BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	))))	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders.	))))	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders.	)))	Case No. 10-344-EL-ATA
In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4921-EL-RDR

POST-HEARING REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK

BRUCE J. WESTON
INTERIM CONSUMERS' COUNSEL

Terry L. Etter, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964
etter@occ.state.oh.us
grady@occ.state.oh.us

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, Ohio 43215
Telephone: 614-221-7201
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org

On Behalf of the Appalachian Peace and Justice Network

November 18, 2011

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility customers, and the Appalachian Peace and Justice Network ("APJN"), a not for profit organization whose members include low-income customers in southeast Ohio (collectively "Customer Parties"), submit their reply brief in the above-captioned proceedings. This reply brief is filed to protect customers from unjustified generation and distribution rate increases that signatory parties to the Stipulation in these cases agreed to in order to get Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP Ohio" or "Companies") to commit to a market based offer for 100% of their load in 2015.[1]

The stipulated agreement between the Companies and a number of intervenors involves the Companies' Electric Security Plan ("ESP"). The stipulating parties have asked the Public Utilities Commission of Ohio ("PUCO" or "Commission") to approve the Stipulation, and hence the ESP of the Companies that was modified by the Stipulation.

Initial briefs were filed in these proceedings on November 10, 2011. The Customer Parties filed a brief opposing the Stipulation, as did the Industrial Energy

[1] Stipulation and Recommendation (September 7, 2011) ("Stipulation").

Users-Ohio ("IEU"), FirstEnergy Solutions Corp. ("FES") and Ormet Primary Aluminum Corporation. These briefs showed, among other things, that the Stipulation does not meet the three-prong test required for Commission approval of a stipulation and is otherwise against Ohio law and public policy.

The Companies joined several signatory parties ("Joint Supporters") in a brief supporting the Stipulation.[2] In addition, individual briefs supporting the Stipulation were filed by Exelon Generation Company, LLC ("Exelon"), Retail Energy Supply Association ("RESA"), Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. ("Constellation") and the Staff of The Public Utilities Commission of Ohio ("PUCO Staff").

Those supporting the Stipulation have failed to show that it meets the standards for approving stipulations and the Companies have failed to meet their burden of proof under R.C. 4928.143(C)(1).[3] In order to protect the Companies' 1.2 million residential customers, the Commission should reject the Stipulation. If the Commission does not reject the Stipulation, the Commission should modify the Stipulation as recommended by the Customer Parties, IEU and FES.[4]

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[2] Ohio Energy Group, Duke Energy Retail Sales, LLC, the Ohio Hospital Association, AEP Retail Energy Partners, LLC, Environmental Law & Policy Center, the Association of Independent Colleges and Universities of Ohio, the City of Grove City, the City of Hilliard, EnerNOC, Inc., Ohio Environmental Council, Paulding Wind Farm, LLC, the Natural Resources Defense Council and The Kroger Company.

[3] The fact that the Customers Parties do not respond to an argument raised in the briefs of those supporting the Stipulation should not be construed as the Customer Parties' acquiescence to that argument.

[4] See Customer Parties Initial Brief at 27, 29, 44; IEU Initial Brief at 72-74; FES Initial Brief at 148-152.

II. THE STIPULATION FAILS THE THREE-PRONG TEST FOR EVALUATING STIPULATIONS.

The Supreme Court of Ohio has recognized that the Commission must determine whether stipulations meet a three-prong test:

> 1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
>
> 2. Does the settlement, as a package, benefit ratepayers and the public interest?
>
> 3. Does the settlement package violate any important regulatory principle or practice?[5]

The signatory parties claim that the Stipulation meets this three-prong test.[6] Their position, however, lacks merit.

The Joint Supporters note that the Commission has considered a number of factors in evaluating the first prong of the test to determine whether the stipulation is a product of "serious bargaining among capable, knowledgeable parties."[7] The Joint Supporters describe the factors as:

> - the extent to which the parties to the settlement negotiations regularly participate in proceedings before the Commission, are knowledgeable about regulatory matters, and were represented by experienced counsel and technical experts during negotiations;
>
> - whether the resulting stipulation represents "a comprehensive compromise of the issues raised by parties with diverse interests;"
>
> - the detail in which the issues in the case were discussed;

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[5] *Consumers' Counsel v. Pub. Util. Comm'n*. (1992), 64 Ohio St.3d 123, 126.

[6] See Joint Supporters Brief at 17-137; Constellation Brief at 3-14; Exelon Brief at 4-14; RESA Brief at 7-24; PUCO Staff Brief at 2-20.

[7] Joint Supporters Brief at 27-28.

- the extent to which all parties to the proceeding had an opportunity to express their opinions during settlement negotiations; and

- the diversity of interests represented by the signatory parties to the stipulation.[8]

The Stipulation falls short on many of these factors.

