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
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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

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK**

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On Behalf of the Appalachian Peace and Justice Network

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APPLICATION FOR REHEARING
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As part of its advocacy that residential consumers of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP Ohio" or "Companies") receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") and the Appalachian Peace and Justice Network ("APJN") file this application for rehearing of the Opinion and Order ("O&O") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned proceedings on December 14, 2011. OCC and APJN are authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

The O&O approved, with modifications, a Stipulation and Recommendation ("Stipulation") filed in these proceedings on September 7, 2011. As a result, the O&O approved an Electric Security Plan ("ESP") for the Companies for the period January 1, 2012 through May 31, 2015.

The O&O was unreasonable and unlawful in the following respects:

1. In approving Standard Service Offer ("SSO") rates for the electric security plan that are not cost-based, the Commission erred by departing from precedent established in previous electric security plan cases without explaining why it departed from precedent and by failing to ensure that the Companies' rates are just and reasonable under R.C. 4928.02(A) and R.C. 4905.22.

2. The Commission erred in its determination that the ESP was more favorable in the aggregate than a market rate offer ("MRO"), in violation of R.C. 4928.143(C)(1).

3. By approving three placeholder riders with costs that have yet to be determined, the Commission erred by favoring the ESP when compared to an MRO, in unlawfully approving an ESP under R.C. 4928.143(C)(1).

4. The Commission erred in increasing the shopping credits in the Market Transition Rider ("MTR") for GS-1 and GS-2 customers without ensuring that customers in other rate classes will not pay for these increases in the shopping credits.

5. The Commission erred by specifying that communities approving aggregation plans in November 2011 may benefit from the set-aside of capacity with pricing based on PJM's reliability pricing model ("RPM"), although other communities may be able to complete the government aggregation process by December 31, 2011. This inconsistent with the requirement in R.C. 4928.20(K) for the PUCO to adopt rules that "encourage and promote large-scale governmental aggregation in this state."

6. The Commission erred in concluding that the Distribution Investment Rider ("DIR") may be included in the Companies' ESP under R.C. 4928.143(B)(2)(h) as "incentive ratemaking" tool and without a commitment to use the considerable funds collected from customers to maintain or improve electric service. Its finding is not based on any facts in the record, and is manifestly against the weight of the evidence, all in violation of R.C. 4903.09.

7. The Commission erred in concluding that it had examined the reliability of the Companies' distribution system as required under R.C. 4928.143(B)(2)(h). Its failure to do so, in the context of the Companies' ESP, means that the DIR was unlawfully approved under the statute. The Commission's finding is not based on any facts in the record and amounts to a mistake, violating R.C. 4903.09.

8. The Commission erred by failing to comply with the requirements of R.C. 4928.143(B)(2)(h) when it did not ensure that the electric utility's expectations for reliability are aligned with the customers' expectations. Its failure to do so means that the DIR was unlawfully approved under the statute.

9. The Commission erred in finding that the DIR should serve as an incentive ratemaking tool because the record reflects that the Companies have more than sufficient funding available to ensure that reliability of the distribution system is maintained.

10. The Commission erred by permitting the Companies to collect revenues for past distribution investment through the DIR, which is contrary to the prospective operation of R.C. 4928.143(B)(2)(h). It is unlawful and a form of impermissible retroactive ratemaking.

11. The Commission erred in permitting the record to include references to a stipulation from Case No. 09-756-EL-CSS, especially where the stipulation is used as a basis for arguing that the Commission has met R.C. 4928.143(B)(2)(h). The Commission's finding was unreasonable and without record support, in violation of R.C. 4903.09.

The reasons in support of these grounds for this application for rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

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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
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On January 27, 2011, the Companies filed their second SSO application,[1] seeking approval of the Application under R.C. 4928.143. The ESP proposed in the Application contained provisions regarding the Companies' distribution service, economic development and job retention, the alternative energy resource requirements of R.C. 4928.64, the energy efficiency requirements of R.C. 4928.66, low-income customer assistance and other matters.[2] The Companies recognized, however, that "the primary focus of the application concerns SSO pricing issues."[3]

Twenty-nine parties were granted intervention in the ESP cases.[4] On July 25, 2011, the intervenors filed the testimony of a total of 29 witnesses either opposing or pointing out inadequacies in the Application. In addition, on August 4, 2011, the PUCO Staff filed the testimony of 16 witnesses, which addressed issues in the Application that the PUCO Staff either did not support or proposed to be modified.[5]

During early August 2011, the Companies, the intervenors and PUCO Staff entered into negotiations regarding a settlement of the ESP cases. The settlement discussions also included matters that were being addressed in other cases before the

[1] Case Nos. 11-346-EL-SSO and 11-348-EL-SSO, Application (January 27, 2011).

[2] See id. at 3.

[3] Id.

[4] See Entry (March 23, 2011) at 4; Entry (July 8, 2011) at 2-3.

[5] Tr. X at 1714.

PUCO: the proposed merger of CSP and OP (Case No. 10-2376-EL-UNC); the CSP and OP emergency curtailment riders (Case Nos. 10-343-EL-ATA and 10-344-EL-ATA); the Commission's review of CSP and OP capacity charges (Case No. 10-2929-EL-UNC); and the mechanism by which CSP and OP may collect deferred fuel charges (Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR).

On September 7, 2011, the Stipulation, signed by the Companies, the PUCO Staff and 18 of the intervenors, was docketed in these proceedings.[6] Among other things, the Stipulation did the following:

- Ostensibly removed several non-bypassable riders that were proposed in the Application, but would impose automatic non-cost-based generation rate increases upon customers over the term of the ESP targeted to provide the Companies with an average base generation rate of $0.0245/kWh starting in January 2012, $0.0257/kWh starting in January 2013 and $0.0272/kWh from January 2014 through May 31, 2015, based upon the billing determinants filed by the Companies in these proceedings.

- Retained the rate design proposed in the Application, including the $8.21/kw/month interruptible credit for existing interruptible customers, with changes affecting demand-metered customers and customers in rate classes GS-2, GS-3 and GS-4.

- Created a shopping credit of $10/MWh for the first 1,000,000 MWh of usage per calendar year for schools in rate classes GS-1 and GS-2, and GS-2 customers that shop after September 6, 2011.

- Established a non-bypassable Generation Resource Rider ("GRR") as a placeholder rider, under which the Companies may seek to collect rate increases from customers for the undefined costs for their Turning Point solar project and their new Muskingum River 6 ("MR6") generating plant.

[6] The dockets discussed above were consolidated "for the purpose of considering the Stipulation" by Entry dated September 16, 2011.

- Would allow 427 customers[7] who have waived the Provider of Last Resort ("POLR") charge and who return from shopping during the ESP period to be served at the SSO rate.

- Set the return on equity ("ROE") threshold for the Companies' significantly excessive earnings test at 13.5%.

- Established a DIR based on *post-2000 investment*, with the ability to collect rate increases from customers totaling $86 million in 2012, $104 million in 2013 and $124 million in 2014 and the first five months in 2015.

- Continued the Enhanced Service Reliability Rider "as proposed" which collects 62 cents per MWh[8] for vegetation management, and established a Storm Damage Recovery mechanism with a baseline of $5 million.

- Established a set-aside of capacity (based on total kWh retail sales), with RPM-based pricing, that would be available to competitive retail electric service ("CRES") providers on a first-come, first-served basis as follows: 21% of AEP Ohio's total retail load in 2012, 29% in 2013 until securitization is completed when it will become 31% and 41% in 2014 through the first half of 2015.

- Established a competitive bidding process by which the Companies would meet their SSO obligations for delivery from June 1, 2015 through May 31, 2016.

- Provided $3 million annually during the ESP term for the Partnership With Ohio ("PWO") initiative that benefits low-income customers, so long as AEP Ohio's return on equity exceeds 10% for the prior calendar year.

- Provided $5 million annually (which shall not be collected from customers) during the ESP term for the Ohio Growth Fund ("OGF") initiative for the benefit of economic development, so long as AEP Ohio's return on equity exceeds 10% for the prior calendar year.[9]

OCC and APJN declined to sign the Stipulation, primarily because the Stipulation would increase the rates that the Companies' 1.2 million residential customers will be

[7] Tr. VI at 913.

