93

RECEIVED-DOCKETING DIV

2012 JAN 13 PM 4:58

PUCO

FILE

FIL

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

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph Oliker
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

January 13, 2012

Attorneys for Industrial Energy Users-Ohio

TABLE OF CONTENTS

Page

APPLICATION FOR REHEARING 2

MEMORANDUM IN SUPPORT 7

I. INTRODUCTION 7

II. ARGUMENT 8

A. Standard of Review 9

B. The ESP as Modified Does Not Pass the Statutory Test for Approval 10

1. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Did Not Comply With the Statutory Requirement of Section 4928.143(C)(1), Revised Code, When the Commission Failed to Consider the Full Term of the ESP Proposed in the Stipulation ("Stipulation ESP") in Applying the ESP versus MRO Test. 12

2. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Determination That the Stipulation ESP Was More Favorable in the Aggregate Than an MRO Is Not Supported by the Manifest Weight of the Evidence. 12

3. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Applied Section 4928.143(C)(1), Revised Code, to an Entity that Was Not an EDU. 15

4. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Excluded Costs That Should Have Been Included in the Stipulation ESP When It Applied the ESP versus MRO Test. 19

5. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Shifts the Burden of Proof to Show that the Stipulation ESP Is More Favorable Than an MRO to a Party Other Than the Company. 19

6. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Included "Other Factors, Including Qualitative Factors," in its Application of the ESP versus MRO Test 19

7. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved the Stipulation ESP, as Modified, with Placeholder Riders Without Accounting for Their Cost. 19

C. Base Generation Rate Increase 23

8. The Generation Capacity Charge Increase Authorized by the Commission's Opinion and Order Is Unlawful and Unreasonable Because It Is Arbitrary, Retroactive, Outside the Commission's Authority, and Results in Rates and Services that Are Unduly Discriminatory and Non Comparable. 25

9. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Approved a Two-tiered Generation Capacity Service Pricing Scheme That Purposely Erects Barriers to Customer Choice in Violation of State Law and Energy Policy 29

10. The Commission's Opinion and Order Approving a Two-Tiered Generation Capacity Service Pricing Scheme Is Unlawful and Unreasonable In That a Finding That the Scheme as Modified Does Not Violate Any Important Regulatory Principle or Practice Is Not Supported by the Manifest Weight of the Evidence 29

11. The Commission's Opinion and Order Is Unlawful and Unreasonable in that the Commission Permits the Recovery of Transition Revenue through the Two-Tiered Generation Capacity Service Pricing Scheme Outside the Market Development Period and the Transition Period 36

12. The Commission's Opinion and Order Approving the Two-Tiered Generation Capacity Service Pricing Scheme Is Unlawful and Unreasonable In That the Commission Failed to Order the Companies to File Tariffs Detailing the Manner in Which Capacity Service Charges Will be Determined as Required by the Ohio Revised Code 39

13. The Commission Should Grant Rehearing to Clarify Its Order Directing the Companies to Apply RPM-based Prices to Generation Service Capacity Associated with Customers Shopping Through Governmental Aggregation Programs 43

D. Base Generation Rate Increase 45

14. The Commission's Opinion and Order Is Unlawful and Unreasonable In That It Authorizes an Increase in Base Generation Rates Without a Cost Justification in Violation of Commission Precedent....45

E. Placeholder Riders....50

15. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Held That It Could Authorize a Placeholder Rider Pursuant to Section 4928.143, Revised Code....50

16. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Generation Resource Rider Without Statutory Authority to Do So....52

17. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Approved a Pool Modification or Termination Rider ("PMR") Not Authorized by Law and Which Exposes Customers to Nearly Unlimited Costs of Pool Termination....54

F. Market Transition Rider....56

18. The Commission's Opinion and Order Is Unlawful and Unreasonable In That It Approved a Market Transition Rider ("MRT") Without Statutory Authority to Do So....56

19. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Market Transition Rider that Increases the Revenue Generated by the ESP Rates by $24 Million Without Findings of Fact or Supporting Opinion in Violation of Section 4903.09, Revised Code....59

20. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Market Transition Rider That Increases the Revenue Generated by the ESP Rates by $24 Million Without a Cost Justification or Explanation for the Commission's Failure to Follow Its Own Precedent....59

G. Phase-In Recovery Rider....60

21. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Phase-In Recovery Rider ("PIRR") That Violates Regulatory Principles

and Statutory Requirements Requiring the Alignment of Costs and Benefits. 60

22. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Phase-In Recovery Rider That is Not Just and Reasonable when the Commission Failed to Remove the Accumulated Deferred Income Taxes (ADIT) From the Calculation of the Deferred Amounts and Imposed a Debt-Based Carrying Charge Rate That Exceeds a Reasonable Amount 63

23. The Attorney Examiner Inapppropraitely Granted the Companies' Motion to Strike Portions of the Direct Testimony of IEU-Ohio Witness Bowser. 65

H. Corporate Separation 65

24. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved the Transfer of Generation Assets Without Requiring Compliance With the Relevant Statute and Commission Rules 65

I. Customer Benefits and Public Interest Findings 66

25. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission's Finding That the Stipulation, as Modified and Taken as a Package, Benefits Ratepayers and the Public Interest Is Not Supported by the Manifest Weight of the Evidence. 66

J. The Motions to Dismiss 69

26. The Commission Unlawfully and Unreasonably Denied the Motions to Dismiss by IEU-Ohio. 69

27. The Commission Should Grant Rehearing and Order that Rates Be Collected Subject to Reconciliation. 78

III. CONCLUSION 79

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

APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") on December 14, 2011 on the electric security plan ("ESP") and other matters contained in a Stipulation and Recommendation ("Stipulation") filed with the Commission on September 7, 2011 by Columbus Southern Power Company and Ohio Power Company (individually "CSP" and "OP", respectively, and collectively "Companies" or "AEP-Ohio") and others (collectively, the Signatory Parties). The Commission's Opinion and Order approving the Stipulation with modifications is unlawful and unreasonable for the following reasons:

1. **The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Did Not Comply With the Statutory Requirement of Section 4928.143(C)(1), Revised Code, When the Commission Failed to Consider the Full Term of the ESP Proposed in the Stipulation ("Stipulation ESP") in Applying the ESP versus MRO Test.**

2. **The Commission's Opinion and Order is Unlawful and Unreasonable Because the Determination That the Stipulation ESP Was More Favorable in the Aggregate Than an MRO Is Not Supported by the Manifest Weight of the Evidence.**

3. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Applied Section 4928.143(C)(1), Revised Code, to an Entity that Was Not an EDU.**

4. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Excluded Costs That Should Have Been Included in the Stipulation ESP When It Applied the ESP versus MRO Test.**

5. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because Commission Shifts the Burden of Proof to Show that the Stipulation ESP Is More Favorable Than an MRO to a Party Other Than the Company.**

6. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Included "Other Factors, Including Qualitative Factors," in its Application of the ESP versus MRO Test.**

7. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved the Stipulation ESP, as Modified, with Placeholder Riders Without Accounting for Their Cost.**

8. **The Generation Capacity Charge Increase Authorized by the Commission's Opinion and Order Is Unlawful and Unreasonable Because It Is Arbitrary, Retroactive, Outside the Commission's Authority, and Results in Rates and Services that Are Unduly Discriminatory and Non Comparable.**

9. **The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Approved a Two-tiered Generation Capacity Service Pricing Scheme That Purposely Erects Barriers to Customer Choice in Violation of State Law and Energy Policy.**

10. **The Commission's Opinion and Order Approving a Two-Tiered Generation Capacity Service Pricing Scheme Is Unlawful and Unreasonable In That a Finding That the Scheme as Modified Does Not Violate Any Important Regulatory Principle or Practice Is Not Supported by the Manifest Weight of the Evidence.**

11. **The Commission's Opinion and Order Is Unlawful and Unreasonable in that the Commission Permits the Recovery of Transition Revenue through the Two-Tiered Generation Capacity Service Pricing Scheme Outside the Market Development Period and the Transition Period.**