First, many of the signatory parties do not regularly participate in proceedings before the Commission and/or did not have their own technical experts during the negotiations. Instead, they relied on the analysis of others, primarily the Companies themselves, to determine the effects and legality of the Stipulation. As the Joint Supporters explain:

> While it does not constitute evidence in this case, the Company also filed testimony prior to the Stipulation demonstrating that the original as-filed ESP is more favorable in the aggregate than the expected results under an MRO. (January 27, 2011 Testimonies of Joseph Hamrock and Laura J. Thomas). The Signatory Parties were aware of this testimony and that, given the many compromises conceded by the Company during negotiations, the positive aggregate MRO test results could only improve as a result of the Stipulation.[9]

But the conclusions reached in the testimony filed with the Companies' original application were disputed by several intervenor witnesses.[10] Thus, the signatory parties' reliance on the Companies' self-serving calculations is misplaced.

Even some of the signatory parties that have more experience in PUCO proceedings did not conduct their own analysis, but instead received their information chiefly from the Companies. In its brief, Constellation admitted that it "has not

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[8] Id. (citations omitted).

[9] Id. at 30.

[10] See, e.g., Direct Testimony of Michael M. Schnitzer, filed July 25, 2011; Direct Testimony of Kevin M. Murray, filed July 25, 2011.

conducted an analysis of the Stipulation as compared to an MRO, but has relied on the analysis conducted by AEP Ohio."[11] Thus, Constellation's conclusion about the legality of the Stipulation rests on the analysis of the party that has the most to gain – millions of dollars in increased generation and distribution rates – from the Stipulation.

The Joint Supporters claim that "[t]he Signatory Parties' knowledge with respect to the issues addressed in the Stipulation has also been informed through several of AEP Ohio's proceedings before the Commission pending over the past two years."[12] They point to the participation of the signatory parties in the other cases that were consolidated with the ESP case and concluded that "the parties have engaged in extensive communication and information sharing – including discovery, depositions, hearing testimony, and briefing – regarding the issues addressed in the Stipulation."[13] The Joint Supporters are wrong, however.

An examination of the dockets in the other cases shows that only seven of the 18 signatory parties have participated in any of the other cases. Constellation and OEG each participated in three cases[14]; OHA and OMA each participated in two[15]; and Duke Energy Services ("DERS"), EnerNOC and Exelon each participated in one.[16]

The fact that eleven of the 18 signatory parties – including Grove City and Hilliard, whom the Joint Supporters claim to represent their residential customers – have

[11] Constellation Brief at 6.

[12] Joint Supporters Brief at 20.

[13] Id.

[14] Case No. 10-2376-EL-UNC; Case Nos. 10-343-EL-ATA and 10-344-EL-ATA; Case No. 10-2929-EL-UNC.

[15] Case No. 10-2376-EL-UNC; Case No. 10-2929-EL-UNC.

[16] DERS intervened in Case No. 10-2376-EL-UNC; EnerNOC intervened in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA; Exelon intervened in Case No. 10-2929-EL-UNC.

not participated in **any** of the consolidated cases other than the ESP case demonstrates the signatory parties' general lack of fundamental knowledge regarding the ramifications of the Stipulation.

Second, the Stipulation does not represent a comprehensive compromise of the issues raised by parties with diverse interests. The Stipulation does not reflect a compromise – comprehensive or otherwise – of the issues raised by the representatives of residential customers, i.e., the Customer Parties. Instead, the Stipulation retains the same unfair rate design that was contained in the Application, a Distribution Investment Rider ("DIR") with many of the same flaws as the DIR proposed in the Application and significant reductions in funding for low-income programs. As explained elsewhere in this reply brief, these provisions alone should make the Stipulation fail.

Third, the Stipulation lacks a diversity of interests. While the signatory parties include marketers and environmental groups, the only customer classes represented among the signatory parties (e.g., cities, hospitals, manufacturers) are industrial and commercial customers. Residential customers are not represented by the signatory parties.

This fact is highlighted by the great lengths the signatory parties go to in order to find "representatives" of residential customers among their ranks. Some claim that Grove City and Hilliard represent "their residential customers…."[17] The Customer Parties have refuted this claim, however, and have noted that the cities have no authority to represent anyone beyond their respective city limits.[18]

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[17] Joint Supporters Brief at 15, 19; RESA Brief at 8.

[18] Customer Parties Brief at 22-23.

