

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING
OF THE JANUARY 30, 2013 ENTRY ON REHEARING
AND MEMORANDUM IN SUPPORT
BY INDUSTRIAL ENERGY USERS-OHIO**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	4
II. ARGUMENT	5
A. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Rate Stability Rider (“RSR”) under Section 4928.143(B)(2)(d), Revised Code.	5
1. Section 4928.143(B)(2)(d), Revised Code, does not provide the Commission authority to authorize a non-bypassable rider to bill and collect generation-related revenue.	6
2. The Commission’s determination that the RSR will result in a non-fuel base generation rate freeze is not legally sufficient to support the Commission’s authorization of the RSR under Section 4928.143(B)(2)(d), Revised Code.....	7
3. The Commission’s determination that the RSR is authorized by Section 4928.143(B)(2)(d), Revised Code, because it provides certain and fixed rates is not supported by the manifest weight of the evidence.	8
4. The Commission may not lawfully approve a rider such as the RSR that renders the modified ESP less favorable in the aggregate than a Market Rate Offer (“MRO”).	10
B. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Pool Termination Rider (“PTR”) under Section 4928.143(B)(2)(d), Revised Code.....	12
1. The Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue under Section 4928.143(B)(2)(d), Revised Code.	14
2. The Commission has not made the required findings that support the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code.....	14
3. The Commission’s determination that the PTR will result in the recovery of wholesale generation revenue through a non-bypassable charge results in a violation of the State Energy Policy stated in Section 4928.02(H), Revised Code, and the requirements for corporate separation under Section 4928.17, Revised Code.....	16

C. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes the deferral of revenue in excess of a 12% rate cap, fails to identify the incurred costs that may be deferred, and fails to identify the carrying charges that apply to the deferred amount.....	18
III. CONCLUSION.....	23

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ON REHEARING BY INDUSTRIAL ENERGY USERS-OHIO**

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Entry on Rehearing issued by the Public Utilities Commission of Ohio ("Commission") on January 30, 2013 ("January 30 Entry on Rehearing") for the following reasons:

- A. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Rate Stability Rider ("RSR") under Section 4928.143(B)(2)(d), Revised Code.**
- 1. Section 4928.143(B)(2)(d), Revised Code, does not provide the Commission authority to authorize a non-bypassable rider to bill and collect generation-related revenue.**
 - 2. The Commission's determination that the RSR will result in a non-fuel base generation rate freeze is not legally sufficient to support the Commission's authorization of the RSR under Section 4928.143(B)(2)(d), Revised Code.**

3. The Commission's determination that the RSR is authorized by Section 4928.143(B)(2)(d), Revised Code, because it provides certain and fixed rates is not supported by the manifest weight of the evidence.
 4. The Commission may not lawfully approve a rider such as the RSR that renders the modified Electric Security Plan ("ESP") less favorable in the aggregate than a Market Rate Offer ("MRO").
- B. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Pool Termination Rider ("PTR") under Section 4928.143(B)(2)(d), Revised Code.
1. The Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue under Section 4928.143(B)(2)(d), Revised Code.
 2. The Commission has not made the required findings that support the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code.
 3. The Commission's determination that the PTR will result in the recovery of wholesale generation revenue through a non-bypassable charge results in a violation of the State Energy Policy stated in Section 4928.02(H), Revised Code, and the requirements for corporate separation under Section 4928.17, Revised Code.
- C. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes the deferral of revenue in excess of a 12% rate cap, fails to identify the incurred costs that may be deferred, and fails to identify the carrying charges that apply to the deferred amount.

