BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement in the Power Purchase Agreement Rider.	)))))	Case No. 14-1693-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 14-1694-EL-AAM

SECOND APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") files this Second Application for Rehearing to oppose AEP Ohio's claim for customers to potentially pay tens of millions, if not hundreds of millions, of dollars to subsidize the Ohio Valley Electric Cooperative ("OVEC") through an OVEC-only Power Purchase Agreement ("OVEC PPA").[1] In its Second Entry on Rehearing of November 3, 2016 ("Second Entry"), the Public Utilities Commission of Ohio ("PUCO") approved the OVEC PPA that includes substantial customer charges. AEP Ohio proposed the OVEC PPA on rehearing because the Federal Energy Regulatory Commission ("FERC") rescinded the waiver under which AEP Ohio claimed it could proceed with its initial PPA proposal without FERC review. OCC does not concede that the OVEC PPA is consistent with federal law or regulation, and specifically reserves the right to challenge it accordingly. But as described herein, the Second Entry is unreasonable and unlawful under Ohio law.

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[1] See R.C. 4903.10 and O.A.C. 4901-1-35.

The Second Entry is unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO's Second Entry is unreasonable and unlawful because it approved a Stipulation that was beyond the reasonably foreseeable scope of the rider sought in the Application/Amended Application.

ASSIGNMENT OF ERROR 2: The PUCO's Second Entry is unreasonable and unlawful because the PUCO must evaluate and the signatory parties must show that a stipulation is a product of "serious bargaining." Intervenors are entitled to present extrinsic evidence about the meaning of the Stipulation.

A. The burden of proof is on the signatory parties, not the OCC.

B. The PUCO is required to review the negotiation process.

C. The best time to develop extrinsic evidence is now.

ASSIGNMENT OF ERROR 3: The PUCO's Second Entry is unreasonable and unlawful because the PUCO has a duty to evaluate the Stipulation as proposed – not as fleshed out or modified in a future ESP case.

ASSIGNMENT OF ERROR 4: The Second Entry is unreasonable and unlawful because this is a RDR case, not an ESP case, so it was unreasonable and unforeseeable that the PUCO would approve a Stipulation that contains unrelated terms without any nexus to the initially proposed PPA Rider.

ASSIGNMENT OF ERROR 5: The PUCO's Second Entry is unreasonable and unlawful because the three-part settlement test is not appropriate for ESP cases given utilities' unequal bargaining power.

ASSIGNMENT OF ERROR 6: The PUCO's Second Entry is unreasonable and unlawful because the parties could not possibly have sufficiently understood the matters at issue in the Stipulation, so the first prong of the settlement test could not have been met. This is because the IEU-AEP Agreement was not disclosed to all parties during the settlement negotiations.

ASSIGNMENT OF ERROR 7: The PUCO's Second Entry is unreasonable and unlawful because it approved the OVEC PPA without addressing material arguments made by OCC against the OVEC PPA and results from a fundamentally unfair process.

ASSIGNMENT OF ERROR 8: The PUCO's Second Entry is unreasonable because it does not provide customers with "rate stability."

ASSIGNMENT OF ERROR 9: The PUCO's Second Entry is unreasonable because it is unclear if the revenues collected under the PPA Rider are being collected subject to refund.

ASSIGNMENT OF ERROR 10: The PUCO's Second Entry is unreasonable and unlawful because it found that AEP Ohio's customers are not captive to a non-bypassable OVEC PPA.

ASSIGNMENT OF ERROR 11: The PUCO's Second Entry is unreasonable and unlawful because the OVEC PPA allows AEP Ohio to make transition charges.

ASSIGNMENT OF ERROR 12: The PUCO's Second Entry is unreasonable and unlawful because a document cannot speak for itself. Non-signatory parties are entitled to fully cross-examine signatory parties.

ASSIGNMENT OF ERROR 13: The PUCO's Second Entry is unreasonable and unlawful because it allows AEP Ohio to charge consumers anticompetitive subsidies for renewable generation.

The basis for each ground for rehearing is in the attached Memorandum in Support. Consistent with R. C. 4903.10 and the claims of error stated herein, the PUCO should grant rehearing and modify or abrogate its Opinion and Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO has an opportunity to stand up for the public interest and stop AEP Ohio from charging consumers tens of millions, if not hundreds of millions, of dollars to subsidize, via government regulation, old, inefficient, coal-fired power plants that cannot compete in a market deregulated by the Ohio General Assembly over sixteen years ago. The PUCO should ensure that its Opinion and Order is reasonable and lawful. Unfortunately for consumers, it is not. To protect consumers and the public interest, it should reconsider those decisions. Upon reconsideration of any one of those decisions, the PUCO should find that the Stipulation should be rejected.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this

proceeding on October 29, 2014, which was granted by Entry dated September 15, 2015. OCC also filed testimony regarding AEP Ohio's Application/Amended Application and the Stipulation. It participated in the evidentiary hearings on both.

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

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed."

The statutory standard for abrogating some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Second Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of March 31, 2016.

III. ERRORS

ASSIGNMENT OF ERROR 1: The PUCO's Second Entry is unreasonable and unlawful because it approved a Stipulation that was beyond the reasonably foreseeable scope of the rider sought in the Application/Amended Application.

In its initial Application for Rehearing, OCC argued that the three-prong settlement standard should not be applied because the proposed Stipulation was a "hodgepodge" of handouts that lacked a sufficient nexus to the original Application/Amended Application. The PUCO rejected this argument – finding that no nexus is required – because an ESP can include a vast number of terms.[2] Further, the PUCO reasoned that because the proposed Stipulation called for AEP Ohio to extend its ESP, it was foreseeable that the proposed Stipulation would include terms that might appear in an ESP.[3] The PUCO's reliance on this being an ESP case is misplaced. It is not an ESP case. The Second Entry is unreasonable and unlawful.

The PUCO's reasoning is fundamentally (and fatally) flawed. It assumes that the instant docket is an ESP. It is not. This is an RDR case. A RDR case cannot include a vast number of terms like an ESP (potentially) can. The PUCO made this distinction itself in its Opinion and Order when it distinguished this case from FirstEnergy's ESP case (14-1297-EL-SSO): the "[AEP] proceedings pertain to *only* a retail rate stability rider while the [FirstEnergy proceedings] pertains to an entire electric security plan (ESP)."[4]

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[2] Second Entry at 9-10.

[3] Second Entry at 9-10.

[4] Opinion and Order at 4 (March 31, 2016) (emphasis added) (hereinafter "PPA Order").

An RDR case must be limited to the specific rider requested in the application – nothing more.[5] Here, the original Application/Amended Application only requested approval of AEP Ohio's proposal to "enter into a new affiliate PPA between the Company and AEP Generation Resources, Inc. (AEPGR) for inclusion in the PPA Rider."[6] Nowhere does the Application/Amended Application mention renewable developments or any of the other handouts included as part of the Stipulation. They are outside the bounds of this proceeding.

Moreover, none of the handouts provided in the Stipulation could have been reasonably foreseen by intervenors, any other party who was considering an intervention, or the general public. The PUCO seems to suggest that because the Stipulation "specifically included an agreement to file an application for the extension of the current ESP […] it was not unreasonable to expect the parties would propose and negotiate provisions to be included in an ESP."[7] This logic is merely sleight of hand that crumbles under its own weight. No intervenor in this RDR case could have "expected" various "provisions to be included in an ESP" to be proposed or negotiated in an RDR case.

Rehearing should be granted for Assignment of Error No. 1.

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[5] See R.C 4909.18 ("Such application shall contain a schedule of the exiting rate […], a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based."; if an application propose any new service or equipment, then the application "shall fully describe" such service or equipment and "shall explain" how the proposed service or equipment differs from the existing service); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Modify Rider FBS, Rider EFBS, Rider FRAS, and Rider GTS*, Case No. 15-50-GA-RDR Opinion at ¶39 (Oct. 12, 2016) (denying a request for an examination of a choice program as "beyond the scope of the proceeding" because the program was not discussed in the application filed in the proceeding). Moreover, the PUCO previously found that an electric utility was "under no burden to anticipate 'unprecedented actions by the FERC' when preparing for an evidentiary hearing" because there is no way the utility could have foreseen these actions taking place. 14-1297-EL-SS0 at 11 (Oct. 12, 2016). Yet, here, the PUCO has placed that burden on intervenors by forcing a stipulation that includes "unprecedented" items that could not have been foreseen by intervenors based on the application.

[6] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Application at 1.

[7] Second Entry at 9-10.

ASSIGNMENT OF ERROR 2: The PUCO's Second Entry is unreasonable and unlawful because the PUCO must evaluate and the signatory parties must show that a stipulation is a product of "serious bargaining." Intervenors are entitled to present extrinsic evidence about the meaning of the Stipulation.

OCC asserted that the Stipulation was not the product of serious bargaining because it is so vague and ambiguous (partially from so many parties opting out from various provisions) that it is unenforceable and will invite future disputes. Moreover, the attorney examiner's broad application of the settlement confidentiality privilege foreclosed parties' ability to introduce extrinsic evidence to help interpret the vague provisions, which would aid in understanding the Stipulation now and in resolving future disputes.

Rejecting these arguments, the PUCO said that OCC's assertions did not demonstrate a "conclusive indication" that there was not serious bargaining.[8] The PUCO also noted that it "is not required to review the negotiation process to the extent requested by OCC and other parties opposing the stipulation."[9] Also, the PUCO found "key" that parties opted out but agreed not to oppose the Stipulation. That "merely reflects the signatory party's support of the stipulation as a total package and supports the likelihood that other parties to the case negotiated for certain provisions of the stipulation that were not of particular interest."[10] Lastly, OCC's concern on foreclosing the consideration of extrinsic evidence was rejected because there are no disputes "at this time."[11] The PUCO's rulings were unreasonable and unlawful.

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[8] Second Entry at 11.

[9] Second Entry at 11.

[10] Second Entry at 12.

[11] Second Entry at 13.

A. The burden of proof is on the signatory parties, not the OCC.

The PUCO's assertion that the OCC had to show that the Stipulation was not the product of serious bargaining is incorrect. The burden of satisfying the three-prong test lies squarely on the shoulders of the signatory parties. The burden does not belong to opponents to a stipulation. The signatory parties did not meet this standard.[12] The PUCO should grant rehearing on this issue.

B. The PUCO is required to review the negotiation process.

Contrary to its ruling, the PUCO is required to review the negotiation process. The first-prong of the settlement test mandates that a stipulation be the product of "serious" bargaining. This "serious" qualifier requires the PUCO to examine the negotiation process as requested by the OCC, to determine if in fact serious bargaining took place. This is made clear by the Ohio Supreme Court's decision in *Time Warner*, where the Court had "grave concerns" about the settlement negotiation process after a close examination.[13] The PUCO did not conduct such a review. Its decision should be reversed.

C. The best time to develop extrinsic evidence is now.

The PUCO affirmed the attorney examiners' blanket application of the settlement confidentiality privilege. Because OCC was not given the opportunity to cross-examine witnesses from the various signatory parties, the terms of the stipulation are still vague

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[12] See, e.g., R.C. 4928.143(C)(1); *In the Matter of the Application of The Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations*, 1985 Ohio PUC Lexis 7, 91 (PUCO Case No. 84-1435-TP-AIR); *In the Matter of the Application of the Ottoville Mutual Telephone Company for Authority to Increase its Rates and Charges and to Revise its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16 Revised Code*, 1973 Ohio PUC Lexis 3, 4 (PUCO Case No. 73-356-Y) ("Although the applicant must shoulder the burden of proof in every application proceeding before the Commission, this burden takes on an added dimension in the context of an emergency rate case.").