Some signatory parties apparently attempt to hold the PUCO Staff out as the representative of residential customers. Constellation states that "[t]he Staff's mandate includes protecting the interests of the public at large, including residential customers."[19] Exelon claims that "[t]he three principal opponents of the Stipulation – FirstEnergy Solutions Corp. ("FES"), Industrial Energy Users-Ohio ("IEU") and the Ohio Office of Consumer [sic] Counsel ("OCC") – represent constituencies that have other representatives who support the settlement (suppliers, industrial customers and residential customers, respectively)."[20] Though not identifying any specific signatory party as a representative of residential customers, Exelon does state that "the Commission Staff's interests are global – not parochial – and Staff actively monitored and negotiated each aspect of the settlement to safeguard the public interest."[21] These efforts to ascribe representation of residential customers onto the PUCO Staff, however, are unconvincing, and most importantly are not made by the PUCO Staff:

- In its brief, the PUCO Staff itself does not claim to represent residential customers.
- The word "residential" does not appear even once in the Staff's brief.
- The Staff describes the signatory parties as "includ[ing] industrial and commercial customers, municipalities, CRES providers, competitive generation suppliers, alternative

[19] Constellation Brief at 5.

[20] Exelon Brief at 4-5.

[21] Id. at 5.

> energy resource and energy efficiency providers, and environmental advocacy groups."[22]

Although, as Exelon points out,[23] part of the PUCO's mission is "to assure all residential and business consumers access to adequate, safe and reliable utility services at fair prices, while facilitating an environment that provides competitive choices," just as important to the PUCO's mission is "[r]esolving through *mediation, arbitration, and adjudication* disputes between utilities and residential, commercial, and industrial customers, as well as between competing utilities."[24] Thus, the PUCO does not *represent* any single party or class of customers. It is a regulator, not a representative of customers or of a utility.

That the Commission does not *represent* any class of customers is shown in its pending Economic Development proceeding. There, the Commission, through its staff, recently put forth a template for providing economic incentives through lower rates to commercial customers, with the other customer classes – including residential customers – paying 80% of the costs.[25]

The signatory parties' strained efforts to "include" representatives of residential customers among their ranks merely highlight the fact that the Customer Parties, whose primary purpose is to advocate on behalf of residential customers, did not sign the Stipulation. Unlike many of the signatory parties, the Customer Parties did not rely upon

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[22] PUCO Staff Brief at 4 (footnote omitted). Further, neither of the exhibits to which the Staff cites for support of this description mentions residential customers. Id. at n. 6. It is unclear what the citation "Id. at 4-5" in the footnote references, since the immediately preceding footnote cites to an Ohio Supreme Court decision that has nothing to do with the Stipulation.

[23] Exelon Brief at 14, n.5.

[24] See http://www.puco.ohio.gov/puco/index.cfm/about-the-commission/mission-and-commitments/ (emphasis added).

[25] *In the Matter of the Staff Proposal for an Economic Development Tariff Template*, Case No. 11-4304-EL-UNC, Entry (July 15, 2011).

the views of AEP or the PUCO Staff, who may harbor interests contrary to the interests of residential customers. Instead, OCC performed its own, independent analysis of the Stipulation and concluded that the Stipulation does not benefit residential customers and does not meet the three-prong test for stipulations.

Constellation alleges that the Stipulation "is supported by the vast majority of parties who represent a variety of different interests…."[26] This does not mean that the Stipulation passes the three-prong test. As shown above, the Stipulation fails at least three of the five factors propounded by the Joint Supporters. The Commission should find that the Stipulation fails the three-prong test.

III. MANY OF THE KEY PUBLIC INTEREST BENEFITS THAT SIGNATORY PARTIES CLAIM TO BE CONTAINED IN THE STIPULATION ARE ILLUSORY.

Some of the signatory parties attempt to show public interest benefits that allegedly are included in the Stipulation. Many of the benefits, however, are illusory.

The PUCO Staff claims that the Companies' agreement to utilize a long-term debt interest rate, instead of the weighted average cost of capital previously approved by the Commission, will produce a substantially reduced carrying cost on the unamortized balance of deferred fuel cost.[27] However, this "benefit" will only come to fruition if the Companies are successful in obtaining legislation they seek.[28]

The Staff also points to the discounted capacity price over the term of the ESP to CRES providers. This discount, however, will only be available to those customers who

[26] Constellation Brief at 16.

[27] PUCO Staff Brief at 5.

[28] Stipulation at 26-27.

are fortunate enough to get the RPM-based set-aside capacity. As noted in the Customer Parties' initial brief, the RPM-based set-aside capacity will likely be taken by those customers who are most experienced in the marketplace, i.e., commercial and industrial customers.[29] Residential customers, including those who are part of governmental aggregation programs, will see little, if any, benefit from this capacity set-aside.[30]

The PUCO Staff and some signatory parties also claim a benefit from the withdrawal of a number of existing and proposed nonbypassable generation-related riders, such as the Facilities Closure Cost Recovery Rider, Carbon Capture and Sequestration Rider, Provider of Last Resort Rider ("POLR"), Environmental Investment Carrying Cost Rider, and Rate Security Rider.[31] But the Facilities Closure Cost Recovery Rider, the Carbon Capture and Sequestration Rider and the Rate Security Rider were new riders that were proposed in the Application. There was no guarantee that any of them would ultimately have been approved by the Commission. Thus, there is no real benefit from the "elimination" of these riders.