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE APPLICATION FOR
REHEARING OF THE JANUARY 30, 2013 ENTRY ON REHEARING BY
INDUSTRIAL ENERGY USERS-OHIO**

I. INTRODUCTION

On August 8, 2012, the Commission issued its Opinion and Order modifying and approving AEP-Ohio's¹ March 30, 2012 modified ESP application. In the Opinion and Order, the Commission substantially increased the amount of revenue that AEP-Ohio recovers through the non-bypassable RSR and provided AEP-Ohio with authorization to seek to increase its non-bypassable charges more in the future. In the January 30 Entry on Rehearing, the Commission had an opportunity to ratchet back AEP-Ohio's unlawful revenue recovery. While the Commission granted rehearing to address several unlawful provisions of the ESP authorized in the August 8, 2012 Opinion and

¹ AEP-Ohio is used to designate the electric distribution utility ("EDU") resulting from the merger of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP").

Order, it reaffirmed on alternative grounds the decisions it had previously made to increase AEP-Ohio's revenue claims from shopping and non-shopping customers. Because these new grounds on which the January 30 Entry on Rehearing relies are also unlawful, the Commission should grant rehearing to prevent AEP-Ohio from recovering now and in the future rates and charges that are unlawful and unreasonable.

II. ARGUMENT

A. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Rate Stability Rider ("RSR") under Section 4928.143(B)(2)(d), Revised Code.

In the modified ESP Application filed March 30, 2012, AEP-Ohio sought an RSR. In a demonstration of the calculation for the RSR based on a target return on equity of 10.5%, it claimed that the RSR should generate total revenue of \$284.1 million during the term of the ESP. In the Opinion and Order, the Commission modified and approved an RSR that increased the total revenue AEP-Ohio may recover to \$508 million as a "revenue target."² IEU-Ohio and others challenged the Commission's authorization of the RSR on both its legal and factual foundations.³

In its January 30 Entry on Rehearing, the Commission granted rehearing to clarify the basis for its finding that the RSR was authorized by Section 4928.143(B)(2)(d), Revised Code. In its Entry on Rehearing, the Commission stated:

[T]he RSR is indeed a charge, meeting the first component of the statute. ...The RSR, as we specified in our Opinion and Order, freezes non-fuel generation rates throughout the term of the ESP, allowing all standard service offer customers to have rate certainty throughout the term of the ESP that would not have occurred absent the RSR. As a SSO is the default service plan for AEP-Ohio customers who choose not to shop, the RSR meets the second inquiry of the statute as it provides a charge

² Opinion and Order at 33 (Aug. 8, 2012) ("Opinion and Order").

³ IEU-Ohio does not waive any of its prior assignments of error concerning the RSR.

related to default service. Finally, as we discussed in extensive detail in our Opinion and Order, the RSR promotes stable retail electric service prices by stabilizing base generation costs at their current rates, ensuring customers have certain and fixed rates going forward.⁴

Thus, the Commission has claimed authority to approve a non-bypassable rider pursuant to Section 4928.143(B)(2)(d), Revised Code, on the assertion that the RSR provides price certainty as it relates to default Standard Service Offer (“SSO”) service.

1. Section 4928.143(B)(2)(d), Revised Code, does not provide the Commission authority to authorize a non-bypassable rider to bill and collect generation-related revenue.

The Commission summarily dismissed all arguments regarding its legal authority to approve a non-bypassable RSR in its January 30 Entry on Rehearing.⁵ The Commission’s clarification that Section 4928.143(B)(2)(d), Revised Code, however, again violates the limited authority the Commission has to authorize a non-bypassable rider to collect generation-related revenue. The Commission may authorize a provision of an ESP only if it fits within one of the provisions of Section 4928.143(B)(2), Revised Code.⁶ Only divisions (b) and (c) authorize a generation-related non-bypassable charge under narrowly defined circumstances. A non-bypassable charge under (B)(2)(b) or (c) is only available to recover costs associated with generating facilities under construction or constructed after 2009 that meet additional statutory requirements. The RSR is not designed to recoup the costs of a generating facility under construction or newly built

⁴ Entry on Rehearing at 15-16 (Jan. 30, 2013) (“January 30 Entry on Rehearing”).

⁵ *Id.* at 16 (“all other assignments of error pertaining to statutory authority for the creation of the RSR are denied”).