[8] Tr. XI at 1922.

[9] See generally Joint Ex. 1 at 4-28.

charged, with little or no cost justification. Under the Stipulation, CSP residential customers' rates would increase 5.68% for winter usage and 7.89% for summer usage over the term of the ESP, while OP residential customers' rates would increase approximately 9.23% over the term of the ESP.[10] In addition, the Stipulation would significantly reduce current funding levels for low-income programs at a time when customers most need assistance in this struggling economy. Further, the Stipulation did not meet the three-prong test for stipulations in PUCO proceedings recognized by the Supreme Court of Ohio.

The PUCO conducted a hearing on the Stipulation during October 2011, and briefs and reply briefs were filed during November 2011. On December 14, 2011, the Commission issued its O&O in these proceedings. In the O&O, the Commission made the following adjustments to the Stipulation:

- Under R.C. 4928.142, the PUCO may approve an ESP only if it is more favorable than an MRO. The record showed that the base generation rate increases would make the ESP less favorable than an MRO by over $325 million. Although the PUCO stated that the numeric price test is only one factor of the ESP/MRO comparison, the PUCO found that the $325 million gap between the proposed ESP and an MRO significant enough to modify the Stipulation. The PUCO cut the base generation increases in half.

- The PUCO increased the shopping credit in the MTR for GS-1 and GS-2 to $10/MWh for the first 2,000,000 MWh of usage per calendar year, with any unused MWh to carry over to the next calendar year.

- The PUCO approved the reduced PWO funding from the Companies' current ESP, but removed the qualification that the funding would be provided only if AEP Ohio's ROE exceeded 10%.

- The PUCO directed AEP Ohio to work with the PUCO Staff to develop a plan by June 1, 2012 to emphasize proactive distribution maintenance that focuses spending on where it will have the greatest impact on maintaining and improving reliability for customers.

[10] See Tr. I at 59-60, 61.

- The PUCO did not approve the corporate separation plan, but will continue to review the plan's remaining issues in an expeditious manner in the corporate separation case.

- Under the Stipulation, if pool modification or termination costs exceeded $50 million, AEP Ohio could apply to collect all the costs through the Pool Modification Rider. The PUCO, however, determined that this served as a disincentive for the Companies to minimize the costs, and modified the rider to permit AEP Ohio to request collection of its pool modification or termination costs <u>in excess of</u> $50 million. Before collection of the costs is authorized, AEP Ohio must show the extent that the pool modification or termination benefited customers, the extent that the costs and/or revenues should be allocated to Ohio customers and that the costs are prudently incurred and reasonable.

- The PUCO modified the capacity set-asides during the term of the ESP to accommodate the load of any community that approved a governmental aggregation program in the November 8, 2011, election, so long as the necessary process to take service in the AEP Ohio service territory is completed by December 31, 2012.

- In addition, to ensure a fair share of RPM-priced capacity for residential customers, the PUCO modified the Stipulation so that the RPM-priced capacity allocation determined for each customer class is only available for customers in the particular customer class. No RPM-priced capacity can be allocated to a customer in another customer class.

The PUCO approved the Stipulation, with the above modifications. The Commission's adjustments to the Stipulation in the O&O improved the ESP embodied in the Stipulation in several important ways, and both OCC and APJN appreciate the Commission's efforts at attempting to make the ESP less objectionable. Nevertheless, many portions of the ESP as modified by the O&O are still unreasonable or unlawful. To comply with the law, the Commission should make additional changes to the ESP as suggested herein.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on February 4, 2011, which was granted in the March 23 Entry. APJN filed a motion to intervene on February 22, 2011, which also was granted in the March 23 Entry. OCC also filed testimony regarding both the Application and the Stipulation, and both OCC and APJN participated in the hearing on the Stipulation.

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

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear." The statute also provides: "If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." As shown herein, the statutory standard for modifying the O&O is met here.

III. ARGUMENT

A. In approving Standard Service Offer rates for the electric security plan that are not cost-based, the Commission erred by departing from precedent established in previous electric security plan cases without explaining why it departed from precedent and by failing to ensure that the Companies' rates are just and reasonable under R.C. 4928.02(A) and R.C. 4905.22.

In the O&O, the Commission approved the rate design contained in the original Stipulation, which was based on the rate design in the Application. That rate design is not based on the Companies' cost of providing service to each rate class.[11]

Although the Stipulation is meant to provide a pathway to market-based rates, the base generation rates in the Stipulation are nevertheless an SSO for an ESP, not an MRO. Customers who do not shop will pay the SSO.

In the Companies' first ESP case, the Commission refused to allow stipulated SSO rates that are not cost-based, stating "[a]s recognized by several interveners, the record is void of sufficient support to rationalize automatic, annual generation increases that are not cost-based, but that are significant, equaling approximately $87 million for CSP and $262 million for OP."[12] As in the Companies' first ESP, the record in this proceeding provides no rationale for the non-cost-based, automatic, annual base generation increases included in the Stipulation. Instead, the increases are something that was merely agreed upon by the Signatory Parties.

Just like the non-cost-based SSO rates in AEP Ohio's first ESP case, the base generation rate increases approved in the O&O are significant, even after the reductions

[11] See Tr. I at 69.

[12] Case Nos. 08-918-EL-SSO and 08-919-EL-SSO, Opinion and Order (March 18, 2009) ("AEP ESP 1 Order") at 30 (citations omitted).

by the Commission in the O&O. As in the Companies' first ESP, there is no justification for the base generation rate increases in the record of *this* proceeding. Although the Commission cut the rate increases in half, the rates themselves are still not cost-based.

In the O&O, the Commission departed from its precedent established in the first AEP Ohio ESP case, but did not explain its rationale for doing so. It is settled law that the Commission should "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law."[13] But if the Commission departs from precedent, the Supreme Court of Ohio has ruled that the Commission must also justify its action.[14] In this proceeding, the Commission failed to follow the Supreme Court's directive.

In addition, the Commission's approval of the non-cost-based rates does not comport with the state policy to "[e]nsure the availability to consumers of … reasonably priced retail electric service" found in R.C. 4928.02(A), or with the statutory requirement in R.C. 4905.22 that utilities' rates be just and reasonable. The purpose of the base generation rate design contained in the Stipulation was to ensure that the Companies receive a guaranteed average annual rate.[15] The only rationale for the base generation rates in the Stipulation was that the Signatory Parties agreed to them. The record of this proceeding does not support that the base generation rates – even with the reduced increase approved by the Commission – are just and reasonable. The Commission thus failed to follow the law.

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[13] *Cleveland Elec. Illuminating Co.* v. *Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, 431, certiorari denied, 423 U.S. 986.

[14] *Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d 49.

[15] See Joint Ex. 1, ¶ 1.f.

In authorizing an ESP with base generation rates that are not cost-based, the Commission departed from precedent without the justification for its actions mandated by the Supreme Court of Ohio. Further, the record does not support that the base generation rates are just and reasonable, as required by statute. The Commission thus acted unlawfully. The Commission should therefore abrogate the O&O and modify the ESP, rejecting the non-cost-based generation rate increases.

B. The Commission erred in determining that the electric security plan was more favorable in the aggregate than a market rate offer, in violation of R.C. 4928.143(C)(1).

R.C. 4928.143(C)(1) requires the Commission to approve an ESP if it finds that the ESP, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results of an MRO. In determining that the ESP, as adjusted in the O&O, is more favorable in the aggregate than an MRO, the Commission pointed to four specific areas. First, the Commission stated that the ESP creates an earlier transition to market than is otherwise possible. Second, the Commission asserted that provisions in the ESP regarding the MR6 and Turning Point projects contribute to the diversity of supply as is consistent with R.C. 4928.02, and allow the Commission to determine the need for construction of additional generation facilities should the market not develop any necessary additional capacity. Third, the Commission found the PWO and OGF initiatives to be significant benefits. And fourth, the Commission's quantitative analysis (with the reduction in base generation rates) favors the proposed ESP by over $35 million.[16]

[16] O&O at 32. The Commission also referenced "additional modifications to the Stipulation" that were also discussed in the O&O. Id. Those modifications apparently are the additional shopping credit for GS-1 and GS-2 customers, the clarification that the Companies may not recover the first $50 million spent on pool modification and termination and the revisions to the capacity plan.

