BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )

Columbus Southern Power Company and )

Ohio Power Company for Authority to ) Case No. 11-346-EL-SSO

Establish a Standard Service Offer Pursuant ) Case No. 11-348-EL-SSO

to Section 4928.143, Revised Code, in the )

Form of an Electric Security Plan. )

In the Matter of the Application of )

Columbus Southern Power Company and ) Case No. 11-349-EL-AAM

Ohio Power Company for Approval of ) Case No. 11-350-EL-AAM

Certain Accounting Authority. )

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**APPLICATION FOR REHEARING OF**

# OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS,

# OHIO SCHOOLS COUNCIL, OHIO SCHOOL BOARD ASSOCIATION

# AND BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS

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Dane Stinson, Esq.

BAILEY CAVALIERI LLC

10 West Broad Street, Suite 2100

Columbus, Ohio 43215

(614) 229-3210 (telephone)

(614) 221-0479 (fax)

Dane.Stinson@BaileyCavalieri.com

*Attorneys for Ohio Schools*

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***THE OHIO SCHOOLS’***

***APPLICATION FOR REHEARING***

The Ohio Schools,[[1]](#footnote-1) by counsel and pursuant to Section 4903.10, Ohio Rev. Code, and Rule 4901-1-35, Ohio Admin. Code, hereby request rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio (“Commission”) in this proceeding on August 8, 2012. The Ohio Schools respectfully submit that the Commission’s Order is unlawful and unreasonable in the following respects:

**A. the RSR is unlawful because it does not “fit” within one of the categories listed in Section 4928.143(B)(2), Ohio rev. code. *In re Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520.**

**1. The Commission’s Order Violates Section 4903.09, Ohio Rev. Code, Because it Fails to Set Forth the Reasons for Finding that the RSR is Related to Limitations of Customer Shopping.**

**2. The Commission’s Order Violates Section 1.47, Ohio Rev. Code, Because it Fails to Give Effect to the Entirety of Section 4928.143(B)(2)(D), Ohio Rev. Code.**

**3. The Order’s Finding that the RSR is Related to “Limitations of Customer Shopping” is Against the Manifest Weight of the Evidence.**

**B. IT IS UNLAWFUL TO RECOVER WHOLESALE CAPACITY COSTS AS A PART OF RETAIL ELECTRIC SERVICE. SECTION 4928.141(A), OHIO REV. CODE.**

**C. IT IS UNLAWFUL TO RECOVER IN THIS ESP PROCEEDING THE WHOLESALE CAPACITY COSTS DEFERRED IN THE CAPACITY CHARGE CASE. SECTION 4928.144, OHIO REV. CODE.**

**D. THE COMMISSION’S ORDER VIOLATES THE OHIO SCHOOLS’ DUE PROCESS RIGHTS AND SECTION 4903.09, OHIO REV. CODE, BY FAILING TO MAKE A COMPLETE RECORD REGARDING THE MECHANISM TO RECOVER CAPACITY COST DEFERRALS IN THIS PROCEEDING.**

**E. THE RSR IS AN UNLAWFUL GENERATION TRANSITION CHARGE THAT IS NOT SUBJECT TO RECOVERY UNDER SECTION 4928.143(B)(2), OHIO REV. CODE. *In re Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520.**

**F. IT IS UNREASONBLE AND AN ABUSE OF DISCRETION TO FIND THAT AN EARLIER TRANSITION TO MARKET BY TWO YEARS AND THREE MONTHS MAKES THE MODIFIED ESP MORE FAVORABLE IN THE AGGREGATE THAN THE MARKET RATE OPTION.**

**G. THE ORDER’S FINDING THAT THE OHIO SCHOOLS’ EXEMPTION FROM THE RSR WOULD REQUIRE TAXPAYERS TO PAY THE SCHOOLS TWICE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

**H. THE COMMISSION ERRED BY FAILINGTO FIND THAT EXEMPTING OHIO’S SCHOOLS FROM THE RSR IS A NON-QUANTIFIABLE BENEFIT THAT WOULD SUPPORT THE ESP OVER THE MRO.**

WHEREFORE, for the reasons more fully set forth in the accompanying Memorandum in Support, the Ohio Schools respectfully request that the Commission grant rehearing of its Order and modify the proposed electric security plan (“ESP”) either by rejecting the retail stability rider (“RSR”) and the recovery of the deferred capacity charges or, alternatively, by exempting Ohio’s schools from the RSR and the deferred capacity charges under the precedent set by the Ohio Supreme Court and this Commission.

Respectfully submitted,

/s/ Dane Stinson\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dane Stinson, Esq.

BAILEY CAVALIERI LLC

10 West Broad Street, Suite 2100

Columbus, Ohio 43215

(614) 229-3210 (telephone)

(614) 221-0479 (fax)

Dane.Stinson@BaileyCavalieri.com

*Attorneys for Ohio Schools*

**MEMORANDUM IN SUPPORT**

***I. INTRODUCTION AND GROUNDS FOR REHEARING***

In their initial briefs filed in this proceeding, the Ohio Schools explained in detail how they were suffering serious financial harm due to a $2.8 billion reduction in their state and federal funding in the current biennium. The Ohio Schools further explained that, in their current financial condition, they simply could not afford the rate increases proposed in AEP Ohio’s[[2]](#footnote-2) proposed ESP. These increases result largely from the proposed RSR and increased capacity charges. The Ohio Schools’ opposed the ESP on the bases that (1) the RSR is an unlawful generation transition charge and (2) the capacity charge must be set for all customers at PJM’s market-based reliability pricing model (“RPM”) price.

Alternatively, the Ohio Schools argued that if the Commission approved the Company’s ESP and retained the RSR in some form, long-standing precedent supported the Commission modifying the ESP to exempt Ohio’s public schools from the RSR and the increased capacity charges. Indeed, in the initial order in this proceeding of December 14, 2011, the Commission exempted Ohio’s public schools from the similarly controversial Market Transition Rider (“MTR”). Opinion and Order, December 14, 2011, at 36. Such an exemption is a significant “non-quantitative” benefit that would support approval of an ESP under the applicable standard of review found in Section 4928.143(C)(1), Ohio Rev. Code, and is sanctioned by the Ohio Supreme Court. *County Commissioners’ Assn. of Ohio v. Pub. Util. Comm*. (1980), 63 Ohio St. 2d 243.