Further, the Companies would need to justify the inclusion of, as well as the amounts proposed for, the POLR Rider and the Environmental Investment Carrying Cost Rider.[32] Any claimed benefit from the withdrawal of these riders is a matter of conjecture.

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[29] Customer Parties Brief at 31. In fact, the maximum cap for RPM-priced capacity is 41% for all customers, and that cap does not start until 2014, which means that a majority of the Companies' customers, and especially residential customers, will pay generation rates that are considerably higher than the RPM-based rates for the duration of this ESP.

[30] Moreover, as argued by FES, the RPM capacity set asides work as a constraint on shopping and therefore actually imposes a cost, and not a benefit on customers. See FES Brief at 50.

[31] PUCO Staff Brief at 6. See also RESA Brief at 16; Constellation Brief at 8-9, 12.

[32] See *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, ¶¶ 22-35.

The PUCO Staff also claims a benefit in the automatic, non-cost based annual increases or decreases to the non-fuel portion of the bypassable base generation rate, which would allow the Companies to achieve an annual average base generation rate during the ESP term.[33] This provision of the Stipulation sets the Companies' average annual rate at $0.0245/kWh starting in January of 2012, $0.0257/kWh in January of 2013 and $0.0272/kWh from January of 2014 through May 31, 2015.[34] The PUCO Staff claims that this average rate "provides rate stability and predictability for customers, while shifting risks to AEP Ohio."[35] These statements are bald assertions, lacking any record support.

For the Companies' customers who do not shop, the "rate stability and predictability" in this provision of the Stipulation merely means that these customers are guaranteed to have their average annual rates go up during the term of the ESP, regardless of the Companies' cost of providing service to them and regardless of the market prices for electric generation service. Combined with the constraints on shopping due to the limited availability of RPM-based capacity for CRES providers, this provision of the Stipulation offers no real benefit to customers.

Further, the PUCO Staff claims the Stipulation's $3 million in annual funding for the Partnership with Ohio ("PWO") initiative helps meet a State policy goal by protecting at-risk populations.[36] The Stipulation, however, does not limit the PWO fund to provide specific assistance for low income customers related to their electric utility payments,

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[33] PUCO Staff Brief at 7.

[34] Stipulation at 7.

[35] PUCO Staff Brief at 7.

[36] Id. at 12.

such as a fuel fund or bill payment assistance.[37] While support for charitable organizations such as food banks and the United Way is admirable, it is not specifically utility related, and therefore does not protect at-risk populations from having their residential electric service disconnected. The Supreme Court of Ohio has recognized this fact:

> While it is true that such contributions to local service areas do benefit the communities served, they also tend to upgrade the company's public image and therefore work more to the benefit of the utility and its shareholders rather than to the benefit of the subscribers. Such an undertaking should be financed by the ownership rather than the utility customers….[38]

Unlike with the Ohio Growth Fund, the Stipulation does not specify that PWO funding cannot be collected from customers.[39] If the at-risk population is to be protected, the PWO commitment in the Stipulation should be structured specifically to assist them in paying their electric bills.

In addition, the PWO funding level in the Stipulation is $2 million **less** per year than the amount currently provided under the PWO for low-income programs, is half of the PWO funding amount in the Companies' original application and, *for the first time*, is contingent on the Companies achieving a 10% rate of return.[40] This represents not only a reduced benefit, but one that is potentially illusory. Unlike the base generation rates, which are guaranteed to increase, funding for the PWO is dependent upon the Companies' profit margin.

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[37] See the Companies' Ex. 8 at 23, lines 15-18.

[38] *Cleveland v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 62, 74. The Supreme Court of Ohio has also noted that "utilities receive favorable treatment under federal tax laws for their charitable contributions." *The Cleveland Electric Illuminating Co. v. Public Util. Comm'n.* (1982), 69 Ohio St. 2d 258; 431 N.E.2d 683, n. 7.

[39] Stipulation at 17.

[40] See Customer Parties Brief at 25-27.

The so-called public interest "benefits" that the signatory parties claim to be embedded in the Stipulation are mostly ethereal. The Commission should reject the Stipulation, or modify it as recommended by the Customer Parties, IEU and FES.

IV. THE RATE DESIGN PROPOSED IN THE STIPULATION IS UNREASONABLE.

The Joint Supporters contend that AEP Ohio witness Roush demonstrated that the substantial cost shifts under the Stipulation's rate structure are reasonable.[41] They also allege that he showed that the proposed rates are justified by elimination of "historical subsidies" among rate classes.[42] The Joint Supporters' claims, however, do not reflect the flaws in the rate design that were shown under cross-examination.