[13] *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229 at 233, fn 2 (1996) (citing *Consumers' Counsel v. Public Util. Comm.*, 64 Ohio St.3d 123, 125-26).

and ambiguous. There will undoubtedly be future litigation over these terms. The best time to develop extrinsic evidence as to what the terms purportedly mean is now. By the time a dispute arises, the signatory parties' representatives involved in the Stipulation may no longer be available or may have no recollection of the grounds behind desiring, opposing, or having no position on a certain provision. To wait until there is a dispute is to wait too long. More importantly, the attorney examiner's blanket application of the settlement confidentiality privilege will prevent extrinsic evidence from being heard in future disputes. The attorney examiners' did not carve out a "wait and see" exception to their application of the settlement confidentiality privilege. Either the extrinsic evidence comes in now, or never.

The development of contemporaneous extrinsic evidence about the meaning of the Stipulation is needed. It is needed now.

Rehearing should be granted for Assignment of Error No. 2.

ASSIGNMENT OF ERROR 3: The PUCO's Second Entry is unreasonable and unlawful because the PUCO has a duty to evaluate the Stipulation as proposed – not as fleshed out or modified in a future ESP case.

OCC argues that the proposed Stipulation lacked so many details that the PUCO could not evaluate it under the three-prong test. The PUCO dismissed this argument, saying that "at this stage, it was not necessary to have all of the details."[14] Rather, the details could be worked out in the case on the ESP extension.[15]

The second prong of the three-prong test for evaluating stipulations is clear: the PUCO must answer "[d]oes the settlement, as a package, benefit ratepayers and the

[14] Second Entry at 13.

[15] Second Entry at 14.

public interest?" It is impossible to answer this question without understanding how much a proposed stipulation will cost customers and how these costs compare to any purported benefits from a proposed stipulation. Although some of the riders may be subject to more analysis in the ESP extension case, they are part of the "package" included in the instant Stipulation. Without knowing all of the details the metes and bounds of the package cannot be determined. And neither can the benefit or cost to customers or the public interest.[16]

Rehearing should be granted for Assignment of Error No. 3.

ASSIGNMENT OF ERROR 4: The Second Entry is unreasonable and unlawful because this is a RDR case, not an ESP case, so it was unreasonable and unforeseeable that the PUCO would approve a Stipulation that contains unrelated terms without any nexus to the initially proposed PPA Rider.

In its Application for Rehearing, OCC pointed out that the Stipulation contains unrelated terms without any nexus to the initially proposed PPA Rider, parties and the public were deprived of notice given the unrelated terms (and thus the PUCO of their input), and the Stipulation cannot be considered as a package in light of all of the opt-outs.[17] Thus, to the degree the PUCO applies the three-

[16] See, e.g., *In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 30, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985) (all discussing standard of review for considering the reasonableness of a stipulation); see also R.C. 4903.09. Under R.C. 4903.09, the PUCO is prohibited from issuing summary rulings and conclusions that do not develop the supporting rationale or record. *MCI Telecommunications Corp. v. Pub. Util. Comm*, (1987), 32 Ohio St.3d 306, 312, 313 N.E.2d. 803; *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶30. Where contested cases are heard, R.C. 4903.09 requires the PUCO to address material issues raised by parties. See e.g., *In the Matter of the Complaint of Westside Cellular, Inc., v. GTE Mobilnet Inc.*, Case No. 93-1758, Entry on Rehearing at ¶7 (Apr. 13, 1995); accord, *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶71.

[17] See, e.g., Second Entry at 15.

part test,[18] the Stipulation fails it. Rejecting these arguments, the PUCO said in the Second Entry that because the Stipulation calls for an ESP extension application, it was neither unreasonable nor unforeseeable that parties negotiated for a hodgepodge of provisions unrelated to the initially proposed PPA to be in an ESP.[19]

The PUCO's rationale presumes clairvoyance in actual intervenors, potential intervenors, and the public. It misses the mark. This is not an ESP case. It is an RDR case. It started out as an RDR case, and remained an RDR case. Parties (those that intervened and those that would have considered intervening, not to mention the public at large) could not conceivably have been expected to foresee that a Stipulation to resolve an RDR case would involve a call for an ESP extension application along with various, unrelated provisions to be in that ESP application. Accordingly, approving such a stipulation can result from a fundamentally unfair process in which all stakeholders were deprived of notice and an opportunity to be heard.[20]

Rehearing should be granted on Assignment of Error No. 4.

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[18] As explained herein in Assignment of Error No. 1, the three-part test should not be applied. As explained in this Assignment of Error No. 4, the PUCO's decision was unreasonable and unlawful even if it applies the three-part test.

[19] See, e.g., Second Entry at 17.

[20] See, e.g., supra, note 5; U.S. Const., Amend. 14; Ohio Const., Art. 1, sec. 16.

ASSIGNMENT OF ERROR 5: The PUCO's Second Entry is unreasonable and unlawful because the three-part settlement test is not appropriate for ESP cases given utilities' unequal bargaining power.

In its Application for Rehearing, OCC argued that applying the standard three-part settlement test as it has historically been applied is inappropriate here.[21] AEP Ohio, and utilities in ESPs generally, have unequal bargaining power. Thus, as traditionally applied, the three-part test is meaningless.[22] Rejecting this argument, the PUCO asserted that accepting OCC's position would nullify parties' ability to settle ESPs.[23]

The PUCO is mistaken. The three-part settlement test is a PUCO construct, so it is not bound to apply it – either at all or as it has traditionally done.[24] It should not apply it in ESP cases due to utilities' unequal bargaining power. Further, OCC's position does not nullify parties' ability to settle ESPs. Instead, it simply calls for a heightened level of scrutiny of settlements in ESP cases in recognition of utilities' unequal bargaining power.[25]

The PUCO should grant rehearing on Assignment of Error No. 5.

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[21] As noted earlier, this is a RDR case, not an ESP case. But if the PUCO continues treating it as an ESP case, the three-part settlement test should not be used.

[22] See Second Entry at 17-18.

[23] See id. at 18.

[24] See, e.g., *Consumers' Counsel v. PUCO*, 64 Ohio St. 3d 123, 125, 592 N.E.2d 1370 (1992) (citation omitted).

[25] For example, the terms of a stipulation in an ESP should have a reasonable nexus to the subject of the case and should not consist of a hodgepodge of "handouts" to induce parties to sign. See, e.g., OCC's Application for Rehearing at 13-14.

ASSIGNMENT OF ERROR 6: The PUCO's Second Entry is unreasonable and unlawful because the parties could not possibly have sufficiently understood the matters at issue in the Stipulation, so the first prong of the settlement test could not have been met. This is because the IEU-AEP Agreement was not disclosed to all parties during the settlement negotiations.

Intervenors were deprived of evaluating the Stipulation's impact, because the IEU-AEP Agreement was not disclosed to all parties during the negotiation process. In response, the PUCO asserted that the settlement test's first prong – serious bargaining – requires only that parties be capable and knowledgeable. It is parties' individual responsibility to evaluate their interests and the Stipulation.[26]

The PUCO's decision is internally inconsistent and wrong. Earlier in the Second Entry, the PUCO explained that the settlement test's first prong requires that parties be capable, knowledgeable, *and sufficiently understand the matters at issue*.[27] Because the IEU-AEP Agreement was not disclosed during settlement negotiations, parties could not possibly have been able to sufficiently understand the matters at issue – the Agreement was not at issue during the negotiations. The settlement test's first part was not satisfied. Further, the PUCO's rationale lends itself to shirking its independent responsibility to determine if a stipulation is in the public's interest, instead leaving it to individual parties.

The PUCO should grant rehearing on Assignment of Error No. 6.

[26] See Second Entry at 22.

[27] See id. at 15.

ASSIGNMENT OF ERROR 7: The PUCO's Second Entry is unreasonable and unlawful because it approved the OVEC PPA without addressing material arguments made by OCC against the OVEC PPA and results from a fundamentally unfair process.

AEP Ohio proposed the OVEC PPA on rehearing, relying on the Stipulation's severability provision.[28] In response, OCC asserted that AEP Ohio's proposal should be rejected because:

a. The severability provision does not apply.[29]

b. The OVEC PPA inhibits implementation of the PUCO's directive to AEP Ohio to divest its interest in OVEC.[30]

c. The hearing addressed the initially proposed PPA. An OVEC PPA played no independent role. Parties had no notice regarding the potential of an OVEC PPA. Approving an OVEC PPA here would be the result of a fundamentally unfair process because parties were deprived of the ability to present a case on an OVEC PPA.[31]

In its Second Entry, the PUCO did not address these arguments. It should.[32]

Instead, the PUCO said that it was approving the OVEC PPA to preserve the Stipulation's other benefits.[33] Such reasoning is contrary to the second part of the three-part test. That part requires the PUCO to determine if a stipulation, as a package, benefits the public interest.[34] Instead of evaluating the Stipulation consistent with the second part – as a package, including the proposed OVEC

[28] See AEP Ohio's Application for Rehearing; id. at Memorandum in Support at 3, n. 2.

[29] See OCC's Memorandum Contra at 3-4.

[30] See id. at 3.

[31] See id. at 3, n. 8.

[32] See R.C. 4903.09 and .10; see also supra note 16.

[33] See Second Entry at 28.

[34] See, e.g., supra note 16.

PPA – the PUCO looked at the Stipulation's *other* provisions, and *their* purported benefits, as a package and bootstrapped the OVEC PPA into the deal to preserve *that* package with *those* purported benefits. It never added the OVEC PPA to the overall package or evaluated the overall package inclusive of the OVEC PPA.

The PUCO should grant rehearing on Assignment of Error No. 7.

ASSIGNMENT OF ERROR 8: The PUCO's Second Entry is unreasonable because it does not provide customers with "rate stability."

OCC argued that the PPA Rider Rate Impact Mechanism should be set at five percent of the generation component of the SSO price, that any revenue lost due to the five percent cap should not be able to be recovered in later periods (i.e., after May 31, 2018), and that AEP cannot charge customers for any reduction in revenues after May 31, 2018.[35] The PUCO rejected this argument because it felt that OCC was trying to redesign the rate impact mechanism.[36]

In approving the mechanism in the first place, the PUCO "found it appropriate to implement a rate impact mechanism, in order to provide additional rate stability for customers."[37] However, without reconsideration, the rate impact mechanism as approved will provide no rate stability after May 31, 2018. AEP Ohio will simply defer various lost revenues until after May 31, 2018 and then collect them from consumers. As a result, consumers will face large and volatile charges. The rate impact mechanism's purported benefits of rate stability and consumer protection (if any) will assuredly be

[35] Second Entry at 44.

[36] Second Entry at 44.

[37] PPA Order at 81; Second Entry at 43-44. And of course, in the PPA Order, the PUCO found that OVEC would *not* promote rate stability. See, e.g., PPA Order at 24-25.

short-lived. If the PUCO is genuine about protecting consumers, it needs to install a rate impact mechanism that will actually prevent large rate increases from impacting customers.

The PUCO should grant rehearing on Assignment of Error No. 8.

ASSIGNMENT OF ERROR 9: The PUCO's Second Entry is unreasonable because it is unclear if the revenues collected under the PPA Rider are being collected subject to refund.