By its Opinion and Order issued in these proceedings on August 8, 2012 (“Order”), the Public Utilities Commission of Ohio (“Commission”), among other things:

* Modified and approved AEP Ohio’s request for an RSR.
* Ordered that the deferred cost-based capacity charges created in the separate and distinct capacity charge proceeding (see, Case No. 10-2929-EL-COI (“*Capacity Charge Case*”)) be recovered initially through the RSR, on a nonbypassable basis, with any remaining unrecovered deferred capacity charges to be recovered over a subsequent three year period.
* Rejected the Ohio Schools’ request to be exempted from the RSR and increased capacity charges if they were approved.
* Modified and approved the ESP even though it was “less favorable” than the alternate market rate option by at least $388 million dollars.

The Commission’s Order is unlawful and unreasonable in the following respects:

**A. the RSR is unlawful because it does not “fit” within one of the categories listed in Section 4928.143(B)(2), Ohio rev. code. *In re Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520.**

**1. The Commission’s Order Violates Section 4903.09, Ohio Rev. Code, Because it Fails to Set Forth the Reasons for Finding that the RSR is Related to Limitations of Customer Shopping.**

**2. The Commission’s Order Violates Section 1.47, Ohio Rev. Code, Because it Fails to Give Effect to the Entirety of Section 4928.143(B)(2)(d), Ohio Rev. Code.**

**3. The Order’s Finding that the RSR is Related to “Limitations of Customer Shopping” is Against the Manifest Weight of the Evidence.**

**B. IT IS UNLAWFUL TO RECOVER WHOLESALE CAPACITY COSTS AS A PART OF RETAIL ELECTRIC SERVICE. SECTION 4928.141(A), OHIO REV. CODE.**

**C. IT IS UNLAWFUL TO RECOVER IN THIS ESP PROCEEDING THE WHOLESALE CAPACITY COSTS DEFERRED IN THE CAPACITY CHARGE CASE. SECTION 4928.144, OHIO REV. CODE.**

**D. THE COMMISSION’S ORDER VIOLATES THE OHIO SCHOOLS’ DUE PROCESS RIGHTS AND SECTION 4903.09, OHIO REV. CODE, BY FAILING TO MAKE A COMPLETE RECORD REGARDING THE MECHANISM TO RECOVER CAPACITY COST DEFERRALS IN THIS PROCEEDING.**

**E. THE RSR IS AN UNLAWFUL GENERATION TRANSITION CHARGE THAT IS NOT SUBJECT TO RECOVERY UNDER SECTION 4928.143(B)(2), OHIO REV. CODE. *In re Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520.**

**F. IT IS UNREASONBLE AND AN ABUSE OF DISCRETION TO FIND THAT AN EARLIER TRANSITION TO MARKET BY TWO YEARS AND THREE MONTHS MAKES THE MODIFIED ESP MORE FAVORABLE IN THE AGGREGATE THAN THE MARKET RATE OPTION.**

**G. THE ORDER’S FINDING THAT THE OHIO SCHOOLS’ EXEMPTION FROM THE RSR WOULD REQUIRE TAXPAYERS TO PAY THE SCHOOLS TWICE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

**H. THE COMMISSION ERRED BY FAILINGTO FIND THAT EXEMPTING OHIO’S SCHOOLS FROM THE RSR IS A NON-QUANTIFIABLE BENEFIT THAT WOULD SUPPORT THE ESP OVER THE MRO.**

The Ohio Schools respectfully request that the Commission grant rehearing of its Order and modify the proposed ESP either by rejecting the RSR and the recovery of deferred capacity charges or, alternatively, by exempting Ohio’s schools from the RSR and deferred capacity charges following the precedent of the Ohio Supreme Court and this Commission.

***III. ARGUMENT***

1. **the RSR is unlawful because it does not “fit” within one of the categories listed in Section 4928.143(B)(2), Ohio rev. code. *In re Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520.**

The Commission’s Order at page 31 provides:

Pursuant to Section 4928.143(B)(2)(d), Revised Code, an ESP may include terms, conditions, or charges relating to ***limitations on shopping for retail electric generation*** that would have the effect of stabilizing retail electric service or provide certainty regarding retail electric service. We believe that the RSR meets the criteria of Section 4928.143(B)(2)(d), as it promotes stable retail electric service prices and ensures customer certainty regarding retail electric service. (Emphasis supplied.)

The Ohio Supreme Court clearly held in *In re Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520, (“*Columbus Southern*”) that provisions may not be included in an ESP unless they “fit” within one of the categories listed in Section 4928.143(B)(2), Ohio Rev. Code. In its attempt to comply with the law, the Order finds that the RSR “fits” under Section 4928.143(B)(2)(d), Ohio Rev. Code, because it is a charge relating to “limitations of customer shopping for retail electric generation service.”[[3]](#footnote-3) Order, at 31. This section provides:

(B)(2) The [ESP] may provide for or include, without limitation, any of the following:

\*\*\*

(d) Terms, conditions, or charges relating to… limitations of customer shopping for retail electric generation service …as would have the effect of stabilizing or providing certainty regarding retail electric service.

However, ***nothing*** in the Order limits customer shopping. Thus, the RSR cannot be related to limitations of customer shopping, and the RSR cannot be included in the ESP. *Columbus Southern, supra*. On this simple basis alone the Order cannot withstand appeal or, more appropriately, a complaint for a writ of prohibition to the Ohio Supreme Court. Inclusion of the RSR in the ESP must be rejected.

1. **The Commission’s Order Violates Section 4903.09, Ohio Rev. Code, Because it Fails to Set Forth the Reasons for the Finding that the RSR is Related to Limitations of Customer Shopping.**

In quasi-judicial cases such as this, the Commission is required to make a complete record of the proceedings, including a transcript of all testimony and exhibits, and to make findings of fact and written opinions setting forth the reasons for the decisions arrived at, based upon said findings of fact. See Section 4903.09, Ohio Revised Code;[[4]](#footnote-4) *Ideal Transp. Co. v. Pub. Util. Comm*. (1975), 42 Ohio St. 2d 195, paragraph one of the syllabus (“Where an opinion and order of the Public Utilities Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the Commission’s opinion and order were based, such order fails to comply with the requirements of Section 4903.09, Ohio Revised Code, and is, therefore, unlawful.”); Accord: *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87 (“*Tongren*”).

The Order in these proceedings makes no findings and provides no reasoning as to how the RSR relates to limitations of customer shopping (likely because, as stated above, the Order does ***nothing*** to limit shopping). Failure to provide this reasoning violates Section 4903.09, Ohio Rev. Code, and prejudices the Ohio Schools in their right to request rehearing and to pursue appellate or extraordinary relief from the Order. *Tongren*, supra.