The Commission, however, overstates the importance of many aspects of the Stipulation as adjusted by the O&O. While it is true that many customers will see an opportunity to shop because of the RPM-based set-asides of capacity, the $255 per MW-Day interim rate the Commission approved in the O&O for that capacity will provide little incentive for shopping. The record shows that the RPM rate for capacity has already been set at $116.15/MW-Day for 2011/2012, $16.46/MW-Day for 2012/2013 and $27.73/MW-Day for 2013/2014.[17] Thus, the RPM-based rate in the Stipulation is more than double the 2011/2012 RPM rate, 14.5 times 2012/2013 RPM rate and nearly ten times the 2013/2014 RPM rate. To characterize the $255/MW-Day capacity charge as a de facto cap is a fair description of the effect of such charges. The RPM-based rate in the Stipulation is not very attractive.

In addition, whether Turning Point and MR6 are a benefit remains to be seen. The Commission noted that the need for these projects will be determined at a later date.[18] Thus, although they **may** "contribute to the diversity of supply," whether they are **needed** for that purpose is not clear. The benefits of Turning Point and MR6 were overstated in the O&O.

Further, as OCC and APJN pointed out on brief,[19] the amount for the PWO contained in the Stipulation – and ultimately approved in the O&O – was $2 million per year less than the amount provided for the PWO in the Companies' first ESP. Likewise, the Commission's removal of the connection between the PWO funding and the Companies' return on equity is not a significant benefit because the PWO funding in the

[17] See Staff Ex. 2 at 5. See also FES Ex. 3 at 21.

[18] O&O at 39-40.

[19] See Initial Brief at 26.

Companies' first ESP also was not contingent on a return on equity benchmark. Hence the treatment of the PWO in the O&O is a net detriment as compared to the PWO in the Companies' first ESP, and makes the ESP less valuable to customers.

In comparing the ESP approved in the O&O to an MRO, the Commission overstated the benefits of the ESP. It was unreasonable for the Commission to consider the factors discussed above as benefits.

C. By approving three placeholder riders with costs that have yet to be determined, the Commission erred by favoring the electric security plan when compared to a market rate offer, in unlawfully approving an electric security plan under R.C. 4928.143(C)(1).

In making the statutorily required comparison in this proceeding, the Commission could not quantify the costs associated with the three placeholder riders approved in the ESP. The absence of costs associated with the riders – that will be charged to customers during the term of the ESP – makes the ESP/MRO comparison flawed, and thus inconsistent with R.C. 4928.143(C)(1). The Commission thus erred in approving the riders.

Under the terms of the Stipulation, the nonbypassable GRR will act as a placeholder for any project-specific costs regarding Turning Point and MR6 that the Commission may approve at a later date.[20] In the O&O, the Commission noted some costs associated with Turning Point, in the form of a revenue requirement for the project, which was claimed as a benefit of the Stipulation.[21] The Commission, however, ignored

[20] See O&O at 20.

[21] Id. at 30.

the fact that other costs associated with Turning Point and MR6 will likely be incurred during the term of the ESP, as these projects progress.

Other placeholder riders approved in the O&O are the PMR, which relates to costs associated with the Companies' modification and termination of their capacity pooling arrangements, and the CHP, which relates to costs associated with customer-sited combined heat and power facilities of industrial customers. These riders suffer the same shortcomings as the GRR.

In addition, the Commission approved the PMR pursuant to R.C. 4928.143(B) without indicating which portion of the statute allows the rider to be included in an ESP.[22] The Ohio Supreme Court recently determined that if a provision of an ESP does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized by statute.[23] Nothing in the record of this proceeding links the PMR to any of the nine categories enumerated in R.C. 4928.143(B)(2). The Commission's approval of the PMR in this proceeding was unlawful.

By including these riders in the ESP, the Commission's ESP/MRO comparison runs counter to R.C. 4928.143(C)(1). The Commission should modify the O&O by removing these riders from the ESP.

[22] O&O at 50.

[23] See *In re: Application of Columbus Southern Power Co*., 2011-Ohio-1788 at ¶ 32.

D. The Commission erred in increasing the shopping credits in the Market Transition Rider for GS-1 and GS-2 customers without ensuring that customers in other rate classes will not pay for these increases in the shopping credits.

The Stipulation contained a shopping credit, in the MTR, of $10/MWh for the first 1,000,000 MWh for schools in the GS-1 and GS-2 customer classes that are currently shopping and for GS-2 customers that switch.[24] In the O&O, the Commission determined that the proposed shopping credit "is too small and has the potential to exclude many eligible customers with the 1,000,000 annual MWh limit."[25] The Commission increased the credit to $10/MWh for the first 2,000,000 MWh of usage per calendar year, with any unused MWh to carry over to the next calendar year.[26]

Although OCC does not challenge the increase to the shopping credit, OCC is concerned that the framework of the MTR could allow the Companies to collect the revenues lost through the shopping credit – approximately $80 million[27] – from other customer classes.[28] This could offset some of the mitigation of harm to residential customers that the Commission ordered through its reductions in the base generation rate increases.[29]

Other customer classes do not benefit from the shopping credit for the GS-1 and GS-2 customers. It was unreasonable for the Commission to authorize the shopping credit without expressly prohibiting the Companies from collecting the amount of the

[24] See O&O at 20.

[25] Id. at 38.

[26] Id.

[27] The shopping credit proposed in the Stipulation was valued at $10 million per year. See Companies' Ex. 2 at Ex. DMR-1.

[28] See Application, Roush Testimony at 11.

[29] See O&O at 42.

credit from other rate classes. The Commission should protect the other customer classes by modifying the O&O to prohibit the Companies from collecting the GS-1 and GS-2 shopping credit from customers in other rate classes.

E. The Commission erred by specifying that communities approving aggregation plans in November 2011 may benefit from the set-aside of capacity with pricing based on PJM's reliability pricing model, although other communities may be able to complete the government aggregation process by December 31, 2011. This inconsistent with the requirement in R.C. 4928.20(K) for the PUCO to adopt rules that "encourage and promote large-scale governmental aggregation in this state."

The original Stipulation contained an initial allocation of set-aside of capacity at RPM-based rates on a pro-rata basis for each customer class for the rest of 2011, but beginning in 2012 there was no set-aside for any specific customer class (with no carry-over from 2011), and the set-aside was available only on a first come, first served basis.[30] The intervenors who did not sign the Stipulation argued that this arrangement virtually precluded government aggregation and residential customers from taking advantage of the RPM-based set-asides.[31] In the O&O, the Commission agreed with the non-signatory parties, and ordered separate RPM-based capacity set-asides specifically for government aggregation and for residential customers.[32]

In ordering the capacity set-asides for governmental aggregation customers, however, the Commission seemed to limit the availability to only those customers whose governmental aggregation plans were approved in the November 8, 2011 elections. The Commission stated:

[30] O&O at 55 and Joint Ex. 1 at IV.2.b.3.

[31] See FES Initial Brief at 117-119; OCC/APJN Initial Brief at 31.

[32] O&O at 54-55.

> [W]e find it necessary to modify the proposed Stipulation to adjust the RPM set-aside levels to accommodate the load of any community that approved a governmental aggregation program in the November 8, 2011, election to ensure that any customer located in a governmental aggregation community will qualify for the RPM set aside, so long as the community or its CRES provider completes the necessary process to take service in the AEP-Ohio service territory by December 31, 2012.[33]

This language would seem to preclude access to the RPM-priced set-aside capacity by those governmental aggregation plans that were approved prior to the November 2011 election, or that may be approved in elections to be held in 2012, and which complete the process to take service in the AEP Ohio service territory by December 31, 2012. If there is RPM-priced capacity available, such governmental aggregation customers should have access to it.

It was unreasonable for the Commission to limit the RPM-priced capacity set-aside for governmental aggregation customers to only those customers whose plans were approved in the November 2011 elections. The PUCO's limits on the set-aside also were inconsistent with the law, regarding governmental aggregation in Ohio. The PUCO is required, under R.C. 4928.20(K), to "adopt rules to encourage and promote large-scale governmental aggregation in this state."