⁶ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-20 (2011).

after 2009. Therefore, there is no basis under Section 4928.143(B)(2), Revised Code, to approve the RSR as a non-bypassable charge.

2. The Commission's determination that the RSR will result in a non-fuel base generation rate freeze is not legally sufficient to support the Commission's authorization of the RSR under Section 4928.143(B)(2)(d), Revised Code.

In order to authorize a rider under Section 4928.143(B)(2)(d), Revised Code, the Commission must find that the rider relates to:

Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

According to the Commission, the RSR “freezes” non-fuel base generation rates and results in price certainty.⁷ The Commission’s conclusion that the RSR “freezes” non-fuel base generation rates so as to provide price stability or certainty, however, is not sufficient to authorize the rider.

Section 4928.143(B)(2)(d), Revised Code, requires that “retail electric service” be made more stable or certain. “Retail electric service” is defined to mean the physical “supplying or arranging for the supply of electricity to ultimate customers in this state, from the point of generation to the point of consumption.”⁸ Thus, the Commission may authorize a term, condition, or charge that makes the physical supply of retail electric service more stable or certain. If the General Assembly had intended the phrase “as would have the effect of stabilizing or providing certainty regarding retail electric service”

⁷ January 30 Entry on Rehearing at 15-16.

⁸ Section 4928.01(A)(27), Revised Code.

to encompass “pricing stability” as the Commission has concluded in the January 30 Entry on Rehearing,⁹ it would have specified that requirement as it did in Section 4928.144, Revised Code.¹⁰ Instead, the General Assembly made clear that the charges that could be authorized under Section 4928.143(B)(2)(d), Revised Code, were to assure that physical supply of electricity would be made more stable and certain. The Commission’s finding that the RSR will produce price certainty, even if true, does not satisfy the finding the Commission must make to authorize the RSR. Thus, the Commission’s authorization of the RSR is unlawful.

3. The Commission’s determination that the RSR is authorized by Section 4928.143(B)(2)(d), Revised Code, because it provides certain and fixed rates is not supported by the manifest weight of the evidence.

In the January 30 Entry on Rehearing, the Commission approved the RSR because it “promotes stable electric prices by stabilizing base generation costs at their current rates, ensuring customers have certain and fixed rates going forward.”¹¹ That conclusion bears no relationship to the volatility and increases in rates that AEP-Ohio will collect from SSO and shopping customers under the ESP modified and approved by the Commission.

Customers’ bills consist of more than base generation rates. All customers are paying an additional \$508 million in RSR charges over the next three years. AEP-Ohio’s authorized charges also include several charges that adjust periodically. As approved, the ESP has ten generation or transmission-related riders besides the RSR

⁹ January 30 Entry on Rehearing at 16.

¹⁰ Section 4928.144, Revised Code, authorizes the use of a phase in of a rate or price “to ensure rate or price stability for consumers.”

¹¹ January 30 Entry on Rehearing at 16.

that can and will fluctuate. These include the FAC, the Alternative Energy Rider (“AER”), the Distribution Investment Rider (“DIR”), the gridSMART Rider, the Transmission Cost Recovery Rider (“TCRR”), the Enhanced Service Reliability Rider (“ESSR”), the Energy Efficiency and Peak Demand Reduction Rider (“EE/PDR”), and the Economic Development Rider (“EDR”).¹² Additionally, the Commission approved the Generation Resource Rider (“GRR”) and the PTR that are initially set at zero but could eventually collect hundreds of millions of dollars.¹³ The structure of the as-approved Modified ESP and all of its moving parts preclude stability and certainty. In addition to increasing the costs of shopping customers through the RSR, the Commission recently assigned a portion of previously bypassable transmission costs to shopping customers.¹⁴ Finally, the collection of the deferred balance of any remaining unamortized capacity compensation awaits all customers after the conclusion of the ESP.¹⁵ The only certainty or stability provided by the RSR is that AEP-Ohio's default service rate will be among the highest in Ohio and shopping will not result in substantial benefits that might otherwise be realized because of the number and amount of non-bypassable charges approved in this and other proceedings.