12. **The Commission's Opinion and Order Approving the Two-Tiered Generation Capacity Service Pricing Scheme Is Unlawful and Unreasonable In That the Commission Failed to Order the Companies to File Tariffs Detailing the Manner in Which Capacity Service Charges Will be Determined as Required by the Ohio Revised Code.**

13. **The Commission Should Grant Rehearing to Clarify Its Order Directing the Companies to Apply RPM-based Prices to Generation Service Capacity Associated with Customers Shopping Through Governmental Aggregation Programs.**

14. **The Commission's Opinion and Order Is Unlawful and Unreasonable In That It Authorizes an Increase in Base Generation Rates Without a Cost Justification in Violation of Commission Precedent.**

15. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Held That It Could Authorize a Placeholder Rider Pursuant to Section 4928.143, Revised Code.**

16. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Generation Resource Rider Without Statutory Authority to Do So.**

17. **The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Approved a Pool Modification or Termination Rider ("PMR") Which Exposes Customers to Nearly Unlimited Costs of Pool Termination.**

18. **The Commission's Opinion and Order Is Unlawful and Unreasonable In That It Approved a Market Transition Rider Without Statutory Authority to Do So.**

19. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Market Transition Rider ("MTR")That Increases the Revenue Generated by the ESP Rates by $24 Million Without Findings of Fact or Supporting Opinion in Violation of Section 4903.09, Revised Code.**

20. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Market Transition Rider That Increases the Revenue Generated by the ESP Rates by $24 Million Without a Cost Justification or Explanation for the Commission's Failure to Follow Its Own Precedent.**

21. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Phase-In Recovery Rider ("PIRR") That Violates Regulatory Principles and Statutory Requirements Requiring the Alignment of Costs and Benefits.**

22. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Phase-In Recovery Rider That is Not Just and Reasonable When the Commission Failed to Remove the Accumulated Deferred Income Taxes From the Calculation of the Deferred Amounts and Imposed a Debt-Based Carrying Charge Rate That Exceeds a Reasonable Amount.**

23. **The Attorney Examiner Unlawfully and Unreasonably Granted the Companies' Motion to Strike Portions of the Direct Testimony of IEU-Ohio Witness Bowser.**

24. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved the Transfer of Generation Assets Without Requiring Compliance With the Relevant Statute and Commission Rules.**

25. **The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission's Finding That the Stipulation, as Modified and Taken as a Package, Benefits Ratepayers and the Public Interest Is Not Supported by the Manifest Weight of the Evidence.**

26. **The Commission Unlawfully and Unreasonably Denied the Motions to Dismiss by IEU-Ohio.**

27. **The Commission Should Grant Rehearing and Order that Rates Be Collected Subject to Reconciliation.**

As discussed in greater detail in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing and further modify the Stipulation ESP to remove the unlawful and unreasonable provisions that were not removed by the December 14, 2011 Opinion and Order.

Respectfully submitted,

Samuel C. Randazzo
Frank P. Darr
Joseph Oliker
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Throughout these proceedings, the contested issues have placed serious legal, policy, and practical questions before the Commission. Initially these questions were raised by the ESP applications ("Applications") filed by OP and CSP (collectively the "Companies"). The Applications were universally opposed by the Commission's Staff ("Staff") and every other stakeholder[1] because the Application contained unlawful and unreasonable proposals. Eventually, the focus of the litigation shifted to proposals contained in a Stipulation and Recommendation ("Stipulation") filed on September 7, 2011.

Both the Applications and the Stipulation contained proposals that have common purposes and outcomes. The Applications and the Stipulation asked the Commission to authorize the Companies to: (1) Unreasonably and unlawfully increase default generation supply prices; (2) Unreasonably and unlawfully increase capacity charges paid by competitive retail electric service ("CRES") suppliers so that the Companies are empowered economically to constrain exercise of the "customer choice" right that is the centerpiece of Ohio's legal framework for electricity regulation; (3) Unreasonably and unlawfully avoid the full requirements of the statutory test that an ESP must satisfy

[1] IEU-Ohio filed a motion to dismiss without prejudice that identified several material procedural errors in the Companies' Applications. Motion to Dismiss and Memorandum in Support of Industrial Energy Users-Ohio (May 10, 2011) ("May 2011 Motion"). IEU-Ohio renewed that motion at the completion of the Companies' case-in-chief. Tr. Vol. VI at 956-58.

before the Commission can lawfully approve that ESP for OP and CSP; and, (4) Unreasonably and unlawfully authorize the Companies to establish "placeholder riders" that set the stage for future unlawful and unreasonable rate increases or bring into play other riders that unreasonably and unlawfully increase electric bills (on a bills rendered basis) effective January 1, 2012.

