9) On September 7, 2011, a stipulation and recommendation (ESP 2 Stipulation) was filed by AEP-Ohio, Staff, and other parties to resolve the issues raised in the ESP 2 Case and several other cases pending before the Commission (consolidated cases),[5] including the above-captioned case. Pursuant to an entry issued on September 16, 2011, the consolidated cases were consolidated for the sole purpose of considering the ESP 2 Stipulation. The September 16, 2011, entry also stayed the procedural schedules in the

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4 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO and 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 and 11-350-EL-AAM.

5 *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC; *In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders*, Case No. 10-343-EL-ATA; *In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders*, Case No. 10-344-EL-ATA; *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC; *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Pursuant to Section 4928.144, Revised Code*, Case No. 11-4920-EL-RDR; *In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Pursuant to Section 4928.144, Revised Code*, Case No. 11-4921-EL-RDR.

pending cases, including this proceeding, until the Commission specifically ordered otherwise. The evidentiary hearing on the ESP 2 Stipulation commenced on October 4, 2011, and concluded on October 27, 2011.

(10) On December 14, 2011, the Commission issued an opinion and order in the consolidated cases, modifying and adopting the ESP 2 Stipulation, including its two-tier capacity pricing mechanism (Initial ESP 2 Order). On January 23, 2012, the Commission issued an entry clarifying certain aspects of the Initial ESP 2 Order (Initial ESP 2 Clarification Entry). Subsequently, on February 23, 2012, the Commission issued an entry on rehearing in the consolidated cases, granting rehearing in part (Initial ESP 2 Entry on Rehearing). Finding that the signatory parties to the ESP 2 Stipulation had not met their burden of demonstrating that the stipulation, as a package, benefits ratepayers and the public interest, as required by the Commission's three-part test for the consideration of stipulations, the Commission rejected the ESP 2 Stipulation. The Commission directed AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous ESP, including an appropriate application of capacity charges under the approved SCM established in the present case.

(11) By entry issued on March 7, 2012, in the above-captioned case, the Commission implemented an interim capacity pricing mechanism proposed by AEP-Ohio in a motion for relief filed on February 27, 2012 (Interim Relief Entry). Specifically, the Commission approved a two-tier capacity pricing mechanism modeled after the one recommended in the ESP 2 Stipulation. Approval of the interim capacity pricing mechanism was subject to the clarifications contained in the Initial ESP 2 Clarification Entry issued in the consolidated cases, including the clarification to include mercantile customers as governmental aggregation customers eligible to receive capacity pricing based on PJM's RPM. Under the two-tier capacity pricing mechanism, the first 21 percent of each customer class was entitled to tier-one, RPM-based capacity pricing. All customers of governmental aggregations approved on or

before November 8, 2011, were also entitled to receive tier-one, RPM-based capacity pricing. For all other customers, the second-tier charge for capacity was $255/megawatt-day (MW-day). In accordance with the Interim Relief Entry, the interim rate was to remain in effect until May 31, 2012, at which point the charge for capacity under the SCM would revert to the current RPM price in effect pursuant to the PJM base residual auction for the 2012/2013 delivery year.

(12) On March 14, 2012, an application for rehearing of the Interim Relief Entry was filed by the Retail Energy Supply Association (RESA). Applications for rehearing were also filed by FES and IEU-Ohio on March 21, 2012, and March 27, 2012, respectively. Memoranda contra the applications for rehearing were filed by AEP-Ohio.

(13) By entry issued on April 11, 2012, the Commission granted rehearing of the Interim Relief Entry for further consideration of the matters specified in the applications for rehearing filed by RESA, FES, and IEU-Ohio.

(14) The evidentiary hearing in this case commenced on April 17, 2012, and concluded on May 15, 2012.

(15) On April 30, 2012, AEP-Ohio filed a motion for extension of the interim relief granted by the Commission in the Interim Relief Entry. By entry issued on May 30, 2012, the Commission approved an extension of the interim capacity pricing mechanism through July 2, 2012 (Interim Relief Extension Entry).

(16) On June 15, 2012, an application for rehearing of the Interim Relief Extension Entry was filed by FES. Applications for rehearing were also filed by IEU-Ohio and the Ohio Manufacturers' Association (OMA) on June 19, 2012, and June 20, 2012, respectively. A memorandum contra the applications for rehearing was filed by AEP-Ohio on June 25, 2012.

(17) By opinion and order issued on July 2, 2012, the Commission approved a capacity pricing mechanism for AEP-Ohio (Capacity Order). The Commission established

$188.88/MW-day as the appropriate charge to enable AEP-Ohio to recover its capacity costs pursuant to its FRR obligations from CRES providers. However, the Commission also directed that AEP-Ohio's capacity charge to CRES providers should be the RPM-based rate, including final zonal adjustments, on the basis that the RPM-based rate will promote retail electric competition. The Commission authorized AEP-Ohio to modify its accounting procedures to defer the incurred capacity costs not recovered from CRES providers, with the recovery mechanism to be established in the ESP 2 Case.

(18) By entry on rehearing issued on July 11, 2012, the Commission granted rehearing of the Interim Relief Extension Entry for further consideration of the matters specified in the applications for rehearing filed by FES, IEU-Ohio, and OMA.

(19) On July 20, 2012, AEP-Ohio filed an application for rehearing of the Capacity Order. The Ohio Energy Group (OEG) filed an application for rehearing and a corrected application for rehearing of the Capacity Order on July 26, 2012, and July 27, 2012, respectively. On August 1, 2012, applications for rehearing of the Capacity Order were filed by IEU-Ohio; FES; Ohio Association of School Business Officials, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Schools Council (collectively, Schools); and the Ohio Consumers' Counsel (OCC). OMA and the Ohio Hospital Association (OHA) filed a joint application for rehearing on August 1, 2012. Memoranda contra the various applications for rehearing were filed by Duke Energy Retail Sales, LLC (Duke); IEU-Ohio; FES; Schools; OMA; OCC; OEG; AEP-Ohio; RESA; and Interstate Gas Supply, Inc. (IGS). Joint memoranda contra were filed by Constellation and Exelon Generation Company, LLC (Exelon)[6]; and by Direct Energy Services, LLC and Direct Energy Business, LLC (jointly, Direct Energy), along with RESA.

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6 The joint memorandum contra was also signed on behalf of Exelon Energy Company, Inc., which has not sought intervention in this proceeding. As a non-party, its participation in the joint memorandum contra was improper and, therefore, will not be afforded any weight by the Commission.

(20) On August 7, 2012, OEG filed a motion for leave to reply and reply to the memorandum contra filed by AEP-Ohio on August 6, 2012. On that same date, AEP-Ohio filed a motion to strike OEG's motion and reply on the grounds that Rule 4901-1-35, Ohio Administrative Code (O.A.C.), does not provide for the filing of a reply to a memorandum contra an application for rehearing.

The Commission finds that OEG's motion is procedurally deficient in several respects. First, as we have recognized in prior cases, Rule 4901-1-35, O.A.C., does not contemplate the filing of a reply to a memorandum contra an application for rehearing.[7] Additionally, although OEG's filing is styled as a motion and reply, the filing is essentially a reply only, lacking a motion and memorandum in support. OEG, therefore, also failed to comply with the requirements for a proper motion, as specified in Rule 4901-1-12, O.A.C. In any event, the Commission has reviewed OEG's filing and finds that OEG merely reiterates arguments that it has already raised elsewhere in this proceeding. Accordingly, OEG's motion for leave to file a reply should be denied and its reply should not be considered as part of the record in this proceeding. Further, AEP-Ohio's motion to strike should be denied as moot.

(21) On August 15, 2012, the Commission issued an entry on rehearing, granting rehearing of the Capacity Order for further consideration of the matters specified in the applications for rehearing filed by AEP-Ohio, OEG, IEU-Ohio, FES, Schools, OMA, OHA, and OCC.

(22) The Commission has reviewed and considered all of the arguments raised in the applications for rehearing of the Initial Entry, Interim Relief Entry, Interim Relief Extension Entry, and Capacity Order. In this entry on rehearing, the Commission will address all of the assignments of error by subject matter as set forth below. Any arguments on rehearing not specifically discussed herein have been

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7 *See, e.g., In the Matter of the Commission Investigation of the Intrastate Universal Service Discounts*, Case No. 97-632-TP-COI, Entry on Rehearing (July 8, 2009).

thoroughly and adequately considered by the Commission and are being denied.

Initial Entry

Jurisdiction and Preemption

(23) AEP-Ohio asserts that the Initial Entry is unreasonable and unlawful because the Commission, as a creature of statute, lacks jurisdiction under both federal and state law to issue an order that affects wholesale rates regulated by FERC. According to AEP-Ohio, the provision of generation capacity to CRES providers is a wholesale transaction that falls within the exclusive ratemaking jurisdiction of FERC. AEP-Ohio adds that no provision of Title 49, Revised Code, authorizes the Commission to establish wholesale prices for the Company's provision of capacity to CRES providers. Additionally, AEP-Ohio believes that Section D.8 of Schedule 8.1 of the RAA does not allow the Commission to adopt RPM-based capacity pricing as the SCM. AEP-Ohio argues that RPM-based capacity pricing, as the default option, is an available pricing option only if there is no SCM.

(24) On a related note, AEP-Ohio also contends that the portions of the Initial Entry relating to the establishment of an SCM are in direct conflict with, and preempted by, federal law. AEP-Ohio notes that Section D.8 of Schedule 8.1 of the RAA is a provision of a FERC-approved tariff that is subject to FERC's exclusive jurisdiction. AEP-Ohio further notes that the provision of capacity service to CRES providers is a wholesale transaction that falls exclusively within FERC's jurisdiction. Accordingly, AEP-Ohio argues that the Commission's initiation of this proceeding was an attempt to delay or derail FERC's review of the Company's FERC filing and to usurp FERC's role in resolving this matter, and that the Commission has acted without regard for the supremacy of federal law.

(25) In its memorandum contra, IEU-Ohio contends that the Commission has not exercised jurisdiction over any subject that is within FERC's exclusive jurisdiction. According to IEU-Ohio, because AEP-Ohio's POLR charge was proposed

and approved as a distribution charge and distribution service is subject to the exclusive jurisdiction of the Commission, the Commission's determination as to what compensation is provided by the POLR charge raises no issue that is subject to FERC's jurisdiction. IEU-Ohio also notes that the Commission has previously rejected the argument that a specific grant of authority from the General Assembly is required before it can make a determination that has significance for purposes of implementing a requirement approved by FERC.

(26) FES argues that, pursuant to Section D.8 of Schedule 8.1 of the RAA, AEP-Ohio, as an FRR Entity, has no option to seek wholesale recovery of capacity costs associated with retail switching, if an SCM is in place. Additionally, FES asserts that the Commission has jurisdiction to review AEP-Ohio's rates. FES emphasizes that AEP-Ohio admits that the Commission has broad authority to investigate matters involving Ohio utilities and that the Commission may explore such matters even as an adjunct to its own participation in FERC proceedings.

(27) As stated in the Initial Entry, Sections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction. The Commission's explicit adoption of an SCM for AEP-Ohio was well within the bounds of this broad statutory authority. Additionally, we stated in the Initial Entry that, in light of AEPSC's FERC filing, a review was necessary to evaluate the impact of the proposed change to AEP-Ohio's existing capacity charge. Section 4905.26, Revised Code, provides the Commission with considerable authority to initiate proceedings to investigate the reasonableness of any rate or charge rendered or proposed to be rendered by a public utility, which the Ohio Supreme Court has affirmed on several occasions.[8] We therefore, grant rehearing for the limited purpose of clarifying that the investigation initiated by the Commission in this proceeding was consistent with Section

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8 *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006); *Allnet Communications Services, Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117 (1987); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979).

4905.26, Revised Code, as well as with our authority under Sections 4905.04, 4905.05, and 4905.06, Revised Code.

The Commission disagrees with AEP-Ohio that we have acted in an area that is reserved exclusively to FERC or that our actions are preempted by federal law. Although wholesale transactions are generally subject to the exclusive jurisdiction of FERC, the Commission exercised jurisdiction in this case for the sole purpose of establishing an appropriate SCM upon review of AEP-Ohio's proposed capacity charge. In doing so, the Commission acted consistent with the governing section of the RAA, which, as a part of PJM's tariffs, has been approved by FERC. Section D.8 of Schedule 8.1 of the RAA acknowledges the authority of the Commission to establish an SCM that, once established, prevails over the other compensation methods addressed in that section. In fact, following issuance of the Initial Entry, FERC rejected AEPSC's proposed formula rate in light of the fact that the Commission had established the SCM.[9] Therefore, we do not agree that we have intruded upon FERC's domain.