Further, the Commission did not comply with the requirements of Section 4928.143(C)(1), Revised Code, when it approved the RSR in the Application for Rehearing. Under that Section, AEP-Ohio has the burden of proof in the proceeding to

¹² Opinion and Order at 16-18, 42, 61-67.

¹³ *Id.* at 19-24, 47-49.

¹⁴ *In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates*, Case No. 12-1046-EL-RDR, Finding and Order (Oct. 24, 2012).

¹⁵ Opinion and Order at 49-52. Further, the Commission retained the option of adjusting the RSR to account for increased shopping if that occurs. *Id.* at 37-38.

approve the ESP.¹⁶ As IEU-Ohio demonstrated in its September 7, 2012 Application for Rehearing, AEP-Ohio failed to provide any testimony that showed that retail electric service was made more stable or certain.¹⁷ Because AEP-Ohio failed to sustain its burden of proof that retail electric service is made more stable as a result of the RSR, the Commission could not lawfully approve the provision in either its initial order or its clarification in the January 30 Entry on Rehearing.

Thus, AEP-Ohio failed to provide evidence to support its assertion that the RSR was authorized by that section, and the manifest weight of the evidence contradicts the Commission's conclusion that RSR relates to default service because it ensures certain and fixed rates. The Commission's clarification on rehearing that the RSR can be authorized under Section 4928.143(B)(2)(d), Revised Code, therefore, was both unlawful and unreasonable.

4. The Commission may not lawfully approve a rider such as the RSR that renders the modified ESP less favorable in the aggregate than a Market Rate Offer ("MRO").

The Commission's conclusion that it may authorize an RSR it values at \$508 million results in an ESP that cannot meet the requirement that the ESP is more favorable in the aggregate than an MRO.¹⁸ As the Commission itself found, the version of the ESP filed on March 30, 2012, with the modifications required by the Commission, is less favorable than an MRO, by \$386 million.¹⁹ The RSR drives the unfavorable

¹⁶ Section 4928.143(C)(1), Revised Code.

¹⁷ Industrial Energy Users-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 37-46 (Sept. 7, 2012).

¹⁸ Section 4928.143(C)(1), Revised Code.

¹⁹ Opinion and Order at 75. As noted in IEU-Ohio's September 7, 2012 Application for Rehearing, the Commission's assessment of the cost of the modified ESP underestimates the cost of the modified ESP as modified and approved by hundreds of millions of dollars. Industrial Energy Users-Ohio's Application {C39854: }

result. Under the Commission's "Price Test," which is calculated without the RSR, the modified ESP is more favorable than an MRO by \$9.8 million when the effects of the energy-only bidding (improperly limited to only two years of the ESP) are used to price ESP service.²⁰ When the RSR (and GRR) are added to the modified ESP, however, the modified ESP fails the ESP versus MRO test by \$386 million, by the Commission's estimate.²¹ To avoid rejecting the Commission-modified ESP, the Commission then found sufficient "nonquantifiable" value in the move to competitive bidding to offset the \$386 million that the ESP was less favorable than an MRO.²² Simply put, the Commission ignored the substantial negative effect of the RSR by assigning an indeterminate value to a bidding process that is not within the term of the ESP.

In the Application for Rehearing, the Commission again ignores the substantial negative effect of the RSR that results in an ESP that is less favorable in the aggregate than an MRO. Although the January 30 Entry on Rehearing points to the "invaluable" benefits of a faster move to an SSO premised on competitive bidding than would be available under an MRO to justify approving the ESP,²³ the claimed benefit occurs outside the term of the ESP. The Commission has already denied consideration of any costs of generation outside the term of the ESP when it refused to consider the long-

for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 26-29 (Sept. 7, 2012).

²⁰ Opinion and Order at 75. IEU-Ohio has already challenged the Commission's decision to delay the bidding start for purposes of calculating the ESP versus MRO "price test." Industrial Energy Users-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 22-25 (Sept. 7, 2012).