Here, the Commission should encourage and promote governmental aggregation by modifying the O&O to allow access to the capacity by those customers whose governmental aggregation plans were approved prior to the November 2011 election or that are approved in 2012 elections, so long as the process to take service in the AEP Ohio service territory is completed by December 31, 2012. Such a result would place all

[33] O&O at 54.

governmental aggregations on a level playing field and provide incentives to them to expeditiously complete the process by the end of 2012.

F. The Commission erred in approving the Distribution Investment Rider.

The PUCO in its O&O approved the DIR with virtually no change, but for the "enhanced Commission oversight." This "enhanced Commission oversight" takes the form of directing the Companies to work with PUCO Staff to develop a plan to emphasize proactive distribution maintenance spending to achieve the greatest impact on maintaining and improving reliability for customers.[34]

The DIR, as currently structured, allows the Companies to collect all $314 million without making even one dollar in additional investment in their distribution system.[35] In Paragraph 1.n. of the Stipulation[36] a "Distribution Investment Rider (DIR)" is established. The DIR is "effective January 2012" and is "based on post-2000 investment."[37] The DIR has a "carrying charge rate" of approximately 20%, which allows the Companies to collect property taxes, commercial activity tax, and associated income taxes, and earn a return on and of plant in service.[38]

In other words, the DIR eliminates to a large degree any need for the Companies to file a distribution rate case.[39] The DIR is to be adjusted quarterly and subject to an

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[34] O&O at 46.

[35] Tr. X at 1732-1733 (Staff Witness Fortney).

[36] Joint Ex. 1.

[37] Id. at 9.

[38] Tr. III at 303-306.

[39] The Stipulation provides that the Companies cannot file a distribution rate case to take effect prior to June 1, 2015. While Signatory Parties may tout this as a benefit of the Stipulation, one can specifically calculate the direct cost of this "benefit" at $314 million.

annual audit in which the DIR investments are to be reviewed for prudence.[40] The annual revenues collected from Ohioans under the DIR are capped at $86 million in 2012, $104 million in 2013 and $124 million in 2014 and the first five months of 2015.[41]

The net capital additions or investments that allow annual revenues to be collected under the caps are based upon gross plant in service incurred post-2000 adjusted for growth in accumulated depreciation.[42] By focusing on the past investment, as opposed to prospective investment made during the electric security plan term, the Companies have the ability to avoid making new distribution investment, and yet still collect the DIR monies, a fact confirmed by Staff Witness Fortney.[43]

1. The Commission erred in concluding that the Distribution Investment Rider may be included in the Companies' electric security plan under R.C. 4928.143(B)(2)(h) as "incentive ratemaking" tool and without a commitment to use the considerable funds collected from customers to maintain or improve electric service. Its finding is not based on any facts in the record, and is manifestly against the weight of the evidence, all in violation of R.C. 4903.09.

The Ohio Supreme Court recently admonished the Commission that if a provision of an ESP does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized by statute.[44] Although the Signatory Parties claimed that the rider is permissible as part of an ESP under R.C. 4928.143(B)(2)(d),[45] the Commission wisely

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[40] Id.

[41] For any year the Companies' spending would produce revenue in excess of that year's cap, the overage is to be recovered in the following cap period, subject to that period's cap. For any year where the revenue collected under the DIR is less than the annual cap allowance, then the difference between the revenue collected and the cap is to be applied to increase the level of the subsequent year's cap. Id. at 10.

[42] Joint Ex. 1 at 9.

[43] Tr. X at 1732-1733 (Staff Witness Fortney).

[44] See *In re: Application of Columbus Southern Power Co*., 2011-Ohio-1788 at ¶ 32.

[45] See Companies' Ex. 19 at 3.

chose to reject those arguments.[46] Instead the Commission in its O&O seizes upon subsection (h) of that statute to justify its approval of the DIR.

Subsection (h) permits an electric distribution utility's ("EDU's") ESP to contain "[p]rovisions regarding the utility's distribution service including without limitation ***provisions regarding single issue ratemaking, a revenue decoupling mechanism, *or any other incentive ratemaking*, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility." The PUCO, citing to this subsection concluded that the DIR is "an incentive ratemaking to accelerate recovery of the Companies' investment in distribution service." According to the PUCO, the DIR is not, and need not be, "a long term energy delivery infrastructure modernization plan."[47] But the Commission is wrong in its attempt to place a square peg in a round hole. The DIR simply is not incentive ratemaking and there is no support in the record for this finding, in violation of R.C. 4903.09.

Under Ohio's law of statutory construction, R.C. 1.42, words and phrases that have acquired a technical or particular meaning shall be construed accordingly.[48] Incentive ratemaking is a term that has acquired a technical or particular meaning. "Incentive ratemaking" within the utility industry generally refers to an alternative to traditional cost-of-service regulation that is intended to enhance efficiency in non-

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[46] That subsection allows an ESP to include provisions for carrying costs, provided they would have the effect of stabilizing or providing certainty regarding retail electric service. OCC and APJN in their initial brief argued that the Companies had not borne the burden of proof, under R.C. 4928.143(C)(1), that the rider would have the effect of stabilizing or providing certainty regarding retail electric service. The only record evidence in this regard is Mr. Hamrock's self-serving and conclusory testimony that his counsel has advised him that there is a basis under R.C. 4928.143(B)(2)(d) that allows for the Commission to approve the carrying charges. This is not enough. See Initial Brief at 56-58.

[47] O&O at 45.

[48] R.C. 1.42; See also *State v. Rentex, Inc.*(1977), 51 Ohio App.2d 57.

competitive markets, resulting in benefits to customers (for instance lower rates or increased quality of service), while providing utilities with the opportunity to earn higher returns.[49] Here however, only half of the bargain is present – the utility will be provided with the opportunity to earn higher returns through what the Commission calls "accelerate[d] recovery of the Companies' investment in distribution service," with no promise of enhanced efficiency.[50]

The DIR will provide the Companies the opportunity to earn higher returns on their distribution assets, including investments made prior to the term of the ESP.[51] These higher returns will be generated under a confluence of factors. The DIR has a high carrying charge rate (20%); the DIR eliminates the regulatory lag associated with traditional electric distribution ratemaking[52] – accelerating recovery of the Companies'

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[49] See, e.g., *Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities; FERC Policy Statement on Incentive Regulation,* Docket No. PL92-1-000, 57 Fed. Reg. 55231 (Nov. 24, 1992) (the Federal Energy Regulatory Commission's ("FERC's") comprehensive policy statement in which it approved incentive ratemaking and established the general principles of incentive ratemaking, but left the details up to the regulatory bodies and utilities.)

See also *In the Matter of the Commission Investigation Into the Establishment of Incentive-Based Ratemaking of Operations and Maintenance Activities under Section 4909.15 of the Revised Code*, Case No. 92-1381-AU-COI, Entry (Sept. 3, 1992), opening up a docket to explore incentives to reward utilities for undertaking cost efficiency measures, and requesting comments on a number of areas including whether the Commission should utilize the ratemaking formula to provide incentive for utilities to undertake cost savings measures which benefit ratepayers; Comments of Columbus Southern Power Company and Ohio Power Company in that docket stating "The Companies also recognize that developing an incentive plan to motivate better utility management and performance in a way that promotes efficiency and has a beneficial effect on a utility's cost of service is a worthy goal both for utilities and their customers. Everyone gains from taking advantage of opportunities to improve efficiencies." Comments at 2 (Nov. 2, 1992).

[50] O&O at 45.

[51] According to FERC policy, incentive mechanisms must be prospective. Incentive regulation is not designed to reward past efficient cost saving behavior. To do so would violate the objective of providing quantified benefits to ratepayers – one of the four FERC recognized standards for implementing specific incentive mechanisms. See *Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities; Policy Statement on Incentive Regulation*, Docket No. PL92-1-000, 57 Fed Reg. 55231 (Nov. 24, 1992).

[52] Regulatory lag has been said to provide some incentive to minimize costs, since savings achieved between rate cases accrue to the benefit of the stockholders. Indeed in the Companies' recent distribution case, after waiting to file a distribution rate application for 11 years, the PUCO Staff recommended overall decreases in CSP's rates. Administrative notice was taken of the Staff Report in that distribution case.

distribution investment; and the Companies will not have to make any additional distribution investment in order to collect $314 million of increased distribution revenues.