OCC (and various other parties) argued in their applications for rehearing that any funds charged under the PPA Rider should be done subject to refund in the event that the rider is later struck down.[38] The PUCO found that it is "unnecessary and inappropriate to direct that the PPA rider be made subject to refund."[39] Apparently, that is because "in the PPA Order, the Commission modified the stipulation to eliminate its prohibition on refunds, in the event of an invalidation of the PPA rider proposal."[40] OCC seeks clarification: a refund of revenues collected under the OVEC PPA is permissible because, in the PPA Order, the PUCO eliminated the Stipulation's prohibition on refunds.

Rehearing should be granted on Assignment of Error No. 9.

ASSIGNMENT OF ERROR 10: The PUCO's Second Entry is unreasonable and unlawful because it found that AEP Ohio's customers are not captive to a non-bypassable OVEC PPA.

OCC asserted on rehearing that the PUCO's Opinion and Order was unreasonable and unlawful because the PUCO had found that AEP Ohio's customers were not

[38] Second Entry at 78.

[39] Second Entry at 78.

[40] Second Entry at 78.

captive.[41] The PUCO responded by saying that it had "expressly determined that shopping and SSO customers are not captive; they continue to have the ability to select a CRES provider or return to the SSO."[42]

But the PUCO erred in this determination. In its Application for Rehearing, OCC pointed out that the PUCO's rationale of what are and what are not captive customers is contrary to FERC's.[43] In fact, OCC alerted the PUCO to the fact that "FERC has recently found that AEP Ohio's customers *are* captive."[44]

The PUCO's error in determining that AEP Ohio's customers are not captive can be explained by the fact that it did not address these arguments from OCC. On rehearing, it should. Upon doing so, it can come to but one conclusion: AEP Ohio's customers are captive to the OVEC PPA.

The PUCO should grant rehearing on Assignment of Error No. 10.

ASSIGNMENT OF ERROR 11: The PUCO's Second Entry is unreasonable and unlawful because the OVEC PPA allows AEP Ohio to collect transition charges from customers.

OCC and others have argued that AEP Ohio's proposal allows it to charge customers for transition costs.[45] Rejecting these arguments, the PUCO reasoned that AEP Ohio's proposal involves a "rate stability" charge, not a transition charge.[46] And there is no "transition" in the proposal – SSO will continue to be sourced through competitive bidding, AEP Ohio does not own any generation assets (except the OVEC

[41] See Second Entry at 87.

[42] Id. at 88.

[43] See OCC's Application for Rehearing at 47-49.

[44] Id. at 48.

[45] See, e.g., Second Entry at 98-100.

[46] See id.

entitlement), and all generation assets used to provide generation service before January 1, 2001, have been transferred to an affiliate.[47] Further, the PUCO reasoned that the OVEC contract does not meet the criteria for "transition costs" under R.C. 4928.39(B) or (D). Its rationale is that "transition costs" are generation costs incurred by a utility to serve customers before retail competition began in 2001 that would not be recovered through the market.[48] OVEC does not meet this definition, according to the PUCO, because it was not providing energy to AEP Ohio before 2001, but to the United States Department of Energy, under contract, until 2003.[49]

The PUCO is wrong, and should grant rehearing on this assignment of error, for two independent reasons. First, the lesson from recent Ohio Supreme Court precedent is that it will not tolerate elevating form over substance when it comes to evaluating whether a utility charge allows the utility to recover "transition costs."[50] So calling AEP Ohio's proposal a "rate stability" charge, or stating that there is no "transition," is immaterial. What is material is the record evidence (record evidence that the PUCO ignored). It confirms that AEP Ohio's proposal allows it to recover transition revenues.[51] Accordingly, AEP Ohio's proposal should be rejected.

Second, the PUCO's conclusion that the OVEC contract does not meet the criteria for "transition costs" under R.C. 4928.39(B) or (D) misses the whole story. True, the contract to provide OVEC-generated power to the federal government was terminated in

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[47] See id.

[48] See id.

[49] See id.

[50] See, e.g., *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Oh. S. Ct. 2016-1608, Slip Opinion (April 21, 2016).

[51] See OCC's Application for Rehearing at 43-44.

2003.[52] But as AEP Ohio Witness Allen explained, the July 10, 1953 Inter-Company Power Agreement ("ICPA") provides for sales of excess power from OVEC to the Sponsoring Companies, including AEP Ohio, of power not used by the Department of Energy or its predecessors.[53] Because the ICPA, in effect before 2001, facilitated AEP Ohio buying power from OVEC to serve its customers, the ICPA falls within R.C. 4928.39(B) and (D). Accordingly, allowing AEP Ohio to charge customers for OVEC costs allows AEP Ohio to charge customers for transition costs, contrary to Ohio law.

The PUCO should grant rehearing on Assignment of Error No. 11.

ASSIGNMENT OF ERROR 12: The PUCO's Second Entry is unreasonable and unlawful because a document cannot speak for itself. Non-signatory parties are entitled to fully cross-examine signatory parties.

In its Application for Rehearing, the OCC contested certain evidentiary rulings (i.e., application of the settlement discussion confidentiality privilege, quashing of subpoenas, etc.). The PUCO held that, based on its rulings in the PPA Order, these rulings were correct and the testimony and discovery responses were not necessary for the PUCO to make its decision. Rather, the Stipulation could speak for itself. These rulings are unreasonable.

First, a document cannot speak for itself – especially not a document negotiated by 11 parties to resolve numerous, complex issues that were the subject of litigation for over 2 years such as those at issue here. For instance, in the PUCO's March 31, 2016,

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[52] See AEP Ohio Ex. 10 (Direct Testimony of William A. Allen, filed May 15, 2015) at 4.

[53] See AEP Ohio Ex. 10 (Direct Testimony of William A. Allen, filed May 15, 2015) at 4-5; see also Composite Copy of Inter-Company Power Agreement dated July 10, 1953 (Attachment 1) at Article 5. As clearly marked in the upper right-hand corner of the document, the ICPA was produced by AEP Ohio as "Ohio Power Company Case No. 14-1693 Sierra Club Set 2 INT 9 Attachment 1." The PUCO should take administrative notice of the ICPA. See Ohio Evid. R. 201. Further, the ICPA is 335 pages long. AEP Ohio produced the document in multiple "batches." Due to its size, OCC has attached the first 30 pages, which includes Article 5.

Order in this case, it noted that its "mission requires the complex task of balancing the interests of Ohio's public utilities companies, other vital businesses, and hard-working citizens."[54] The PUCO went on to explain that its role is to make a decision "balancing many interests" developed through a "complex[] record" that "demonstrate[d] the depth of stakeholder concern and the myriad of suggestions made to assist the Commission in [its] decision."[55] Yet now the PUCO attempts a complete 180 degree turn by suggesting that a single document attempting to resolve these voluminous and complex concerns can "speak for itself" because its terms "are either, on their face, beneficial to [consumers] and the public interest of they are not."

This is simply not the case. Indeed, the Ohio legislature requires that parties to a proposed stipulation "must file or provide the testimony of at least one signatory party that supports the stipulation."[56] This requirement recognizes that stipulations resolving matters in front of the PUCO inherently will require explanation outside of the four corners of the document itself.[57] The PUCO's rulings that denied OCC (and all intervenors and the PUCO) the ability to effectively and fully cross-examine Signatory parties and to use written discovery responses is unreasonable and unlawful.

The PUCO should grant rehearing on Assignment of Error No. 12.

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[54] PPA Order at 4.

[55] PPA Order at 5.

[56] Ohio Adm. Code 4901-1-30(D).

[57] See id.

ASSIGNMENT OF ERROR 13: The PUCO's Second Entry is unreasonable and unlawful because it allows AEP Ohio to charge consumers anticompetitive subsidies for renewable generation.

In its Second Entry affirming AEP Ohio's proposal regarding renewables, the PUCO remarks that "renewable energy plays an integral role in promoting a *reliable* and *cost-effective grid*, and furthers the policy *objectives set forth in R.C. 4928.02*."[58] The PUCO also clarified that nothing in the PPA Order would preclude AEP Ohio or its affiliates from owning up to 50 percent of solar projects and 50 percent of wind projects on an aggregate net basis based on installed capacity.[59]

The Second Entry is unreasonable and unlawful for a number of reasons. Generation reliability is not the state's responsibility in a restructured environment, such as Ohio. Reliability is ensured on a regional basis by PJM Interconnection, L.L.C. ("PJM") subject to the Federal Energy Regulatory Commission's ("FERC") and the North American Electric Reliability Corporation's ("NERC") oversight. The PJM Base Residual Auction ("BRA") reserve margin 2018/2019 Delivery Year was 19.8 percent, or 4.1 percent higher than the target reserve margin of 15.7 percent.[60] PJM's generation reserve margin for the 2019/2020 BRA Delivery Year is 22.4 percent, or 5.9% higher than the target reserve margin of 16.5%.[61] Both show that the available generation is more than adequate to maintain reliability.62 Even if the PUCO was responsible for generation reliability (which it is not), there is no need for the PUCO to base its decision

[58] PPA Order at ¶ 82 Second Entry on Rehearing at ¶136.

[59] Second Entry on Rehearing at ¶135.

[60] See, e.g., Hearing Transcript at Vol. II, p. 451:21-452:22; 454:18-22.

[61] PJM 2016/2017 RPM Base Residual Auction Results, Online: https://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2019-2020-base-residual-auction-report.ashx

[62] See, e.g., id and note 3; see also id. at Vols. I, p. 214:3-8 and 137:19-23; VI, p. 1618:23-25.

on the misconception that AEP Ohio's PUCO-approved renewable energy facilities are necessary to enhance reliability. In fact, as discussed in more detail below, because these facilities will be subsidized by captive customers through a purchase power agreement, constructing them could actually harm reliability by artificially distorting PJM markets for electricity.

OCC notes that there is an open complaint at FERC to address the problems associated with Ohio's subsidization of existing generation facilities through a purchase power agreement ("PPA").[63] Consequently, FERC is likely to decide, or additional complaints are likely to be filed and prevail, to prevent renewable resources funded by a PPA from clearing PJM's BRA because they would distort PJM markets and/or are not necessary to maintain reliability. And the guaranteed funding for these new generation facilities from captive customers will distort PJM's markets and/or unfairly guarantee AEP market share (through a 50% ownership) to the detriment of competition in Ohio.

And if these renewable facilities do not clear the BRA auction, AEP would receive no capacity revenues from PJM. So under the PPA Order, allowing AEP Ohio to charge customers (through a PPA) for the difference between market rates and the cost of production could cause great harm to customers. They would be saddled with the entire cost of these potentially unnecessary facilities. Such cost subsidization from captive customers will not promote a cost-effective grid.

[63] FERC Docket No. EL16-49 - Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean) Energy, LLC and Panda Power Generation Infrastructure Fund, LLC, (Complainants), v. PJM Interconnection, L.L.C.

Alternatively, if AEP liquidates this subsidized generation into PJM's various electricity markets, the subsidized generation will have adverse effects on these markets. The subsidized generation would artificially suppress prices throughout PJM. Such price suppression will work to the detriment of generation that does not receive guaranteed subsidized funding and send incorrect price signals. Ultimately this will harm customers who rely on the efficient operation of the competitive markets to provide reasonably priced electric services.