²¹ Opinion and Order at 75.

²² *Id.* at 75-76. The Commission also pointed to distribution riders that the Commission acknowledged customers are paying for. *Id.*

²³ January 30 Entry on Rehearing at 11.

term costs of the GRR.²⁴ It is unreasonable for the Commission to now turn around and offset the amount that the Commission-approved ESP fails the ESP versus MRO test with the “invaluable benefits” of competitive bidding that will occur only after the term of the ESP. (Any value of a faster move to an auction based ESP for energy during the term of the ESP is already incorporated into the SSO price.²⁵)

While the Commission might approve the ESP without the RSR because the results of its calculation of the ESP versus MRO test demonstrates that the Commission-approved ESP is more favorable in the aggregate than an MRO, the Commission cannot lawfully approve an RSR as part of an ESP if doing so renders the ESP less favorable in the aggregate than the MRO. Yet, the Commission has approved the RSR that results in an ESP that fails the ESP versus MRO test in its Opinion and Order and Entry on Rehearing. Because the resulting Commission-approved ESP fails the statutory test and is unlawful, the RSR cannot be lawfully approved.

B. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes a Pool Termination Rider (“PTR”) under Section 4928.143(B)(2)(d), Revised Code.

In its March 30, 2012 modified ESP Application, AEP-Ohio sought authorization for “an opportunity to make a subsequent application if needed to recover lost revenues as part of the move to competitive markets” due to the dissolution of the Interconnection Agreement (“Pool Agreement”).²⁶ AEP-Ohio further proposed that it would not need to file the subsequent application to recover lost revenue if the Commission approved its corporate separation plan, including the plan for the transfer of the Amos and Mitchell

²⁴ *Id.* at 8.

²⁵ Opinion and Order at 74.

²⁶ AEP-Ohio Ex. 104 at 22-23.

generation stations, without modification.²⁷ In the Opinion and Order, the Commission approved the PTR under Section 4928.143(B)(2)(h), Revised Code.²⁸ On rehearing, the Commission rejected IEU-Ohio's argument that the PTR operated to unlawfully allow AEP-Ohio to violate corporate separation requirements and to recover transition revenue in violation of Section 4928.39, Revised Code, and its Electric Transition Plan Stipulation.²⁹ The Commission, however, did grant rehearing to find that the PTR was authorized under Section 4928.143(B)(2)(d), Revised Code. The Commission's rationale for approving the PTR under this Section rested on the following claims:

The termination of the Pool Agreement is a pre-requisite to AEP-Ohio's transition to full structural corporate separation. With AEP-Ohio's move to full structural corporate separation and CRES providers securing capacity in the market, the number of service offers for SSO customers and shopping customers will likely increase and improve. On that basis, termination of the Pool Agreement is key to establishment of effective competition and authorized under the terms of Section 4928.143(B)(2)(d), Revised Code.³⁰

The Commission's grant of rehearing to authorize the PTR was unlawful. First, the Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue. Second, the Commission has not made a finding that supports the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code. Third, the Commission's authorization of the collection of wholesale generation revenue through the PTR will result in a violation of Section 4928.02(H) and Section 4928.17, Revised Code.³¹

²⁷ *Id.* at 23.

²⁸ Opinion and Order at 49.

²⁹ January 30 Entry on Rehearing at 57-58.

³⁰ *Id.* at 60.

³¹ IEU-Ohio does not waive any of its prior assignments of error concerning the PTR.

1. The Commission cannot lawfully authorize a non-bypassable rider to recover lost generation revenue under Section 4928.143(B)(2)(d), Revised Code.