First, the Companies do not identify any "historical subsidies" that allegedly occurred among rate classes. Neither have the Companies quantified these "subsidies" so that the Commission can determine whether the redesigned rates are reasonable. Instead, the rate redesign does nothing more than provide lower rates for those classes that historically have been courted by CRES providers and provides higher rates for those customers that have shown very little interest in shopping. The rate restructuring is nothing more than a response to competition.

Second, the purpose of the rate redesign is supposedly driven by cost-causation principles:

> Q. And when you talk about removing subsidies, what you are saying is that the persons or entities that cause the costs are also paying those costs, correct?

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[41] Joint Supporters Brief at 38-40.

[42] Id. at 39.

A. I guess when I say "removing the subsidies," I think of it in the traditional cost-based regulation world where in traditional cost-based regulations the goal was always to try to get to equal rates of return which meant all customers were contributing fairly to pay their costs plus a reasonable rate of return.

And to the extent there was subsidy, that meant a certain class was underpaying relative to that standard and another class was overpaying relative to that standard.

Q. And, again, the standard is one of cost causation, correct?

A. I guess underlying it would be a cost of service study based upon cost-causation principles, yes.[43]

But again, there is nothing in the record reflecting the costs associated with either the rates comprising the rate redesign or the average annual base generation rate provided in the Stipulation.

Third, Mr. Roush admitted that the rate redesign violates the cost-causation principles in at least one instance. The Stipulation would allow the Companies to collect phase-in deferrals equally from OP and CSP customers, even though CSP's phase-in deferrals have already been collected from its customers, so that CSP has a zero phase-in deferral balance.[44] On cross-examination, Mr. Roush admitted that this charge to CSP's customers violates cost-causation principles because it is not related to cost causation, but instead is related to the merger of CSP and OP.[45]

Fourth, some of Mr. Roush's rebuttal exhibits present an inaccurate picture of the Stipulation's actual effect on customers. The table at the bottom of Exhibit DMR-R3 shows the distribution increase as a percentage of total rates. But the "2012 Total Rates

[43] Tr. XIII at 2310-2311.

[44] See Customer Parties Brief at 39.

[45] Tr. XIII at 2311-2312.

before Stipulation ESP" includes POLR charges that the Commission ordered removed in the Remand Decision.[46] The POLR charge was 57 cents for CSP customers and 23 cents for OP customers.[47] Removing the POLR charges from the RS rates for CSP and OP customers would increase the percentages shown in Exhibit DMR-R3.[48]

In addition, Exhibit DMR-R4 compares total bill rates that were in effect in January 2011 with the rates that would be in effect in January 2012 under the Stipulation. But the January 2011 rates also include POLR charges that the Commission ordered removed in the Remand Decision.[49] Thus, the Companies' current rates are lower than the January 2011 rates shown in Exhibit DMR-R4 and, correspondingly, the rate increases would be greater. The harm to residential customers is thus greater than Exhibit DMR-R4 shows.

Further, Exhibit DMR-R5 compares the rates proposed in the Stipulation to the rates the Companies proposed in their original ESP application filed in January of this year. There is no guarantee, however, that the Commission would have approved the rates originally proposed in the ESP application. And the rates proposed in the original ESP are considerably higher than current rates. Thus, the so-called "savings" shown in the last column of the first table in the exhibit are illusory. Indeed, the very use of the label "savings" to describe a comparison of what merely are proposed and not actual rates is unhelpful for clarity of communications with the public on the real effect they would see under the Stipulation.

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[46] Id. at 2290-2293.

[47] See id. at 2292.

[48] An examination of Exhibit DMR-R4 shows that the 2012 total rate for CSP customers would be $10.59, and the percentage of increase would be 3.8%. For OP customers, the RS rate would be $10.32 and the percentage of increase would be 3.3%.

[49] Tr. XIII at 2293-2295.

The PUCO Staff states that "[t]he generation prices for SSO customer during this transition will reflect a highly simplified pricing structure."[50] This "simplified pricing structure," however, mandates increases in the rates customers pay without justification. Further, PUCO Staff Witness Fortney stated that the rate structure causes substantial cost shifts, when there is no immediate need to overhaul it prior to actual market price offerings.[51] The Commission should not allow this to happen. The Commission should reject the Stipulation.