Provider of Last Resort (POLR) Charge

(28) AEP-Ohio contends that the Initial Entry is unlawful and unreasonable in finding that the POLR charge approved in the ESP 1 Order reflected the Company's cost of supplying capacity for retail loads served by CRES providers and that the POLR charge was based upon the continued use of RPM pricing to set the capacity charge for CRES providers. AEP-Ohio notes that the POLR charge related to an entirely different service and was based on an entirely different set of costs than the capacity rates provided for under Section D.8 of Schedule 8.1 of the RAA. Specifically, AEP-Ohio points out that the POLR charge was based on the right of retail customers to switch to a CRES provider and subsequently return to the Company for generation service under SSO rates, whereas the capacity charge compensates the Company for its wholesale FRR capacity obligations to CRES providers that serve shopping customers. AEP-Ohio argues that its retail POLR charge was not the SCM

9 *American Electric Power Service Corporation*, 134 FERC ¶ 61,039 (2011).

envisioned under the RAA and did not compensate the Company for the wholesale capacity that it makes available as an FRR Entity under the RAA.

(29) In its memorandum contra, IEU-Ohio argues that AEP-Ohio's POLR charge, as it was proposed by the Company and largely approved by the Commission in the ESP 1 Order, included compensation for capacity costs. FES agrees with IEU-Ohio that the POLR charge recovered capacity costs associated with retail switching. Both IEU-Ohio and FES note that AEP-Ohio's testimony in support of the POLR charge indicated that the charge would compensate the Company for the challenges of providing capacity and energy on short notice. FES adds that AEP-Ohio's POLR charge and its wholesale capacity charge were both intended to recover capacity costs associated with accommodating retail choice and ultimately pay for the same generating capacity. FES and Constellation assert that AEP-Ohio's POLR charge was the SCM, contrary to the Company's claim.

(30) In the Initial Entry, the Commission noted that it had approved retail rates for AEP-Ohio, including recovery of capacity costs through the POLR charge to certain retail shopping customers, based upon the continuation of the current capacity charges established by PJM's capacity auction. We find no error in having made this finding. The Commission approved AEP-Ohio's retail rates, including the POLR charge, in the ESP 1 Order. For the most part, the POLR charge was approved by the Commission as it was proposed by AEP-Ohio.[10] AEP-Ohio's testimony in support of the POLR charge indicates that various inputs were used by the Company to calculate the proposed charge.[11] One of these inputs was the market price, a large component of which was intended to reflect AEP-Ohio's capacity obligations as a member of PJM. Although the purpose of the POLR charge was to compensate AEP-Ohio for the risk associated with its POLR obligation, we nonetheless find that the POLR charge was approved, in

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10 ESP 1 Order at 38-40.

11 Cos. Ex. 2-A at 12-14, 31-32; Tr. XI at 76-77; Tr. XIV at 245.

part, to recover capacity costs associated with customer shopping. Accordingly, we find that AEP-Ohio's request for rehearing should be denied.

Due Process

(31) AEP-Ohio argues that the Initial Entry was issued in a manner that denied the Company due process and violated various statutes, including Sections 4903.09, 4905.26, and 4909.16, Revised Code. AEP-Ohio notes that, absent an emergency situation under Section 4909.16, Revised Code, the Commission must provide notice and a hearing before setting a rate. AEP-Ohio argues that there is no emergency in the present case and that the Commission was, therefore, required to provide notice and a hearing pursuant to the procedural requirements of Section 4905.26, Revised Code, prior to imposing a capacity pricing mechanism that is different from the mechanism proposed by the Company in its FERC filing. Additionally, AEP-Ohio argues that the Initial Entry was issued in the absence of any record and that it provides little explanation as to how the Commission arrived at its decision to establish a capacity rate, contrary to Section 4903.09, Revised Code.

(32) IEU-Ohio responds that the Initial Entry did not establish or alter any of AEP-Ohio's rates or charges and that the entry merely confirmed what the Commission had previously determined.

(33) The Commission finds no merit in AEP-Ohio's due process claims. The Initial Entry upheld a charge that had been previously established in the ESP 1 Order. The Initial Entry did not institute or even modify AEP-Ohio's capacity charge, which was based on RPM pricing both before and after issuance of the entry. The purpose of the Initial Entry was to expressly establish the SCM and maintain RPM pricing as the basis for the SCM during the pendency of the review of AEP-Ohio's proposed change to its capacity charge. Additionally, we find that the rationale behind the Initial Entry was sufficiently explained, consistent with the requirements of Section 4903.09, Revised Code. The Commission clearly indicated that it was necessary to explicitly establish the SCM based on RPM capacity pricing

in light of AEPSC's FERC filing proposing a cost-based capacity charge. Thus, AEP-Ohio's request for rehearing should be denied.

Interim Relief Entry

Jurisdiction

(34) IEU-Ohio argues that the Interim Relief Entry is unlawful because the Commission is without subject matter jurisdiction to establish a cost-based capacity charge in this proceeding. IEU-Ohio notes that the Commission's ratemaking authority under state law is governed by statute. According to IEU-Ohio, this case is not properly before the Commission, regardless of whether capacity service is considered a competitive or noncompetitive retail electric service.

(35) As discussed above with respect to the Initial Entry and addressed further below in regard to the Capacity Order, the Commission finds that it has jurisdiction under state law to establish an SCM, pursuant to the general supervisory authority granted by Sections 4905.04, 4905.05, and 4905.06, Revised Code, and that our review was consistent with our broad investigative authority under Section 4905.26, Revised Code. The Ohio Supreme Court has recognized the Commission's authority to investigate an existing rate and, following a hearing, to order a new rate.[12] Additionally, we believe that a cost-based SCM may be established for AEP-Ohio's FRR capacity obligations, pursuant to our regulatory authority under Chapter 4905, Revised Code, as well as Chapter 4909, Revised Code, which enable the Commission to use its traditional regulatory authority to approve rates that are based on cost. We find, therefore, that IEU-Ohio's request for rehearing should be denied.

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12 *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979).

Process

(36) FES and IEU-Ohio contend that the Interim Relief Entry is unreasonable, unlawful, and procedurally defective because it effectively allowed AEP-Ohio to avoid the statutory procedures to seek the relief granted by the entry.[13] FES and IEU-Ohio argue that there is no remedy or procedure to seek relief from a Commission order other than to file an application for rehearing pursuant to Section 4903.10, Revised Code, and that the Commission, in granting AEP-Ohio's motion for relief, allowed the Company to bypass the rehearing process. IEU-Ohio adds that the Commission abrogated its prior order directing the Company to implement RPM-based capacity pricing upon rejection of the ESP 2 Stipulation, without determining that the prior order was unjust or unwarranted.

(37) IEU-Ohio also asserts that the Interim Relief Entry is unlawful and unreasonable because the Commission failed to comply with the emergency rate relief provisions found in Section 4909.16, Revised Code. IEU-Ohio adds that AEP-Ohio has not invoked the Commission's emergency authority pursuant to that statute and, in any event, the Company failed to present a case supporting emergency rate relief.

(38) AEP-Ohio responds that its motion for relief did not seek to revise the Initial ESP 2 Entry on Rehearing, which rejected the ESP 2 Stipulation. Rather, AEP-Ohio submits that the motion was filed, pursuant to Rule 4901-1-12, O.A.C., for the purpose of seeking interim relief during the pendency of the ESP 2 Case and the present proceedings. AEP-Ohio adds that the motion for relief was properly granted based on the evidence and that arguments to the contrary have already been considered and rejected by the Commission.

(39) The Commission finds that no new arguments have been raised regarding the process by which AEP-Ohio sought, and the Commission granted, interim relief. Although we recognized in the Interim Relief Entry that AEP-Ohio may

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[13] IEU-Ohio joins in the application for rehearing filed by FES, in addition to raising its own assignments of error.

have other means to challenge or seek relief from an interim SCM based on RPM capacity pricing, we also found that the Commission is vested with the authority to modify the SCM that we established in the Initial Entry. We continue to believe that, just as we have the necessary authority to establish the SCM, as discussed elsewhere in this entry, so too may we modify the SCM. Accordingly, FES' and IEU-Ohio's assignments of error should be denied.

Evidentiary Record and Basis for Commission's Decision

(40) FES asserts that the Interim Relief Entry is unlawful and unreasonable in that it authorized AEP-Ohio to recover a capacity rate allegedly based on its full embedded costs, which costs are not authorized by the RAA, are not recoverable under Ohio law, and do not reflect an offset for energy revenues. FES contends that, because the ESP 2 Stipulation was rejected, the Commission lacks a record basis to approve the negotiated rate of $255/MW-day as an element of the interim SCM.

(41) FES further argues that the Interim Relief Entry is not based on probative evidence that AEP-Ohio would suffer immediate or irreparable financial harm under RPM-based capacity pricing. FES adds that the Commission erred in relying on AEP-Ohio's loss of revenues from its unlawful POLR charge as further justification for the tier-two rate of $255/MW-day.

(42) AEP-Ohio replies that FES' arguments regarding the two-tiered capacity pricing structure have already been considered and rejected by the Commission on more than one occasion.

(43) IEU-Ohio asserts that the Interim Relief Entry is unlawful and unreasonable because there is no record to support the Commission's finding that the SCM could risk an unjust and unreasonable result. Like FES, IEU-Ohio argues that it was unreasonable for the Commission to rely on the fact that AEP-Ohio is no longer recovering its POLR costs as support for the interim SCM, when the Commission previously determined that the POLR charge was not

justified. Further, IEU-Ohio contends that the Commission unreasonably relied on evidence supporting the ESP 2 Stipulation, given that the Commission rejected the stipulation and elected instead to restart this proceeding. Finally, regarding the Commission's reasoning that AEP-Ohio must share off-system sales (OSS) revenues with its affiliates pursuant to the AEP East Interconnection Agreement (pool agreement), IEU-Ohio notes that there is no evidence addressing any shortfall that may occur.

(44) AEP-Ohio contends that its motion for relief was properly made and properly granted by the Commission based on probative evidence in the record. According to AEP-Ohio, the Commission recognized that the Company's ability to mitigate capacity costs with off-system energy sales is limited. AEP-Ohio adds that the Commission's eventual determination that the Company may not assess a POLR charge does not contradict the fact that the Commission initially relied upon the Company's POLR charge in setting RPM-based capacity pricing as the SCM in the Initial Entry.

(45) IEU-Ohio also argues that the Interim Relief Entry is unlawful and unreasonable because the rate increase is not based on any economic justification as required by Commission precedent. According to IEU-Ohio, the Commission stated, in the ESP 1 Order, that AEP-Ohio must demonstrate the economic basis for a rate increase in the context of a full rate review. IEU-Ohio argues that, contrary to this precedent, AEP-Ohio made no showing, and the Commission made no finding, that the Company was suffering an economic shortfall.

(46) The Commission again rejects claims that the relief granted in the Interim Relief Entry was not based on record evidence. The present case was consolidated with the ESP 2 Case and the other consolidated cases for the purpose of considering the ESP 2 Stipulation. As we noted in the Interim Relief Entry, the testimony and exhibits admitted into the record for that purpose remain a part of the record in this proceeding. Although the Commission subsequently rejected the ESP 2 Stipulation, that action did not purge the evidence from the record in this case. It was thus appropriate for the Commission to rely upon that

evidence as a basis for granting AEP-Ohio's motion for interim relief.

In the Interim Relief Entry, the Commission cited three reasons justifying the interim relief granted, specifically the elimination of AEP-Ohio's POLR charge, the operation of the pool agreement, and evidence indicating that RPM-based capacity pricing is below the Company's capacity costs. With respect to the POLR charge, we merely noted that AEP-Ohio was no longer receiving a revenue stream that was intended, in part, to enable the Company to recover capacity costs. Although the Commission determined that AEP-Ohio's POLR charge was not supported by the record on remand, nothing in that order negated the fact that there are capacity costs associated with an electric distribution utility's POLR obligation and that such costs may be properly recoverable upon a proper record.[14] Having noted that AEP-Ohio was no longer receiving recovery of capacity costs through the POLR charge, the Commission next pointed to evidence in the record of the consolidated cases indicating that the Company's capacity costs fall somewhere within the range of $57.35/MW-day to $355.72/MW-day, as a merged entity. Finally, we noted that, although AEP-Ohio may sell its excess supply into the wholesale market when retail customers switch to CRES providers, the pool agreement limits the Company's ability to fully benefit from these sales, as the margins must be shared with its affiliates.[15] Although IEU-Ohio argues that AEP-Ohio failed to demonstrate any shortfall resulting from the operation of the pool agreement or any other economic justification for the interim rate relief, IEU-Ohio offers insufficient support for its theory that the Company must make such a showing. We have previously rejected IEU-Ohio's argument that the Commission broadly stated in the ESP 1

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14 *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Order on Remand (October 3, 2011).