1. **The Commission’s Order Violates Section 1.47, Ohio Rev. Code, Because it Fails to Give Effect to the Entirety of Section 4928.143(B)(2)(D), Ohio Rev. Code.**

Section 1.47, Ohio Rev. Code, provides:

In enacting a statute, it is presumed that:

\*\*\*

(B) The entire statute is intended to be effective…

As stated above, the Order finds that the RSR “fits” under Section 4928.143(B)(2)(d), Ohio Rev. Code, because it relates to “limitations of customer shopping.” Remarkably, the Order only mentions the phrase “limitations of customer shopping” one time (at page 31), and without providing any reasoning as to how the RSR is related. Thereafter, the Order discusses only how the RSR (1) promotes stable retail electric service and (2) ensures customer certainty regarding retail electric service. Indeed, at page 32 of the Order, the Commission states that the legislative intent of Section 4928.143 is that “electric security plans may include retail electric service terms, conditions, and charges that relate to customer stability and certainty.” By focusing on only these two criteria the Order fails to give effect to the condition precedent in the statute – that the RSR first must relate to limitations on customer shopping. Thus, the Order violates Section 1.47, Ohio Rev. Code.

The danger in the Order’s reasoning is that, by focusing only on stability and certainty, ***any*** charges at ***any*** level could be justified in an ESP. By listing the specific provisions that could be included in an ESP, the General Assembly refused to provide the Commission with such carte blanche in order to protect consumers. The Ohio Supreme Court agrees. In *Columbus Southern* it rejected the Commission’s and AEP Ohio’s position that the items listed in Section 4928.143(B)(2) are merely illustrative and not exhaustive in nature:

\*\*\*[the Commission’s and AEP Ohio’s] interpretation would remove any substantive limit to what an electric security plan may contain, a result that we do not believe the General Assembly intended.

*Columbus Southern*, at 520.

1. **The Order’s Finding that the RSR is Related to “Limitations of Customer Shopping” is Against the Manifest Weight of the Evidence.**

The Order points to no testimony or other evidence that supports a finding that the RSR is related to limitations of customer shopping – because no such evidence is a part of the record. What the record makes clear is that the RSR is a generation transition charge designed to recover AEP Ohio’s stranded capacity costs. AEP Ohio witness Allen described the charge as a “transitional rider” designed to recover lost capacity charges related to generation assets. See AEP Ohio Exhibit 116, at 13. Staff witness Fortney concurred with this intended transitional purpose of the rider, and further agreed that it is a generation rider. Tr. XVI (Fortney), at 4557-4558.

Indeed, the Commission’s own order implicitly acknowledges that the RSR recovers capacity charges not otherwise recovered from shopping customers. See Order, at 35. The Order calculated an RSR of $508 million. Its calculation shows that as customers switch to CRES providers, AEP-Ohio’s non-fuel revenues fall (i.e., AEP Ohio no longer receives the capacity charges embedded in SSO rates). As customers switch, capacity revenues from CRES providers increase but not enough to cover the embedded capacity costs ($188.88/MW-day), because CRES providers are not charged the full cost of capacity, but only $20.01/MW-day, per the *Capacity Charge Case*. The result is that the RSR is required to recover these stranded capacity charges.[[5]](#footnote-5) See Order at 35.

The RSR is not related to limitations of customers shopping, but rather recovers stranded capacity costs. Section 4928.143(B)(2) does not permit the recovery of stranded capacity charges in an ESP.

1. **IT IS UNLAWFUL TO RECOVER WHOLESALE CAPACITY COSTS AS A PART OF RETAIL ELECTRIC SERVICE. SECTION 4928.141(A), OHIO REV. CODE.**

In the *Capacity Charge Case*, the Commission found that the capacity costs at issue were not subject to Chapter 4928, Ohio Rev. Code, because they were intrastate ***wholesale*** charges. *Capacity Charge Case*, at 13. The Commission proceeded to calculate AEP Ohio’s ***wholesale*** capacity costs, finding them to be $188.88/MW-day. Id., at 35. It ordered that AEP Ohio could charge no more than the current RPM rate to third party CRES providers ($20.01), and deferred the remainder of the costs ($168.87/MW-day) (Id., at 23), ultimately finding that the deferred amount should be recovered from ***retail*** consumers in this ESP proceeding (Order, at 36).

Section 4928.141(A), Ohio Rev. Code, provides in part:

Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive ***retail electric services*** necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section [4928.142](http://codes.ohio.gov/orc/4928.142) or [4928.143](http://codes.ohio.gov/orc/4928.143) of the Revised Code

Emphasis supplied. Clearly, this provision requires that an ESP approved under Section 4928.143 be for a standard service offer comprised only of ***retail*** electric services. The recovery of the deferred ***wholesale*** capacity costs as a part of ESP is unlawful.

1. **IT IS UNLAWFUL TO RECOVER IN THIS ESP PROCEEDING THE WHOLESALE CAPACITY COSTS DEFERRED IN THE CAPACITY CHARGE CASE. SECTION 4928.144, OHIO REV. CODE.**

The Order bases its authority to include the deferred wholesale capacity charges in this ESP on Section 4928.144, Ohio Rev. Code, which provides:

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

This statute plainly and unambiguously requires that any phase-in or deferral be of a price established under Section 4928.143, Ohio Rev. Code. The wholesale capacity price at issue was established and deferred solely in the *Capacity Charge Case*.

As recognized in *Columbus Southern, supra*, and as stated previously, the General Assembly intended that only the items listed in Section 4928.143(B)(2) be included in an ESP. Clearly, stranded capacity costs are not among the permissible items included in Section 4928.143(B)(2). This backdoor attempt to include capacity costs in the ESP through Section 4928.144 is unlawful. If this rationale were accepted, any costs for any reason could be deferred in a separate proceeding and subsequently included in an ESP.

1. **THE COMMISSION’S ORDER VIOLATES THE OHIO SCHOOLS’ DUE PROCESS RIGHTS AND SECTION 4903.09, OHIO REV. CODE, BY FAILING TO MAKE A COMPLETE RECORD REGARDING THE MECHANISM TO RECOVER CAPACITY COST DEFERRALS IN THIS PROCEEDING.**

Section 4903.09, Ohio Rev. Code, provides:

In all contested cases heard by the public utilities commission, **a complete record of all of the proceedings shall be made**, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases***, findings of fact and written opinions*** setting forth the reasons prompting the decisions arrived at, ***based upon said findings of fact***.

(Emphasis supplied.) In its July 2, 2012, order in the *Capacity Charge Case*, the Commission, for the first time, announced that it would determine the mechanism for recovery in this proceeding of the capacity charges deferred in the *Capacity Charge Case*. The Commission’s announcement was made after the record was closed in this proceeding, depriving the Ohio Schools and other parties their due process rights to discovery and cross-examination regarding the deferral recovery mechanism.