If this generation is dedicated exclusively to the captive customers who pay the subsidies, then this guaranteed AEP market share will foreclose competition in the market for the provision of service via the Standard Service Offer. Moreover, this would also place Competitive Retail Electric Service providers ("Marketers") who provide power from non-subsidized generation at a competitive disadvantage when trying to attract shopping customers. That is, AEP will be guaranteed market share and customer funding, but will not be required to demonstrate that the new generation facilities are used and useful or the associated rates to captive customers are just and reasonable. AEP put forth no evidence that there is a need for these generation facilities. The guaranteed funding from captive customers for these potentially unnecessary facilities will not promote cost effectiveness contrary to the PUCO's findings.

The PUCO's actions are inapposite to 4928.02(B). Guaranteeing market share and customer funding for these facilities where such guarantees are not available to other competitors of AEP Ohio does not advance the directive to ensure "diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers…" Rather the only thing that the PUCO will ensure is that AEP

always wins in a marketplace that is supposed to be competitive. This guaranteed captive-customer funding (through a PPA) will only result in market inefficiencies and distortions. The PUCO's actions will hinder the objectives set forth in R.C. 4928.02.

IV. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its November 3, 2016 Second Entry on Rehearing because it will harm customers. Granting rehearing as requested by OCC is necessary to ensure that AEP Ohio customers are not subject to unreasonable and unjust charges. Without rehearing, Ohio consumers will end up paying for a whole host of unreasonable and unlawful charges, including a government ordered subsidy of a power plant by customers that under the law should be competing in a competitive market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Second Application for Rehearing was served via electronic transmission, to the persons listed below, on this 5th day of December, 2016.

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COMPOSITE COPY

OF

INTER-COMPANY POWER AGREEMENT

DATED JULY 10, 1953

AMONG

OHIO VALLEY ELECTRIC CORPORATION,
APPALACHIAN POWER COMPANY (formerly
APPALACHIAN ELECTRIC POWER COMPANY),
THE CINCINNATI GAS & ELECTRIC COMPANY,
COLUMBUS SOUTHERN POWER COMPANY (formerly
COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY),
THE DAYTON POWER AND LIGHT COMPANY,
INDIANA MICHIGAN POWER COMPANY (formerly
INDIANA & MICHIGAN ELECTRIC COMPANY),
KENTUCKY UTILITIES COMPANY,
LOUISVILLE GAS AND ELECTRIC COMPANY,
MONONGAHELA POWER COMPANY,
OHIO EDISON COMPANY,
OHIO POWER COMPANY (formerly THE OHIO
POWER COMPANY),
PENNSYLVANIA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
THE TOLEDO EDISON COMPANY, and
WEST PENN POWER COMPANY.

COMPOSITE COPY AS MODIFIED BY:

Modification No. 1, dated as of June 3, 1966

Modification No. 2, dated as of January 7, 1967

Modification No. 3, dated as of November 15, 1967

Modification No. 4, dated as of November 5, 1975

Modification No. 5, dated as of September 1, 1979 (Eff. 3/29/80)

Modification No. 6, dated as of August 1, 1981 (Eff. 10/1/81)

Modification No. 7, dated as of January 15, 1992 (Eff. 10/14/92)

Modification No. 8, dated as of January 19, 1994 (Eff. 1/19/94)

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INTER-COMPANY POWER AGREEMENT

0.01 THIS AGREEMENT, dated this 10th day of July, 1953, by and among OHIO VALLEY ELECTRIC CORPORATION (herein called OVEC), APPALACHIAN ELECTRIC POWER COMPANY (herein called Appalachian), THE CINCINNATI GAS & ELECTRIC COMPANY (herein called Cincinnati), COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY (herein called Columbus), THE DAYTON POWER AND LIGHT COMPANY (herein called Dayton), INDIANA & MICHIGAN ELECTRIC COMPANY (herein called Indiana), KENTUCKY UTILITIES COMPANY (herein called Kentucky), LOUISVILLE GAS AND ELECTRIC COMPANY (herein called Louisville), MONONGAHELA POWER COMPANY (herein called Monongahela), OHIO EDISON COMPANY (herein called Ohio Edison), THE OHIO POWER COMPANY (herein called Ohio Power), PENNSYLVANIA POWER COMPANY (herein called Pennsylvania), THE POTOMAC EDISON COMPANY (herein called Potomac), SOUTHERN INDIANA GAS AND ELECTRIC COMPANY (herein called Southern Indiana), THE TOLEDO EDISON COMPANY (herein called Toledo), and WEST PENN POWER COMPANY (herein called West Penn), all of the foregoing, other than OVEC, being herein sometimes collectively referred to as the Sponsoring Companies and individually as a Sponsoring Company,

WITNESSETH THAT:

0.02 WHEREAS, the United States Atomic Energy Commission (herein called AEC) proposes to construct a new project (herein called the Project) near Portsmouth, Ohio, and will require at the site of the Project electric power and energy (herein called power and energy) in a large amount which is not now available; and

0.03 WHEREAS, OVEC has entered into a power agreement (herein called DOE Power Agreement) with the United States of America, acting by and through DOE, relating to the supply of power and energy to the Project, and the DOE Power Agreement provides, among other things, that OVEC will expeditiously undertake or cause to be undertaken the design, purchase, and construction, and operation and maintenance of two steam-electric generating stations, one station (herein called Ohio Station) consisting of five turbo-generators each with an expected capability of 200,000 kw with all other necessary equipment, at a location on the Ohio River near Cheshire, Ohio, and the other station (herein called Indiana Station) consisting of six turbo-generators each with an expected capability of 200,000 kw with all other necessary equipment, at a location on the Ohio River near Madison, Indiana, (the Ohio Station and the Indiana Station being herein called the Project Generating Stations) for the purpose of supplying the power and energy requirements of the Project; and

0.04 WHEREAS, the DOE Power Agreement also provides that OVEC will expeditiously undertake or cause to be undertaken the design, purchase, and construction, and operation and maintenance of necessary transmission and general plant facilities (herein called the Project Transmission Facilities) to deliver the energy produced at the Project Generating Stations for use at the Project and that OVEC will establish or cause to be established interconnections between the Project Generating Stations and/or the Project Transmission Facilities and/or substations to be provided by DOE at the Project (herein called the DOE Substations) and the systems of certain of the Sponsoring Companies, directly or indirectly, to deliver for use at the Project certain amounts of Interim Power and Supplemental Power, as hereinafter defined; and

0.05 WHEREAS, OVEC has entered into an agreement, attached hereto as Exhibit A, with Indiana-Kentucky Electric Corporation (herein called IKEC), a corporation organized under the laws of the State of Indiana as a wholly owned subsidiary corporation of OVEC, which embodies the terms and conditions for the ownership and operation by IKEC of the Indiana Station and such portion of the Project Transmission Facilities which are to be owned and operated by it; and

0.06 WHEREAS, in order to provide the power and energy requirements of the Project prior to the completion of the Project Generating Stations and to supplement the power supply following the completion of the Project Generating Stations, it is proposed that transmission facilities will be constructed by certain of the Sponsoring Companies to interconnect the systems of such Sponsoring Companies, directly or indirectly, with the Project Generating Stations and/or the Project Transmission Facilities and/or DOE Substations and that the Sponsoring Companies will agree to pay for such Surplus Power, as hereinafter defined, as may be available at the Project Generating Stations; and

0.07 WHEREAS, the parties hereto desire to define the terms and conditions governing (a) the supply by the Sponsoring Companies of Interim Power and Supplemental Power in order to enable Corporation, as hereinafter defined, to fulfill its obligations under the DOE Power Agreement, and (b) the rights of the Sponsoring Companies to receive Surplus Power as may be available at the Project Generating Stations and the obligations of the Sponsoring Companies to pay therefor; and

[The following "WHEREAS" clauses were included in various modifications, as were other "WHEREAS" clauses not set forth herein.]

0.03 WHEREAS, OVEC has proposed an arrangement to modify the provisions of the Agreement on the terms set forth in

the letter from OVEC to AEC dated December 17, 1965 to provide for certain credits and payments to the Sponsoring Companies of $734,126 and to AEC of $4,356,374 by OVEC and certain additional payments or credits to the Sponsoring Companies and AEC, and each of the Sponsoring Companies has on or before December 29, 1965 agreed thereto; and

0.04 WHEREAS, OVEC has proposed arrangements to modify the provisions of the Agreement on the terms set forth in letters from OVEC to AEC dated December 12, 1966 and December 29, 1966 to provide for certain credits and payments to the Sponsoring Companies of $42,925 and to AEC of $194,575 by OVEC and certain additional payments or credits to the Sponsoring Companies and AEC, and each of the Sponsoring Companies has on or before December 29, 1966 agreed to such arrangements; and

0.02 WHEREAS, pursuant to the Energy Reorganization Act of 1974, the AEC was abolished on January 19, 1975 and certain of its functions, including the procurement of electric utility services for the Project, were transferred to and vested in the Administrator of Energy Research and Development; and

0.03 WHEREAS, pursuant to the Department of Energy Organization Act, on October 1, 1977, all of the functions vested by law in the Administrator of Energy Research and Development or the Energy Research and Development Administration were transferred to, and vested in, the Secretary of Energy, the statutory head of the Department of Energy (hereinafter called "DOE"); and

NOW, THEREFORE, the parties hereto agree with each other as follows:

ARTICLE 1

DEFINITIONS

1.01 For the purposes of this Agreement, the following terms, wherever used herein, shall have the following meanings:

1.011 "Corporation" means OVEC, IKEC, and all other subsidiary corporations of OVEC.

1.012 "Power Participation Ratio" as applied to each of the Sponsoring Companies refers, prior to any adjustment hereinafter described, to the percentage set forth opposite its respective name in the tabulation below:

Company	Power Participation Ratio--Percent
Appalachian*	15.2
Cincinnati*	9.0
Columbus*	4.3
Dayton*	4.9
Indiana*	7.6
Kentucky*	2.5
Louisville*	7.0
Monongahela*	3.5
Ohio Edison*	14.5
Ohio Power*	15.0
Pennsylvania*	2.0
Potomac*	2.0
Southern Indiana*	1.5
Toledo*	4.0
West Penn*	7.0
Total	100.0