15 AEP-Ohio Ex. 7 at 17.

Order that AEP-Ohio must demonstrate the economic basis for a rate increase in the context of a full rate review.[16]

In light of the evidence discussed above, the Commission reasonably concluded that an SCM based on the current RPM pricing could risk an unjust and unreasonable result for AEP-Ohio. We determined that the two-tier capacity pricing mechanism, as proposed by AEP-Ohio and modified by the Commission, should be approved on an interim basis, with the first tier based on RPM pricing, and the second tier fixed at $255/MW-day, representing a reasonable charge in the mid portion of the range reflected in the record. Upon review of the arguments raised on rehearing, we continue to believe that our rationale for granting AEP-Ohio's interim relief was thoroughly explained, warranted under the unique circumstances, and supported by the evidence of record in the consolidated cases. Accordingly, FES' and IEU-Ohio's requests for rehearing should be denied.

Discriminatory Pricing

(47) FES argues that the Interim Relief Entry established an interim SCM that imposed on certain customers a capacity price that was two times more than other customers paid, contrary to the Commission's duty to ensure nondiscriminatory pricing and an effective competitive market, and in violation of Sections 4905.33, 4905.35, 4928.02, and 4928.17, Revised Code.

(48) Similarly, IEU-Ohio contends that the Interim Relief Entry is unlawful because the resulting rates were unduly discriminatory and not comparable. IEU-Ohio notes that the interim SCM authorized two different capacity rates without any demonstration that the difference was justified. IEU-Ohio adds that there has been no showing that the capacity rates for CRES providers were comparable to the capacity costs paid by SSO customers.

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16 *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Entry on Rehearing (December 14, 2011), at 5-6.

(49) In response to many of IEU-Ohio's various arguments, including its discrimination claim, AEP-Ohio contends that IEU-Ohio improperly attempts to relitigate issues that have already been considered and rejected by the Commission.

(50) The Commission does not agree that the interim capacity pricing authorized by the Interim Relief Entry was unduly discriminatory or otherwise unlawful. We recognize that customers who acted earlier than others to switch to a CRES provider benefitted from their prompt action. However, as we have determined on prior occasions, this does not amount to undue preference nor create a case of discrimination, given that all customers had an equal opportunity to take advantage of the allotted RPM-based capacity pricing.[17] Rehearing on this issue should thus be denied.

Transition Costs

(51) IEU-Ohio maintains that the Interim Relief Entry is unlawful and unreasonable because it permitted AEP-Ohio to recover transition costs in violation of state law. According to IEU-Ohio, AEP-Ohio's opportunity to recover transition costs has ended, pursuant to Section 4928.38, Revised Code. AEP-Ohio responds that IEU-Ohio merely repeats an argument that the Commission has previously rejected.

(52) The Commission disagrees that the Interim Relief Entry authorized the recovery of transition costs. We do not believe that the capacity costs associated with AEP-Ohio's FRR obligations constitute transition costs. Pursuant to Section 4928.39, Revised Code, transition costs are costs that, among meeting other criteria, are directly assignable or allocable to retail electric generation service provided to electric consumers in this state. AEP-Ohio's provision of capacity to CRES providers, as required by the Company's FRR capacity obligations, is not a retail electric service as

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17 *See, e.g., In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator,* Case No. 99-1658-EL-ETP, *et al.*, Opinion and Order (August 31, 2000), at 41.

defined by Section 4928.01(A)(27), Revised Code. The capacity service in question is not provided directly by AEP-Ohio to retail customers, but is rather a wholesale transaction between the Company and CRES providers. Because AEP-Ohio's capacity costs are not directly assignable or allocable to retail electric generation service, they are not transition costs by definition. IEU-Ohio's assignment of error should be denied.

Allocation of RPM-Based Capacity Pricing

(53) RESA requests that the Commission grant rehearing for the purpose of clarifying that the Interim Relief Entry did not authorize AEP-Ohio to revoke RPM-based capacity pricing to any customer who received such pricing pursuant to the Commission's approval of the ESP 2 Stipulation. RESA asserts that, in order to maintain the status quo, commercial customers that have been receiving RPM-based capacity pricing should have continued to receive such pricing. According to RESA, the Interim Relief Entry did not direct AEP-Ohio to decrease the number of commercial customers that were receiving RPM-based capacity pricing. RESA notes that the Interim Relief Entry states that the first 21 percent of each class shall receive RPM-based capacity pricing, but it did not require that only 21 percent can receive such pricing.

RESA argues that it would be unjust and unreasonable to charge customers that were shopping and receiving RPM-based capacity pricing prior to the Commission's rejection of the ESP 2 Stipulation, and while the ESP 2 Stipulation was in place, the tier-two price for capacity. RESA also argues that it is unjust and unreasonable to decrease the amount of RPM-based capacity pricing for the commercial class from the level authorized in the Initial ESP 2 Order, in light of the fact that the Commission ordered an expansion of RPM-based capacity pricing for governmental aggregation. RESA concludes that the Commission should clarify that any customer that began shopping prior to September 7, 2012, and received RPM-based capacity pricing shall be charged such pricing during the period covered by the Interim Relief Entry.

(54) Like RESA, FES also notes that AEP-Ohio has interpreted the Interim Relief Entry to allow RPM-based capacity pricing to be taken away from a significant number of customers that were shopping as of September 7, 2011, when the ESP 2 Stipulation was filed. FES notes that both the ESP 2 Stipulation and the Initial ESP 2 Order recognized that all shopping customers qualifying for RPM-based capacity pricing as of September 7, 2011, would be entitled to continue to receive such pricing. FES argues that the Commission should have established an interim SCM based on RPM prices or, alternatively, should confirm that, during the interim period, all customers that were shopping as of September 7, 2011, should receive RPM-based capacity pricing.

(55) AEP-Ohio contends that the applications for rehearing of RESA and FES should be denied, because they are essentially untimely applications for rehearing of the Initial ESP 2 Clarification Entry in the consolidated cases. AEP-Ohio asserts that the Interim Relief Entry merely confirmed that the capacity pricing requirements of the Initial ESP 2 Clarification Entry were to continue on an interim basis, even though the Commission rejected the ESP 2 Stipulation. AEP-Ohio believes that RESA and FES should have raised their objections to the capacity pricing requirements by seeking rehearing of the Initial ESP 2 Clarification Entry. AEP-Ohio further argues that RESA and FES ignore the fact that the ESP 2 Stipulation was rejected by the Commission in its entirety, which eliminated all of the benefits of the stipulation, and, therefore, RESA and FES have no basis upon which to claim that CRES providers should receive those benefits.

Next, AEP-Ohio disputes RESA's characterization of the status quo, and argues that the Commission maintained the status quo by retaining the capacity pricing set forth in the Initial ESP 2 Clarification Entry. Finally, AEP-Ohio asserts that the Initial ESP 2 Clarification Entry, which remained in effect pursuant to the Interim Relief Entry, required that each customer class receive an allocation of RPM-based capacity pricing for 21 percent of its load, and did not permit the reallocation of capacity from one customer class

to another. AEP-Ohio argues that RESA has misconstrued the Interim Relief Entry in representing the 21 percent as a minimum, not a maximum.

(56) Initially, the Commission disagrees with AEP-Ohio's argument that RESA's and FES' applications for rehearing of the Interim Relief Entry are essentially untimely applications for rehearing of the Initial ESP 2 Clarification Entry. Although the Interim Relief Entry was subject to the clarifications in the Initial ESP 2 Clarification Entry, the entries are otherwise entirely distinct and were issued for different purposes. Whereas the Initial ESP 2 Clarification Entry was issued to clarify the terms of our approval of the ESP 2 Stipulation, the Interim Relief Entry was issued to approve an interim SCM in light of our subsequent rejection of the ESP 2 Stipulation. We find that the applications for rehearing of RESA and FES were appropriate under the circumstances.

Further, the Commission clarifies that all customers that were shopping as of September 7, 2011, should have continued to receive RPM-based capacity pricing during the period in which the interim SCM was in effect. Pursuant to the terms of the ESP 2 Stipulation as approved by the Commission in the Initial ESP 2 Order, customers that were taking generation service from a CRES provider as of the date of the ESP 2 Stipulation (*i.e.*, September 7, 2011) were to continue to be served under the RPM rate applicable for the remainder of the contract term, including renewals.[18] In the Initial ESP 2 Clarification Entry, the Commission confirmed that it had modified the ESP 2 Stipulation to prohibit the allocation of RPM-based capacity pricing from one customer class to another and that this modification dated back to the initial allocation among the customer classes based on the September 7, 2011, data. This clarification was not intended to adversely impact customers already shopping as of September 7, 2011. Likewise, the Interim Relief Entry, which was subject to the clarifications in the Initial ESP 2 Clarification Entry, was not intended to discontinue RPM-based capacity

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[18] Initial ESP 2 Order at 25, 54.

pricing for customers shopping as of September 7, 2011. AEP-Ohio is directed to make any necessary adjustments to CRES billings that occurred during the interim period, consistent with this clarification.

Interim Relief Extension Entry

Evidentiary Record and Basis for Commission's Decision

(57) FES argues that the Interim Relief Extension Entry is unreasonable and unlawful because it is not based on probative or credible evidence that AEP-Ohio would suffer immediate or irreparable financial harm under RPM-based capacity pricing. FES asserts that AEP-Ohio's claims regarding the purported harm that would result from RPM-based capacity pricing are overstated and unsupported by any evidence in the record. FES adds that AEP-Ohio made no attempt to comply with the requirements for emergency rate relief.

Additionally, FES contends that the Interim Relief Extension Entry is unreasonable and unlawful because it is in direct conflict with the RAA and RPM, pursuant to which capacity pricing is not based on a traditional cost-of-service ratemaking methodology, but is instead intended only to compensate RPM participants, including FRR Entities, for ensuring reliability. According to FES, capacity pricing is not intended to compensate AEP-Ohio for the cost of its generating assets and only the Company's avoidable costs are relevant.

FES also argues that the Interim Relief Extension Entry is unreasonable and unlawful because it imposed capacity pricing above the RPM-based price on tier-one customers that have always been entitled to RPM-based capacity pricing, without any explanation or supporting evidence. FES adds that tier-one customers and CRES providers will be severely prejudiced by the Commission's modification.

Finally, FES argues that the Interim Relief Extension Entry is unreasonable and unlawful because it extended an improper interim SCM without sufficient justification as to why the Commission elected to continue above-market

capacity pricing, despite its earlier determination that the interim rates should only remain in effect though May 31, 2012. FES contends that the Commission relied on traditional cost-of-service concepts that have no relevance in this proceeding.

(58) OMA argues that the Commission's approval of AEP-Ohio's proposal to increase and extend the Company's interim capacity pricing is not supported by record evidence. OMA adds that a majority of the Commission was unable to agree on a rationale for granting the extension. OMA concludes that the Commission should reverse its decision to grant the extension or, in the alternative, retain the interim capacity pricing adopted in the Interim Relief Entry.

(59) AEP-Ohio responds that the majority of the arguments raised by FES and OMA have already been considered and rejected by the Commission on numerous occasions during the course of the proceeding and should again be rejected. Regarding the remaining arguments, AEP-Ohio notes that the Commission thoroughly addressed all of the arguments that were raised in response to the Company's motion for extension.

(60) As discussed above, the Commission finds that we thoroughly explained the basis for our decision to grant interim relief and approve an interim capacity pricing mechanism as compensation for AEP-Ohio's FRR obligations. In granting an extension of the interim relief, the Commission found that the same rationale continued to apply. In the Interim Relief Extension Entry, we explained that, because the circumstances prompting us to grant the interim relief had not changed, it was appropriate to continue the interim relief, in its current form, for an additional period while the case remained pending. The Commission also specifically noted that various factors had prolonged the course of the proceeding and delayed a final resolution, despite the Commission's considerable efforts to maintain an expeditious schedule. We uphold our belief that it was reasonable and appropriate to extend the interim capacity pricing mechanism under these circumstances. Therefore, rehearing should be denied.

Extension of Interim SCM

(61) FES argues that the Interim Relief Extension Entry is unreasonable and unlawful because it authorized the extension of an interim SCM that is unlawful, as demonstrated in FES' application for rehearing of the Interim Relief Entry. Similarly, IEU-Ohio reiterates the arguments raised in its briefs and application for rehearing of the Interim Relief Entry. AEP-Ohio replies that the Commission has already addressed intervenors' arguments in the course of this proceeding.

(62) As addressed above, the Commission does not agree that the interim SCM was unlawful. For the same reasons enumerated above with respect to the Interim Relief Entry, the Commission finds nothing improper in our extension of the interim SCM for a brief period.