On December 14, 2011, the Commission issued an Opinion and Order modifying and approving the contested Stipulation. The Opinion and Order modified the Stipulation in some respects, but did not address all the contested issues.[2]

This Application for Rehearing invites the Commission to complete the work that must be done before the Commission can lawfully approve an ESP and to further modify the Stipulation ESP to remove many unlawful and unreasonable provisions. Rehearing is necessary because the Stipulation's fundamental legal defects were mostly untouched by the modifications in the Opinion and Order, as discussed below. This Application for Rehearing also urges the Commission to promptly and proactively require the Companies to transparently identify and disclose the details that both customers and CRES suppliers must have to understand and appreciate how the anti-shopping provisions authorized by the Commission shall be implemented.

For the reasons outlined below, the IEU-Ohio urges the Commission to grant rehearing and the relief requested herein.

II. <u>ARGUMENT</u>

---

[2] Predictably, the Companies commenced making threats to withdraw and terminate the modified and approved ESP.

A. Standard of Review

In approving the Stipulation with modifications, the Commission recognized that it must determine that the Stipulation satisfies three criteria. First, the Commission must determine that the settlement is the product of serious bargaining among capable and knowledgeable parties. Second, the Commission must find that the Stipulation, as a package, benefits ratepayers and the public interest. Third, the Commission must determine that the Stipulation package does not violate any important regulatory practice or principle.[3] Additionally, the Commission must find that the ESP is more favorable in the aggregate than a Market Rate Offer ("MRO").[4]

A settlement cannot provide the Commission with authority to do what the Commission does not otherwise have authority to do or to disrespect procedural or substantive requirements established by the General Assembly or the Commission's rules. For example, Monongahela Power relied upon a settlement for its authority to end the five-year market development period ("MDP") early (a result which would have imposed "rate shock"). The Ohio Supreme Court ("Supreme Court") rejected the claim that the settlement provided support for the early termination, stating:

> Nevertheless, to the extent that Section IV of the Stipulation approved by the commission in the ETP Order can be considered an order authorizing the early end of Mon Power's MDP, that order was premature. It was based upon an optimistic assumption that the requisite levels of the switching rate or effective competition would be achieved by December 31, 2003, an assumption that proved to be unwarranted,

---

[3] Opinion and Order at 27. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992). *See, also, AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82-83 (2002).

[4] *Id.*, citing Section 4928.143(C)(1), Revised Code.

> making any such order ending the MDP unenforceable *because the order exceeded the statutory authority of the commission.*[5]

As IEU-Ohio has noted throughout these proceedings, the original Application and the Stipulation sought outcomes that the Commission is not authorized to order. As discussed below, the Commission stepped beyond the statutory and procedural limits when it approved the Stipulation with modifications. Because the results are unreasonable and unlawful, the Commission must grant rehearing and correct its decision.[6]

B. The ESP as modified does not pass the statutory test for approval.

The Stipulation ESP was not more favorable in the aggregate than an MRO as provided by Section 4928.142, Revised Code ("ESP versus MRO test").[7] Rather than reject the Stipulation ESP, the Commission invoked its authority to modify an ESP and ordered that the proposed base generation rate increase be reduced by half.[8] By reducing the increase in base generation rates by 50%, the Commission determined the modified Stipulation ESP was more favorable than the MRO during the first 41 months of the Stipulation ESP term by $42 million.[9] The Commission then gave additional weight to four factors to support its finding that the ESP, as modified, was more

---

[5] *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896 at ¶ 26 (2004) (emphasis added).

[6] Section 4903.10, Revised Code.

[7] Opinion and Order at 30. The Commission did not make an explicit finding that the Stipulation ESP was not more favorable, but it is clear from the decision that without modification the Stipulation ESP would fail the statutory test.