And yet, there are no quantified benefits or enhanced efficiencies to customers that are present under the DIR. The record is eerily silent on this. While allegations are made that the DIR will enable the Companies to maintain and enhance reliability (Tr. XII at 2031), there is no requirement that even one dollar be spent on prospective distribution investment (during the ESP term) in order to collect $314 million of increased revenue. The Companies have the opportunity to be rewarded for past distribution investment (i.e., “post 2000 investment”) which does not incentivize them in any respect, and provides no benefit to customers. The fact that the Commission will be overseeing the distribution maintenance spending does not obligate the Companies to make prospective investments in the distribution system to maintain or enhance reliability with the DIR monies collected from customers. The Commission specifically chose not to link collection of the DIR with distribution expenditures made during the term of the ESP – expenditures which arguably could inure to the benefit of customers. And, despite the testimony of Staff Witness Fortney,[53] the Commission chose not to tie distribution expenditures to more stringent reliability criteria, a provision which could have benefited customers.

Instead the Commission, in its own words, uses the DIR as “an incentive ratemaking to accelerate recovery of the Companies’ investment in distribution service.” It is thus, merely rewarding the Companies by accelerating recovery of investment, with no strings attached for the favorable treatment. And the DIR can accelerate recovery for past investment, and is not necessarily linked to prospective investment during the term

[53] Tr. X at 1730-1731.

of the ESP. Indeed, the DIR does not incent the Companies to do anything other than file to collect $314 million. There is no need for the Companies to invest any further, and there is no requirement for it to do so.

"Incentive ratemaking must be fair. Properly done, all can benefit; improperly done, it may hurt parties – especially those the Commission has historically protected – as much as it helps."[54] As noted in FERC's policy adopting incentive ratemaking for electric utilities, incentive ratemaking must simultaneously protect customers' interests and offer potential rewards to the utility for good performance.[55]

Here there is insufficient protection for customers' interests and rewards to the utility that are not linked to good performance. Customers are asked to fund $314 million under the DIR, when there is no commitment to undertake future distribution investment to enhance reliability. Moreover, there is no justification for the amount of the "caps" in the record[56] – they are far too generous. Customers are required to hand over millions of dollars, and the Companies need not show that funding is needed for future investment during the term of ESP. The DIR funding can go to collect the Companies' past distribution investment and is not linked to distribution investment during the term of the

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[54] *See Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities; Policy Statement on Incentive Regulation*, Docket No. PL92-1-000, 57 Fed Reg. 55231 at 5 of 41 (Nov. 24, 1992).

[55] Id. FERC's principles on incentive ratemaking establish that incentive ratemaking should encourage efficiency; and that the starting rates should conform to the Commission's traditional just and reasonable standard. Furthermore, FERC has concluded that there are five regulatory standards for implementing specific incentive mechanism. That they should be (1) prospective, (2) voluntary, (3) understandable, (4) result in quantified benefits to consumers; and (5) must demonstrate how the proposals maintain or enhance incentives to improve the quality of service. Id. The "incentive" described by the PUCO fails to meet these standards as it is not necessarily prospective; it does not result in quantified benefits to consumers; and there is no evidence that it will maintain or enhance incentives to improve the quality of service.

[56] Any reliance on Mr. Kirkpatrick's testimony (Tr .XII at 2039) for support for the level of the caps is inappropriate as Mr. Kirkpatrick's testimony was not made part of the record in this proceeding and thus was not subject to cross-examination.

ESP. There is no commitment to increased reliability. The Companies are rewarded with accelerated recovery of investment, but that reward is not linked to "good performance."

The DIR as structured is not incentive ratemaking as the term is used in R.C. 4928.143(B)(2)(h). The record is silent on how the DIR enhances efficiency and results in benefits to customers. Rather, the only aspect of incentive ratemaking that is met by the DIR is that the utility will be provided with the opportunity to earn higher returns. But even the reward – earning higher returns – is not linked to good performance, an integral concept associated with incentive ratemaking.

Rather, the DIR is an asymmetrical provision which allows the utility to be compensated for past distribution investment.[57] It is not incentive ratemaking. It has no statutory basis in R.C. 4928.143(B)(2). It is not authorized by statute. The Commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly.[58] The Commission has no authority to implement it.

Additionally, the conclusion that the DIR is incentive ratemaking is not based on any facts in the record. It is manifestly against the weight of the evidence, and thus violates R.C. 4903.09. Rehearing should be granted, and the Commission should reject the DIR, or significantly modify it, by turning it into an actual incentive ratemaking

[57] But cf. *In the Matter of the Commission Investigation Into the Establishment of Incentive-Based Ratemaking of Operations and Maintenance Activities under Section 4909.15 of the Revised Code*, Case No. 92-1381-AU-COI, Comments of Columbus Southern Power Company and Ohio Power at 6 (Nov. 2, 1992), stating that one of the four basic characteristics of a satisfactory incentive ratemaking experiment are that the program be "symmetric."

[58] *Columbus S. Power Co. v. Pub. Util. Comm*. (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm*. (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

mechanism, with quantified benefits to customers associated with distribution investment, but only as it pertains to investment made during the term of the ESP.

2. The Commission erred in concluding that it had examined the reliability of the Companies' distribution system as required under R.C. 4928.143(B)(2)(h). Its failure to do so, in the context of the Companies' electric security plan, means that the DIR was unlawfully approved under the statute. The Commission's finding is not based on any facts in the record and amounts to a mistake, violating R.C. 4903.09.

Under R.C. 4928.143(B)(2)(h), as part of the PUCO's determination as to whether to allow an EDU to include in its ESP "any provision described in (B)(2)(h)," the Commission "shall examine the reliability of the electric distribution utility distribution system and ensure that the customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system."

The Commission in its O&O found it had examined the reliability of the Companies' distribution system.[59] The Commission, however, does not pin down the basis of its conclusion. Rather one is left to assume that the Commission believes it has complied with the statute vis-à-vis adopting the claims by AEP Ohio and the PUCO Staff that the reliability of AEP Ohio is under "constant review by Staff through performance standards and compliance filings."[60] Its finding is wrong, is not supported by the record

[59] O&O at 43.

[60] Id. at 65.

and is against the manifest weight of the evidence. It amounts to a mistake. The Commission's O&O is unlawful under R.C. 4903.09.[61]

Citing to the performance standard (developed by stipulation)[62] and compliance filings that are made separate and apart from the ESP proceeding is not the same thing as the review called for under the statute. Consequently, it cannot and 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 ESP 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.[63] OCC

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[61]See *Motor Service Co. v. Pub. Utl. Comm.* (1974), 39 Ohio St.2d 3; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1976), 42 Ohio St.2d 403.

[62] At the evidentiary hearing OCC moved to strike testimony citing to the performance standards agreed to in a stipulated proceeding being used as precedent in this proceeding. See Tr. XII at 1980-1982; Tr. XIII at 2369-2370. The Attorney Examiner denied OCC's Motion to Strike. Tr. XIII at 2373; Tr. XII at 1990-1991. OCC and APJN raised this issue on brief as well (Initial Brief at 10-15), but the Commission determined to uphold the Attorney Examiner's ruling overruling OCC's objection. O&O at 12.

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

Witness Duann[64] as well as IEU Ohio Witnesses Bowser and Murray[65] all came to very same conclusion.

If the Commission is correct that the statutory 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 4901:1-10-10, 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. Had it been the intent of the Legislature, surely it would have referred to the pre-established method of measuring reliability as set forth by an earlier enacted statute and by the Ohio Administrative Code.

R.C. 4928.11, the earlier enacted statute, contained a mandate from the General Assembly to the Commission to "adopt rules *** that specify minimum service quality, safety, and reliability requirements for non-competitive retail electric services." The statute also requires the filing of annual reports with the Commission, regarding the utilities' compliance with the rules developed under R.C. 4928.11.[66] Rules were in fact developed and implemented and are contained in Ohio Adm. Code 4901:1-10-10.

It may be properly assumed that the General Assembly had knowledge of existing reliability provisions in R.C. 4928.11 and in the Ohio Administrative Code at the time R.C. 4828.143(B)(2)(h) was adopted.[67] Indeed, the General Assembly had earlier by

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[64] OCC Ex. 1 at 31.