In its Order, the Commission dismissed these concerns, stating that it has the authority to modify and approve an ESP pursuant to Section 4928.143(C)(1), Ohio Rev. Code.[[6]](#footnote-6) Order, at 52. While the statute does give the Commission such authority, that authority must be lawfully exercised, requiring that the parties be given their due process rights, and that the Commission make a complete record of the proceedings upon which to base its findings and opinions. No record of the mechanism for deferral recovery was made in this proceeding, prejudicing the Ohio Schools’ rights. The Commission must grant rehearing to offer the Ohio Schools and other parties their due process rights.

1. **THE RSR IS AN UNLAWFUL GENERATION TRANSITION CHARGE THAT IS NOT SUBJECT TO RECOVERY UNDER SECTION 4928.143(B)(2), OHIO REV. CODE. *In re Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520.**

In its initial briefs, the Ohio Schools explained that the RSR is an unlawful generation transition charge designed to recover stranded capacity costs. See Ohio Schools Initial Br., at 17. The Order summarily rejects the Ohio Schools’ argument (and other parties’ related arguments) by stating:

…we reject the claim that the RSR allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010 pursuant to Senate Bill 3, as [1] AEP-Ohio does not argue its ETP [electric transition plan] did not provide sufficient revenues, and, [2] in light of events that occurred after the ETP proceedings, including AEP Ohio’s status as an FRR entity, AEP-Ohio is able to recover its actual costs of capacity, pursuant to our decision in the Capacity Case. Therefore, anything over RPM auction capacity prices cannot be labeled as transition costs or stranded cost.

Order, at 32.

1. **It is Irrelevant that AEP Ohio has not Claimed its ETP did not Provide Sufficient Revenues.**

It is irrelevant whether AEP Ohio claims, in this proceeding, that its ETP failed to provide sufficient revenues or not. AEP Ohio’s own witness Allen described the RSR charge as a “transitional rider” designed to recover lost capacity charges related to generation assets. See AEP Ohio Exhibit 116, at 13. Staff witness Fortney concurred with this intended transitional purpose of the rider, and further agreed that it is a generation rider. Tr. XVI (Fortney), at 4557-4558. The RSR is a generation transition rider designed to recover stranded capacity costs and Section 4928.143(B)(2) does not permit recovery of such charges in an ESP. It’s that simple. *Columbus Southern*.

Generation transition costs only could be recovered through the initial restructuring legislation enacted in 1999 (Senate Bill 3). The recovery of transition costs is no longer permitted. Electric retail competition began in Ohio on January 1, 2001 (Section 4928.01(A)(2), Ohio Rev. Code),[[7]](#footnote-7) and AEP Ohio was allowed to begin recover-

ing transition costs on that date. Section 4928.38, Ohio Rev. Code.[[8]](#footnote-8) Two types of transition costs could have been recovered: generation transition costs and regulatory transition costs. Ohio Schools Exhibit 101 (Frye), at 8. The costs for each were required to be collected by a date certain. AEP-Ohio was entitled to recover any generation transition costs by the end of the market development period, which was December 31, 2005. Sections 4928.38 and 4928.40, Ohio Rev. Code.[[9]](#footnote-9) AEP-Ohio’s operating companies were entitled to recover regulatory transition costs by December 31, 2007, for Columbus Southern Power and December 31, 2008, for Ohio Power. *In Re AEP-Ohio’s Application for Approval of an Electric Transition Plan*, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP (Order, September 20, 2000; Stipulation, May 8, 2000) (“*ETP Case*”); Section 4928.40, Ohio Rev. Code. The Commission allowed the Company to collect over $616 million in regulatory transition charges. *ETP Case*, at 47, Finding No. 8. Although AEP-Ohio initially sought to recover its alleged generation transition costs in the *ETP Case*, it waived that right when stipulating a resolution to the proceeding. See *ETP Case*, Stipulation, May 8, 2000, Section IV (“Neither [Columbus Southern Power Company nor Ohio Power Company] will impose any lost revenue charges (generation transition charges) on any switching customer.”)

It is settled that the Commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly. *Tongren v. Pub. Util. Comm. (1999), 85 Ohio St. 3d 87;* [*Columbus S. Power Co. v. Pub. Util. Comm*. (1993), 67 Ohio St. 3d 535](https://www.lexis.com/research/buttonTFLink?_m=14459ce3f19dc4bf5839be986bcc6f76&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b67%20Ohio%20St.%203d%20535%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLbVzk-zSkAA&_md5=a98aa0b87eb76c88c423b7972965227f);  [*Pike Natural Gas Co. v. Pub. Util. Comm*. (1981), 68 Ohio St. 2d 181](https://www.lexis.com/research/buttonTFLink?_m=14459ce3f19dc4bf5839be986bcc6f76&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=20&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b68%20Ohio%20St.%202d%20181%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLbVzk-zSkAA&_md5=03d9742be5430b0645c884d1f35a0e2b); [*Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153](https://www.lexis.com/research/buttonTFLink?_m=14459ce3f19dc4bf5839be986bcc6f76&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=21&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b67%20Ohio%20St.%202d%20153%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLbVzk-zSkAA&_md5=570180c38cdd977ab4c88fc48aa238f3); and [*Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St. 2d 302](https://www.lexis.com/research/buttonTFLink?_m=14459ce3f19dc4bf5839be986bcc6f76&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b85%20Ohio%20St.%203d%2087%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=22&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b64%20Ohio%20St.%202d%20302%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLbVzk-zSkAA&_md5=a9463582536e2ec23aa508085a98adf5). Because the statutory period for collecting generation transition charges has expired, the Commission lacks authority to approve the RSR, which admittedly is designed to recover the stranded generation (capacity) costs of AEP Ohio. Moreover, having waived the right to collect the charges, the Company cannot attempt to do so now.

1. **Approval of the Collection of Cost-Based Capacity Charges in the Capacity Charge Case is Irrelevant as such Approval was Unlawful; Moreover, The RSR would Collect Generation Transition Charges Other than the Capacity Charges Approved in the Capacity Charge Case.**

The Order reasons that, because the *Capacity Charge Case* permitted AEP Ohio to recover its actual cost of capacity, the deferred capacity costs to be recovered in this proceeding cannot constitute transition or stranded costs. As a threshold matter, the Commission’s approval of cost-based capacity charges in the *Capacity Charge Case* was unlawful, as the Ohio Schools explained in its briefs and application for rehearing in that case, which the Ohio Schools incorporate by reference herein.

Moreover, the *Capacity Cost Case* approved recovery of only $20.01/MW-day in capacity costs from CRES providers. The remaining $168.87/MW-day of this wholesale charge is NOT to be recovered from CRES providers, but was deferred for collection from retail customers in this proceeding. This difference – the amount above the RPM price unrecoverable from CRES providers – is the stranded costs the Order requires recovered through an unlawful generation transition charge – the RSR. Approval of the capacity charge in the *Capacity Charge Case* is irrelevant to the issue at hand. The Commission’s approval merely authorizes the collection of otherwise stranded capacity costs, which is unlawful.