* Inter-State Company

provided, however, that each Sponsoring Company shall, if it so elects, be entitled to offer to release, by written notice delivered to Corporation and to each of the other Sponsoring Companies not less than 75 days prior to the commencement of a calendar month designated in such notice, all or a designated part of its Power Participation Ratio for a period of not less than 90 days, to other Sponsoring Companies; and provided further that (a) if a Sponsoring Company offers in a particular case to release any part (including the entire amount) of its Power Participation Ratio and such part is assumed in its entirety by other Sponsoring Companies during the period designated in the notice by such Sponsoring Company, said Sponsoring Company's Power Participation Ratio shall be reduced by such part during the period designated in the notice; (b) if a Sponsoring Company assumes in a particular case any part of another Sponsoring Company's Power Participation Ratio, said Sponsoring Company's Power Participation Ratio shall be equal, during the period designated in the notice delivered by such other Sponsoring Company, to the sum of its own Power Participation Ratio and the part of the Power Participation Ratio which it has assumed; (c) if a Sponsoring Company offers to release in a particular case any part of its Power Participation Ratio and two or more of the other Sponsoring Companies are each willing to assume portions of such part which aggregate more than such part of said Sponsoring Company's Power Participation Ratio during the period designated in the notice delivered by such Sponsoring Company, such part shall be allotted (successively if necessary) among the Sponsoring Companies willing to assume it in

proportion to their respective Power Participation Ratios; (d) if a Sponsoring Company offers in a particular case to release any part of its Power Participation Ratio during a period specified in the written notice delivered by such Sponsoring Company and the Power Participation Ratio, or part thereof, which such Sponsoring Company offers to release is greater than the part thereof that other Sponsoring Companies are willing to assume during such period, Corporation shall, prior to the commencement of the first calendar month designated in the written notice delivered by the Sponsoring Company offering so to release such part of its Power Participation Ratio, take appropriate action to notify DOE pursuant to paragraph 1 of Section 2.05 of the DOE Power Agreement that on the first day of such calendar month, and for the period designated in such written notice, the DOE contract demand shall be increased from the amount which, had Corporation not elected to deliver such notice, would otherwise be in effect as the DOE contract demand, by an amount which will be equivalent to, as nearly as practicable under then prevailing conditions, the amount of such excess, and in such case during such period the Power Participation Ratio of such Sponsoring Company shall, after giving effect to the part thereof assumed by other Sponsoring Companies, be reduced to give effect to the resulting increase in DOE's contract demand and the respective Power Participation Ratios of the other Sponsoring Companies, after giving effect to any increase effected pursuant to (b) above, shall be increased, in an aggregate amount equal to the amount of such reduction, in proportion to their respective Power Participation Ratios and in amounts necessary to assure that the total of the respective Power Participation Ratios of the Sponsoring Companies will at no time exceed, or be less than, one hundred percent (100%); (e) where two or more notices are delivered by Sponsoring Companies to Corporation, separate actions, and allotments, if necessary, shall be made with respect thereto in the chronological order of receipt by Corporation of the written notices from such Sponsoring Companies; and (f) if on any occasion each of the Sponsoring Companies shall offer to release for any period the entire amount of their respective Power Participation Ratios, but no part thereof is assumed by any Sponsoring Company (including any Sponsoring Company which has previously released its entire Power Participation Ratio pursuant to clause (a) and/or clause (d) above) the Power Participation Ratio of each Sponsoring Company shall be equal during such period to the percentage set forth opposite its respective name in the tabulation above, but in such case Corporation shall take appropriate action to notify DOE pursuant to Paragraph 1 of Section 2.05 of the DOE Power Agreement that on the date of the commencement of, and during, such period the DOE contract demand shall be equal to the Full Contract Quantity.

1.013 "Inter-State Sponsor" means each of the Sponsoring Companies designated as an Inter-State Company in the foregoing tabulation.

1.014 "Intra-State Sponsor" means each of the Sponsoring Companies designated as an Intra-State Company in the foregoing tabulation.

1.015 "Sponsors A" means those Sponsoring Companies which, as of any specified time, have direct connections to Corporation's facilities and/or DOE Substations through their own transmission lines.

1.016 "Sponsors B" means those Sponsoring Companies whose transmission systems, as of any specified time, are only indirectly connected to Corporation's facilities and/or DOE Substations, i.e., through intervening transmission systems owned by other Sponsoring Companies.

1.017 "Interim Power" means power and accompanying energy which will be required by DOE from Corporation for construction or operation purposes at the Project, from sources other than the Project Generating Stations, prior to Full Scale Operation as defined below.

1.018 "Permanent Power" means all power and accompanying energy classified as permanent power under Section 2.03 of the DOE Power Agreement.

1.019 "Supplemental Power" means power and accompanying energy to be supplied by or for the account of the Sponsoring Companies during Full Scale Operation in order to enable Corporation to fulfill its obligation under paragraph 1 of Section 2.04 of the DOE Power Agreement.

1.0110 "Maximum Power" of the Project Generating Stations at any particular time means the total net kilowatts at the 345-kv busses of the Project Generating Stations which Corporation in its sole discretion will determine that the Project Generating Stations will be capable of safely delivering under conditions then prevailing, including all conditions affecting capability.

1.0111 "DOE Power" at any particular time means the total net kilowatts of Permanent Power which the Corporation is then generating at the Project Generating Stations for delivery, directly or indirectly, to DOE at the Project, adjusted to the 345-kv busses at the Project Generating Stations, but will not include any Interim Power or Supplemental Power.

1.0112 "Surplus Power" of the Project Generating Stations at any particular time means the net kilowatts

consisting of the excess, if any, of Maximum Power over DOE Power.

1.0113 "Surplus Energy" of the Project Generating Stations means the energy associated with Surplus Power.

1.0114 "DOE Contract Demand" means the amount of power which Corporation is obligated to supply DOE at the Project under the DOE Power Agreement during Full Scale Operation as defined below.

1.0115 "Full Scale Operation" means the operation of the Project Generating Stations after all eleven generating units shall have been placed in commercial operation.

1.0116 "Month" means a calendar month.

1.0117 "Uniform System of Accounts" means the Uniform System of Accounts prescribed by the Federal Power Commission for Public Utilities and Licensees, as in effect on July 1, 1952.

[Sections 1.0118, 1.0119, 1.0120 and 1.0121 no longer applicable]

1.0122 "DOE" includes the DOE and any successor operator of the Project of DOE near Portsmouth, Ohio, to whom all of DOE's rights, obligations and responsibilities have been assigned pursuant to the DOE Power Agreement.

1.0123 "Emergency Power Supply Period" means any period of time during which, at the request of one or more of the Sponsoring Companies, OVEC and DOE have agreed to reduce the contract demand under the DOE Power Agreement in order that one or more of the Sponsoring Companies will have available additional Surplus Power and Energy to prevent or alleviate an emergency which impairs or jeopardizes the ability of the Sponsoring Company or Companies to meet load.

ARTICLE 2

TRANSMISSION FACILITIES

2.01 *Obligation of Sponsoring Companies*. Each Sponsoring Company, subject to *Section* 2.02 hereof, shall make available or provide transmission facilities in its transmission system which, together with the transmission facilities so made available or provided by other Sponsoring Companies and Corporation shall, in the aggregate, be adequate to transmit power and energy from or to each of the Sponsoring Companies in amounts equal to their respective Power Participation Ratios of Interim Power, Supplemental Power, and Surplus Power.

2.02 *Additional Facilities.* Whenever the foregoing requires that additional facilities be provided in the transmission system of any Sponsoring Company for the transmission of power and energy to or from other Sponsoring Companies, which additional facilities would not be needed for its own use by said Sponsoring Company other than for the purposes of this Agreement, said Sponsoring Company shall construct or cause to be constructed, own, operate, and maintain such additional facilities unless it otherwise elects. In the event that such Sponsoring Company elects otherwise, then such additional facilities shall be constructed, owned, operated and maintained by Corporation. In either event the parties hereto shall, from time to time, enter into supplementary transmission agreements for the construction, ownership, operation, and maintenance of such additional facilities as may be required. Such supplementary agreements shall designate which of the parties hereto is to provide specific additional facilities, shall describe such additional facilities in detail and shall provide for apportionment and settlement of costs of such additional facilities. Such supplementary agreements shall form part of this Agreement.

2.03 *Apportionment and Settlement of Costs.* The Corporation shall pay to a Sponsoring Company providing facilities of the character described in *Section* 2.02 hereof all charges which the parties hereto mutually agree are properly allocable to such facilities. The aggregate of the charges so paid to Sponsoring Companies or incurred by Corporation (including, in the case of Corporation, the costs of facilities provided by Corporation and/or charges applicable thereto) shall be assessed by Corporation against all the Sponsoring Companies in proportion to their Power Participation Ratios.

2.04 *Limited Burdening of Corporation's Transmission Facilities.* Transmission facilities provided and owned by the Corporation, including the facilities described in *Section* 2.02 hereof and the Project Transmission Facilities, shall not be burdened by power and energy flows of any Sponsoring Company to an extent which would impair or prevent the transmission of Interim Power, Supplemental Power, or Surplus Power. The Project Transmission Facilities shall not be so burdened to an extent which would impair or prevent the transmission of Permanent Power.

2.05 *Emergency Use of Transmission Facilities.* In the event of outage of one or more of the elements of the Project Transmission Facilities between the Project Generating Stations and the point of delivery at the Project (as defined in Section 2.06 of the DOE Power Agreement), the Sponsoring Companies agree to make available to Corporation any capacity of their transmission systems that they determine is not at such time needed by them to supply their customers under commitments made prior thereto, and Corporation shall be entitled to use such

transmission capacity, without charge, for the period during which such capacity is not so needed by the Sponsoring Companies to the extent required to transmit Permanent Power to said point of delivery.

[Article 3 no longer applicable]

ARTICLE 4

SUPPLEMENTAL POWER

4.01 *Supply of Supplemental Power.* Paragraph 1 and the first sentence of paragraph 2 of Section 2.04 of the DOE Power Agreement read as follows:

"1. Whenever, for any clock hour, the aggregate amount of permanent power and the energy associated therewith furnished by Corporation to DOE pursuant to Section 2.03 and the scheduled kwh of occasional energy for which provision has been made by Corporation pursuant to Section 2.09 is insufficient to supply the part of the DOE contract demand which is then being demanded by DOE, Corporation shall, unless Corporation shall be excused as a result of conditions contemplated by Section 7.05 of this Agreement or DOE shall have otherwise excused Corporation from meeting such demand, furnish additional generating capacity and the energy associated therewith to DOE at the point of delivery to make up for such insufficiency in any amount necessary up to a number of kilowatts which will equal the Applicable Percentage (which percentage, for purposes of this Section 2.04, shall not exceed thirty percent) of the sum of (i) the DOE contract demand and (ii) the transmission losses thereon from the 345 kv busses of the project generating stations. At the request of DOE, during any clock hour Corporation may, at its option, furnish to DOE supplemental power which, when added to the permanent power and occasional energy then being furnished, shall exceed the DOE contract demand; provided that, in such event, DOE shall, if requested to do so by Corporation, forthwith take action to reduce its power and energy requirements to an amount not exceeding the aggregate amount which Corporation would otherwise be obligated to supply. Notwithstanding the foregoing, the aggregate amount of supplemental power and energy which Corporation shall be obligated to furnish to DOE pursuant to this paragraph 1 during any calendar year shall not exceed the product of 900,000,000 kwh multiplied by the average DOE capacity ratio of such calendar year, weighted with respect to the periods of time during which DOE capacity ratios were in effect.

2. The additional generating capacity and the energy associated therewith furnished to DOE pursuant to paragraph 1 above is called 'supplemental power'." . . .

In order to enable Corporation to fulfill its obligation under the DOE Power Agreement to supply Supplemental Power to DOE, each Sponsoring Company shall stand ready to supply, either from its own capacity, capacity to which it is entitled at the Project Generating Stations or through arrangements with other companies, its Power Participation Ratio of the amounts of power and energy required for such supply of Supplemental Power plus its Power Participation Ratio of the aggregate of all electrical losses incurred by all Sponsoring Companies in so supplying required amounts of power and energy. It is understood, however, that Corporation shall endeavor to obtain such power from the most economical source without respect to Power Participation Ratios, including power classified as Surplus Power to which the Sponsoring Companies are entitled but which they are not utilizing.

4.02 *Method of Delivery*. Sponsors A shall receive power and energy transmitted by adjoining Sponsors B associated with the supply of Supplemental Power and shall deliver to Corporation and to DOE for the account of Corporation a total amount of power and energy for such supply from their released generating capacity equal to that received from such Sponsors B (appropriately adjusted for electrical losses) plus such amount as such Sponsors A may be supplying pursuant to *Section* 4.01 above.