The PTR would authorize AEP-Ohio to seek to recoup lost wholesale generation revenue when the Pool Agreement is terminated.³² Under Section 4928.143(B)(2), only divisions (b) and (c) allow for a generation-related non-bypassable charge. A non-bypassable charge under (B)(2)(b) or (c) is available to recover costs associated only with generating facilities under construction or constructed after 2009 that meet additional statutory requirements. The PTR is not designed to recoup the costs of a generating facility under construction or newly built after 2009. Therefore, there is no basis under Section 4928.143(B)(2), Revised Code, to approve the RSR, Capacity Shopping Tax, and the PTR as non-bypassable charges.

2. The Commission has not made the required findings that support the authorization of the PTR under Section 4928.143(B)(2)(d), Revised Code.

As discussed above, AEP-Ohio has the burden of proof to demonstrate the lawfulness of its ESP, and the Commission must find that the PTR satisfies the requirements of Section 4928.143(B)(2)(d), Revised Code. Unless the Commission makes the necessary findings, the Commission cannot approve the rider under Section 4928.143(B)(2)(d), Revised Code.³³ The Section, in particular, requires the Commission to find that the PTR has the “effect of stabilizing or providing certainty regarding retail electric service.” As discussed above, “retail electric service” is defined as the supply or arrangements for the supply of retail electric service.

³² Opinion and Order at 48-49.

³³ *In re Columbus S. Power Co.*, 128 Ohio St. 3d at 519-20.

The Commission has not made the necessary findings to demonstrate that the PTR would have the effect of stabilizing or providing certainty regarding retail electric service. According to the Commission, termination of the pool is pre-requisite to full corporate separation and the Commission expects that the number of service offers for SSO customers and shopping customers will “increase and improve”³⁴ after CRES providers secure capacity in the market. More offers does not equate to stable or certain service. The Commission has not made any finding that demonstrates that the PTR will result in the supply of retail electric service that will be more certain or stable.

Even if there was some connection between an increased number of offers by CRES providers and the provision of stable or certain retail electric service, the factual findings that the Commission relies upon are not consistent with either the record in this case or the Commission’s decision in the *AEP-Ohio Capacity Case*.³⁵ The record in this case demonstrated that nothing in the current Pool Agreement prevented a system-wide auction for the provision of SSO service.³⁶ Further, the Commission’s decision to price capacity sold at the RPM-Based Price in the *AEP-Ohio Capacity Case* was predicated on the conclusion that CRES providers would be able to compete effectively and expand and improve their offerings.³⁷ Dissolution of the Pool Agreement had no bearing on the Commission’s conclusion. Based on the record in this case and the Commission’s finding in the *AEP-Ohio Capacity Case*, there is no basis for the

³⁴ January 30 Entry on Rehearing at 60.

³⁵ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012) (*AEP-Ohio Capacity Case*).

³⁶ FES Ex. 103 at 19 (Testimony of Rodney Frame).

³⁷ *AEP-Ohio Capacity Case*, Opinion and Order at 23 (July 2, 2012).

Commission to conclude that termination of the Pool Agreement is “key to the establishment of effective competition.”³⁸

In fact, the PTR does not even address retail electric service as required by the terms of Section 4928.143(B)(2)(d), Revised Code. As proposed by AEP-Ohio and as acknowledged by the Commission,³⁹ the PTR will recover from *retail* customers lost *wholesale* Pool revenue. It is one more example of the efforts of AEP-Ohio to transfer the risks it faces in the wholesale market to its retail customers. Because it is a means of shifting wholesale risks, there is no basis for the Commission to find that the PTR has the effect of providing certainty or stability in the provision of retail electric service to those retail customers.

3. The Commission’s determination that the PTR will result in the recovery of wholesale generation revenue through a non-bypassable charge results in a violation of the State Energy Policy stated in Section 4928.02(H), Revised Code, and the requirements for corporate separation under Section 4928.17, Revised Code.

The Commission is required to “ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.”⁴⁰ It is State policy to “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service ... including by *prohibiting the recovery of any generation-related costs through distribution or transmission rates.*”⁴¹ (Emphasis added.) Further, the requirements for corporate separation require that AEP-Ohio comply with the policy

³⁸ January 30 Entry on Rehearing at 60.