Finally, according to the Commission’s extra-record calculations, the deferred capacity charges to be recovered in this proceeding make up only $144 million of the RSR. Order, at 75, fn. 32. As explained previously in this application for rehearing, the entire RSR of $508 million is designed to recover additional capacity costs related to customers switching to CRES providers. These transition charges were not approved in the *Capacity Cost Case*.

1. **IT IS UNREASONBLE AND AN ABUSE OF DISCRETION TO FIND THAT AN EARLIER TRANSITION TO MARKET BY TWO YEARS AND THREE MONTHS MAKES THE MODIFIED ESP MORE FAVORABLE IN THE AGGREGATE THAN THE MARKET RATE OPTION.**

The applicable standard of review in this proceeding is whether the ESP’s pricing and all other terms and conditions of AEP Ohio’s proposed plan, as modified by the Order, are more favorable in the aggregate than the market rate option (“MRO”). Section 4928.143(C)(1), Ohio Rev. Code. The bulk of the analyses performed in this proceeding on the quantitative pricing shows that the ESP is less favorable than the MRO and, in its Order, the Commission found that the modified ESP was at least $388 million ***less favorable*** than an MRO.[[10]](#footnote-10) The question thus becomes whether the Order’s non-quantifiable benefits make the modified ESP more favorable than an MRO.

In addressing this issue, the Order looks to the RSR (including the deferred capacity charges) as the most significant cost of the modified ESP, and finds that the RSR makes the modified ESP more favorable in the aggregate because it allows AEP Ohio to transition to a competitive bid process in approximately two and a half years – which is two years and three months earlier than under an MRO. See Order at 76; Commissioner Roberto Dissent, at 1. Restated, the question becomes whether going to auction two years and three months earlier is worth at least $388 million to consumers. Common sense dictates that it is not. The Ohio Schools, like most other consumers, would rather wait two years and three months for market rates than to pay $388 million for this “benefit.”

1. **THE ORDER’S FINDING THAT THE OHIO SCHOOLS’ EXEMPTION FROM THE RSR WOULD REQUIRE TAXPAYERS TO PAY THE SCHOOLS TWICE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

The Ohio Schools’ primary position in this proceeding is that the RSR is unlawful and must be rejected. The Ohio Schools’ alternative position is that, if the Commission approved the Company’s application in some form, and retained the RSR, long-standing precedent supports the Commission modifying the ESP to exempt Ohio’s public schools from the RSR (including the deferred capacity charges). The Ohio Schools provided the Commission with abundant authority in which the Ohio Legislature, the Ohio Supreme Court, and this Commission all have recognized the reasonableness and lawfulness of providing Ohio’s public schools special rate treatment. See Ohio Schools Initial Brief. The Ohio Schools sought such special rate treatment because their funding for the biennium had been cut by ***$2.8 billion***.

The Order rejected the Ohio Schools’ alternative position, finding that if schools were exempted from the RSR, it would (1) cause the RSR to increase and (2) cause AEP-Ohio customers to pay “pay the schools twice.”

As to the first point, Ohio Schools’ witness Frye testified that granting the schools the exemption would not cause the RSR to increase, if the amount of the proposed RSR were reduced by the proportion otherwise allocated to schools. Tr. X, at 2887-2888. This testimony was not challenged.

As to the second point, the Commission completely misunderstands the Ohio Schools’ position. The Order erroneously assumes that school district residents already are paying, through taxes, for the increased electricity costs imposed in this case and that, if the exemption were recovered through the RSR, school district residents would be paying for the schools’ electricity twice. However, the record in this proceeding shows that Ohio’s schools have suffered budget cuts of $**2.8 billion** dollars in this biennium, are cutting teachers, staff and programs, and if electric rates are increased, schools will have to seek extra millage in levy requests to cover electricity costs. The costs to be imposed by this case are not currently being recovered by the schools. If the exemption were granted, the schools’ proportionate share of the increase would not have to be recovered through the RSR, and the schools would have no need to seek additional millage from taxpayers to pay for the increased electricity costs. Thus, under the Ohio Schools’ position, exemption from the RSR would prevent taxpayers from paying the schools even ONCE for the increased electricity costs. The Order’s finding that the exemption would require taxpayers to pay schools twice for this increase in electric rates simply is wrong and against the manifest weight of the evidence.

Indeed, taxpayers testified at the public hearing in this matter that if AEP Ohio’s proposed increase were approved, **TAXPAYERS WOULD HAVE TO PAY AEP OHIO TWICE – ONCE FOR THEIR OWN BILL AND ONCE FOR THEIR SCHOOL DISTRICT’S BILL**, because schools’ only source of funding is by levying taxes. Public witness Bill Daugherty, Tr. Canton Public Hearing, at 11-12; Public witness Brad Deleruyelle, Lima Public Hearing, at 21-22. The Ohio Schools seek the exemption so that taxpayers will not be forced to pay AEP Ohio twice for the cost increases imposed by this case.

Even if the RSR were increased in proportion to the schools’ exemption, taxpayers still would not “pay the schools twice.” If exempted, the schools would not have to seek additional millage in a levy to pay for the increased electricity costs. While AEP Ohio customers may have to absorb the schools’ RSR costs, such costs otherwise would have had to have been recovered from them through the additional millage in a levy. Taxpayers and the public at large would benefit from the exemption by keeping taxpayer dollars in the classroom, where they belong – retaining teachers, staffs, programs, and supplies which will benefit the taxpayers’ communities, their children, and the employers who will need an educated workforce in the future.

The Commission’s determination ignored the evidence of record and is against the manifest weight of the evidence.

1. **THE COMMISSION ERRED BY FAILING TO FIND THAT EXEMPTING OHIO’S SCHOOLS FROM THE RSR IS A NON-QUANTIFIABLE BENEFIT THAT WOULD SUPPORT THE ESP OVER THE MRO.**

In its initial and reply briefs, the Ohio Schools explained, as it has in this application for rehearing, that the non-quantifiable benefits relied upon by AEP Ohio and Staff would not make the ESP more favorable in the aggregate than the MRO, as required for approval under Section 4928.143(C)(1), Ohio Rev. Code. The Ohio Schools also explained on brief that exempting the schools from the RSR (including the deferred capacity charges) would support approval of the ESP. As stated previously, taxpayers would be relieved from the burden of paying additional millage on school levies to support the increased rates. Indeed, it is difficult to imagine a more ubiquitous benefit than relief to Ohio’s public schools, which would benefit all taxpayers, hundreds of thousands of schoolchildren, and the employers who will need their services in the future. Moreover, this non-quantitative benefit is sanctioned by the Ohio Supreme Court.