Power and energy delivered by Sponsors B associated with the supply of Supplemental Power shall be delivered by them to adjoining Sponsoring Companies. Such adjoining Sponsoring Companies that are Sponsors B and which are intermediate to Sponsors A and to more remote Sponsors B shall transmit power and energy to the next adjoining Sponsoring Company to allow the eventual delivery to Sponsors A of an amount of power and energy from their released generating capacity equal to that received from the more remote Sponsors B (appropriately adjusted for electrical losses) plus such amount as such intermediate Sponsors B may be supplying pursuant to *Section* 4.01 above.

4.03 *Settlements*. Corporation shall pay each Sponsoring Company the out-of-pocket cost, as defined in Appendix I, of energy delivered by such company associated with the supply of Supplemental Power. In the event that a Sponsoring Company purchases power and energy from another Sponsoring Company or from a source other than a Sponsoring Company, Corporation shall not be obligated to reimburse such Sponsoring Company for any demand charge or demand component applicable thereto.

ARTICLE 5

SURPLUS POWER SUPPLY

5.01 *Operation of Project Generating Stations.* Corporation shall operate and maintain the Project Generating Stations in a manner consistent with safe, prudent, and efficient operating practice so that the Maximum Power available from said stations shall be at the highest practicable level attainable throughout the term of this Agreement.

5.02 *Surplus Power Entitlement.* The Sponsoring Companies collectively shall be entitled to take from Corporation and Corporation shall be obligated to supply to the Sponsoring Companies any and all Surplus Power and Surplus Energy pursuant to the provisions of this Agreement. Each Sponsoring Company's Surplus Power Entitlement hereunder shall be its Power Participation Ratio, as defined in *subsection* 1.012, of Surplus Power.

5.03 *Allotment of Surplus Power.* Corporation shall make available to each Sponsoring Company, during each calendar week, a portion of the then available Surplus Power corresponding to said Sponsoring Company's Surplus Power Reservation established as described in *Section* 5.04 below.

5.04 *Surplus Power Reservations.* The establishment of each Sponsoring Company's Surplus Power Reservation shall be in accordance with the following conditions:

5.041 Any Sponsoring Company's Surplus Power Reservation, established as hereinbelow provided, shall remain in effect for a period of not less than a calendar week except during an Emergency Power Supply Period. Surplus Power Reservations shall provide the basis for carrying out settlements between OVEC and Sponsoring Companies.

5.042 If a Sponsoring Company does not release any part of its own Surplus Power Entitlement or does not reserve any part of any Surplus Power Entitlements released by other Sponsoring Companies, said Sponsoring Company's Surplus Power Reservation shall be equal to its Surplus Power Entitlement.

5.043 If a Sponsoring Company is willing to release any part or all of its Surplus Power Entitlement but no part of such released Entitlement is reserved by other Sponsoring Companies, said Sponsoring Company's Surplus Power Reservation shall be equal to its Surplus Power Entitlement.

5.044 If a Sponsoring Company is willing to release any part or all of its Surplus Power Entitlement, said Sponsoring Company's Surplus Power Reservation shall be reduced to the extent that such released part is reserved by other Sponsoring Companies.

5.045 If a Sponsoring Company reserves any part of other Sponsoring Companies' released Surplus Power Entitlements, said Sponsoring Company's Surplus Power Reservation shall be equal to the sum of its own Surplus Power Entitlement and such part of other Sponsoring Companies' Surplus Power Entitlements that it has so reserved.

5.046 If a Sponsoring Company releases any part or all of its Surplus Power Entitlement and there are more than one of the other Sponsoring Companies willing to reserve such part of said Sponsoring Company's Surplus Power Entitlement, such part shall be allotted (successively if necessary) among the Sponsoring Companies willing to reserve it in proportion to their respective Power Participation Ratios.

5.047 If the aggregate of Surplus Power Entitlements that Sponsoring Companies are willing to release is greater than the total amount of such Entitlements that other Sponsoring Companies are willing to reserve, the amount to be released and reserved shall be allotted (successively if necessary) among the Sponsoring Companies willing to so release their Entitlements in proportion to their respective Power Participation Ratios.

5.05 *Surplus Energy.* Corporation shall make available to each Sponsoring Company Surplus Energy in proportion to said Sponsoring Company's Surplus Power Reservation. No Sponsoring Company, however, shall be obligated to avail itself of any Surplus Energy. In the event that any Sponsoring Company does not avail itself of its portion of the Surplus Energy, the remaining amount shall be made available (through successive allotments if necessary) to the other Sponsoring Companies in proportion to their Power Participation Ratios. Each Sponsoring Company availing itself of Surplus Energy shall be entitled to an amount of energy (herein called billing kilowatt-hours of Surplus Energy) equal to its portion, determined as provided above, of the total Surplus Energy after deducting therefrom such Sponsoring Company's proportionate share, as defined below in this *Section* 5.05, of all losses which would be incurred in transmitting the total of such Surplus Energy from the 330-kv busses of the Project Generating Stations to the systems of all Sponsoring Companies availing themselves of Surplus Energy. The proportionate share of all such losses that shall be so deducted from such Sponsoring Company's portion of Surplus Energy shall be equal to all such losses multiplied by the ratio of such portion

of Surplus Energy to the total of such Surplus Energy. Each Sponsoring Company shall have the right, pursuant to this *Section* 5.05, to avail itself of Surplus Energy for the purpose of meeting the loads of its own system and/or of supplying energy to other systems in accordance with agreements, other than this Agreement, to which such Sponsoring Company is a party.

ARTICLE 6

CHARGES FOR SURPLUS POWER

6.01 *Total Monthly Charge*. The amount to be paid Corporation each month by the Sponsoring Companies for Surplus Power and Surplus Energy supplied under this Agreement shall consist of the sum of an energy charge, a demand charge and, if applicable, an emergency power surcharge, all determined as set forth in this *Article* 6.

6.02 *Energy Charge*. The energy charge to be paid each month by the Sponsoring Companies shall be determined by Corporation as follows:

6.021 Determine the aggregate of all expenses for fuel incurred in the operation of the Project Generating Stations, in accordance with Account 703 (Fuel) of the Uniform System of Accounts.

6.022 Determine the total energy charge to be billed to DOE for such month, such charge to be the sum of (a) an amount equal to the product resulting from the computation made for such month in accordance with Section 3.03 of the DOE Power Agreement and (b) the total of the amounts for fuel expense payable by DOE pursuant to paragraph 3 of Section 2.04 of the DOE Power Agreement for billing kwh of supplemental energy furnished from the Project Generating Stations. Said Section 3.03 of the DOE Power Agreement reads as follows:

"SECTION 3.03 *Adjustment of Energy Charge*. The provisional semi-monthly energy charges for any calendar month specified in Section 3.01 shall be adjusted so that the sum of such charges, as adjusted, for such month shall equal the product of the total net charges for such month at the project generating stations to Account 703 (Fuel) of the Uniform System of Accounts, and the ratio of (a) the billing kwh of Permanent Power for such month plus the transmission losses thereon from the 345 kv busses of the project generating stations to the point of delivery, to (b) the total net kwh generated at the project generating stations during such month corrected for losses to the 345 kv busses thereof. Such losses shall be determined

by such methods and procedures as may be mutually agreed upon."

Said paragraph 3 of Section 2.04 of the DOE Power Agreement reads as follows:

"3. Whenever the total net metered kwh delivered to DOE at the point of delivery for any clock hour is in excess of the aggregate amount of the billing kwh of Permanent Power, the scheduled kwh of arranged energy and the scheduled kwh of occasional energy for such hour, such excess, subject to paragraph 4 of this Section 2.04, shall be classified as, and is herein referred to as, 'delivered kwh of supplemental energy.' The aggregate of the delivered kwh of supplemental energy for all the hours of a month shall be the delivered kwh of supplemental energy for such month. To the delivered kwh of supplemental energy so computed for such month shall be added the number of kwh of transmission losses applicable thereto from the points of generation thereof to the point of delivery and the sum so computed is herein called the 'billing kwh of supplemental energy'. Such transmission losses shall be computed on an incremental loss basis by such methods and procedures as may be mutually agreed upon. For the billing kwh of supplemental energy, DOE shall pay Corporation an amount equal to the 'out-of-pocket costs', as defined in Appendix II."

6.023 Determine for such month the difference between the total cost of fuel as described in *subsection* 6.021 above and the total energy charge to be billed DOE as described in *subsection* 6.022 above. For the purposes hereof the difference so determined shall be the fuel cost allocable for such month to the total kilowatt-hours of energy generated at the Project Generating Stations for the supply of Surplus Energy. Each Sponsoring Company shall pay Corporation, for such month, an amount equal to (a) an amount obtained by multiplying the billing kilowatt-hours of Surplus Energy availed of by such Sponsoring Company during such month by the average station heat rate of the Project Generating Stations times the average cost per Btu (determined in a uniform manner for all Sponsoring Companies in conformity with any applicable requirements of Account 703 (Fuel) of the Uniform System of Accounts) of all fuel consumed by said Sponsoring Company in its own generating stations, both averages to be computed in respect of the month next preceding that for which payment is being made, plus (b) its Power Participation Ratio of the excess, if any, for such month of the fuel costs of the Corporation allocable to the total kilowatt-hours of energy generated at the Project Generating Stations for the supply of Surplus Energy over the aggregate of the amounts computed with

respect to all Sponsoring Companies under (a) above, minus (c) its Power Participation Ratio of the excess, if any, for such month of the aggregate of the amounts computed with respect to all Sponsoring Companies under (a) above over the fuel costs of the Corporation allocable to the total kilowatt-hours of energy generated at the Project Generating Stations for the supply of Surplus Energy.

6.03 *Demand Charge During Full Scale Operation Prior to Termination of DOE Power Agreement or Reduction of DOE Contract Demand to Zero Under DOE Power Agreement.* The demand charge to be paid each month during Full Scale Operation by the Sponsoring Companies, subject to the provisions of *Sections* 6.08 and 6.12 below, shall be determined by Corporation as follows:

6.031 Determine the aggregate of the costs incurred for such month by Corporation resulting from its ownership, operation, and maintenance of the Project Generating Stations and Project Transmission Facilities, in accordance with paragraph 3 of Section 3.04 of the DOE Power Agreement, which reads:

"3. As soon as practicable after the close of each calendar month the following components of costs of Corporation (eliminating any duplication of costs which might otherwise be reflected among the corporate entities comprising Corporation) applicable to the ownership, operation and maintenance of the facilities described in Sections 1.01, 1.02, 3.06 and 3.07 for such month shall, except as otherwise provided in Sections 3.06 and 3.07, be determined and recorded:

(a) Component (A) shall consist of fixed charges made up of (i) the amounts of interest properly chargeable to Accounts 530, 534 and 535, less the amount thereof credited to Account 536, of the Uniform System of Accounts, including the interest component of any purchase price, interest, rental or other payment under an installment sale, loan, lease or similar agreement relating to the purchase, lease or acquisition by Corporation of additional facilities under Section 3.06 and replacements under Section 3.07 (which, if the right to receive such interest component under such installment sale, loan, lease or similar agreement shall have been assigned by the seller, lender, lessor or other party to any such similar agreement with the written consent of Corporation and DOE, to a trustee under an indenture pursuant to which bonds or other debt securities have been issued and sold, shall be paid by DOE directly to such assignee rather than to Corporation), (ii) the amounts of amortization

of debt discount or premium and expenses properly chargeable to Accounts 531 and 532, and (iii) an amount equal to the sum of (I) the applicable amount of the debt amortization component for such month required to retire the total amount of indebtedness of Corporation issued and outstanding at the beginning of full scale operation on a twenty-five year semi-annual payment level debt sinking fund basis (computed with an interest component of 3-3/4% per annum from the beginning of full scale operation), (II) the amortization requirement for such month in respect of indebtedness (including the principal or amortization component of any purchase price, amortization, rental or other payment under an installment sale, loan, lease or similar agreement relating to the purchase, lease or acquisition by Corporation of additional facilities under Section 3.06 and replacements under Section 3.07, which, if the right to receive such principal or amortization component under such installment sale, loan, lease or similar agreement shall have been assigned by the seller, lender, lessor or other party to any such similar agreement, with the written consent of Corporation and DOE, to a trustee under an indenture pursuant to which bonds or other debt securities have been issued and sold, shall be paid by DOE directly to such assignee rather than to Corporation) of Corporation incurred in respect of facilities referred to in Sections 3.06 and 3.07, the cost of which has been financed by Corporation from sources of capital funds other than DOE as contemplated by such Sections 3.06 and 3.07, and (III) to the extent not provided for pursuant to clause (II) of this clause (iii), an appropriate allowance for depreciation of the facilities referred to in Sections 3.06 and 3.07, the cost of which has been financed by Corporation from sources of capital funds other than DOE as contemplated by such Sections 3.06 and 3.07.