[65] IEU Ex. 8 at 7; IEU Ex. 9A at 22.

[66] It is these compliance reports that the Commission relies heavily upon for the notion that it has examined the reliability of the Companies in this proceeding. Notably, the compliance reports were not admitted into the record in this proceeding, nor were they administratively noticed.

[67] See, e.g., *City of Cincinnati v. Thomas Soft Ice Cream, Inc.* (1977), 52 Ohio St.2d 76, 79.

statute (R.C. 4928.11) directed the PUCO to adopt rules to specify reliability requirements and directed the Commission to require annual reports regarding the utilities' compliance with the rules.

And yet the General Assembly chose not to incorporate any reference to R.C. 4928.11 (or the Ohio Administrative Code rules) into R.C. 4928.143(B)(2)(h). Nor did the General Assembly choose to defer the examination of reliability called for under the statute to the process that was already being undertaken as part of Ohio Adm. Code 4901:1-10-10 and had been ordered to be undertaken by R.C. 4928.11. It could have done so but did not. Its failure to do so should be construed as an intentional omission, lending credence to OCC's and APJN's argument that the reliability examination under R.C. 4938.143(B)(2)(h) must be done as part of the review of the ESP.

Additionally, the requirement that reliability be examined as part of the ESP proceeding, is an integral part of R.C. 4928.143(B)(2)(h). To render this part of the statute superfluous violates a primary rule of statutory construction. That rule, R.C. 1.47(B), presumes that the entire statute is intended to be effective.[68]

There has been no examination of the reliability of the Companies *in this case*. The Commission is wrong. The "continual" process of review, along with compliance reports (not admitted into evidence or administratively noticed) is not statutorily sufficient. The Commission's finding amounts to a mistake, and the O&O fails to meet the requirements of R.C. 4903.09.[69] Rehearing should be granted on this issue. The

[68] See, e.g., *Richards v. Market Exch. Bank Co*. (1910), 81 Ohio St. 348.

[69] See *Motor Service Co. v. Pub. Util. Comm*. (1974), 39 Ohio St.2d 3; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm*. (1976), 42 Ohio St.2d 403.

PUCO should proceed to examine the reliability of the Companies' distribution service in this proceeding in order to comply with R.C. 4928.143(B)(2)(h).

3. The Commission erred by failing to comply with the requirements of R.C. 4928.143(B)(2)(h) when it did not ensure that the electric utility's expectations for reliability are aligned with the customers' expectations. Its failure to do so means that the DIR was unlawfully approved under the statute.

Part of the reliability analysis that must be done to comply with R.C. 4928.143(B)(2)(h) is that the Commission must ensure that the expectations of the Companies and the customers are aligned. In its O&O, the Commission indicated that it had considered the customers' and utility's expectations with respect to reliability.[70] The Commission did not, however, find that the expectations of the customers and the Companies were aligned on reliability. Thus, the Commission failed to meet the requirements of R.C. 4928.143(B)(2)(h).

In fact, the Commission took action to ensure the expectations of the utility and the customers diverge. It did so by assuming the present reliability of the Companies' system is in need of $314 million of cash infusion in order to meet the allegedly increased reliability expectations of a minority of the Companies' customers.

The Commission focused on 2011 year-end surveys results showing that for 2011 to present, 20 percent of AEP Ohio residential customers surveyed and 21 percent of commercial customers surveyed expected their future electric service reliability expectations to increase.[71] Its focus however is myopic. The larger survey results show that for 2011 to present *the majority of customers do not have increased reliability*

[70] O&O at 46.

[71] Id.

expectations over the next five years.[72] Hence, the majority of customers consistently (2009-2011) indicate that their reliability needs over the next five years will either stay the same or decrease.[73] Such expectations are inconsistent with the Companies' plans, endorsed by the Commission, for enhancements to existing reliability – i.e., going from a reactive to a proactive approach.

In determining enhancements are needed to the Companies' existing distribution system, the Commission also relies in part on testimony it refers to but does provide a citation for. It states that "extensive testimony" has been presented at the local public hearings that reliable electric service is crucial to attracting large commercial and industrial business to the state. A review of the transcripts from the five local public hearings shows that the "extensive testimony" refers to the testimony of five witnesses out of a total of 59 public witnesses. The testimony of five witnesses who spoke as stewards for economic development[74] – and not as commercial and industrial customers – does not rise to "extensive testimony."

The record supports a finding by the Commission that the interests of the Companies in enhancing reliability through a proactive approach are not in line with the majority of its customers. Rather the majority of the Companies' customers, according to

[72] See Tr. XII at 2019-2022; 2024-2025.

[73] See OCC Ex. 10 which shows the results for the 2009 surveys. The Companies did not produce an exhibit comparable to OCC Ex. 10 for the 2011 surveys, but Mr. Hamrock testified that the 2009 results were approximately the same as the 2011 results. Tr. XII at 2019-2022, 2024-2025. In the 2009 results, 66% of residential customers (and 64% of commercial customers) indicated their service reliability expectations would say the same; 11% of residential customers (and 14% of commercial customers) indicated their service reliability expectations will decrease or significantly decrease.

[74] The witnesses spoke in their respective capacity as representatives of economic development organizations. These organizations included the Columbus Partnership, the Allen Economic Development Group, Columbus 20/20, and the Wayne County Economic Development Council. Mr. Ebbing, from the New Albany Company, appears to have testified on behalf of the New Albany Economic Development Committee, which he is a member of. See http://www.newalbanycompany.com/aboutus/thenewalbanycompanyteam.aspx.

the Companies' own surveys, do not have increased reliability expectations over the next five years. The Commission thus has failed to ensure interests are aligned. Thus, it is without authority to approve the distribution investment rider under R.C. 4928.143(B)(2)(h). Rehearing should be granted and the Commission should decline to approve the distribution investment rider as proposed. On rehearing, if a distribution investment rider is to be implemented, the Commission should require the Companies to come forward with evidence to support a level of distribution investment that is necessary to maintain, but not enhance its current levels of reliability.

4. The Commission erred in finding that the DIR should serve as an incentive ratemaking tool because the record reflects that the Companies have more than sufficient funding available to ensure that reliability of the distribution system is maintained.

The Commission determined to approve the DIR as an incentive ratemaking tool.[75] As explained above, however, the DIR does not qualify as incentive ratemaking under R.C. 4928.143(B)(2)(h). This is because the DIR does not require enhanced efficiency and there are no resulting benefits to customers (for instance lower rates or increased quality of service).[76] Nor does the DIR incent any distribution investment by the Companies because it allows them to collect $314 million over the term of the ESP without spending $1 on distribution investment.[77]

Assuming *arguendo* though that the DIR is an appropriate incentive ratemaking mechanism, it must also fail for other reasons. The other reason is that there is no record

[75] O&O at 46.

[76] As explained further, the absence of a rate case is not necessarily a benefit to consumers. In the rate case process all facets of the Companies' costs and revenues are examined. Rate decreases can be a result of a rate case filing. See, e.g., the Staff Report in CSP's distribution case recommending a decrease in rates.

[77] See Tr. X at 1730-1733 (Staff Witness Fortney).

that supports a need for the DIR. Because the DIR is not needed to incent the Companies to go from a reactive to a proactive replacement strategy, it is unreasonable to charge customers $314 million over the next three years for it.

There is no evidence that shows a need for the DIR.[78] Nothing in the record supports the notion that AEP Ohio will not be able to maintain and provide reliable distribution service without the added DIR funding. And maintaining existing reliability, not achieving increased reliability, is what customers indicated they expected.[79] While the Commission indicates its belief that "it is detrimental to the state's economy to require the utility to be reactionary or allow the performance standards to take a negative turn before we encourage the electric utility to proactively and efficiently replace and modernize infrastructure"[80] the Commission is ignoring important facts in the record.

The Companies have agreed to and met more stringent reliability standards since they became effective, beginning in year 2010.[81] This has occurred despite the fact that the Companies did not get revenue funding for their enhanced program,[82] nor did they receive any distribution increases. Thus, the current level of reliability has been maintained (and in fact increased) with only the vegetation management funds ($24 million per year) supplemented by the ongoing $140 million funding contained in current rates for replacement of aging distribution infrastructure.[83] And the Stipulation, even

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[78] See, e.g., Testimony of Bob Fortney, confirming that the Staff had come to this conclusion and referring to the position of the Staff prior to the signing of the Stipulation. Tr. X at 1722-1725.