Due Process

(63) IEU-Ohio contends that the totality of the Commission's actions during the course of this proceeding violated IEU-Ohio's due process rights under the Fourteenth Amendment. IEU-Ohio believes the Commission's conduct throughout this proceeding has subjected the positions of parties objecting to AEP-Ohio's demands to condemnation without trial. In its memorandum contra, AEP-Ohio argues that IEU-Ohio's lengthy description of the procedural history of this proceeding negates its due process claim.

(64) The Commission finds no merit in IEU-Ohio's due process claim. Pursuant to the procedural schedule, all parties, including IEU-Ohio, were afforded ample opportunity to participate in this proceeding through means of discovery, a lengthy evidentiary hearing with cross-examination of witnesses and presentation of exhibits, and briefing. IEU-Ohio was also afforded the opportunity to respond to AEP-Ohio's motion for interim relief, as well as its motion for an extension of the interim relief. As the record reflects, IEU-

Ohio took full advantage of its opportunities and, accordingly, its request for rehearing should be denied.

Requests for Escrow Account or Refund

(65) OMA asserts that the Interim Relief Extension Entry undermined customer expectations and substantially harmed Ohio manufacturers and other customers. OMA notes that, as a result of the Interim Relief Extension Entry, all customers, including customers in tier one, were required to pay capacity rates that were substantially higher than the current RPM-based capacity price, contrary to their reasonable expectations, and to the detriment of their business arrangements and the competitive market. OMA adds that the Commission failed to consider its recommendation that AEP-Ohio deposit the difference between the two-tiered interim relief and the RPM-based capacity price in an escrow account.

(66) IEU-Ohio asserts that the Commission should direct AEP-Ohio to refund all revenue collected above RPM-based capacity pricing, or at least to credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.

(67) In response to IEU-Ohio, AEP-Ohio asserts that many of IEU-Ohio's arguments are irrelevant to the Interim Relief Extension Entry and thus inappropriate for an application for rehearing. Further, AEP-Ohio disagrees with OMA that there is no evidence that the Company would suffer harm from RPM-based capacity pricing. AEP-Ohio also contends that neither customers nor CRES providers can claim a continuing expectation of such pricing or rely upon the now rejected ESP 2 Stipulation.

(68) For the reasons previously discussed, the Commission finds that the brief extension of the interim capacity pricing mechanism, without modification, was reasonable under the circumstances. Accordingly, we do not believe that IEU-Ohio's request for a refund of any amount in excess of RPM-based capacity pricing and OMA's request that an escrow account be established are necessary or appropriate. Further, if intervenors believed that extraordinary relief

from the Interim Relief Extension Entry was required, the appropriate course of action would have been to seek a stay of the entry.

We do not agree that the Interim Relief Extension Entry undermined customer expectations or caused substantial harm to customers. This case was initiated by the Commission nearly two years ago for the purposes of reviewing AEP-Ohio's capacity charge and determining whether the SCM should be modified in order to promote competition and to enable the Company to recover the costs associated with its FRR capacity obligations. In any event, as with any rate, there is no guarantee that the rate will remain unchanged in the future. We find that the Interim Relief Extension Entry appropriately balanced the interests of AEP-Ohio, CRES providers, and customers, which has been the Commission's objective throughout this proceeding.

Capacity Order

Jurisdiction

(69) IEU-Ohio argues that the Capacity Order is unlawful and unreasonable because the Commission is prohibited from applying cost-based ratemaking principles or resorting to Chapters 4905 and 4909, Revised Code, to supervise and regulate generation capacity service from the point of generation to the point of consumption. IEU-Ohio contends that it makes no difference whether the service is termed wholesale or retail, because retail electric service includes any service from the point of generation to the point of consumption. IEU-Ohio asserts that the Commission's authority with respect to generation service is limited to the authorization of retail SSO rates that are established in conformance with the requirements of Sections 4928.141 to 4928.144, Revised Code.

(70) The Schools contend that the Commission lacks authority to set cost-based capacity rates, because AEP-Ohio's capacity service is a deregulated generation-related service. The Schools believe the Commission's authority regarding

capacity service is limited to effectuating the state's energy policy found in Section 4928.02, Revised Code.

(71) In the Capacity Order, the Commission determined that it has authority pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code, to establish the SCM. We determined that AEP-Ohio's provision of capacity to CRES providers is appropriately characterized as a wholesale transaction rather than a retail electric service. We noted that, although wholesale transactions are generally subject to the exclusive jurisdiction of FERC, our exercise of jurisdiction in this case was for the sole purpose of establishing an appropriate SCM and is consistent with Section D.8 of Schedule 8.1 of the FERC-approved RAA. Additionally, we noted that FERC had rejected AEPSC's proposed formula rate in light of the fact that the Commission had established an SCM in the Initial Entry.[19] The Commission further determined, within its discretion, that it was necessary and appropriate to establish a cost-based SCM for AEP-Ohio, pursuant to our regulatory authority under Chapter 4905, Revised Code, as well as Chapter 4909, Revised Code, which authorized the Commission to use its traditional regulatory authority to approve rates that are based on cost, such that the resulting rates are just and reasonable, in accordance with Section 4905.22, Revised Code. Because the capacity service at issue is a wholesale rather than retail electric service, we found that, although market-based pricing is contemplated in Chapter 4928, Revised Code, that chapter pertains solely to retail electric service and is thus inapplicable under the circumstances. The Commission concluded that we have an obligation under traditional rate regulation to ensure that the jurisdictional utilities receive just and reasonable compensation for the services that they render. However, rehearing is granted to clarify that the Commission is under no obligation with regard to the specific mechanism used to address capacity costs. Such costs may be addressed through an SCM that is specifically crafted to meet the stated needs of a particular utility or through a rider or other mechanism.

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19 *American Electric Power Service Corporation*, 134 FERC ¶ 61,039 (2011).

The Commission carefully considered the question of whether we have the requisite statutory authority in this matter. We affirm our findings in the Capacity Order that capacity service is a wholesale generation service between AEP-Ohio and CRES providers and that the provisions of Chapter 4928, Revised Code, that restrict the Commission's regulation of competitive retail electric services are inapplicable. The definition of retail electric service found in Section 4928.01(A)(27), Revised Code, is more narrow than IEU-Ohio would have it. As we discussed in the Capacity Order, retail electric service is "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption." Because AEP-Ohio supplies the capacity service in question to CRES providers, rather than directly to retail customers, it is not a retail electric service, as IEU-Ohio appears to contend, or a deregulated service, as the Schools assert.

Additionally, as discussed above, we note that Section 4905.26, Revised Code, grants the Commission considerable authority to review rates[20] and authorizes our investigation in this case. The Commission properly initiated this proceeding, consistent with that statute, to examine AEP-Ohio's existing capacity charge for its FRR obligations and to establish an appropriate SCM upon completion of our review. We grant rehearing for the limited purpose of clarifying that the Capacity Order was issued in accordance with the Commission's authority found in Section 4905.26, Revised Code, as well as Sections 4905.04, 4905.05, and 4905.06, Revised Code.

Cost-Based SCM

(72) OCC argues that the Commission erred in adopting a cost-based SCM rather than finding that the SCM should be based on RPM pricing. Similarly, the Schools argue that the Commission failed to find that RPM-based capacity

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20 *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006); *Allnet Communications Services, Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117 (1987); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979).

pricing is reasonable and lawful and should be reinstated as the SCM. AEP-Ohio replies that the arguments raised by OCC and the Schools are unsupported and have already been considered and rejected by the Commission. AEP-Ohio notes that the Commission determined that it has the authority to establish an SCM based on the costs associated with the Company's FRR capacity obligations.

(73) FES contends that the Capacity Order unlawfully and unreasonably established an SCM based on embedded costs. Specifically, FES argues that, pursuant to the language and purpose of the RAA, the only costs that can possibly be considered for pricing capacity in PJM are avoidable, not embedded, costs and that AEP-Ohio's avoidable costs would be fully recovered using RPM-based pricing. FES asserts that AEP-Ohio's FRR capacity obligations are not defined by the cost of its fixed generation assets but are instead valued based on PJM's reliability requirements. FES believes that the Capacity Order provides a competitive advantage to AEP-Ohio in that the Company will be the only capacity supplier in PJM that is guaranteed to recover its full embedded costs for generation. FES notes that AEP-Ohio's status as an FRR Entity does not justify different treatment, as there is no material difference between the FRR election and participation in PJM's base residual auction.

(74) AEP-Ohio argues that the Commission appropriately determined that cost, as the term is used in Section D.8 of Schedule 8.1 of the RAA, refers to embedded cost. AEP-Ohio notes that no reference to avoided cost is contained within Section D.8 of Schedule 8.1 of the RAA and that, as a participant in the drafting of the RAA, the Company understood that the reference to cost was intended to mean embedded cost. AEP-Ohio contends that, because avoided costs are bid into the RPM's base residual auction, FES' argument renders the option to establish a cost-based capacity rate under Section D.8 of Schedule 8.1 of the RAA meaningless.

(75) Like FES, IEU-Ohio argues that the Capacity Order is in conflict with the RAA for numerous reasons, including that the order does not account for Delaware law; ignores the

RAA's focus on the entire PJM region and the RAA's objective to support the development of a robust competitive marketplace; finds that use of the term "cost" in the RAA means embedded cost; and is based on AEP-Ohio's flawed assumptions that the Company is an FRR Entity with owned and controlled generating assets that are the source of capacity provided to CRES providers serving retail customers in the Company's certified electric distribution service area.

(76) In its memorandum contra, AEP-Ohio notes that IEU-Ohio fails to explain how the application of Delaware law would make any practical difference with respect to the Commission's interpretation of the RAA. AEP-Ohio argues that the RAA cannot be interpreted to mean that state commissions are constrained by Delaware law in establishing an SCM. AEP-Ohio also contends that, if the reference to cost in Section D.8 of Schedule 8.1 of the RAA is interpreted as avoidable cost, it would render the provision meaningless. AEP-Ohio adds that IEU-Ohio relies on inapplicable U.S. Supreme Court precedent in support of its argument that cost does not mean embedded cost.

(77) The Commission finds that the arguments raised by the Schools, OCC, FES, and IEU-Ohio have already been thoroughly considered by the Commission and should again be denied. As discussed above, the Commission has an obligation to ensure that AEP-Ohio receives reasonable compensation for the capacity service that it provides. We continue to believe that the SCM for AEP-Ohio should be based on the Company's costs and that RPM-based capacity pricing would prove insufficient to yield reasonable compensation for the Company's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations.

Initially, the Commission finds no merit in IEU-Ohio's claim that AEP-Ohio is not an FRR Entity. Although AEPSC signed the RAA, it did so on behalf of the Company. The Commission also disagrees with FES' contention that the Capacity Order affords an undue competitive advantage to AEP-Ohio over other capacity

suppliers in PJM. The Commission initiated this proceeding solely to review AEP-Ohio's capacity costs and determine an appropriate capacity charge for its FRR obligations. We have not considered the costs of any other capacity supplier subject to our jurisdiction nor do we find it appropriate to do so in this proceeding. Further, the Commission does not agree that the SCM that we have adopted is inconsistent with the RAA. Section D.8 of Schedule 8.1 of the RAA provides only that, where the state regulatory jurisdiction requires that the FRR Entity be compensated for its FRR capacity obligations, such SCM will prevail. There are no requirements or limitations for the SCM in that section or elsewhere in the RAA. Although Section D.8 of Schedule 8.1 of the RAA specifically contemplates that an SCM may be established by the state regulatory jurisdiction, neither that section nor any other addresses whether the SCM may provide for the recovery of embedded costs, nor would we expect it to do so, given that the FRR Entity's compensation is to be provided by way of a state mechanism. The Commission finds that we appropriately adopted an SCM that is consistent with Section D.8 of Schedule 8.1 of the RAA and state law and that nothing in the Capacity Order is otherwise contrary to the RAA.

Energy Credit

(78) AEP-Ohio raises numerous issues with respect to the energy credit recommended by Staff's consultant in this case, Energy Ventures Analysis, Inc. (EVA), which was adopted by the Commission in the Capacity Order. In its first assignment of error, AEP-Ohio contends that the Commission's adoption of an energy credit of $147.41/MW-day was flawed, given that EVA assumed a static shopping level of 26.1 percent throughout the relevant timeframe. AEP-Ohio notes that, according to Staff's own witness, the energy credit should be lower based upon the established shopping level of thirty percent as of April 30, 2012. AEP-Ohio adds that the energy credit should be substantially lower based upon the increased levels of shopping that will occur with RPM-based capacity pricing. AEP-Ohio believes that there is an inconsistency

between the Commission's recognition in the Capacity Order that RPM-based pricing will cause shopping to increase and the Commission's adoption of EVA's methodology without an adjustment to reflect a higher level of shopping. At a minimum, AEP-Ohio argues that the Commission should account for the actual shopping level as of the date of the Capacity Order.