³⁹ *Id.*

⁴⁰ Section 4928.06(A), Revised Code.

⁴¹ Section 4928.02(H), Revised Code.

specified in Section 4928.02, Revised Code, including the provision that prohibits the recovery of any generation-related costs through distribution rates.⁴² As the Commission has recognized, a non-bypassable charge to recover generation-related costs would violate the requirement of Section 4928.02(H), Revised Code.⁴³

The Commission apparently agrees that AEP-Ohio will be recovering a subsidy through the PTR. In response to Applications for Rehearing that demonstrated that the PTR resulted in cross-subsidy, the Commission stated, “[W]hile effective competition is indeed the goal of the Commission, Section 4928.02(H), Revised Code, does not strictly prohibit cross-subsidization. The Ohio Supreme Court has ruled that the policies set forth in Section 4928.02, Revised Code, do not impose strict requirements on any given program but simply express state policy and function as guidelines for the Commission to weigh in evaluating utility proposals.”⁴⁴ The January 30 Entry on Rehearing implicitly accepts that a subsidy will occur because generation-related costs will be recovered through a non-bypassable rider, but then concludes that Section 4928.02(H), Revised Code, is merely a guideline that the Commission need not enforce in this case.⁴⁵

The Commission’s conclusion that it may disregard subsidies, however, misreads the applicable law. Unlike many of the provisions in the State Energy Policy which seek to “ensure” or “encourage” particular outcomes, the policy expressed in Section 4928.02(H), Revised Code, requires the Commission to “*prohibit[] the recovery of any*

⁴² Section 4928.17(A), Revised Code.

⁴³ *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) (“*Sporn Decision*”).

⁴⁴ *Id.*

⁴⁵ January 30 Entry on Rehearing at 60.

generation-related costs through distribution or transmission rates.” (Emphasis added.)

The directive in Section 4928.06(A), Revised Code, that the Commission shall ensure that the State policy is effectuated, can be accomplished in only one way: by prohibiting the recovery of generation-related costs, including lost wholesale revenue associated with the dissolution of the Pool.

The Commission cannot lawfully ignore that policy under the guise that the State Energy Policy is only a “guideline.” In this case, the “guideline” expressly prohibits the recovery of the generation-related costs through a non-bypassable charge, as the Commission already correctly determined in the *Sporn* decision. Based on the explicit statutory requirement of Section 4928.02(H), Revised Code, and the Commission’s prior holding in the *Sporn* decision, the Commission’s approval of the non-bypassable recovery of generation-related costs through the RSR is unlawful.

A violation of Section 4928.02(H), Revised Code, also results in a violation of Section 4928.17, Revised Code. Under the latter section, AEP-Ohio must implement and operate under a corporate separation plan that is “consistent with the policy specified in section 4928.02 of the Revised Code.” The Commission’s approval of the recovery of generation-related costs through what is effectively a distribution rider, however, permits AEP-Ohio to violate the prohibition contained in Section 4928.02(H), Revised Code. As a result, the Commission’s approval of the PTR also is unlawful under Section 4928.17(A)(1), Revised Code.

- C. The January 30 Entry on Rehearing is unlawful and unreasonable because it authorizes the deferral of revenue in excess of a 12% rate cap, fails to identify the incurred costs that may be deferred, and fails to identify the carrying charges that apply to the deferred amount.**

In its Opinion and Order, the Commission directed that “AEP-Ohio ... cap customer rate increases at 12 percent over their current ESP I rate plan bill schedules for the entire term of the modified ESP.”⁴⁶ The 12% cap is to be determined on an individual customer basis.⁴⁷ The Commission also ordered that AEP-Ohio file in a separate docket on May 31, 2013 a “detailed accounting of its deferral impact created by the 12 percent rate cap.”⁴⁸ The Commission further stated that it would “maintain the discretion to adjust the 12 percent limit, as necessary, throughout the term of the ESP.”⁴⁹