[8] Opinion and Order at 31-32.

[9] *Id.*

favorable in the aggregate than an MRO. First, the Commission noted that the transition to competition would be sooner under the Stipulation ESP than if the Companies had elected to operate under Section 4928.142, Revised Code.[10] Second, the Commission stated "that the redesign of AEP-Ohio's corporate structure will be smoother if steps are taken prior to the transition to a competitively bid SSO."[11] Third, the Commission stated that the Muskingum River 6 ("MR6") and Turning Point projects could contribute to supply diversity.[12] Fourth, the Commission concluded that payments for the Partnership With Ohio ("PWO") and Ohio Growth Fund ("OGF") were "significant benefits," especially since the Commission modified the terms of the Stipulation to require those amounts to be paid by the Companies regardless of the earnings of the Companies.[13] Based on the reduction of the base generation increase and a finding that "other factors, including qualitative factors"[14] should be considered, the Commission then concluded that the Stipulation ESP, with the modification of the base generation rate increase, was more favorable in the aggregate than an MRO.

In applying the ESP versus MRO test, however, the Commission did not address the effects of the last twelve months of the Stipulation ESP. When the last twelve months are included in the test, the Stipulation ESP fails the test by over $300 million. Moreover, the Commission did not apply the test on an electric distribution utility

---

[10] *Id.*

[11] *Id.* at 32.

[12] *Id.*

[13] *Id.*

[14] *Id.*

("EDU")-specific basis, included terms as benefits that should be excluded and failed to consider costs that should be included. For these reasons discussed more fully below, the Commission should grant rehearing.

1. **The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Did Not Comply With the Statutory Requirement of Section 4928.143(C)(1), Revised Code, When the Commission Failed to Consider the Full Term of the ESP Proposed in the Stipulation ("Stipulation ESP") in Applying the ESP versus MRO Test.**

2. **The Commission's Opinion and Order is Unlawful and Unreasonable Because the Determination That the Stipulation ESP Was More Favorable in the Aggregate than an MRO Is Not Supported by the Manifest Weight of the Evidence.**

As noted above, the Commission modified the proposed base generation rates by lowering the increase by half, and in doing so the Commission claimed that the modified ESP would result in a $42.4 million benefit over an MRO. In making this determination, however, the Commission illegally and unreasonably failed to include the last twelve months of the Stipulation ESP, June 2015 to May 2016. When the cost of the last twelve months of the Stipulation ESP is included in the ESP versus MRO test, even as modified by the Commission, the Stipulation ESP fails the test by over $300 million.

Section 4928.143(C), Revised Code, permits the Commission to approve an ESP if it finds that the ESP including its pricing and all other terms and conditions, including any deferrals and further recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code (an MRO). The MRO that is compared to the ESP must be based on a blending of the prior ESP and the results of a competitive bidding process ("CBP"). "The first application [for an MRO] ... by an electric distribution utility that, as July 31, 2008, directly owns in whole or part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid ... as follows: ten per cent of the load in year one and not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five."[15] The blending period is mandatory.[16]

According to the terms of the Stipulation, the ESP Standard Service Offer ("SSO") rates were being proposed for January 2012 to May 31, 2016,[17] with SSO rates for the last twelve months, June 2015 to May 2016, determined by a CBP.[18] Thus, the relevant period for testing the Stipulation ESP was January 2012 to May 2016, which included the SSO rates set by the CBP.[19]

---

[15] Section 4928.142(D), Revised Code.

[16] The Commission in the *Duke MRO* decision held that a five year blending period is required by Section 4928.142(D), Revised Code, even if the proposed MRO sought to move the generation base rate to the results of a competitive bid for base generation after the first two years. *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer, Electric Generation Supply Accounting Modifications, and Tariffs for Generation Service,* Case No. 10-2586-EL-SSO, Opinion and Order at 23 (Feb. 23, 2011) ("*Duke MRO*").

[17] Stipulation at 4.

[18] *Id.* at 11.