(79) IEU-Ohio responds that the arguments raised by AEP-Ohio in its application for rehearing assume that the Commission may act beyond its statutory jurisdiction to set generation rates and that the Commission may unlawfully authorize the Company to collect transition revenue. IEU-Ohio also contends that all of AEP-Ohio's assignments of error that relate to the energy credit are based on the flawed assumption that the Company identified and established the incurred cost of satisfying the FRR Entity's capacity obligations. IEU-Ohio notes that AEP-Ohio's cost-based methodology relies on the false assumption that the Company's owned and controlled generating assets are the source of capacity available to CRES providers serving customers in the Company's distribution service territory.

(80) AEP-Ohio also argues that there are a number of errors in EVA's energy credit, resulting in an energy credit that is unreasonable and against the manifest weight of the evidence. AEP-Ohio contends that the Commission adopted EVA's energy credit without meaningful explanation or analysis and abdicated its statutory duty to make reasonable findings and conclusions, in violation of Section 4903.09, Revised Code.

Specifically, AEP-Ohio asserts that EVA's methodology does not withstand basic scrutiny and is largely a black box that cannot be meaningfully tested or evaluated by others; EVA failed to calibrate its model or otherwise account for the impact of zonal rather than nodal prices; EVA erred in forecasting locational marginal prices (LMP) instead of using available forward energy prices, which were used by Staff in the ESP 2 Case; EVA used inaccurate and understated fuel costs; EVA failed to use correct heat rates to capture minimum and start time operating constraints and associated cost impacts; EVA wrongly incorporated

traditional OSS margins and otherwise failed to properly reflect the impact of the pool agreement; and EVA's estimate of gross margins that AEP-Ohio will earn from June 2012 through May 2015 are overstated by nearly 200 percent. AEP-Ohio argues that, at a minimum, the Commission should conduct an evidentiary hearing on rehearing to evaluate the accuracy of EVA's energy credit compared to actual results. In support of its request, AEP-Ohio proffers that EVA's forecasted energy margins for June 2012 were more than three times higher than the Company's actual margins, resulting in an energy credit that is overstated by $91.52/MW-day, and that provisional data for July 2012 confirms a similar degree of error in EVA's projections.

AEP-Ohio also points out that Staff admitted to significant, inadvertent errors in Staff witness Harter's testimony regarding calculation of the energy credit and that Staff was granted additional time to present the supplemental testimony of Staff witness Medine in an attempt to correct the errors. AEP-Ohio notes that Staff presented three different versions of EVA's calculation of the energy credit, which was revised twice in order to address errors in the calculation. AEP-Ohio asserts that the Commission nevertheless adopted EVA's energy credit without mention of these procedural irregularities. In any event, AEP-Ohio believes that Ms. Medine's testimony only partially and superficially addressed Mr. Harter's errors. According to AEP-Ohio, the Commission should grant the Company's application for rehearing and address the remaining fundamental deficiencies in EVA's methodology in order to avoid a reversal and remand from the Ohio Supreme Court.

(81) FES responds that the Commission already considered and rejected each of AEP-Ohio's arguments. FES adds that there are flaws in the energy credit calculated by AEP-Ohio's own witness and that the Company's criticisms of EVA's approach lack merit.

(82) The Commission finds that AEP-Ohio's assignments of error regarding the energy credit should be denied. First, with respect to EVA's shopping assumption, we find

nothing inappropriate in EVA's use of a static shopping level of 26 percent, which reflects the actual level of shopping in AEP-Ohio's service territory as of March 31, 2012, which was around the time of EVA's analysis. We recognize that the level of shopping will continually fluctuate in both directions. For that reason, we believe that it was appropriate for EVA to use the actual level of shopping as of a recent date, rather than a projection, and find that EVA's figure is a reasonable approximation. EVA's use of a static shopping level provides certainty to the energy credit and capacity rate. The alternative would be to review the level of shopping at regular intervals, an option that would unreasonably necessitate continual recalculations of the energy credit to reflect the shopping level of the moment, while introducing uncertainty into the capacity rate. The Commission also notes that, contrary to AEP-Ohio's assertion, Staff witness Medine did not testify that the energy credit should be adjusted to reflect the current level of shopping. Rather, Ms. Medine testified only that EVA assumed a shopping level of 26 percent, which was the level of shopping as of March 31, 2012, and that this figure was used as a conservative approach.[21]

Regarding the alleged errors in EVA's approach, the Commission notes initially that we explained the basis for our adoption of EVA's energy credit in the Capacity Order, consistent with the requirements of Section 4903.09, Revised Code. A review of the testimony of Staff witnesses Medine and Harter reflects that EVA sufficiently described its methodology, including the fuel costs and heat rates applied in this case; its decision to use zonal prices and forecasted LMP; and its accounting for OSS margins and operation of the pool agreement.[22] We affirm our finding that, as a whole, EVA's energy credit, as adjusted by the Commission, is reasonable. Although AEP-Ohio contends that EVA should have used different inputs in a number of respects, we do not believe that the Company has demonstrated that the inputs actually used by EVA are unreasonable. AEP-Ohio's preference for other inputs that

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21 Tr. X at 2189, 2194; Staff Ex. 105 at 19.

22 Staff Ex. 101 at 6-11, 105 at 4-19.

would result in an outcome more to its liking is not a sufficient ground for rehearing. Neither do we find any relevance in AEP-Ohio's claimed procedural irregularities with respect to EVA's testimony. Essentially, the Commission was presented with two different methodologies for calculating the energy credit, both of which were questioned and criticized by the parties. Overall, the Commission believes that EVA's approach is the more reasonable of the two in projecting AEP-Ohio's future energy margins and that it will best ensure that the Company does not over recover its capacity costs.

Authorized Compensation

(83) OCC argues that the Commission erred in finding that compensation of $188.88/MW-day is an appropriate charge to enable AEP-Ohio to recover its capacity costs for its FRR obligations from CRES providers. OCC notes that there is no evidence to support the Commission's finding, given that no party recommended a charge of $188.88/MW-day. OCC further notes that the Commission adopted AEP-Ohio's unsupported return on equity (ROE), without explanation, in violation of Section 4903.09, Revised Code.

(84) In response to OCC, as well as similar arguments from OMA and OHA, AEP-Ohio asserts that the ROE approved by the Commission is supported by relevant and competent evidence and that the ROE is appropriate for the increased risk associated with generation service. Given the considerable evidence in the record, AEP-Ohio contends that the rationale for the Commission's rejection of Staff's proposed downward adjustment to the Company's proposed ROE is evident.

(85) In the Capacity Order, the Commission explained thoroughly based on the evidence in the record how it determined that $188.88/MW-day is an appropriate capacity charge for AEP-Ohio's FRR obligations. We also explained that we declined to adopt Staff's recommended ROE, given that it was solely based on a stipulated ROE from an unrelated case, and concluded that the ROE proposed by AEP-Ohio was reasonable under the

circumstances in the present case. The evidence of record reflects that AEP-Ohio's proposed ROE is consistent with the ROEs that are in effect for the Company's affiliates for wholesale transactions in other states.[23] Therefore, the requests for rehearing should be denied.

Deferral of Difference Between Cost and RPM

Deferral Authority

(86) IEU-Ohio argues that the Commission is prohibited under Section 4928.05(A), Revised Code, from regulating or otherwise creating a deferral associated with a competitive retail electric service under Section 4905.13, Revised Code, and that the Commission may only authorize a deferral resulting from a phase-in of an SSO rate pursuant to Section 4928.144, Revised Code. IEU-Ohio further notes that, under generally accepted accounting principles (GAAP), only an incurred cost can be deferred for future collection, and not the difference between two rates. IEU-Ohio also asserts that the Commission unreasonably and unlawfully determined that AEP-Ohio might suffer financial harm if it charged RPM-based capacity pricing and established compensation for generation capacity service designed to address the financial performance of the Company's competitive generation business, despite the Commission's prior confirmation that the Company's earnings do not matter for purposes of establishing generation rates.

(87) AEP-Oho asserts that it was unreasonable and unlawful for the Commission to adopt a cost-based SCM and then order the Company to charge CRES providers the lower RPM-based capacity pricing. Specifically, AEP-Ohio contends that it was unreasonable and unlawful to require the Company to charge any price other than $188.88/MW-day, which the Commission established as the just and reasonable cost-based rate. AEP-Ohio argues that the Commission has no statutory authority to require the Company to charge CRES providers less than the cost-

23 Tr. II at 305.

based capacity rate that the Commission determined was just and reasonable.

(88) In its memorandum contra, IEU-Ohio argues that AEP-Ohio assumes that the Commission may act beyond its statutory jurisdiction to set generation rates and that the Commission may unlawfully authorize the Company to collect transition revenue. IEU-Ohio adds that customer choice will be frustrated if the Commission grants the relief requested by AEP-Ohio in its application for rehearing.

(89) The Schools respond that AEP-Ohio should not complain that the Commission lacks authority to order a deferral, given that the Company has refused to accept the ratemaking formula and related process contained in Sections 4909.15, 4909.18, and 4909.19, Revised Code. The Schools add, however, that the Commission has wide discretion to issue accounting orders under Section 4905.13, Revised Code, in cases where the Commission is not setting rates pursuant to Section 4909.15, Revised Code.

(90) RESA and Direct Energy argue that the Commission's approach is consistent with Ohio's energy policy, supported by the record, and reasonable and lawful. RESA and Direct Energy believe that the Commission pragmatically balanced the various competing interests of the parties in establishing a just and reasonable SCM.

(91) Noting that nothing prohibits the Commission from bifurcating the means of recovery of a just and reasonable rate, Duke replies that AEP-Ohio's argument is not well founded, given that the Company will be made whole through the deferral mechanism to be established in the ESP 2 Case.

(92) In the Capacity Order, the Commission authorized AEP-Ohio to modify its accounting procedures to defer the incurred capacity costs not recovered from CRES providers and indicated that a recovery mechanism for the deferred capacity costs would be established in the ESP 2 Case. We find nothing unlawful or unreasonable in this approach. We continue to believe that it appropriately balances our objectives of enabling AEP-Ohio to fully recover its

capacity costs incurred in carrying out its FRR obligations, while encouraging retail competition in the Company's service territory.

The Commission finds no merit in the arguments that we lack the authority to order the deferral. As we noted in the Capacity Order, the Commission relied upon the authority granted to us by Section 4905.13, Revised Code, in directing AEP-Ohio to modify its accounting procedures to defer a portion of its capacity costs. Having found that the capacity service at issue is not a retail electric service and thus not a competitive retail electric service, IEU-Ohio's argument that the Commission may not rely on Section 4905.13, Revised Code, is unavailing. Neither do we find that authorization of the deferral was contrary to GAAP or prior Commission precedent, as IEU-Ohio contends. The requests for rehearing of IEU-Ohio and AEP-Ohio should, therefore, be denied.

Competition

(93) AEP-Ohio contends that it was unreasonable and unlawful for the Commission to require the Company to supply capacity to CRES providers at a below-cost rate to promote artificial, uneconomic, and subsidized competition that is unsustainable and likely to harm customers and the state economy, as well as the Company.

(94) Duke disagrees, noting that the evidence is to the contrary. Duke adds that the other Ohio utilities use RPM-based capacity pricing without causing a flood of unsustainable competition or damage to the economy in the state. FES responds that the deferral authorized by the Commission is an appropriate way to spur real competition and to prevent the chilling effect on competition that would result from above-market capacity pricing. FES contends that there is nothing artificial in allowing customers to purchase capacity from willing sellers at market rates. RESA and Direct Energy agree, noting that the Capacity Order will promote real competition among CRES providers to the benefit of customers.

(95) As the Commission thoroughly addressed in the Capacity Order, we believe that a capacity charge assessed to CRES providers on the basis of RPM pricing will advance the development of true competition in AEP-Ohio's service territory. We do not agree with AEP-Ohio that there is anything artificial in charging CRES providers the same market-based pricing that is used throughout PJM. Lacking any merit, AEP-Ohio's assignment of error should be denied.

Existing Contracts

(96) AEP-Ohio argues that it was unreasonable and unlawful, as well as unnecessary, for the Commission to extend RPM-based pricing to customers that switched to a CRES provider at a capacity price of $255/MW-day. AEP-Ohio asserts that CRES providers will enjoy a significant windfall to the Company's financial detriment. According to AEP-Ohio, the Capacity Order should not apply to existing contracts with a capacity price of $255/MW-day.