V. THE SIGNATORY PARTIES HAVE NOT SHOWN THAT THE DISTRIBUTION INVESTMENT RIDER IS REASONABLE OR LAWFUL.

A. The DIR Has Not Been Shown To Be Reasonable.

Under the proposed DIR, the Companies' customers can be required to pay yearly distribution rate increases of $86 million in 2012, $104 million in 2013 and $124 million in 2014. These rate increases are in addition to any distribution rate increases coming out of the Companies' distribution cases. These rate increases are also in addition to the distribution asset recovery rider increases – totaling approximately $374 million of deferred expenses, to be imposed on customers over the next seven years – requested in the Companies' distribution rate case application. These rate increases are also in addition to $24 million annual increases for the Enhanced Service Reliability Rider ("ESRR"). These rate increases are also in addition to the automatic annual generation rate increases under the Stipulation. These rate increases are also in addition to the phase-in recovery rider increases ($628 million) to be collected from the Companies'

[50] PUCO Staff Brief at 11.

[51] See Tr. X at 1715, where Mr. Fortney explained his pre-Stipulation testimony opposing the rate design in the original application, which remains in place in the Stipulation.

customers over the next six years.[52] These rate increases are also in addition to the unidentified increases expected under the generation resource rider. These rate increases are also in addition to the potential pool termination increases. And these rate increases are also in addition to the $20 million annual increases to fund interruptible credits.

Nonetheless, according to the PUCO Staff, the DIR is reasonable.[53] Staff's embracing of the DIR concept is a change in position[54] that can only be attributed to an effort to reach a settlement of the ESP case. While the PUCO Staff on brief characterizes the DIR as speeding the "funding of reliability enhancements,"[55] this characterization is misleading. The evidentiary hearing record reflects that the DIR will allow the Companies to collect from customers up to the cap each year in carrying charges alone, **without investing one additional dollar for reliability**.[56] Thus there is no assurance anywhere in the record that this will speed up reliability enhancements, let alone fund reliability enhancements.

Moreover, Staff's additional claims on brief that the DIR and the ESRR provide added benefits, should be disregarded. These claims are unfounded and Staff provides no citation to record evidence to support such claims. These unsubstantiated claims are that

- [E]nergy Efficiency is directly benefited.

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[52] See Case No. 11-4921-EL-RDR, Application (September 1, 2011), Exhibit A, page 1 of 7 (showing $628,073,325 as the estimated FAC balance for OP as of December 31, 2011. This equates to an annual phase-in recovery rider revenue requirement of $129,644,938).

[53] PUCO Staff Brief at 13.

[54] Staff Witness Fortney acknowledged that the pre-stipulation position of the Staff, presented in the filed direct testimony of Doris McCarter on August 4, 2011, was that the DIR should be rejected. Tr. X at 1722-1725.

[55] PUCO Staff Brief at 10.

[56] Tr. X at 1732-1733.

- Transmission costs are avoided leading to more reasonably priced electricity.
- It provides an opportunity for AEP Ohio to build new generating resources that will be dedicated to its retail customers that can serve as a hedge against potentially volatile market prices.[57]

To the contrary, the DIR is not reasonable because: 1) there has been no demonstrated need for it[58]; 2) it is forced funding that could have nothing to do with reliability; 3) there is no enhanced reliability improvements associated with the funding[59]; 4) customer expectations do not match with the need for enhancements to reliability[60]; 5) sufficient funding exists within current distribution rates to maintain (and even enhance) reliability[61]; 6) the carrying charges (20%) on the expenditures are unreasonable on their face; 7) the Companies have not demonstrated compliance with R.C. 4928.143(B)(2); and 8) there is the potential for double recovery of the distribution costs unless some credit is required – and none is currently required in the ESP Stipulation or committed to in the distribution case.

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[57] PUCO Staff Brief at 10.

[58] Tr. X at 1722-1726; OCC Ex. 1 at 31.

[59] Tr. X at 1730.

[60] OCC Ex. 10; Tr. XII at 2017-2018.

[61] See Customer Parties Brief at 53.

B. The Signatory Parties Have Not Borne the Burden of Proving That the DIR Complies with the Provisions of R.C. 4928.143(B)(2).

According to the signatory parties, there are "multiple" options in the ESP statute for the Commission to base its approval of the DIR carrying charge.[62] The multiple provisions they refer to are R.C. 4928.143(B)(2)(d) and R.C. 4928.143(B)(2)(h). These provisions will be separately addressed below.

1. The signatory parties have failed to show how the DIR has the effect of stabilizing or providing certainty regarding retail electric service, as required under R.C. 4928.143(B)(2)(d).