(b) Component (B) shall consist of the total operating expenses for labor, maintenance, materials, supplies, services, insurance, administrative and general expense, etc., properly chargeable to the Operating Expense Accounts of the Uniform System of Accounts (exclusive of (i) Accounts 703, 738, 739, 785, 786, 787, 788 and 789 of the Uniform System of Accounts and (ii) any expenses for which DOE reimburses Corporation under Sections 1.05, 4.02 and 4.08), and additional amounts which, after provision for all

estimated Federal income taxes on such amounts, shall equal any amounts paid or payable by Corporation as fines or penalties with respect to occasions (before or after the effective date of Modification No. 11 to this Agreement) where it is asserted that Corporation failed to comply with a law or regulation relating to the emission of pollutants or the discharge of wastes; provided, however, that the cost of any insurance carried solely for the benefit of DOE at its request shall be paid for solely by DOE unless otherwise agreed upon from time to time by the parties hereto.

(c) Component (C) shall consist of the total expenses for taxes, including all taxes on income (other than (i) Federal income taxes, (ii) any taxes that are now or may hereafter be levied based on revenue, energy generated or sold or on any other basis capable of direct distribution, the cost of which taxes shall be allocated directly to DOE and Corporation in amounts reflecting the proper share of each, and DOE shall pay to Corporation its share thereof, (iii) taxes arising from payments received by Corporation for difficult to quantify costs under Section 2.08 and (iv) taxes arising from payments received by Corporation for use of Corporation's transmission facilities under Section 2.10), properly chargeable to Account 507 of the Uniform System of Accounts; provided, however, that any taxes for which DOE reimburses Corporation under Sections 1.05, 3.06, 3.07, 4.02, and 4.08 shall not be included in Component (C).

(d) Component (D) shall consist of an amount equal to the product of $2.089 multiplied by the total number of shares of capital stock of the par value of $100 per share of Ohio Valley Electric Corporation which shall have been issued and which are outstanding on the last day of such month."

The amount specified in the computation of Component (D) in subparagraph (d) of paragraph 3 of Section 3.04 of the DOE Power Agreement is subject to modification or adjustment as provided in the DOE Power Agreement. In the event of any modification or adjustment of Component (D), or in the manner of the computation thereof, under the DOE Power Agreement, whether by formal modification or amendment or otherwise, the above quoted provisions, and the computation of Component (D) shall, for the purposes of this Agreement, be similarly modified or adjusted automatically without further action or consent by the parties hereto, and determination of Component (D) of the demand charges for the purposes of this Agreement at any particular time

shall be made in accordance with the DOE Power Agreement as the same, as theretofore modified or adjusted, shall be in effect at such time.

In the event that any such modification or amendment shall be made in the terms of the DOE Power Agreement, Corporation shall thereafter be entitled, but shall not be required, to take such action before, including such filings with, any regulatory authority having jurisdiction with respect to any term or condition of this Agreement as Corporation shall deem appropriate and in the event of such action by Corporation, the terms and conditions under which service shall be rendered and charges determined shall be the terms and conditions as shall result from such action by or before any such regulatory authority.

6.032 Determine the DOE capacity ratio for such month in accordance with paragraphs 1 and 2 of Section 3.04 of the DOE Power Agreement which read:

"1. The term 'established capability' of the Project Generating Stations as used herein means the total net capability of the Project Generating Stations (with all eleven generating units operating) at their 345 kv busses, determined in accordance with the procedures described in Appendix III.

2. The term 'DOE capacity ratio' as used herein means the ratio of (a) the sum of (i) the DOE contract demand, (ii) the kw transmission losses thereon from the 345 kv busses of the Project Generating Stations, determined by such methods and procedures as may be mutually agreed upon, and (iii) the Applicable Percentage of the sum of items (i) and (ii) as an allowance for reserve generating capacity, to (b) the established capability of the Project Generating Stations; provided, however, that the DOE capacity ratio shall not exceed unity.

The term 'Applicable Percentage', referred to in paragraph 1 of Section 2.04, in paragraph 1 of Section 2.05, and in paragraph 2 of this Section 3.04, shall be, on any particular date, fifteen per cent (15%) plus 1.5 percentage points for each whole percentage point by which the average availability of Corporation's generating capacity during the calendar year immediately preceding such particular date, determined as provided in Appendix VI, was less than 90 percent."

6.033 Determine the demand charge to be charged to DOE for such month, such demand charge to be an amount equal to the product of the aggregate of the costs deter-

mined in accordance with *subsection* 6.031 above and the average DOE capacity ratio in effect for such month, weighted with respect to the periods of time during which DOE capacity ratios were in effect; provided, however, that the demand charge to be charged to DOE for such month shall be made on the basis that the average DOE capacity ratio in effect for such month equalled unity as to amounts, if any, specified in paragraph 3 of Section 3.04 of the DOE Power Agreement with respect to the cost of facilities which are referred to in Sections 3.06 and 3.07 of the DOE Power Agreement, which costs are incurred after October 14, 1977, whether or not the purchase and installation of such facilities occurred in whole or in part prior to such date; and provided further, however, that the demand charge to be charged to DOE for such month shall be reduced by amounts, if any, specified in paragraph 3 of Section 3.04 of the DOE Power Agreement with respect to fines and penalties, which amounts DOE shall not be obligated to pay to Corporation as a result of the second proviso contained in Section 7.05 of the DOE Power Agreement and other amounts, if any, specified in paragraph 3 of Section 3.04 of the DOE Power Agreement which DOE shall not be obligated to pay to Corporation as a result of adjustments mutually agreed upon by Corporation and DOE pursuant to said second proviso which reads as follows:

> "provided, further, that DOE shall be relieved of its obligation to pay to Corporation amounts specified in paragraph 3 of Section 3.04 with respect to fines and penalties with respect to occasions where it is asserted that Corporation failed to comply with a law or regulation relating to the emission of pollutants or the discharge of wastes, if, and only if, prior to any such particular occasion, (i) DOE has requested Corporation to limit the generation at either or both Project Generating Stations so as not to exceed a stated number of megawatts for a stated period to comply with applicable laws or regulations relating to the emission of pollutants or the discharge of wastes, (ii) DOE has advised Corporation that it will, and does, during such period, limit its demand at the Project so that the number of megawatts to be supplied by Corporation at the point of delivery as permanent and supplemental power shall not exceed the amount determined by multiplying the DOE capacity ratio by the number of megawatts of permanent and supplemental power to which DOE would be entitled after giving effect to the limitation provided in clause (i) above, and (iii) Corporation shall willfully fail so to limit generation at either or both of the Project Generating Stations so as not to exceed the number of megawatts stated in such request (however, should Corporation willfully operate either or both of the Project Generating Stations so

that the number of megawatts generated shall exceed (x) the number of megawatts which could have been generated had DOE not requested Corporation to limit its generation as provided in clause (i) above, minus (y) the number of megawatts which could have been generated had DOE not requested Corporation to limit its generation as provided in clause (i) above multiplied by the DOE capacity ratio, plus (z) the number of megawatts determined as provided in clause (ii) above plus transmission losses thereon, then the amount to be paid by DOE to Corporation on account of the costs specified in paragraph 3 of Section 3.04 other than (a) any interest, principal, and/or amortization component of any purchase price, amortization, rental, or other payment under an installment sale, loan, lease or similar agreement relating to the purchase, lease, or acquisition by Corporation of additional facilities under Section 3.06 and replacements under Section 3.07, (b) the cost of any insurance carried solely for the benefit of DOE at its request pursuant to paragraph 3(b) of Section 3.04 and (c) any taxes allocated directly to DOE pursuant to paragraph 3(c) of Section 3.04, shall be adjusted to the extent mutually agreed upon);. . ."

[Section 6.034 deleted as of November 15, 1967]

6.035 Determine the difference, if any, between (a) the aggregate of the costs determined as provided in subsection 6.031 above and (b) the sum of the demand charge to be charged to DOE determined as provided in subsection 6.033 above plus the amounts (other than amounts for fuel expense), if any, payable by DOE pursuant to paragraph 3 of Section 2.04 of the DOE Power Agreement for billing kwh of supplemental energy furnished from the Project Generating Stations. The aggregate demand charge which shall be paid by or credited to all Sponsoring Companies for such month shall be the amount of such difference.

The portion thereof payable for such month by each Sponsoring Company shall be computed by allocating such aggregate demand charge, based on availability on a kilowatt-hour basis, among the calendar weeks (or fractions thereof) of such month and shall be the total of the products obtained by multiplying the respective Surplus Power Reservations of said Sponsoring Company for such weeks (or fractions thereof) by the respective amounts so allocated.

[Original Section 6.036 deleted as of November 15, 1967]
[New Section 6.036 added as of January 19, 1994]

6.036 If, during an Emergency Power Supply Period, OVEC requests DOE to reduce load so that more

capacity and energy can be made available to a Sponsoring Company or Companies affected by such emergency and if DOE agrees to do so on condition that OVEC reimburse DOE for its estimated costs of reducing load (emergency power surcharge), the aggregate demand charge to be paid by each Sponsoring Company shall be adjusted to reflect its agreed share of DOE's emergency power surcharge paid or credited by OVEC to DOE. Such share shall be determined based on DOE's estimated cost per kilowatt of reducing an increment of load during a clock-hour and the amount of capacity reserved by such Sponsoring Company attributable to such load reduction.

[Sections 6.037, 6.038, 6.039 and 6.040 no longer applicable]

6.04 *Demand Charge Annual Adjustment During Full Scale Operation Prior to Termination of DOE Power Agreement.* Paragraph 5 of Section 3.04 of the DOE Power Agreement reads:

> "5. After the close of each calendar year a further adjustment shall be made by multiplying the total of the costs specified in paragraph 3 of this Section 3.04 for the entire year by the average DOE capacity ratio for such year, weighted with respect to the periods of time during which DOE capacity ratios were in effect, and crediting or charging DOE, as the case may be, with the difference between the resulting product and the aggregate of the amounts of the provisional semi-monthly demand charges for such year, after adjustment of such amounts pursuant to paragraph 4 of this Section 3.04; provided, however, that such further adjustment shall be made on the basis that the average DOE capacity ratio for such year equalled unity as to amounts, if any, specified in paragraph 3 of this Section 3.04 with respect to the cost of facilities which are referred to in Sections 3.06 and 3.07, which costs are incurred after October 14, 1977 whether or not the purchase and installation of such facilities occurred in whole or in part prior to such date."