(97) Duke responds that AEP-Ohio offers no evidence that these contracts prohibit renegotiation of pricing for generation supply. IEU-Ohio asserts that AEP-Ohio's argument must be rejected because the Company may not charge a rate that has not been authorized by the Commission, and the Company has not demonstrated that it has any valid basis to charge $255/MW-day for capacity supplied to CRES providers. IEU-Ohio adds that there is likewise no basis to conclude that CRES providers will enjoy a windfall, given the fact that the Commission earlier indicated that RPM-based capacity pricing would be restored and such pricing comprised the first tier of the interim capacity pricing mechanism. FES also contends that there is no justification for discriminating against customers formerly charged $255/MW-day for capacity by requiring them to continue to pay above-market rates. RESA and Direct Energy add that customers that were charged $255/MW-day elected to shop with the expectation that they would eventually be charged RPM-based capacity pricing. OMA agrees that customers had a reasonable expectation of RPM-based capacity pricing, regardless of when they elected to shop.

OMA notes that AEP-Ohio's argument is contrary to state policy, which requires that nondiscriminatory retail electric service be available to consumers.

(98) The Commission finds no merit in AEP-Ohio's argument and its request for rehearing should, therefore, be denied. The contracts in question are between CRES providers and their customers, not AEP-Ohio. It is for the parties to each contract to determine whether the contract pricing will be renegotiated in light of the Capacity Order. As between AEP-Ohio and CRES providers, the Company should charge the applicable RPM-based capacity pricing as required by the Capacity Order.

State Policy

(99) IEU-Ohio believes the deferral mechanism is in conflict with the state policy found in Section 4928.02, Revised Code, which generally supports reliance on market-based approaches to set prices for competitive services such as generation service and strongly favors competition to discipline prices of competitive services.

(100) AEP-Ohio asserts that it was unreasonable and unlawful for the Commission to rely on the state policies set forth in Sections 4928.02 and 4928.06(A), Revised Code, as justification for reducing CRES providers' price of capacity to RPM-based pricing, after the Commission determined that Chapter 4928, Revised Code, does not apply to the capacity charge paid by CRES providers to the Company. AEP-Ohio argues that the Commission determined that the chapter is inapplicable to the Company's capacity service but then unreasonably relied upon it anyway.

(101) Duke disagrees, noting that the impact of AEP-Ohio's capacity charge on retail competition in Ohio is an issue for Commission review in this proceeding and that the issue cannot be considered without reference to state policy. IEU-Ohio adds that AEP-Ohio has urged the Commission in this proceeding to rely on the state policy found in Section 4928.02, Revised Code. IEU-Ohio also points out that the Commission is required to apply the state policy in making decisions regarding generation capacity service.

FES contends that, if the Commission has the authority to create a cost-based SCM, then it also has the authority to follow the express guidance of Chapter 4928, Revised Code, and encourage competition through the use of market pricing. RESA and Direct Energy note that Section 4928.02, Revised Code, contains the state's energy policy, parts of which are not limited to retail electric services. RESA and Direct Energy contend that the Capacity Order is consistent with Section 4928.02(C), Revised Code, which requires a diversity of electricity supplies and suppliers.

(102) Initially, the Commission notes that, although we determined that Chapter 4928, Revised Code, has no application in terms of the Commission's authority to establish the SCM, we have made it clear from the outset that one of the objectives in this proceeding was to determine the impact of AEP-Ohio's capacity charge on CRES providers and retail competition in Ohio. The Commission cannot accomplish that objective without reference to the state policy found in Section 4928.02, Revised Code. Further, as the Commission stated in the Capacity Order, we believe that RPM-based capacity pricing is a reasonable means to promote retail competition, consistent with the state policy objectives enumerated in Section 4928.02, Revised Code. We do not agree with IEU-Ohio that the deferral of a portion of AEP-Ohio's capacity costs is contrary to any of the state policy objectives identified in that section. The assignments of error raised by AEP-Ohio and IEU-Ohio should be denied.

Evidentiary Record and Basis for Commission's Decision

(103) OCC contends that there is no evidence in the record that supports or even addresses a deferral of capacity costs and that the Commission, therefore, did not base its decision on facts in the record, contrary to Section 4903.09, Revised Code. OCC also asserts that the Commission erred in authorizing carrying charges based on the weighted average cost of capital (WACC) until such time as a recovery mechanism was approved in the ESP 2 Case.

OCC believes that any carrying charges should be calculated based on AEP-Ohio's long-term cost of debt.

(104) AEP-Ohio responds that OCC's argument is moot. AEP-Ohio explains that the SCM and associated deferral did not take effect until August 8, 2012, which was the date on which the Commission approved a recovery mechanism in the ESP 2 Case, and, therefore, the WACC rate did not apply.

(105) Like OCC, IEU-Ohio contends that the Commission's authorization of carrying charges lacks any supporting evidence in the record and that the carrying charge rates approved are excessive, arbitrary, capricious, and contrary to Commission precedent.

(106) The Commission notes that OCC appears to assert that the Commission may not authorize a deferral unless it has first been proposed by a party to the proceeding. We find no basis for OCC's apparent contention that the Commission may not authorize a deferral on our own initiative. As discussed above, the Commission has the requisite authority pursuant to Section 4905.13, Revised Code. Further, the reasons prompting our decision were thoroughly explained in the Capacity Order and supported with evidence in the record, as reflected in the order. We thus find no violation of Section 4903.09, Revised Code.

Regarding the specific carrying cost rates authorized, the Commission finds that it was appropriate to approve the WACC rate until such time as the recovery mechanism was established in the ESP 2 Case, in order to ensure that AEP-Ohio was fully compensated, and to approve the long-term debt rate from that point forward. As we have noted in other proceedings, once collection of the deferred costs begins, the risk of non-collection is significantly reduced. At that point, it is more appropriate to use the long-term cost of debt rate, which is consistent with sound regulatory practice and Commission precedent.[24] In any event, as

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24 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Each Company's Transmission Cost Recovery Rider*, Case No. 08-1202-EL-UNC, Finding and Order (December 17, 2008); *In the Matter of the Application of Columbus Southern Power Company and Ohio*

AEP-Ohio notes, OCC's argument is moot. Because the SCM took effect on the same date on which the deferral recovery mechanism was approved in the ESP 2 Case, there was no period in which the WACC rate applied. Accordingly, OCC's and IEU-Ohio's assignments of error should be denied.

Recovery of Deferred Capacity Costs

(107) OCC argues that the Commission erred in allowing wholesale capacity costs, which should be the responsibility of CRES providers, to be deferred for potential collection from customers through the Company's rates for retail electric service established as part of its ESP. OCC asserts that the Commission has no jurisdiction to authorize AEP-Ohio to collect wholesale costs for capacity service from retail SSO customers. OCC contends that nothing in either Chapter 4905 or 4909, Revised Code, enables the Commission to authorize a deferral of wholesale capacity costs that are to be recovered by AEP-Ohio through an ESP approved for retail electric service pursuant to Section 4928.143, Revised Code.

(108) IGS responds that OCC's argument should be addressed in the ESP 2 Case, which IGS believes is the appropriate venue in which to determine whether the deferred capacity costs may be collected through an ESP.

(109) OEG argues that the Commission has no legal authority to order future retail customers to repay the wholesale capacity cost obligations that unregulated CRES providers owe to AEP-Ohio. OMA and OHA agree with OEG that the Commission has neither general ratemaking authority nor any specific statutory authority that applies under the circumstances to order the deferral of costs that the utility is authorized to recover, and that retail customers may not lawfully be required to pay the wholesale costs owed by

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Power Company for Authority to Modify Their Accounting Procedure for Certain Storm-Related Services Restoration Costs, Case No. 08-1301-EL-AAM, Finding and Order (December 19, 2008); *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case No. 11-4920-EL-RDR, *et al.*, Finding and Order (August 1, 2012).

CRES providers to AEP-Ohio. OEG contends that the deferral authorized by the Commission will result in future customers paying hundreds of millions of dollars in above-market capacity rates as well as interest on the deferral. According to OEG, CRES providers should pay the full cost-based capacity price of $188.88/MW-day as AEP-Ohio incurs its capacity costs. Noting that shopping occurred in AEP-Ohio's service territory with a capacity charge of $255/MW-day, OEG asserts that the record does not indicate that a capacity charge of $188.88/MW-day will hinder retail competition and, therefore, there is no reason to transfer the wholesale capacity payment obligation from CRES providers to future retail customers.

Alternatively, OEG requests that the Commission clarify that customers that have reasonable arrangements and certify that they did not shop during the three-year ESP period are exempt from repayment of AEP-Ohio's deferred capacity costs; any deferred capacity costs will be allocated and recovered on the same basis as if the CRES providers were charged the full capacity rate in the first place (*i.e.*, on the basis of demand); and the Company is required to reduce any deferred capacity costs by the relevant accumulated deferred income tax during the recovery period so that the interest expense reflects its actual carrying costs. OEG asserts that payment of the deferred capacity costs should be collected only from CRES providers or shopping customers, which are the entities that will have benefitted from the initial RPM-based capacity pricing.

(110) AEP-Ohio and numerous intervenors disagree with OEG's characterization of the Capacity Order as having represented that the deferral is an amount owed by CRES providers to the Company. AEP-Ohio asserts that the Commission clearly indicated that all customers, including customers with reasonable arrangements, should pay for the deferral because they benefit from the opportunity to shop that is afforded by RPM-based capacity pricing. AEP-Ohio offers a similar response to the contentions of OCC and OMA/OHA that the deferral is solely the obligation of CRES providers. AEP-Ohio notes that all customers benefit

from the provided capacity, which was developed or obtained years ago for all connected load based on the Company's FRR obligations. AEP-Ohio argues that, if the Commission does not permit recovery of the deferred capacity costs from retail customers, the deferred amount should be recovered from CRES providers. AEP-Ohio also requests that the Commission create a backstop remedy to ensure that the full deferred amount is collected from CRES providers, in the event the Company is not able to recover the deferred costs from retail customers as a result of an appeal.

In response to arguments that the Commission lacks statutory authority to approve the deferral, AEP-Ohio asserts, as an initial matter, that such arguments should be raised in the ESP 2 Case, because recovery of the deferral is to be addressed in those proceedings. AEP-Ohio adds that the Commission explained in the Capacity Order that it may authorize an accounting deferral, pursuant to Section 4905.13, Revised Code, and also noted, in the ESP 2 Case, that it may order a just and reasonable phase-in, pursuant to Section 4928.144, Revised Code, for rates established under Section 4928.141, 4928.142, or 4928.143, Revised Code.

(111) FES responds to OEG that the only amount that AEP-Ohio can charge CRES providers for capacity is the RPM-based price and that the deferral does not reflect any cost obligation on the part of CRES providers. FES adds that the deferral authorized by the Commission is an above-market subsidy intended to provide financial benefits to AEP-Ohio and that should thus be paid for by all of the Company's customers, if it is maintained as part of the SCM. FES also asserts that OEG's argument regarding the Commission's lack of statutory authority to order the deferral is flawed, because the Commission's authority to establish the SCM is not based on Chapter 4909, Revised Code, but rather on the RAA.

(112) RESA agrees with FES that the deferred amount is not owed by CRES providers and that the Commission clearly indicated that CRES providers should only be charged RPM-based capacity pricing. RESA notes that, practically

speaking, the deferral authorized by the Commission is the only way in which to maintain RPM-based capacity pricing in AEP-Ohio's service territory, while also ensuring the Company recovers its embedded costs until corporate separation occurs. RESA adds that all customers should pay for the deferral, because all customers have the opportunity to shop and receive the benefit of the RPM-based capacity pricing. RESA contends that the fact that some level of competition may still occur is not justification alone to charge CRES providers $188.88/MW-day. According to RESA, the Commission has the necessary authority to establish the deferral and design the SCM as it did.

(113) According to Duke, OEG misconstrues the nature of a deferral. Duke points out that OEG incorrectly characterizes the deferral as an amount owed to the FRR Entity, rather than an amount reflecting costs incurred but not recovered. Duke also notes that the Commission has specifically directed that CRES providers not be charged more than the RPM-based price. Duke argues that the deferred amount is, therefore, not the obligation of CRES providers. Duke disagrees with OEG's argument that the Commission has no authority to authorize a deferral, noting that, although the Ohio Supreme Court has held that the Commission must fix rates that will provide a utility with appropriate annual revenues, it has not determined that the Commission is barred from ordering a deferral.

(114) The Schools contend that collection of the deferral from CRES providers or customers would cause Ohio's schools serious financial harm. The Schools believe that CRES providers may pass the increase through to their shopping customers under existing contracts or terminate the contracts altogether. The Schools add that, pursuant to AEP-Ohio's proposal for a retail stability rider (RSR) in the ESP 2 Case, the capacity charge adopted by the Commission in this case could result in an increase to the RSR of approximately $550 million, which could lead to rate shock for Ohio's schools.