[19] During his cross-examination, Staff witness Fortney acknowledged his understanding that an initial MRO application by a utility that owned generation assets requires blending of the competitive bid prices with the legacy ESP prices for a minimum of five years. Tr. Vol. X at 1739-41 (Cross-examination of Robert Fortney). Ohio Energy Group ("OEG") witness Stephen Baron previously submitted testimony supporting a five-year blending period, also. IEU-Ohio Ex. 2 at 2.

The Commission, however, did not include the effects of the last twelve months of the Stipulation ESP in its determination that the Stipulation ESP, with the Commission's modification, passed the ESP versus MRO test. In applying the test, the Commission used Table 3 from the FirstEnergy Solutions ("FES") initial brief, which was based on the prefiled testimony of Staff witness Fortney.[20] Neither FES Table 3[21] nor Mr. Fortney[22] accounts for the last twelve months of the Stipulation ESP. As a result, the Commission failed to consider the total ESP versus the total blended MRO. The Commission's application of the requirements of Section 4928.143(C), Revised Code, as set out in this decision, therefore, is unlawful and unreasonable in that the Commission has applied the statute in such a way as to exclude the effects of the last twelve months of the Stipulation ESP.

Including the last twelve months, moreover, requires the Commission to reverse its determination that the Stipulation ESP, even as modified by the Commission's Opinion and Order, satisfies the ESP versus MRO test. Based on the modifications it made to the base generation rate increases, the Commission concluded that the modified ESP resulted in a quantitative benefit to customers of $42.4 million for January 2012 to May 2015.[23] In the last twelve months of the modified ESP, customers will pay nearly $400 million more than they would pay under the blended MRO.[24] When the last

---

[20] Opinion and Order at 32.

[21] Post-Hearing Brief of FirstEnergy Solutions Corp. at 19 (Nov. 10, 2011).

[22] Staff Ex. 4, Attachment A.

[23] Opinion and Order at 32.

[24] IEU-Ohio Ex. 9A, Exhibit KMM-11, includes an analysis of the ESP versus MRO for the period of June 2015 through May 2016. Mr. Murray concluded that the Stipulation ESP was less favorable than an MRO

twelve months of the modified ESP are included in the ESP versus MRO test, the modified ESP fails the test by more than $300 million. Thus, the finding that the Stipulation ESP was more favorable was also against the manifest weight of the evidence.

3. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Applied Section 4928.143(C)(1), Revised Code, to an Entity that Was Not an EDU.

In making the determination that the Stipulation ESP was more favorable than the MRO, the Commission relied upon the testimony of Staff Witness Fortney as corrected and presented in FES Table 3. FES Table 3 and the testimony on which it is based present the calculations of the ESP versus MRO test for an entity identified as AEP-Ohio, *i.e.*, CSP and OP on a combined basis. The Commission failed to make a separate ESP versus MRO determination for CSP and OP as EDUs. CSP and OP, however, are each an EDU in their own right as defined by Ohio law.[25] AEP-Ohio is not a legal entity and is not an EDU.[26]

Section 4928.141, Revised Code, requires that an EDU apply to the Commission to establish an SSO. If the EDU elects to file an application for an ESP, the application

---

by $8.61 per MWH hour for OP and $9.44 per MWH for CSP. See the attachment to this Application for Rehearing ("Attachment") for a demonstration of the costs of the ESP in the last twelve months.

[25] Tr. Vol. V at 783 (Cross-examination of Joseph Hamrock); *see also* Section 4928.01(A)(6), Revised Code.

[26] Tr. Vol. V at 783-84 (Cross-examination of Joseph Hamrock). In fact, American Electric Power Company, Inc. has claimed that it is not a public utility and, as a result, the Commission lacks jurisdiction over it: "AEP posits that it is not a public utility as that term is defined in Section 4905.02, Revised Code, and therefore, the Commission lacks jurisdiction over AEP." *In the Matter of the Complaint of Brian Tomlin v. Columbus Power Company*, Case No. 02-46-EL-CSS, Opinion and Order (Dec. 12, 2002).

is governed by Section 4928.143, Revised Code. Division (A) of that Section provides in relevant part;

> [A]n *electric distribution utility* may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section.

Emphasis added.