In view of the provisions of said paragraph 5, promptly following the close of a calendar year during Full Scale Operation prior to termination of the DOE Power Agreement, the annual adjustment in demand charges payable for such year by the Sponsoring Companies to Corporation shall be based upon the following determinations to be made by Corporation:

6.041 Determine for such year the amount DOE is to be credited or charged in accordance with said paragraph 5 of Section 3.04 of the DOE Power Agreement.

6.042 Determine (a) the aggregate for such year of the amounts computed for each month thereof chargeable to each Sponsoring Company in accordance with *subsection* 6.035 above and (b) the ratio of such aggregate so determined for

each Sponsoring Company to the total for such year chargeable to all of the Sponsoring Companies in accordance with *subsection* 6.035 above. Each Sponsoring Company's total demand charge for such year shall be adjusted either by a charge or credit, whichever is appropriate, by an amount equal to the product of the ratio so determined for such Sponsoring Company and the amount to be credited or charged to DOE determined in accordance with *subsection* 6.041 above.

[Sections 6.04 A and 6.04 B no longer applicable]

[Sections 6.05, 6.06 and 6.07 deleted as of November 15, 1967]

6.08 *Demand Charge during Full Scale Operation Coincident with Notice Period of Reduction of DOE Contract Demand.* Paragraph 1 of Section 6.03 of the DOE Power Agreement reads as follows:

"1. The right of termination of this Agreement by DOE provided for in Section 6.02 shall include the right to mak optional reductions (including a reduction the effect of which would be to reduce the DOE contract demand to zero) under this Section 6.03 of the DOE contract demand to the extent that power is no longer required at the Project, without payment of any cancellation charge or cost (other than (i) the reimbursement of Corporation for expenditures and costs, and the making of the payments with respect to fuel supply, as specified in paragraph (f) of Section 6.02 and (ii) the demand charges, including any modified demand charges, and any other payment required under Article III, payable by DOE during the notice period), by not more than 300 mw at any one time, upon not less than 60 months' prior written notice to Corporation; provided, however, that no such reduction shall be made effective until a period of at least six months has elapsed subsequent to the effective date of any prior reduction in the DOE contract demand."

Paragraph (b) and the currently applicable provisions of paragraph (d) of Section 6.02 of the DOE Power Agreement read as follows:

"(b) In the event that DOE shall, during the notice period, deliver to Corporation a further notice in writing to the effect that DOE will not require any power during any specified remaining portion of the notice period and thereafter, DOE shall, during such specified remaining portion, pay, in lieu of the demand charges referred to in paragraph (a) of this Section 6.02, the modified demand charges as defined in paragraph (d) of this Section 6.02. In the event that such further notice is to the effect that DOE will not require any specified amount of power during any specified remaining portion of the notice period and thereafter,

appropriate adjustments shall be made with respect to the demand charges payable for power required during such specified remaining portion of notice period and the modified demand charges for power not so required."

* * *

"(d) The 'modified demand charges' mentioned in paragraphs (b) and (c) of this Section 6.02 shall be the sum of the monthly demand charges which would have been payable by DOE for Permanent Power pursuant to Article III hereof, under conditions prevailing at the notice date, without regard to any waiver by Corporation of any term or provision of this Agreement, if DOE had not delivered such notice of termination and the Project Generating Stations had been operated to furnish the DOE contract demand in effect at the notice date (without regard to any such waiver), less one-half of the costs of the nature described in paragraph 3.(b) of Section 3.04 included in the computation of the monthly demand charges under this paragraph (d); provided however that the costs of the nature described in paragraph 3.(b) of Section 3.04 so included in such computation of the monthly demand charges under this paragraph (d), after reduction by one-half of such costs, shall not exceed the aggregate amounts which Corporation properly records on its books during such month with respect to costs of the nature described in paragraph 3.(b) of Section 3.04."

In the event DOE delivers such further notice to Corporation as provided in said paragraph (b) of Section 6.02 of the DOE Power Agreement and payment of a modified demand charge by DOE to Corporation as provided in said paragraph (d) of Section 6.02 of the DOE Power Agreement becomes effective during any portion of the notice period as defined in said Section 6.02 of the DOE Power Agreement, during such portion of the notice period determination of the demand charges to be paid by the Sponsoring Companies to Corporation each month shall continue to be in accord with the provisions of *Section* 6.03 of this Agreement, modified only as such provisions may be affected by said paragraphs (b) and (d) and consistent with the principle that the aggregate of (i) the demand charges payable by DOE adjusted pursuant to paragraph 4 of Section 3.04 of the DOE Power Agreement and (ii) the demand charges payable by the Sponsoring Companies, computed before making the credits and adjustments provided in *subsections* 6.037, 6.038, 6.039 and 6.040, each month to Corporation shall be equal to the total costs incurred for such month by Corporation resulting from its ownership, operation, and maintenance of the Project Generating Stations and Project Transmission Facilities determined in accordance with paragraph 3 of Section 3.04 of the DOE Power Agreement and quoted in *subsection* 6.031 above.

[Sections 6.09, 6.10 and 6.11 deleted as of November 15, 1967]

6.12 *Demand Charge Following Termination of DOE Power Agreement or Reduction of DOE Contract Demand to Zero Under DOE Power Agreement.* During the period commencing with the month following termination of the DOE Power Agreement or reduction of the DOE contract demand to zero under the DOE Power Agreement and for the remainder of the term of this Agreement, subject to the provisions of *Article* 11 below, demand charges payable by the Sponsoring Companies to Corporation shall be determined as provided below in this *Section* 6.12.

During such period the aggregate demand charge, computed before making the credits or adjustments provided for in *subsections* 6.037, 6.038, 6.039 and 6.040 above, payable each month by the Sponsoring Companies to Corporation shall be equal to the total costs incurred for such month by Corporation resulting from its ownership, operation, and maintenance of the Project Generating Stations and Project Transmission Facilities determined in accordance with the then applicable requirements of paragraph 3 of Section 3.04 of the DOE Power Agreement quoted in *subsection* 6.031 above (after giving effect to all prior modifications or adjustments made with respect thereto under the DOE Power Agreement).

The portion of such aggregate demand charge payable for such month by each Sponsoring Company shall be computed by allocating such aggregate demand charge on a kilowatt-day basis among the calendar weeks (or fractions thereof) of such month and shall be the total of the products obtained by multiplying the respective Surplus Power Reservations of said Sponsoring Company for such weeks (or fractions thereof) by the respective amounts so allocated. The kilowatt-days for any day for the above purpose shall be determined on a calendar-day basis and shall be one twenty-fourth of the aggregate of the kilowatts of Surplus Power available during each clock-hour of such day.

ARTICLE 7

TRANSMISSION LOSSES

7.01 *Energy Received and Delivered.* Each Sponsoring Company that transmits energy to or from any other Sponsoring Company, pursuant to this Agreement, shall deliver from its system an amount of energy equal to that which it received less the increase in electrical losses incurred on its system, or shall deliver from its system an amount of energy equal to that which it received plus the decrease in electrical losses on its system (as the case may be) resulting from the transmission of such energy.

ARTICLE 8

METERING OF ENERGY SUPPLIED

8.01 *Measuring Instruments.* The parties hereto shall own and maintain such metering equipment as may be necessary to provide complete information regarding the delivery of power and energy to or for the account of any of the parties hereto; and the ownership and expense of such metering shall be in accordance with agreements among them. Each party will at its own expense make such periodic tests and inspections of its meters as may be necessary to maintain them at the highest practical commercial standard of accuracy and will advise all other interested parties hereto promptly of the results of any such test showing an inaccuracy of more than 1%. Each party will make additional tests of its meters at the request of any other interested party. Other interested parties shall be given notice of, and may have representatives present at, any test and inspection made by another party. If any periodic or additional test shows that a meter is within 1% of accuracy, no correction shall be made in billings; but if any test shows that the meter is inaccurate by more than 1%, a correction shall be made in the billing for the previous month, or from the date of the latest test if within the previous month, and for the elapsed period in the month during which the test was made. The cost of any additional test requested by any party other than the owner of the meter to be tested shall be borne by the party requesting the test if such test shows the meter to be within 1% of accuracy, and by the party owning the meter if such test shows it to be inaccurate by more than 1%.

ARTICLE 9

COSTS OF REPLACEMENTS AND ADDITIONAL FACILITIES; ADVANCE PAYMENTS FOR ENERGY CHARGES

9.01 *Replacement Costs.* The Sponsoring Companies shall reimburse Corporation for the difference between (a) the total cost of replacements chargeable to property and plant (other than facilities described in *Section* 2.02) made by Corporation during any month prior thereto (and not previously reimbursed) and (b) the amounts received by Corporation from DOE as reimbursement for the cost of replacements under the provisions of the DOE Power Agreement, or paid for out of proceeds of fire or other applicable insurance protection, or out of amounts recovered from third parties responsible for damages requiring replacement. If Corporation is unable to secure a satisfactory ruling to the effect that amounts paid by the Sponsoring Companies in reimbursement of replacement costs do not constitute taxable income to Corporation, or in case such ruling once obtained shall be reversed or rescinded, then the Sponsoring Companies shall pay to Corporation such amount, in lieu of the

amounts to be paid as above provided, which, after provision for all taxes on income shall equal the costs of the replacements reimbursable by the Sponsoring Companies to Corporation as above provided. Each Sponsoring Company's share of such payment shall be the percentage of such difference represented by its Power Participation Ratio. The term cost of replacements, as used herein, shall include all components of cost, plus removal expense, less salvage.

9.02 *Additional Facility Costs*. The Sponsoring Companies shall reimburse Corporation for the difference between (a) the total cost of additional facilities and/or spare parts (other than facilities described in *Section* 2.02) purchased and/or installed by Corporation during any month prior thereto (and not previously reimbursed) and (b) the amounts received by Corporation from DOE as reimbursement for the cost of additional facilities and/or spare parts under the provisions of the DOE Power Agreement. If Corporation is unable to secure a satisfactory ruling to the effect that amounts paid by the Sponsoring Companies in reimbursement of additional facility and/or spare part costs do not constitute taxable income to Corporation, or in case such ruling once obtained shall be reversed or rescinded, then the Sponsoring Companies shall pay to Corporation such amount, in lieu of the amounts to be paid as above provided, which, after provision for all taxes on income, shall equal the costs of the additional facilities and/or spare parts reimbursable by the Sponsoring Companies to Corporation as above provided. Each Sponsoring Company's share of such payment shall be the percentage of such difference represented by its Power Participation Ratio.

9.03 *Provisional Semi-Monthly Payments for Surplus Power*. The Sponsoring Companies shall, from time to time on request by Corporation, make provisional semi-monthly payments for Surplus Power in amounts approximately equal to the estimated amounts payable for Surplus Power delivered by Corporation to the Sponsoring Companies during each semi-monthly period. Each Sponsoring Company shall pay to Corporation as a provisional semi-monthly payment for Surplus Power an amount equal to the estimated amount payable for Surplus Power delivered by Corporation to such Sponsoring Company during each semi-monthly period, and the amounts so paid by such Sponsoring Company shall be credited to the account of such Sponsoring Company with respect to future payments to be made pursuant to Section 6.02 above by such Sponsoring Company to Corporation for Surplus Power.

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12/5/2016 4:18:05 PM

in

Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM

Summary: App for Rehearing Second Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.