AEP-Ohio, the Office of the Ohio Consumers’ Counsel and the Appalachian Peace and Justice Network (“OCC/APJN”) filed applications for rehearing seeking clarification of the Commission’s order creating the 12% cap. In the January 30 Entry on Rehearing, the Commission granted rehearing and clarified that the 12% cap applies only to items that were established and approved within the Commission modified ESP and not any previously authorized riders and tariffs.⁵⁰ It granted AEP-Ohio additional time to implement systems to account for the cap. It also authorized “the deferral of any expenses associated with the rate cap pursuant to Section 4928.144, Revised Code, inclusive of carrying charges.”⁵¹ In approving the “deferral of any expenses,” the Commission did not identify the incurred costs that may be deferred. Additionally, the Commission failed to address the level of carrying charges that AEP-Ohio may apply to

⁴⁶ Opinion and Order at 70.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ January 30 Entry on Rehearing at 40.

⁵¹ *Id.*

the deferred amounts of expenses. The Commission's January 30 Entry on Rehearing, rather than clarifying the 12% cap, fails to demonstrate that the cap is lawful and is so vague as to be unreasonable.

The Commission's authority to approve a "phase-in" of ESP rates is governed by Section 4928.144, Revised Code. That Section provides:

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

While the Commission's decision to try to limit immediate rate increases by delaying and spreading those increases to other customers is understandable in light of the significant additional riders it has approved, the Commission's order fails to accomplish its intended outcome. The Commission may authorize a deferral and the creation of a deferred asset for "incurred costs" under Section 4928.144, Revised Code, but the Commission has failed to identify the costs being deferred. In fact, at this point the Commission has provided only that AEP-Ohio may defer the difference in revenue between the authorized levels with and without the cap. Thus, there is no legal basis on which to authorize the deferral.

The Commission's order also fails to comply with applicable accounting standards. By law, the Commission's authorization must provide for the creation of a regulatory asset pursuant to Generally Accepted Accounting Principles ("GAAP").

GAAP requires specific identification of the “allowable costs” that the accounting procedures will defer for future recovery to properly measure and record the expense levels that are deferred for future recovery. When such costs are deferred for future collection pursuant to a valid regulatory order, a regulatory asset is created to hold the accumulated deferred amount pending the amortization process. According to the applicable accounting requirements, the deferral and creation of a regulatory asset must be conditioned on a showing that recovery of the regulatory asset is probable because of regulatory action allowing future cost recovery.⁵² AEP-Ohio, however, ended regulatory accounting for its generation function several years ago in response to changes in Ohio law that ended the Commission’s authority to approve cost-based rates for generation related services.⁵³ Thus, under GAAP, AEP-Ohio cannot use regulatory accounting for any deferred cost associated with its competitive generation function.

Even if the order properly permitted the creation of a deferred asset (which it does not), the Commission must also determine carrying charges. Neither the Opinion and Order nor the January 30 Entry on Rehearing, however, states the level of carrying charges. Thus, the January 30 Entry on Rehearing is unreasonably vague.

The carrying charge level that should be applied is an issue that must be addressed by rehearing. As IEU-Ohio demonstrated, the use of AEP-Ohio’s cost of debt is unreasonable because it is high when compared to the cost of debt available in the current market.⁵⁴ Thus, if the Commission continues to authorize a deferral of revenue in excess of the 12% cap, it must also order rehearing to set the level of the

⁵² Financial Accounting Standards Board Codification 980.

⁵³ IEU-Ohio Ex. 105.

⁵⁴ IEU-Ohio Ex. 129 at 12-13.

carrying charges on the deferral balance to a reasonable level below either AEP-Ohio's long or short-term cost of debt.

III. CONCLUSION

The Commission's January 30 Entry on Rehearing is unlawful and unreasonable for the reasons discussed above. The Commission should grant rehearing, reverse its authorization of the unlawful charges, and thereby bring the rates and charges contained in AEP-Ohio's default service into compliance with Ohio law.

Respectfully submitted,

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