[79] See OCC Ex. 10.

[80] O&O at 46.

[81] Staff Ex. 5 at 5.

[82] Except for the vegetation management.

[83] See Tr. XII at 2030-2031 (cross examination of Mr. Hamrock who testified there is already approximately $140 million in distribution rates per year associated with distribution infrastructure replacement).

without the DIR, contains $24 million per year distribution investment funding through the continued Enhanced Service Reliability Rider. To suggest, as the Commission does, that the DIR is needed in order to prevent the Companies' performance from taking a "negative turn" is an unsubstantiated conclusion not supported by the facts in the record. It is thus unlawful and cannot be a basis for a decision according to R.C. 4903.09.

Indeed AEP Ohio, a monopoly service provider of distribution service, has a statutory responsibility to provide high quality, safe, and reliable service.[84] And the Commission has the responsibility, under R.C. 4928.02(A), to ensure that state policies on electric services are observed, including policies that ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory and reasonably priced retail electric service. Trying to fashion an "incentive" to the Companies to meet their statutory obligations is inappropriate and unreasonable. The only incentive provided here by approval of this DIR is for the Companies to request more money from customers without providing any future benefits in return.

It is unreasonable for the Commission to use the DIR as an "incentive" when the record does not support a need for the incentive. Without a need for additional distribution investment funding for the ESP term, it is unreasonable to impose DIR costs upon the Companies' customers. Doing so will undermine the state policy to ensure that reasonably priced retail electric service is made available to consumers.[85] The PUCO

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[84] R.C. 4928.11(A). Cf R.C. 4905.22 (utility shall furnish service and facilities that are adequate and in all respects just and reasonable). See also *In the Matter of the Commission Investigation Into the Establishment of Incentive-Based Ratemaking of Operations and Maintenance Activities under Section 4909.15 of the Revised Code*, Case No. 92-1381-AU-COI, Comments of Columbus Southern Power Company and Ohio Power (Nov. 2, 1992) at 21 ("The utilities are expected to provide reliable service in an efficient manner as part of their obligation to serve. The purpose of additional incentives as we understand it is to stimulate extraordinary efforts to improve efficiency.").

[85] See R.C. 4928.02(A).

should reject alleged logic which presses for more customer funding without any demonstrated need for the funding – just as it did in the Companies' first ESP proceeding.[86]

5. The Commission erred by permitting the Companies to collect revenues for past distribution investment through the DIR, which is contrary to the prospective operation of R.C. 4928.143(B)(2)(h). It is unlawful and a form of impermissible retroactive ratemaking.

The DIR is "effective January 2012" for commercial and industrial customers and January 2013 for residential customers. The DIR is "based on post-2000 investment."[87] The net capital additions or investment that allows annual revenues to be collected under the DIR caps are based upon gross plant in service incurred post-2000 adjusted for growth in accumulated depreciation.[88] Thus, under the DIR the Companies can reach back to January 1, 2000, and collect $314 million in revenues from customers related to distribution investment that was incurred prior to the ESP term in this proceeding – 2012 through 2015. This amounts to retroactive ratemaking – where past losses (in the form of lost return on investment not included in test year rate base) are permitted to be recovered in future rates. Retroactive ratemaking is prohibited by Supreme Court precedent.[89]

Specifically, in Ohio there are also two fundamental sources that limit retroactive laws: R.C. 1.48 and Article II, Section 28 of the Ohio Constitution.[90] Under R.C. 1.48,

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[86] In the Companies' first ESP proceeding, Case No. 08-917-EL-SSO, the Companies unsuccessfully pled that distribution investment is needed to replace aging assets *to maintain* reliability. See Tr. XII at 2004-2005 (cross examination of Witness Hamrock: "Q. So at that time its your understanding that Mr. Boyd testified that AEP Ohio would not be able to maintain its level of reliability at the current level of spending at that particular point in time, is that a fair characterization of his testimony? A. Yes, in general."). The Commission rejected such claims. AEP ESP I Order at 32.

[87] Joint Ex. 1 at 9.

[88] Id.

[89] See, e.g., *Lucas County Comm'rs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 349, 686 N.E.2d 501.

[90] "The general assembly shall have no power to pass retroactive laws***."

statutes in Ohio are presumed to be prospective, unless expressly made retrospective or retroactive.[91] The other source, Article II, Section 28 of the Ohio Constitution, precludes the General Assembly from passing retroactive laws.

In reviewing statutes that are being applied retroactively, the Ohio Supreme Court has acknowledged it must comply with these sources and has adopted a two part inquiry: Did the General Assembly expressly make the statute retroactive? And, if so, is the statutory restriction substantive or remedial in nature?[92] Importantly, the Court has determined that it will not tackle the constitutionality unless it concludes that the General Assembly expressly made the statute retroactive.[93] "Upon its face, R.C. 1.48 establishes a threshold analysis which must be utilized prior to inquiry under Section 28, Article II of the Ohio Constitution."[94]

The presumption under R.C. 1.48 that statutes are prospective is not easily overcome. The Ohio Supreme Court has dictated that a statute must "clearly proclaim" its retroactive application.[95] A mere inference of retroactivity is insufficient.[96] Nor is

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[91] The terms "retroactive" and "retrospective" are used interchangeably to refer to a law that affects "'acts or facts occurring, or rights accruing, before it came into force'" *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶1, fn. 1 (quoting Black's Law Dictionary (6th Ed. 1990) at 1317).

[92] Id.

[93] *Van Fossen et al. v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, syllabus ¶1.

[94] Id., citing *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 28 OBR 337, 339-340, 503 N.E.2d 753, 756; *Wilfong et al. v. Batdorf* (1983), 6 Ohio St.3d 100, 6 OBR 162, 451 N.E.2d 1185; and *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 9 OBR 123, 458 N.E.2d 827.

[95] *State of Ohio v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, syllabus ¶1.

[96] Id., ¶ 15 citing *Kelley v. State* (1916), 94 Ohio St. 331, 338-339, 114 N.E. 255.

ambiguous language adequate to overcome the presumption. The language must do more than suggest retroactivity.[97]

There is no strong and unmistakable declaration by the General Assembly that an incentive ratemaking mechanism can be made retroactive. R.C. 4928.143(B)(2)(h) does not clearly proclaim retroactivity, and under the Court's holdings, the threshold has not been met.

The PUCO had no authority under R.C. 4928.143(B)(2)(h) to include a DIR under an ESP that permits a utility to collect retroactive rates pertaining to investment made prior to the term of the ESP. R.C. 4928.143(B)(2)(h) does not expressly proclaim that the PUCO can enact retroactive rates. Rehearing should be granted. On rehearing, if a DIR is to be permitted, the PUCO must limit the DIR to collect only investment that is made during the term of the ESP. That is, the DIR must collect rates related to future, not past, investment. Such a finding would be in keeping with the traditional regulatory notion of disallowing investment that occurs outside the test year.

G. The Commission erred in permitting the record to include references to a stipulation from Case No. 09-756-EL-CSS, especially where the stipulation is used as a basis for arguing that the Commission has met R.C. 4928.143(B)(2)(h). The Commission's finding was unreasonable and without record support, in violation of R.C. 4903.09.

Under R.C. 4928.143(B)(2)(h), before the Commission can approve provisions regarding distribution infrastructure and modernization, as part of an ESP, the PUCO "shall examine the reliability of the distribution system" and ensure that customers and

[97] See, e.g., *Van Fossen et al. v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100,103 ("This section applies to and governs any action***pending in any court on the effective date of this section ***notwithstanding any provisions of any prior statute or rule of law of this state."); *State v. Cook* (1998), 83 Ohio St.3d 404, 410, 700 N.E.2d 570, 576-577(statute applies to anyone who "was convicted of or pleaded guilty to a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after" that date).

the EDU's expectations are aligned and that the EDU is placing sufficient emphasis on and dedicating sufficient resources to the reliability of their system.