(115) OMA and OHA contend that the authorized deferral is so large that it will substantially harm customers. They assert that, if AEP-Ohio's shopping projections come to fruition, the amount of the deferral will be approximately $726 million, plus carrying charges, which renders the capacity charge unjust and unreasonable, contrary to Section 4905.22, Revised Code. OMA and OHA conclude that, on rehearing, the Commission should revoke the deferral authority granted to AEP-Ohio or, at a minimum, find that Staff's recommended ROE is reasonable and reduce the cost of the Company's capacity charge by $10.09/MW-day.

(116) AEP-Ohio replies that the arguments of the Schools and OMA and OHA regarding the size and impact of the deferral are premature and speculative, given that their projections are based on a number of variables that are uncertain, such as future energy prices, future shopping levels, and the ultimate outcome in the ESP 2 Case.

(117) FES asserts that, if AEP-Ohio is permitted to recover its full embedded costs, the Commission should clarify that the deferral recovery mechanism is nonbypassable because the excess cost recovery serves only as a subsidy to the Company and, therefore, all of its customers should be required to pay for it. FES believes that a nonbypassable recovery mechanism is necessary to fulfill the Commission's goal of promoting competition. FES also asserts that the Commission should recognize AEP-Ohio's impending corporate separation and direct that the SCM will remain in place only until January 1, 2014, or transfer of the Company's generating assets to its affiliate, in order to avoid an improper cross-subsidy to a competitive, unregulated supplier.

(118) OEG asserts that FES mischaracterizes the Capacity Order in describing the deferral as an above-market subsidy. OEG also contends that the SCM established by the Commission does not consist of a wholesale market-based charge and a cost-based retail charge, as FES believes. According to OEG, the Capacity Order explicitly states that $188.88/MW-day is an appropriate charge to enable AEP-Ohio to recover its capacity costs for its FRR obligations from CRES providers. OEG also notes that the RAA does

not permit capacity costs to be recovered from non-shopping customers pursuant to the SCM. Because the Commission established a wholesale cost-based capacity charge of $188.88/MW-day, OEG believes that the charge must be paid by CRES providers. OEG argues that state law does not authorize the Commission to assess a wholesale charge directly to shopping customers. OEG concludes that the SCM can only apply to CRES providers and that the Commission has no authority to direct that deferred capacity costs be recovered on a nonbypassable basis. OCC agrees with the arguments made by OEG and notes that there is no statutory basis upon which the Commission may order recovery of the deferred capacity costs from all customers under the provisions of an ESP.

(119) OCC also argues that FES' argument for a nonbypassable cost recovery mechanism should be rejected because CRES providers should be responsible for paying capacity costs. OCC notes that, if a wholesale charge applies to retail customers, the result will be unfair competition, double payments, and discrimination in violation of Sections 4905.33, 4905.35, 4928.02(A), 4928.02(L), and 4928.141, Revised Code. OCC argues that non-shopping customers should not have to pay for an anticompetitive subsidy for the sake of competition, which is contrary to Section 4928.02(H), Revised Code. OCC also disagrees with FES' characterization of the Capacity Order as providing a subsidy to AEP-Ohio. According to OCC, there can be no subsidy where AEP-Ohio is receiving compensation for its cost of capacity, as determined by the Commission.

(120) IEU-Ohio also urges the Commission to reject FES' request for clarification and argues that an unlawful and unreasonable charge cannot be made lawful and reasonable simply by making it a nonbypassable charge.

(121) AEP-Ohio argues, in response to FES, that it is lawful and reasonable to continue recovery of the deferral after corporate separation occurs. AEP-Ohio notes that the Commission already rejected FES' arguments in the ESP 2 Case. AEP-Ohio notes that, because its generation affiliate will be obligated to support SSO service through the

provision of adequate capacity and energy, it is appropriate that the affiliate receive the associated revenues.

(122) IEU-Ohio asserts that the Capacity Order does not ensure comparable and non-discriminatory capacity rates for shopping and non-shopping customers, contrary to Sections 4928.02(B), 4928.15, and 4928.35(C), Revised Code. According to IEU-Ohio, the Commission must recognize that AEP-Ohio has maintained that non-shopping customers are, on average, paying nearly twice the $188.88/MW-day price for generation capacity service. IEU-Ohio contends that the Commission must eliminate the excessive compensation embedded in the SSO or credit the amount of such compensation above $188.88/MW-day against any amount deferred based on the difference between RPM-based capacity pricing and $188.88/MW-day. IEU-Ohio also believes that the Commission's approval of an above-market rate for generation capacity service will unlawfully subsidize AEP-Ohio's competitive generation business by allowing the Company to recover competitive generation costs through its noncompetitive distribution rates, which is contrary to Section 4928.02(H), Revised Code.

(123) Similarly, OCC argues that both shopping and non-shopping customers will be forced to pay twice for capacity in violation of Sections 4928.141, 4928.02(A), and 4928.02(L), Revised Code, and that non-shopping customers will pay more for capacity than shopping customers in violation of Sections 4928.141, 4928.02(A), 4905.33, and 4905.35, Revised Code. OCC believes that, if the deferral is collected from retail customers, the Commission will have granted an unlawful and anticompetitive subsidy to CRES providers in violation of Section 4928.02(H), Revised Code.

(124) In response to OCC, IGS replies that the Capacity Order does not result in a subsidy to CRES providers. IGS notes that the capacity compensation authorized by the Commission is for AEP-Ohio, not CRES providers.

(125) The Commission notes that several of the parties have spent considerable effort in addressing the mechanics of

the deferral recovery mechanism, such as whether CRES providers or retail customers should be responsible for payment of AEP-Ohio's deferred capacity costs, whether such costs should be paid by non-shopping customers as well as shopping customers, and whether the deferral results in subsidies or discriminatory pricing between non-shopping and shopping customers. We find that all of these arguments were prematurely raised in this case. The Capacity Order did not address the deferral recovery mechanism. Rather, the Commission merely noted that an appropriate recovery mechanism would be established in the ESP 2 Case and that any other financial considerations would also be addressed by the Commission in that case. The Commission finds it unnecessary to address arguments that were raised in this proceeding merely as an attempt to anticipate the Commission's decision in the ESP 2 Case. Accordingly, the requests for rehearing or clarification should be denied.

Process

(126) AEP-Ohio asserts that it was unreasonable and unlawful for the Commission to authorize the Company to collect only RPM-based pricing and require deferral of expenses up to $188.88/MW-day without simultaneously providing for recovery of the shortfall. AEP-Ohio argues that the Commission's decision to establish an appropriate recovery mechanism for the deferral in the ESP 2 Case rather than in the present case was unreasonable, because the two proceedings involve unrelated issues and each will be subject to a separate rehearing and appeal process.

(127) OCC agrees that the Commission's decision to address the issue of recovery of the deferral in the ESP 2 Case was unreasonable and unlawful. OCC argues that there is no evidence in the ESP 2 Case related to an appropriate recovery mechanism, which is a separate and distinct proceeding, and that it was particularly unreasonable to defer the issue for decision just one week prior to the filing of reply briefs in the ESP 2 Case.

(128) IGS disagrees with OCC and argues that the Commission's decision to address the deferral in the ESP 2 Case was not unreasonable. IGS points out that the Commission has discretion to decide how to manage its dockets and that it should consider the deferral in the context of AEP-Ohio's total package of rates, which is at issue in the ESP 2 Case.

(129) Constellation and Exelon respond that AEP-Ohio's argument is contrary to its position in September 2011, when the Company sought to consolidate this case and the ESP 2 Case for the purpose of hearing in light of related issues. Duke agrees that AEP-Ohio has invited the review of one issue in multiple dockets and adds that the Commission is required to consider the deferral mechanism in the ESP 2 Case.

(130) RESA and Direct Energy argue that there is no statute or rule that requires the Commission to establish a deferral and corresponding recovery mechanism in the same proceeding. They add that, because recovery of the deferral will require an amendment to AEP-Ohio's retail tariffs, the proper forum to establish the recovery mechanism is the ESP 2 Case.

(131) Additionally, the Schools argue that the Capacity Order is unlawful, because the Commission failed to follow the traditional ratemaking formula and related processes prescribed by Sections 4909.05, 4909.15, 4909.18, and 4909.19, Revised Code. The Schools add that neither Section 4905.22, Revised Code, nor the Commission's general supervisory authority contained in Sections 4905.04, 4905.05, and 4905.06, Revised Code, authorizes the Commission to establish cost-based rates. FES and IEU-Ohio raise similar arguments.

(132) AEP-Ohio responds that arguments that the Commission and the Company were required to conduct a traditional base rate case, following all of the procedural and substantive requirements in Chapter 4909, Revised Code, relevant to applications for an increase in rates, are without support, given that the Commission was acting under its general supervisory authority found in Sections 4905.04, 4905.05, and 4905.06, Revised Code, and pursuant to

Section D.8 of Schedule 8.1 of the RAA. AEP-Ohio asserts that the adjudicatory process used by the Commission was more than sufficient, consisting of extensive discovery, written and oral testimony, cross-examination, presentation of evidence through exhibits, and briefs. AEP-Ohio adds that, even if the ratemaking requirements were strictly applicable, the Commission could have determined that these proceedings involve a first filing of rates for a service not previously addressed in a Commission-approved tariff, pursuant to Section 4909.18, Revised Code. AEP-Ohio argues that the process adopted by the Commission in this case far exceeded the requirements for a first filing.

(133) IEU-Ohio argues that the Commission failed to restore RPM-based capacity pricing, as required by Section 4928.143(C)(2)(b), Revised Code, due to its rejection of the ESP 2 Stipulation. IEU-Ohio contends that the Commission was required to restore the prior provisions, terms, and conditions of AEP-Ohio's prior SSO, including RPM-based capacity pricing, until such time as a new SSO was authorized for the Company.

On a related note, IEU-Ohio asserts that, because the Commission was obligated to restore RPM-based capacity pricing upon rejection of the ESP 2 Stipulation, the Commission should have directed AEP-Ohio to refund all revenue collected above RPM-based capacity pricing, or at least to credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges. AEP-Ohio responds that the Commission has recently rejected similar arguments in other proceedings.

(134) Upon review of the parties' arguments, the Commission finds that rehearing should be denied. The Commission believes that the process followed in this proceeding has been proper and well within the bounds of our discretion. As the Ohio Supreme Court has recognized, the Commission is vested with broad discretion to manage its dockets so as to avoid undue delay and the duplication of effort, including the discretion to decide how, in light of its internal organization and docket considerations, it may

best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort.[25] We, therefore, find no error in our decision to address the recovery mechanism for the deferral in the ESP 2 Case, as a means to effectively consider how the deferral recovery mechanism would fit within the mechanics of AEP-Ohio's ESP.

Additionally, we find no merit in the various arguments that the Commission or AEP-Ohio failed to comply with Chapters 4905 and 4909, Revised Code. This proceeding is not a traditional rate case requiring an application from AEP-Ohio under Section 4909.18, Revised Code. Rather, this proceeding was initiated by the Commission in response to AEPSC's FERC filing for the purpose of reviewing the capacity charge associated with AEP-Ohio's FRR obligations. As clarified above, the Commission's initiation of this proceeding was consistent with Section 4905.26, Revised Code, which requires only that the Commission hold a hearing and provide notice to the applicable parties. The Commission has fully complied with the requirements of the statute. We also note that the Ohio Supreme Court has recognized that Section 4905.26, Revised Code, enables the Commission to change a rate or charge, without compelling the public utility to apply for a rate increase pursuant to Section 4909.18, Revised Code.[26]

Finally, the Commission does not agree with IEU-Ohio's arguments that the rejection of the ESP 2 Stipulation necessitated the restoration of RPM-based capacity pricing until such time as a new SSO was authorized for AEP-Ohio, or that the Company should have been directed to refund any revenue collected above RPM-based capacity pricing. As addressed elsewhere in this entry on rehearing, the Commission finds that we have the requisite authority to modify the SCM and the rejection of the ESP 2 Stipulation has no bearing on that authority.

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25 *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982).

26 *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006).

Constitutional Claims

(135) AEP-Ohio argues that the SCM, particularly with respect to the energy credit adopted by the Commission, is unconstitutionally confiscatory and constitutes an unconstitutional taking of property without just compensation, given that the energy credit incorporates actual costs for the test period and then imputes revenues that have no basis in actual costs. AEP-Ohio points out that the Commission has recognized that traditional constitutional law questions are beyond its authority to determine; however, the Company raises the arguments so as to preserve its rights on appeal.