Under R.C. 4928.143(B)(2)(d), an ESP *may* provide for or include carrying costs as would have the effect of stabilizing or providing certainty regarding retail electric service. The signatory parties seize upon this provision to justify the DIR. They refer singularly to Mr. Hamrock's testimony where he claims that the DIR "will allow recovery of carrying costs on incremental distribution plant investment."[63]
The signatory parties note the Order on Remand in Case Nos. 08-917-EL-SSO et al. utilized this statutory provision as justification for environmental carrying costs as part of the Companies' first ESP.[64]

As pointed out in the Customer Parties' Initial Brief, the Companies have failed to meet the burden of proving the DIR will stabilize and provide certainty regarding the Companies' retail electric service from the customers' and the Companies' perspective. The bare statement of Mr. Hamrock, explaining how the DIR will function, falls woefully short of the Companies' burden of proof under R.C. 4928.143(C)(1). Merely mentioning

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[62] Joint Supporters Brief at 64.

[63] Companies' Ex. 8 at 20; Joint Supporters Brief at 64.

[64] Joint Supporters Brief at 64.

the Commission's Remand Order does little as well. The record in the Remand Case provided some support for the Commission's finding that the carrying charges at issue were permissible under R.C. 4928.143(B)(2)(d). Here, however, there is no record support for the Commission to find that the DIR complies with R.C. 4928.143(B)(2)(d).

2. The signatory parties have failed to show that the reliability of the Companies has been examined as part of the determination in this proceeding that the ESP should include enhanced distribution service funding, as required under R.C. 4928.143(B)(2)(h).

According to the Joint Supporters, the reliability of AEP Ohio is "constantly under review by PUCO Staff and through compliance filings."[65] They point out that the PUCO Staff was integral to the setting of the reliability indices in Case No. 09-756.[66] The Joint Supporters rely upon the results of the Companies' surveys that show most customers are expecting to either maintain their current level of service or see an increase in the level of reliability over the next five years.[67] Citing to PUCO Staff Witness Baker, the Joint Supporters allege that, based on the Companies' performance against the reliability standards of 09-756, the PUCO Staff believes the expectations are aligned and Companies are dedicating sufficient resources to reliability.

The PUCO Staff on brief alleges that it "has examined the AEP Companies' reliability to ensure that the reliability expectations of these Companies are in alignment with those of their customers."[68] Apparently, the PUCO Staff is referring to a separate and distinct process under 4901-1-10(B)(2), where each utility is required to file an application with the PUCO to establish company specific **minimum** reliability standards.

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[65] Id. at 65.

[66] Id.

[67] Id.

[68] PUCO Staff Brief at 14, citing to Staff Ex. 5 at 3.

The PUCO Staff states that it works with the utilities to establish commission-approved reliability standards considering historical performance, customer surveys, etc. Staff then monitors the performance against standards.[69]

There are, however, flaws in the arguments presented by the PUCO Staff and the Joint Supporters. The primary flaw is that the analysis and setting of the reliability standards in a separate proceeding does not satisfy the provisions of R.C. 4928.143(B)(2)(h).

The distribution reliability standards contained in Ohio Adm. Code 4901-1-10, were developed pre-S.B. 221. They were thus, not established in conjunction with the requirements associated with the offering of a SSO, nor developed in response to R.C. 4928.143(B)(2)(h). Indeed according to Ohio Adm. Code 4901-1-10-02(D), "the rules in this chapter shall not relieve the electric utilities and/or transmission owners from: … 2) Complying with the laws of this state."

The laws of this state include R.C. 4928.143(B)(2)(h). That law requires that "as part of its determination" as to whether to allow an electric security plan to include provisions pertaining to distribution infrastructure, the Commission "shall" examine the reliability of the electric distribution system and ensure that customer expectations are aligned with the Companies' expectations. No reliability examination has occurred in this case, as PUCO Staff Witness Hecker testified and PUCO Staff Witness Fortney confirmed.[70]

These admissions by the PUCO Staff witnesses serve to demonstrate the underlying problem. If both the Companies and the Staff are correct that the statutory

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[69] Id.

[70] Tr. IX at 1656; see also Tr. X at 1730.

test set forth in R.C. 4928.143(B)(2)(h) is simply met by satisfying the standards and process enumerated in Ohio Adm. Code 4901-1-10(B)(2), which predates the statute, then R.C. 4928.143(B)(2)(h) becomes meaningless. In essence, the statutory test has been supplanted by one found in the Ohio Administrative Code. This could not have been the intent of the legislature. In addition, this violates a primary rule of statutory construction: to interpret statutes so as to give them meaning and effect, not render them superfluous.[71]

And, as explained in the Customer Parties' Initial Brief in this proceeding, if an examination of the Companies' reliability had been done in this proceeding, it would have shown that there is no need for the DIR, as the PUCO Staff and OCC concluded.[72] Customer expectations measured by the 2010 and 2011 surveys showed that the majority of customers DO NOT have increased reliability expectations over the next five years. They in fact see their reliability needs as either staying the same, decreasing, or decreasing significantly.[73] Such expectations are inconsistent with the Companies' plans for enhancements to existing reliability – i.e., going from a reactive to a proactive approach.