***III. CONCLUSION***

For the foregoing reasons, the Ohio Schools request the Commission to grant rehearing of its Order and modify the proposed ESP either by rejecting the RSR and the recovery of the deferred capacity charges or, alternatively, by exempting Ohio’s schools from the RSR and the deferred capacity charges under the precedent set by the Ohio Supreme Court and this Commission.

Respectfully submitted,

/s/ Dane Stinson\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dane Stinson, Esq.

BAILEY CAVALIERI LLC

10 West Broad Street, Suite 2100

Columbus, Ohio 43215

(614) 229-3210 (telephone)

(614) 221-0479 (fax)

Dane.Stinson@BaileyCavalieri.com

*Attorneys for Ohio Schools*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing *Ohio Schools’ Application for Rehearing* was served by electronic mail this 7st day August, 2012, upon the following.

/s/ Dane Stinson\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dane Stinson

|  |  |
| --- | --- |
| Matthew J. Satterwhite  Steven T. Nourse  Anne M. Vogel  American Electric Power Service Corporation  1 Riverside Plaza, 29th Floor  Columbus, OH 43215  mjsatterwhite@aep.com  stnourse@aep.com  [amvogel@aep.com](mailto:amvogel@aep.com)  Daniel R. Conway  Christen M. Moore  Porter Wright Morris & Arthur  41 S. High Street  Columbus, OH 43215  dconway@porterwright.com  cmoore@porterwright.com | Dorothy K. Corbett  Amy B. Spiller  Jeanne W. Kingery  139 East Fourth Street  1303-Main  Cincinnati, OH 45202  Dorothy.Corbett@duke-energy.com  Amy.spiller@duke-energy.com  Jeanne.kingery@duke-energy.com  Robert A. McMahon  Eberly McMahon LLC  2321 Kemper Lane, Suite 100  Cincinnati, OH 45206 |
| David F. Boehm  Michael L. Kurtz  Boehm, Kurtz & Lowry  36 East Seventh Street Suite 1510  Cincinnati, OH 45202  dboehm@BKLlawfirm.com  mkurtz@BKLlawfirm.com  Gregory J. Poulos  EnerNOC, Inc.  101 Federal Street, Suite 1100  Boston, MA 02110  gpoulos@enernoc.com | Rocco D’Ascenzo  Elisabeth Watts  Duke Energy Ohio, Inc.  139 East Fourth Street - 1303-Main  Cincinnati, OH 45202  Elizabeth.watts@duke-energy.com  Rocco.d’ascenzo@duke-energy.com  Kyle L. Kern  Terry L. Etter  Maureen R. Grady  Office of the Ohio Consumers’ Counsel  10 W. Broad Street, 18th Floor  Columbus, OH 43215-3485  kern@occ.state.oh.us  etter@occ.state.oh.us  grady@occ.state.oh.us |
| Richard L. Sites  General Counsel & Senior Director of Health Policy  Ohio Hospital Association  155 East Broad Street, 15th Floor  Columbus, OH 43215-3620  ricks@ohanet.org | Thomas J. O’Brien  Bricker & Eckler, LLP  100 South Third Street  Columbus, OH 43215-4291  tobrien@bricker.com |
| Terrence O’Donnell  Christopher Montgomery  Bricker & Eckler LLP  100 South Third Street  Columbus, OH 43215-4291  todonnell@bricker.com  cmontgomery@bricker.com | Mark S. Yurick  Zachary D. Kravitz  Taft Stettinius & Hollister  65 East State Street, Suite 1000  Columbus, OH 43215  myurick@taftlaw.com  zkravitz@taftlaw.com |
| Mark A. Hayden  FirstEnergy Service Company  76 South Main Street  Akron, OH 44308  [haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)  James F Lang  Laura C. McBride  N. Trevor Alexander  Calfee, Halter & Griswold LLP  1400 KeyBank Center  800 Superior Ave.  Cleveland, OH 44114  jlang@calfee.com  lmcbride@calfee.com  talexander@calfee.com  David A. Kutik  Jones Day  North Point  901 Lakeside Avenue  Cleveland, OH 44114  dakutik@jonesday.com  Allison E. Haedt  Jones Day  P.O. Box 165017  Columbus, OH 43216-5017  aehaedt@jonesday.com  John N. Estes III  Paul F. Wight  Skadden, Arps, Slate, Meagher & Flom LLP  1440 New York Ave., N.W.  Washington, DC 20005  jestes@skadden.com  paul.wight@skadden.com | Michael R. Smalz  Joseph V. Maskovyak  Ohio Poverty Law Center  555 Buttles Avenue  Columbus, OH 43215  msmalz@ohiopovertylaw.org  jmaskovyak@ohiopovertylaw.org  Lisa G. McAlister  Matthew W. Warnock  Thomas O’Brien  BRICKER & ECKLER LLP  100 South Third Street  Columbus, OH 43215-4291  lmcalister@bricker.com  mwarnock@bricker.com  tobrien@bricker.com  Jay E. Jadwin  American Electric Power Service Corporation  1 Riverside Plaza, 29th Floor  Columbus, OH 43215  jejadwin@aep.com  Glen Thomas  1060 First Avenue, Ste. 400  King of Prussia, PA 19406  gthomas@gtpowergroup.com  Laura Chappelle  4218 Jacob Meadows  Okemos, MI 48864  laurac@chappelleconsulting.net |
| M. Howard Petricoff  Stephen M. Howard  Vorys, Sater, Seymour and Pease LLP  52 E. Gay Street  P.O. Box 1008  Columbus, OH 43215-1008  mhpetricoff@vorys.com  smhoward@vorys.com | Henry W. Eckhart  1200 Chambers Road, Suite 106  Columbus, OH 43212  henryeckhart@aol.com  Christopher J. Allwein  Williams, Allwein and Moser, LLC  1373 Grandview Ave., Suite 212  Columbus, OH 43212  callwein@williamsandmoser.com |
| William L. Massey  Covington & Burling, LLP  1201 Pennsylvania Ave., NW  Washington, DC 20004  wmassey@cov.com  Joel Malina  Executive Director  COMPLETE Coalition  1317 F Street, NW  Suite 600  Washington, DC 20004  malina@wexlerwalker.com | Gary A Jeffries  Assistant General Counsel  Dominion Resources Services, Inc.  501 Martindale Street, Suite 400  Pittsburgh, PA 15212-5817  [Gary.A.Jeffries@aol.com](mailto:Gary.A.Jeffries@aol.com)  Michael J. Settineri  Vorys, Sater, Seymour and Pease LLP  52 East Gay Street  P.O. Box 1008  Columbus, OH 43216-1008  mhpetricoff@vorys.com  mjsettineri@vorys.com  smhoward@vorys.com |
|  |  |