The rebuttal testimony presented by Messrs. Hamrock and Baker[98] is the only evidence put forth by the signatory parties to suggest that R.C. 4928.143(B)(2)(h) has been complied with. Such testimony, however, cited to a stipulation (and the Commission Order approving the stipulation) entered into by the Companies, PUCO Staff and OCC in Case No. 09-756-EL-ESS ("09-756" or "Reliability Standards Case").[99] The 09-756 stipulation set forth specific reliability standards the Companies were to meet starting in 2010, using the CAIDI and SAIFI indices.

OCC moved to strike both testimonies in a timely manner at the evidentiary hearing.[100] As OCC explained in its Motion to Strike, the Reliability Standards stipulation contains language that prohibits the terms of the Stipulation and the

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[98] Mr. Hamrock in his rebuttal testimony at page 3, lines 18-22, refers to the Commission's rulings in that proceeding where the PUCO approved reliability standards for the Companies using a customer average interruption duration index ("CAIDI") and the system average interruption frequency index ("SAIFI"). Mr. Hamrock stated that those standards "resulted from a settlement agreement between the Commission Staff, the Ohio Consumers' Counsel, and AEP Ohio." Companies' Ex. 19 at 3. Mr. Baker in his rebuttal testimony similarly testifies that OCC was involved in the reliability standard setting process and in fact "signed a joint stipulation recommending reliability standards for the AEP Companies." Staff Ex. 5 at 5.

[99] *In the Matter of the Establishment of 4901:1-10-10(B) Minimum Reliability Performance Standards for Columbus Southern Power Company and Ohio Power Company*, Case No. 09-756-EL-ESS, Stipulation and Recommendation (July 22, 2010) ("09-756 stipulation"). That stipulation was admitted into evidence as OCC Exhibit 11. The Commission approved the stipulation without modification by Opinion and Order issued on September 8, 2010.

[100] See Tr. XII at 1980-1982 (moving to strike Rebuttal Testimony of Mr. Hamrock); Tr. XIII at 2369-2370 (moving to strike Rebuttal Testimony of Mr. Baker).

information and data contained in the stipulation from being cited as precedent in any future proceeding.[101]

The "information or data" that was contained in the 09-756 stipulation included the SAIFI and the CAIDI indices that AEP Ohio agreed to for 2010. The "Commission ruling adopting it" refers to the PUCO's Order accepting the stipulation, and adopting the reliability standards. Mr. Hamrock and Mr. Baker both referred to the 09-756 stipulation and the Commission Order adopting the stipulation in their rebuttal testimony.[102]

The Attorney Examiners nonetheless denied both motions to strike.[103] The Attorney Examiner in her initial ruling with respect to Mr. Hamrock's testimony concluded that "[w]e note that the Commission respects stipulations *but is considering the CAIDI and the SAFI established in that stipulation* in this case and finds it to be appropriate."[104]

In the O&O, the Commission affirmed the Attorney Examiner's ruling.[105] The Commission indicated that acknowledging the reliability indices [agreed to in the stipulation] was not "an attempt to use the indices as precedent, or to use the terms, information, and data contained in the Reliability Standards Case stipulation as precedent

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[101] See OCC Ex. 11 at 2: "Except for purposes of enforcement of *the terms of this Stipulation, this Stipulation, the information and data contained therein or attached, and any Commission rulings adopting it, shall not be cited as precedent in any future proceeding for or against any party* or the Commission itself. The Parties' agreement to this Stipulation in its entirety shall not be interpreted in a future proceeding before the Commission as agreement to any isolated provision of this stipulation. More specifically, no specific element or item contained in or supporting this Stipulation shall be construed or applied to attribute the results set forth in the Stipulation as the results that any party might support or seek but for this Stipulation." (Emphasis added).

[102] See note 98 supra.

[103] Tr. XIII at 2373; Tr. XII at 1990-1991.

[104] Tr. XII at 1991 (emphasis added). The ruling denying OCC's motion to strike the Rebuttal Testimony of Mr. Baker was not explained. Tr. XIII at 2373.

[105] O&O at 12.

or against any party to a proceeding." It ruled that the reliability indices are not a basis for answering a "similar issue of law" in the ESP 2 case.[106] It also rejected OCC and APJN's claim that recognizing the indices developed in the stipulation would have a chilling effect on future settlements as "there was no discussion towards the content of the Reliability Standards Stipulation, nor was there an attempt to establish it as precedent."[107]

But the Commission's O&O is at odds with the express words of the Attorney Examiner. The Attorney Examiner admitted that the Commission "*is considering the CAIDI and the SAFI established in that stipulation* in this case and finds it to be appropriate." This begs the question, if the Commission is considering the CAIDI and SAIFI established in the 09-756 stipulation, what is it considering it for? Something other than an examination of the reliability of the AEP Ohio distribution system? This ruling overtly conflicts with the PUCO O&O which alleges that "the reliability indices [stipulated to] are not a basis for answering a 'similar issue of law' in the ESP 2 case." And yet, it appears consistent with later statements in the PUCO's O&O. Specifically, and seemingly as a predicate to finding that it has examined the reliability of the Companies' distribution system, the Commission specifically acknowledges the Companies' claim that they were "in compliance with their CAIDI and SAIFI performance standards established in the Reliability Standards Case."[108]

Moreover, PUCO Staff and the Companies in their briefs argue that the standards approved in the Stipulation have been met and thus they have "answered a similar issue

[106] Id. at 11-12.

[107] Id. at 12.

[108] Id. at 45-46.

of law in the ESP 2 case." In the Joint Initial Brief of the Undersigned Signatory Parties, the Signatory Parties (including the Companies) admit that the reference to the standards [adopted under the 09-756 stipulation] is to "cite to the Commission standard that resulted from a case that analyzed the elements the Non-Signatory Parties assert is required to be reviewed by the Commission in this proceeding."[109]

Additionally, the Signatory Parties allege that "whether AEP Ohio meets that goal [the stipulated CAIDI and SAIFI criteria] can be viewed by some as portraying whether the Company is staying up to date on its reliability issues."[110] The Signatory Parties on brief assert as well that "[a]s testified to by Staff Witness Baker, it is the opinion of the Commission Staff that participation in setting and the performance in meeting the service standards [under the 09-756 stipulation] satisfies the criteria of R.C. 4928.143(B)(2)(h)."[111]

The PUCO Staff in its Initial Brief is more direct in its use of the 09-756 stipulation and the Commission Order approving it: "OCC participated in the standards proceeding by filing comments (and replies), and also signed the joint stipulation recommending reliability standards for the AEP Companies. The Commission approved that stipulation on September 8, 2010. The AEP Companies have met their standards [stipulated CAIDI and SAFI levels] since they became effective (beginning for year 2010). As a result, there is requisite support for the DIR under R.C. 4928.143(B)(2)(h)."[112]

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[109] Joint Reply Brief of Undersigned Signatory Parties (Nov. 18, 2011) at 42.

[110] Id.

[111] Id. at 43.

[112] Staff Brief (Nov. 10, 2011) at 15.

The Commission's ruling is not supported by the record, and thus violates R.C. 4903.09. Instead the record plainly supports the opposite conclusion – that the 09-756 stipulation and the Commission order adopting it were used by parties and the Commission as precedent. Using the CAIDI and the SAFI standards established in the Reliability Standards Case, along with the Companies' alleged compliance with those standards since 2010, is a direct violation of the plain language of the 09-756 settlement agreement that OCC, the Companies and the PUCO Staff expressly agreed to. And that stipulation, as a whole, was adopted by the PUCO without amendment.

The Commission's ruling strikes at the very heart of the Reliability Standards stipulation and ignores one very essential term of that stipulation, and indeed all stipulations – the stipulation cannot be used as precedent. This will have a chilling effect on parties' willingness to enter into settlement agreements. It makes for bad public policy and is unreasonable as a result. The Commission should abrogate its finding.

IV. CONCLUSION

OCC and APJN appreciate the Commission's efforts to modify the ESP contained in the Stipulation and its attempts to make it comport with Ohio law. Nonetheless, the O&O did not go far enough to revise the ESP, and many portions of it are unreasonable or unlawful. To protect consumers, the Commission should grant OCC and APJN rehearing and modify the O&O as recommended by OCC and APJN.

Respectfully submitted,

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On Behalf of the Appalachian Peace and Justice Network

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 13th day of January 2012.

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in

Case No(s). 10-2376-EL-UNC, 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.