An even more fundamental problem for the signatory parties is that the DIR is not really a distribution infrastructure improvement mechanism that qualifies under R.C. 4928.143(B)(2)(h) because of the way it is structured. The DIR for all three years can be collected without a dollar being attributed to distribution investment.[74] There are no

[71] R.C. 1.47.

[72] Tr. X at 1725; OCC Ex. 1 at 31.

[73] See OCC Ex. 10.

[74] Tr. X at 1732-1733.

projects or replacements slated.[75] There are no requirements for, or measurements of, increased reliability.[76] And the DIR is not needed.[77]

The Companies have failed to bear the burden of proving that the DIR is lawful and appropriate. The Commission should reject the DIR provision of the Stipulation.

C. The Potential for Double Collection of Distribution Investment from Customers Exists Despite Allegations Otherwise.

The Joint Supporters claim there is no potential for double collection of distribution investment from customers.[78] This claim assumes that a fix is made in the distribution case. As of the writing of this brief, there is no fix. And there is no language contained in the Stipulation that precludes such double collection. The PUCO should fix the problem in this docket, and should not rely upon the Companies to fix the problem it has created here elsewhere.

VI. CONCLUSION

Despite the claims of the signatory parties, the Stipulation does not pass the three-prong test for Commission approval of stipulations. Many of the signatory parties are inexperienced in Commission proceedings and/or relied on the biased view of the Companies in joining the Stipulation. The Stipulation does not reflect the concerns presented by the intervenors who are authorized to represent residential customers, and thus lacks the diversity of interests necessary for Commission approval. Funding for the low-income assistance programs under the PWO is significantly reduced from both the current amount and the amount proposed in the original application. Many of the key

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[75] Tr. XII at 2033; OCC Ex. 4; Companies' Ex. 19 at 4.

[76] Tr. X at 1730-1731.

[77] Id. at 1725; OCC Ex. 1 at 31.

[78] Joint Supporters Brief at 70.

benefits that the signatory parties claim to be contained in the Stipulation are illusory. The rate design is unreasonable and has not been justified. Further, the DIR is unreasonable, unlawful and may allow double collection of the Companies' investments from customers. In order to protect residential customers, the Commission should reject the Stipulation.

Respectfully submitted,

BRUCE J. WESTON
INTERIM CONSUMERS' COUNSEL

/s/ Terry L. Etter______________________
Terry L. Etter, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964
etter@occ.state.oh.us
grady@occ.state.oh.us

/s/ Michael R. Smalz__________________
Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, Ohio 43215
Telephone: 614-221-7201
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org

On Behalf of the Appalachian Peace and Justice Network

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Reply Brief has been served electronically upon those persons listed below this 18th day of November 2011.

/s/ Terry L. Etter______________________
Terry L. Etter
Assistant Consumers' Counsel

PARTIES SERVED

Werner.margard@puc.state.oh.us
Jonathan.tauber@puc.state.oh.us
lmcalister@bricker.com
MWarnock@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
tobrien@bricker.com
fdarr@mwncmh.com
joliker@mwncmh.com
ghummel@mwncmh.com
ricks@ohanet.org
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org
Philip.sineneng@thompsonhine.com
Dorothy.corbett@duke-energy.com
todonnell@bricker.com
cmontgomery@bricker.com
myurick@cwslaw.com
dconway@porterwright.com
haydenm@firstenergycorp.com
mkurtz@BKLlawfirm.com
dboehm@BKLlawfirm.com
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
keith.nusbaum@snrdenton.com
JLang@Calfee.com
lmcbride@calfee.com
talexander@calfee.com
ssolberg@eimerstahl.com
aaragona@eimerstahl.com
dstahl@eimerstahl.com

jbentine@cwslaw.com
jejadwin@aep.com
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
wmassey@cov.com
henryeckhart@aol.com
jesse.rodriguez@exeloncorp.com
sandy.grace@exeloncorp.com
kpkreider@kmklaw.com
dmeyer@kmklaw.com
holly@raysmithlaw.com
BarthRoyer@aol.com
Gary.A.Jeffries@dom.com
gthomas@gtpowergroup.com
laurac@chappelleconsulting.net
cmiller@szd.com
gdunn@szd.com
ahaque@szd.com
sjsmith@szd.com
tsantarelli@elpc.org
nolan@theoec.org
trent@theoec.org
cathy@theoec.org
ned.ford@fuse.net
gpoulos@enernoc.com
sfisk@nrdc.org
zkravitz@cwslaw.com
aehaedt@jonesday.com
dakutik@jonesday.com
callwein@williamsandmoser.com
Terrance.Mebane@ThompsonHine.com

whitt@carpenterlipps.com
vparisi@igsenergy.com
mswhite@igsenergy.com

Greta.See@puc.state.oh.us