| David I. Fein  Vice President, Energy Policy – Midwest  Constellation Energy Group, Inc.  Cynthia Fonner Brady  Senior Counsel  Constellation Energy Resources LLC  550 West Washington Blvd., Suite 300  Chicago, IL 60661  david.fein@constellation.com  [cynthia.brady@constellation.com](mailto:cynthia.brady@constellation.com)  Barth E. Royer (Counsel of Record)  Bell & Royer Co., LPA  33 South Grant Avenue  Columbus, OH 43215-3927  [BarthRoyer@aol.com](mailto:BarthRoyer@aol.com)  Tara C. Santarelli  Environmental Law & Policy Center  1207 Grandview Ave., Suite 201  Columbus, OH 43212  tsantarelli@elpc.org  Sandy I-ru Grace  Assistant General Counsel  Exelon Business Services Company  101 Constitution Ave., NW  Suite 400 East  Washington, DC 20001  sandy.grace@exeloncorp.com  David M. Stahl  Eimer Stahl Klevorn & Solberg LLP  224 South Michigan Avenue, Suite 1100  Chicago, IL 60604  dstahl@eimerstahl.com | Jeanine Amid Hummer  Thomas K. Lindsey  *City of Upper Arlington*  Pamela A. Fox  *City of Hilliard*  C. Todd Jones,  Christopher L. Miller,  Gregory H. Dunn  Asim Z. Haque  Ice Miller LLC  250 West Street  Columbus, OH 43215  pfox@hillardohio.gov  christopher.miller@icemiller.com  gregory.dunn@icemiller.com  asim.haque@icemiller.com  jhummer@uaoh.net  [tlindsey@uaoh.net](mailto:tlindsey@uaoh.net)  Nolan Moser  Trent A. Dougherty  Camille Yancy  Cathryn Loucas  Ohio Environmental Council  1207 Grandview Avenue, Suite 201  Columbus, OH 43212-3449  nolan@theoec.org  trent@theoec.org  camille@theoec.org  cathy@theoec.org. |
|  |  |
| Robert Korandovich  KOREnergy  P.O. Box 148  Sunbury, OH 43074  [korenergy@insight.rr.com](mailto:korenergy@insight.rr.com)  Jay L. Kooper  Katherine Guerry  Hess Corporation  One Hess Plaza  Woodbridge, NJ 07095  jkooper@hess.com  kguerry@hess.com | Kenneth P. Kreider  David A. Meyer  Keating Muething & Klekamp PLL  One East Fourth Street  Suite 1400  Cincinnati, OH 45202  kpkreider@kmklaw.com  dmeyer@kmklaw.com  Holly Rachel Smith  Holly Rachel Smith, PLLC  Hitt Business Center  3803 Rectortown Road  Marshall, VA 20115  holly@raysmithlaw.com  Steve W. Chriss  Manager, State Rate Proceedings  Wal-Mart Stores, Inc.  Bentonville, AR 72716-0550  Stephen.Chriss@wal-mart.com |
| Douglas G. Bonner  Emma F. Hand  Keith C. Nusbaum  Clinton A. Vince  Daniel D. Barnowski  James Rubin  Thomas Millar  SNR Denton US LLP  1301 K Street NW  Suite 600, East Tower  Washington, DC 20005  doug.bonner@snrdenton.com  emma.hand@snrdenton.com  keith.nusbaum@snrdenton.com  clinton.vince@snrdenton.com  daniel.barnowski@snrdenton.con  james.rubin@snrdenton.com  thomas.millar@snrdenton.com  Arthur Beeman  SNR Denton US LLP  525 Market Street, 26th Floor  San Francisco, CA 941-5-2708  arthur.beeman@snrdenton.com | Allen Freifeld  Samuel A. Wolfe  Viridity Energy, Inc.  100 West Elm Street, Suite 410  Conshohocken, PA 19428  afreifeld@viridityenergy.com  swolfe@viridityenergy.com  Jacqueline Lake Roberts,  Counsel of Record  101 Federal Street, Suite 1100  Boston, MA 02110  jroberts@enernoc.com  Benita Kahn  Lija Kaleps-Clark  Vorys Sater, Seymour and Pease LLC  52 East Gay Street, P.O. Box 1008  Columbus, OH 43216-1008  bakahn@vorys.com  lkalepsclark@vorys.com |
| Vincent Parisi  Matthew White  Interstate Gas Supply, Inc.  6100 Emerald Parkway  Dublin, OH 43016  vparisi@igsenergy.com  mswhite@igsenergy.com | Mark A. Whitt  Melissa L. Thompson  Whitt Sturtevant LLP  PNC Plaza, Suite 2020  155 East Broad Street  Columbus, OH 43215  whit@whitt-sturtevant.com  thompson@whitt-sturtevant.com |
| Chad A. Endsley  Chief Legal Counsel  Ohio Farm Bureau Federation  280 North High Street, P.O. Box 182383  Columbus, OH 43218-2383  cendsley@ofbf.org. | Brian P. Barger  Brady, Coyle & Schmidt, LTD  4052 Holland-Sylvania Rd.  Toledo, OH 43623  bpbarger@bcslawyers.com |
| Diem N. Kaelber  Robert J Walter  10 West Broad Street, Suite 1300  Columbus, OH 43215  kaelber@buckleyking.com  walter@buckleyking.com | Judi L. Sobecki  Randall V. Griffin  The Dayton Power and Light Company  1065 Woodman Drive  Dayton, OH 45432  Judi.sobecki@dplinc.com  Randall.griffin@dplinc.com |
| Sara Reich Bruce  Ohio Automobile Dealers Association  655 Metro Place South, Suite 270  Dublin, OH 43017  sbruce@oada.com | Joseph M. Clark  Direct Energy Services LLC  And Direct Energy Business LLC  6641 North High Street, Suite 200  Worthington, OH 43085  jmclark@vectren.com |
| Todd M. Williams  Williams Allwein and Moser, LLC  Two Maritime Plaza-Third Floor  Toledo, OH 43604  toddm@wamenergylaw.com | Matthew R. Cox  Matthew Cox Law, Ltd.  4145 St. Theresa Blvd.  Avon, OH 44011  matt@matthewcoxlaw.com |
| Carolyn S. Flahive  Stephanie M. Chmiel  THOMPSON HINE LLP  41 S. High Street, Suite 1700  Columbus, OH 43215  Carolyn.Flahive@ThompsonHine.com  Stephanie.Chmiel@ThompsonHine.com | Randy J. Hart  Rob Remington  David J. Michalski  200 Public Square, Suite 2800  Cleveland, OH 44114-2316  rhart@hahnlaw.com  rrremington@hahnlaw.com  djmichalski@hahnlaw.com |
| Larry F. Eisenstat  Richard Lehfeldt  Robert L. Kinder, Jr.  Dickstein Shapiro LLP  1825 Eye St. NW  Washington, DC 20006  eisenstatl@dicksteinshapiro.com  lehfeldtr@dicksteinshapiro.com  kinderr@dicksteinshapiro.com | Sue A. Salamido  Kristin Watson  Cloppert, Latanick, Sauter & Washburn  225 East Broad Street, 4th Floor  Columbus, OH 43215  ssalamido@cloppertlaw.com  kwatson@cloppertlaw.com |
| Robert L. Kinder, Jr.  Dickstein Shapiro LLP  1825 Eye St. NW  Washington, DC 20006  kinder@DicksteinShapiro.com | Mary W. Christensen  Christensen Law Offices  8760 Orion Place, Suite 300  Columbus, OH 43240  mchristensen@columbuslaw.org |
| Samuel C. Randazzo  Joseph E. Oliker  Frank P. Darr  McNees Wallace & Nurick LLC  21 East State Street, 17th Floor  Columbus, OH 43215  [sam@mwncmh.com](mailto:sam@mwncmh.com)  [joliker@mwncmh.com](mailto:joliker@mwncmh.com)  [rdarr@mwncmh.com](mailto:rdarr@mwncmh.com) | Greta See  Jon Tauber  Attorney Examiner  Public Utilities Commission of Ohio  180 East Broad Street, 12th Floor  Columbus, OH 43215  [Greta.See@puc.state.oh.us](mailto:Greta.See@puc.state.oh.us)  [Jonathan.tauber@puc.state.oh.us](mailto:Jonathan.tauber@puc.state.oh.us) |
| William Wright  Werner Margard  Thomas Lindgren  John H. Jones  Assistant Attorneys’ General  Public Utilities Section  180 East Broad Street, 6th Floor  Columbus, OH 43215  john.jones@puc.state.oh.us  werner.margard@puc.state.oh.us  thomas.lindgren@puc.state.oh.us  william.wright@puc.state.oh.us |  |