(136) In its memorandum contra, OMA argues that the Capacity Order does not result in confiscation or an unconstitutional taking and that AEP-Ohio has not made the requisite showing for either claim. IEU-Ohio responds that neither the applicable law nor the record or non-record evidence cited by AEP-Ohio supports the Company's claims. FES points out that FERC has determined that RPM-based capacity pricing is just and reasonable and, therefore, such pricing is not confiscatory or a taking without just compensation. The Schools argue that AEP-Ohio's constitutional issues would be avoided if the Commission were to recognize that capacity service is a competitive generation service and that market-based rates should apply. The Schools also note that AEP-Ohio, in making its partial takings claim, relies on extra-record evidence from the ESP 2 Case and that the Company's reference to such evidence should be stricken. OCC argues that the Commission does not have jurisdiction to resolve constitutional claims and that, in any event, AEP-Ohio's arguments are without merit and should be denied.

(137) IEU-Ohio also asserts a constitutional claim, specifically contending that the Capacity Order unreasonably impairs the value of contracts entered into between CRES providers and customers under a justified assumption that RPM-based capacity pricing would remain in effect. IEU-Ohio believes that the capacity pricing adopted in the Capacity Order should not apply to such contracts.

(138) AEP-Ohio replies that it is noteworthy that neither the intervenors that are actually parties to the contracts nor OCC seeks rehearing on this issue. AEP-Ohio further notes that IEU-Ohio identifies no specific contract that has allegedly been unconstitutionally impaired. According to AEP-Ohio, the lack of any such contract in the record is fatal to IEU-Ohio's impairment claim. AEP-Ohio adds that customers and CRES providers have long been aware that the Commission was in the process of establishing an SCM that might be based on something other than RPM pricing. Finally, AEP-Ohio points out that IEU-Ohio makes no attempt to satisfy the test used to analyze impairment claims.

(139) The Commission agrees that it is the province of the courts, and not the Commission, to judge constitutional claims. As the Ohio Supreme Court is the appropriate forum for the constitutional challenges raised by AEP-Ohio and IEU-Ohio, they will not be considered here.

Transition Costs

(140) IEU contends that the Commission, in approving an above-market rate for generation capacity service, authorized AEP-Ohio to collect transition revenue or its equivalent, contrary to Section 4928.40, Revised Code, and the stipulation approved by the Commission in the Company's electric transition plan case. AEP-Ohio responds that this argument has already been considered and rejected by the Commission.

(141) As previously discussed, the Commission does not believe that AEP-Ohio's capacity costs fall within the category of transition costs. Section 4928.39, Revised Code, defines transition costs as costs that, among meeting other criteria, are directly assignable or allocable to retail electric generation service provided to electric consumers in this state. As we have determined, AEP-Ohio's provision of capacity to CRES providers is not a retail electric service as defined by Section 4928.01(A)(27), Revised Code. It is a wholesale transaction between AEP-Ohio and CRES

providers. IEU-Ohio's request for rehearing should thus be denied.

Peak Load Contribution (PLC)

(142) IEU-Ohio contends that the Commission unlawfully and unreasonably failed to ensure that AEP-Ohio's generation capacity service is charged in accordance with a customer's PLC factor that is the controlling billing determinant under the RAA. IEU-Ohio argues that AEP-Ohio should be required to disclose publicly the means by which the PLC is disaggregated from AEP East down to AEP-Ohio and then down to each customer of the Company. IEU-Ohio adds that calculation of the difference between RPM-based capacity pricing and $188.88/MW-day will require a transparent and proper identification of the PLC.

(143) The Commission notes that IEU-Ohio is the only party that has identified or even addressed the PLC factor as a potential issue requiring resolution in this proceeding. Additionally, the Commission finds that IEU-Ohio has not provided any indication that there are inconsistencies or errors in capacity billings. In the absence of anything other than IEU-Ohio's mere conclusion that the issue requires the Commission's attention, we find no basis upon which to consider the issue at this time. If IEU-Ohio believes that billing inaccuracies have occurred, it may file a complaint pursuant to Section 4905.26, Revised Code. Therefore, IEU-Ohio's request for rehearing should be denied.

Due Process

(144) IEU-Ohio argues that the totality of the Commission's actions during the course of this proceeding violated IEU-Ohio's due process rights under the Fourteenth Amendment. Specifically, IEU-Ohio believes that the Commission has repeatedly granted applications for rehearing, indefinitely tolling them to prevent parties from taking an unobstructed appeal to the Ohio Supreme Court; repeatedly granted AEP-Ohio authority to temporarily impose various forms of its two-tiered, shopping-blocking capacity charges without record support; failed to address

major issues raised by parties in violation of Section 4903.09, Revised Code; authorized a deferral mechanism without record support and then addressed the details of the deferral mechanism in a separate proceeding where the evidentiary record had already closed; and authorized carrying charges on the deferral at the WACC rate without record support. AEP-Ohio responds that the various due process arguments raised by IEU-Ohio are generally misguided.

(145) In a similar vein, IEU-Ohio contends that the Commission violated Section 4903.09, Revised Code, in that it failed to address all of the material issues raised by IEU-Ohio, including its arguments related to transition revenue; PLC transparency; non-comparability and discrimination in capacity rates; the Commission's lack of jurisdiction to use cost-based ratemaking to increase rates for generation service or through the exercise of general supervisory authority; the anticompetitive subsidy resulting from AEP-Ohio's above-market capacity pricing; and the conflict between the Company's cost-based ratemaking proposal and the plain language of the RAA. AEP-Ohio disagrees, noting that the Commission has already responded to IEU-Ohio's arguments on numerous occasions and has done so in compliance with Section 4903.09, Revised Code.

(146) The Commission again finds no merit in IEU-Ohio's due process claim. This proceeding was initiated by the Commission for the purpose of reviewing AEP-Ohio's capacity charge for its FRR obligations. From the beginning, IEU-Ohio was afforded the opportunity to participate, and did participate, in this proceeding, including the evidentiary hearing. Contrary to IEU-Ohio's claims, the Commission has, at no point, intended to delay this proceeding, but has rather proceeded carefully to establish a thorough record addressing the SCM and AEP-Ohio's capacity costs. Additionally, as discussed throughout this entry on rehearing, the Commission was well within its authority to initiate and carry out its investigation of AEP-Ohio's capacity charge in this proceeding. We find no merit in IEU-Ohio's claim that we acted without evidence in the record. The evidence in this

proceeding is quite extensive, consisting of considerable testimony and exhibits submitted in this proceeding, as well as the consolidated cases. Finally, we do not agree that we have failed to address any of the material issues in violation of Section 4903.09, Revised Code. The Commission believes that the findings of fact and written opinion found in the Capacity Order provide a sufficient basis for our decision. The Commission concludes that we have appropriately explained the basis for each of our orders in this case based on the evidence of record and that IEU-Ohio has been afforded ample process. Its request for rehearing should be denied.

Pending Application for Rehearing

(147) AEP-Ohio argues that it was unreasonable and unlawful for the Commission to fail to address in the Capacity Order the merits of the Company's application for rehearing of the Initial Entry.

(148) In light of the fact that the Commission has addressed AEP-Ohio's application for rehearing of the Initial Entry in this entry on rehearing, we find that the Company's assignment of error is moot and should, therefore, be denied.

It is, therefore,

ORDERED, That OEG's motion for leave to reply filed on August 7, 2012, be denied. It is, further,

ORDERED, That the applications for rehearing of the Initial Entry, Interim Relief Entry, and Capacity Order be granted, in part, and denied, in part, as set forth herein. It is, further,

ORDERED, That the applications for rehearing of the Interim Relief Extension Entry be denied. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

SJP/sc

Entered in the Journal
OCT 17 2012
Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC

CONCURRING OPINION
OF COMMISSIONER ANDRE T. PORTER

I concur with the majority on the reasoning and result on all issues addressed in this opinion and entry on rehearing except to the extent that my May 30, 2012 statement stands.

Andre T. Porter

ATP/sc

Entered in the Journal
OCT 17 2012

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC

CONCURRING AND DISSENTING OPINION
OF COMMISSIONER CHERYL L. ROBERTO

I dissent from the findings and conclusions in the following paragraphs of the rehearing order: 71, 92, 95,98, 102, 106, 125, and 134.

As I have expressed previously, to the extent that the Commission has authority to determine capacity costs it is because these costs compensate noncompetitive retail electric service. Chapter 4928, Revised Code, defines "retail electric service" to mean any service involved in the supply or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For purposes of Chapter 4928, Revised Code, retail electric service includes, among other things, transmission service.[1] As discussed, *supra*, AEP-Ohio is the sole provider of the Fixed Resource Requirement service for other transmission users operating within its footprint until the expiration of its obligation on June 1, 2015. As such, this service is a "noncompetitive retail electric service" pursuant to Sections 4928.01(A)(21) and 4928.03, Revised Code. This Commission is empowered to set rates for noncompetitive retail electric services. While PJM could certainly propose a tariff for FERC adoption directing PJM to establish a compensation method for Fixed Resource Requirement service, it has opted not to do so in favor of a state compensation method when a state chooses to establish one. When this Commission chooses to establish a state compensation method for a noncompetitive retail electric service, the adopted rate must be just and reasonable based upon traditional cost-of-service principles.

This Commission previously established a state compensation method for AEP-Ohio's Fixed Resource Requirement service within AEP-Ohio's initial ESP. AEP-Ohio received compensation for its Fixed Resource Requirement service through both the provider of last resort charges to certain retail shopping customers and a capacity charge levied on competitive retail providers that was established by the three-year

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1 Section 4928.01(A)(27), Revised Code.

capacity auction conducted by PJM.[2] Since the Commission adopted this compensation method, the Ohio Supreme Court reversed the authorized provider of last resort charges,[3] and the auction value of the capacity charges has fallen precipitously, as has the relative proportion of shoppers to non-shoppers.

I agree with the majority that the Commission is empowered pursuant to its general supervisory authority found in Sections 4905.04, 4905.05, and 4905.06, Revised Code to establish an appropriate rate for the Fixed Resource Requirement service. I also agree that pursuant to regulatory authority under Chapter 4905, Revised Code, as well as Chapter 4909, Revised Code a cost-based compensation method is necessary and appropriate. Additionally, I find that because the Fixed Resource Requirement is a noncompetitive retail electric service, the Commission must establish the appropriate rate based upon traditional cost of service principles. Finally, I find specific authority within Section 4909.13, Revised Code, for a process by which the Commission may cause further hearings and investigations and may examine into all matters which may change, modify, or affect any finding of fact previously made. Given the change in circumstances since the Commission adopted the initial state compensation for AEP-Ohio's Fixed Resource Requirement service, it is appropriate for the Commission to revisit and adjust that rate to reflect current circumstances.

Additionally, I continue to find that the "deferral" is unlawful and inappropriate. In prior cases, this Commission has levied a rate or tariff on a group of customers but deferred collection of revenues due from that group until a later date. In this instance, the majority proposes to establish a rate for the Fixed Resource Requirement service provided by AEP-Ohio to other transmission users but then to discount that rate such that the transmission users will never pay it. The difference between the authorized rate and that paid by the other transmission users will be booked for future payment not by the transmission users but by retail electricity customers. The stated purpose of this device is to promote competition.

As an initial matter, I am not convinced on the record before us that competition has suffered sufficiently or will suffer sufficiently during the remaining

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2 *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Opinion and Order (March 18, 2009), Entry on Rehearing (July 23, 2009); *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry (December 8, 2010).

3 *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).

term of the Fixed Resource Requirement as the result of the state compensation method to warrant intervention in the market. If it did, the Commission could consider regulatory options such as shopping credits granted to the consumers to promote consumer entry into the market. With more buyers in the market, in theory, more sellers should enter and prices should fall. The method selected by the majority, however, attempts to entice more sellers to the market by offering a significant, no-strings-attached, unearned benefit. This policy choice operates on faith alone that sellers will compete at levels that drop energy prices while transferring the unearned discount to consumers. If the retail providers do not pass along the entirety of the discount, then consumers will certainly and inevitably pay twice for the discount today granted to the retail suppliers. To be clear, unless every retail provider disgorges 100 percent of the discount to consumers in the form of lower prices, shopping consumers will pay more for Fixed Resource Requirements service than the retail provider did. This represents the first payment by the consumer for the service. Then the deferral, with carrying costs, will come due and the consumer will pay for it all over again --plus interest.

I find that that the mechanism labeled a "deferral" in the majority opinion is an unnecessary, ineffective, and costly intervention into the market for which no authority exists and that I cannot support.

To the extent that these issues were challenged in rehearing, I would grant rehearing.

Cheryl L. Roberto

CLR/sc

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