1. Joint Intervenors Buckeye Association of School Administrators, Ohio Association of School Business Officials, Ohio School Boards Association and Ohio Schools Council are collectively referred to as the “Ohio Schools.” [↑](#footnote-ref-1)
2. Ohio Power Company and Columbus Southern Power Company merged effective December 31, 2011. Ohio Power Company is the surviving entity and will be referred to as “AEP-Ohio” or “the Company.” [↑](#footnote-ref-2)
3. Interestingly, AEP Ohio, which authored the ESP application and created the RSR, attempted to justify it as related to “default service” under Section 4928.143(B)(2)(d), or as an “automatic increase” to the standard service offer under Section 4928.143(B)(2)(e), or as an “economic development or job retention program” under Section 4928.143(B)(2)(i). See AEP Ohio Initial Br., at 39. Those attempts were futile, as demonstrated in the Ohio Schools’ Reply Brief, at 5-9, and by the Order’s failure to address AEP Ohio’s rationale. The Order’s attempt to “fit” the RSR into another provision of the Revised Code – and not advocated by the RSR’s creator – also is not well made. [↑](#footnote-ref-3)
4. Section 4903.09, Ohio Rev. Code, provides:

   In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions ***setting forth the reasons prompting the decisions arrived at***, ***based upon said findings of fact***.

   Emphasis supplied. [↑](#footnote-ref-4)
5. Interestingly, the only capacity costs the Order explicitly recognizes are the deferred capacity costs created in the *Capacity Charge Case*, $144 million of which is to be initially recovered in this proceeding through the RSR. Order, at 75, fn. 32. However, as stated above, the Order’s calculations show that the entire RSR of $508 million is meant to recover the stranded capacity costs created by customer switching, and by AEP Ohio’s inability to recover its embedded capacity costs ($188.88/MW-day) once a customer switches to a CRES supplier that pays AEP Ohio for capacity at $20.01/MW-day. [↑](#footnote-ref-5)
6. The Commission also claims that it may sua sponte order a deferral pursuant to Section 4928.144, Ohio Rev. Code. The Ohio Schools have shown previously that the wholesale capacity charges deferred in a separate proceeding, cannot be recovered from retail customers in an ESP proceeding. [↑](#footnote-ref-6)
7. Section 4928.02(A)(28), Ohio Rev. Code, provides:

   As used in this Chapter:

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   (28) Starting date of competitive retail electric service’ means January 1, 2001. [↑](#footnote-ref-7)
8. Section 4928.38, Ohio Rev. Code, provides:

   Pursuant to a transition plan approved under section [4928.33](http://codes.ohio.gov/orc/4928.33) of the Revised Code, an electric utility in this state may receive transition revenues under sections [4928.31](http://codes.ohio.gov/orc/4928.31) to [4928.40](http://codes.ohio.gov/orc/4928.40) of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections [4905.33](http://codes.ohio.gov/orc/4905.33) to [4905.35](http://codes.ohio.gov/orc/4905.35) of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility’s receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections [4928.31](http://codes.ohio.gov/orc/4928.31) to [4928.40](http://codes.ohio.gov/orc/4928.40) of the Revised Code. [↑](#footnote-ref-8)
9. Section 4928.40(A), Ohio Rev. Code, provides:

   (A) Upon determining under section [4928.39](http://codes.ohio.gov/orc/4928.39) of the Revised Code the allowable transition costs of an electric utility authorized for collection as transition revenues under sections [4928.31](http://codes.ohio.gov/orc/4928.31) to 4928.40 of the Revised Code, the public utilities commission, by order under section [4928.33](http://codes.ohio.gov/orc/4928.33) of the Revised Code, shall establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided in division (A)(1)(b) of section [4928.37](http://codes.ohio.gov/orc/4928.37) of the Revised Code during a market development period for the utility, ending on such date as the commission shall reasonably prescribe. The market development period shall end on December 31, 2005, unless otherwise authorized under division (B)(2) of this section. However, the commission may set the utility’s recovery of the revenue requirements associated with regulatory assets, as established pursuant to section [4928.39](http://codes.ohio.gov/orc/4928.39) of the Revised Code, to end not later than December 31, 2010… [↑](#footnote-ref-9)
10. The Ohio Schools do not agree with the Order’s calculation of the $388 million figure, and are of the opinion that the modified ESP is at least $388 million less favorable than an MRO. [↑](#footnote-ref-10)