The Commission's authority to approve an ESP extends only to an EDU. Only an EDU can file an application for an ESP. "EDU" is a defined term. Section 4928.01(A)(6), Revised Code, defines "Electric distribution utility" as "an electric utility that supplies at least retail electric distribution service." It further defines "Electric utility" as "an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state."[27] No entity other than an EDU is authorized to seek an ESP. OP and CSP are each an EDU.[28] Sections 4928.141 and 4928.143, Revised Code, confine the opportunity to seek and obtain an ESP to an EDU.

Second, the plan must relate to the terms of service of the EDU. Sections 4928.143(B)(2)(b) and (c), Revised Code, are limited to providing cost recovery for construction work in progress ("CWIP") and generation facilities dedicated to Ohio customers by the EDU. Divisions (B)(2)(f), (g), (h), and (i) similarly are constrained by reference to the EDU. Although Divisions (B)(2)(d) and (e) do not specifically mention a

---

[27] Section 4928.01(A)(11), Revised Code.

[28] Tr. Vol. V at 783-84 (Cross-examination of Joseph Hamrock).

limitation to an EDU, they are limited to terms affecting the EDU's "retail electric service"[29] and "standard service offer price," respectively.[30]

Third, Section 4928.143(B)(2)(a)-(i), Revised Code, requires that the ESP relate specifically to services and charges of an EDU, and just as importantly, those subdivisions detail the exclusive list of what may be included in an ESP. As the Supreme Court has explained, "[b]y its terms, R.C. 4928.143(B)(2) allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any' provision. So if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[31]

Fourth, Section 4928.143(C)(1), Revised Code, provides that the EDU has the burden of proof to demonstrate that the ESP is more favorable in the aggregate than the results that would apply under Section 4928.142, Revised Code, an MRO. Moreover, it is only the EDU that may withdraw an application under Section 4928.143(C)(2), Revised Code.

---

[29] Section 4928.01(A)(27), Revised Code, defines "retail electric service" as "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following 'service components': generation service, aggregation service, power marketing service, power brokerage service, transmission ... ."

[30] The relevant provisions of Sections 4928.143(C) and 4928.144, Revised Code, similarly apply to only an EDU. The EDU has the burden to demonstrate that the ESP meets the requirement that the ESP is better in the aggregate than the alternative under Section 4928.142, Revised Code, and only the EDU may withdraw an ESP if the Commission modifies and approves an ESP not to the EDU's liking. Section 4928.143(C), Revised Code. Finally, the provision regarding phase-in deferral recovery is similarly limited to the provision of a phase-in plan for an EDU. Section 4928.144, Revised Code.

[31] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d. 512, 520 (2011).

Thus, the statute authorizing an ESP focuses exclusively on the EDU, from defining the entity that may seek an ESP, to the terms that may be included in an ESP, to the burden of demonstrating that the Commission should approve the ESP.

When the Commission approved the Stipulation ESP with modifications, it did so with regard to CSP and OP on a combined basis. As noted above, the Commission supported its decision by reference to the evidence presented by Mr. Fortney and summarized in Table 3 of the FES Initial Brief. The table and the supporting testimony are presented on an AEP-Ohio basis; no EDU-specific findings can be derived from that information.

The only explanation offered by the Commission for this misapplication of Section 4928.143(C)(1), Revised Code, is found in the Commission's discussion concerning IEU-Ohio's motion to dismiss. In that portion of the Opinion and Order, the Commission explained, "The Commission commonly uses the AEP-Ohio notation and interprets applications and pleadings using the reference to refer to both CSP and OP. ... The Commission finds that sufficient and adequate evidence has been provided in the record by the Companies and the Signatory Parties that indicates that this matter is within the Commission's jurisdiction ... ."[32] The Commission, however, does not indicate what that evidence is. Moreover, whatever that evidence might be, the Commission did not make any of the required findings on an EDU-specific basis. As demonstrated above, the Commission approved the ESP as though OP and CSP were one entity. Thus, the Commission acted outside its statutory authority when it approved

---

[32] Opinion and Order at 8.

the Stipulation ESP with modifications. For this reason, the Commission's Opinion and Order is unlawful and unreasonable.

4. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Excluded Costs That Should Have Been Included in the Stipulation ESP When It Applied the ESP versus MRO Test.**

5. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Shifts the Burden of Proof to Show That the Stipulation ESP Is More Favorable Than an MRO to a Party Other Than the Company.**

6. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Included "Other Factors, Including Qualitative Factors" in its Application of the ESP versus MRO Test.**

7. **The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved the Stipulation ESP, as Modified, with Placeholder Riders Without Accounting for Their Cost.**

Section 4928.143(C)(1), Revised Code, requires the Commission to find that an ESP, including all terms and conditions and any deferrals, is more favorable than an MRO. The Commission in this case considered several factors in approving the Stipulation ESP which were not part of the ESP and failed to cost the Stipulation ESP for items that are part of the Stipulation ESP. The Commission thus applied the wrong test. As a result, the Commission's Opinion and Order is unlawful and unreasonable.

The Commission noted that it was appropriate to account for the cost of Turning Point because the Companies had an estimated cost and claimed Turning Point as a potential benefit if the Stipulation was approved.[33] The Commission, however, made no allowance in the Generation Resource Rider ("GRR") for MR6. The Companies should have been required to demonstrate the cost of MR6 in the ESP as they and the Commission claimed a benefit to the ESP from the inclusion of MR6 in the ESP.[34] By approving the ESP without assigning a cost to MR6, the Commission did not apply the ESP versus MRO test as required by the express terms of Section 4928.143(C)(1), Revised Code, and unlawfully and unreasonably shifted the burden of proof to the parties opposing the Stipulation to demonstrate the effect, a result not supported by Section 4928.143(C)(1), Revised Code.

The Commission made a similar error with regard to the Pool Modification Rider ("PMR") and the customer sited combined heat and power generation rider ("CHP"). The Commission did not assign any value to the PMR in its evaluation of the Stipulation ESP because it concluded that "it would have been speculative because there is no estimate on what the potential PMR costs could be."[35] This statement concedes that the PMR is a cost of the ESP, but the Companies failed to demonstrate what the effect would be. Similarly the Commission approved the CHP Rider but did not assign it a value in the ESP versus MRO test.[36] The Commission's decision again unlawfully and unreasonably failed to apply properly the ESP versus MRO test and shifted the burden of proof to the opposing parties to demonstrate what the PMR costs would be.

---

[33] Opinion and Order at 30.

[34] *Id.* at 32.

[35] *Id.* at 31.

[36] *Id.* at 55-56.

Moreover, the exclusion of PMR costs is unreasonable because it is based on an incorrect finding that there was no evidence concerning the cost of the PMR. Mr. Schnitzer provided an estimate of the cost of the PMR.[37] Thus, there was record evidence regarding the cost associated with the PMR which the Commission was obligated to take into account when conducting the ESP versus MRO test.

Finally, the Commission chose to ignore the effect of the Distribution Investment Rider ("DIR") on the theory that customers could be made to pay the same costs through a distribution case.[38] This supposed result, however, assumes that the Companies would be entitled to recover a DIR as part of the revenue requirement in a traditional distribution case under Chapter 4909, Revised Code, a conclusion for which there is absolutely no support in this record. Thus, there was no basis for the Commission to exclude the known cost of the DIR for purposes of conducting the ESP versus MRO test.

The Commission also included several qualitative factors for which there is no basis in the statutory test. Specifically, it found that the Stipulation would permit an earlier transition to a CBP and concluded that this transition was a benefit.[39] However, the record also demonstrated that competitive electric rates were expected to increase

---

[37] FES Ex. 3 at 19.

[38]Opinion and Order at 31.

[39] *Id.* at 32.

toward the end of the Stipulation ESP, and this increase would produce a higher CBP.[40] On a purely mathematical basis, it is impossible to conclude that customers will benefit from a move to a CBP more quickly if the prices produced by the CBP are higher than would be the case than if the pace of the increases were controlled by an MRO as provided by Section 4928.142(D), Revised Code. In effect, the Commission is incorrectly claiming that it is a benefit to raise customers' prices faster, a result that makes no sense to customers.

Similarly, the Commission assigns a positive effect to a smoother process of corporate separation. Corporate separation, however, is completely unrelated to the factors the Commission is to review under the ESP versus MRO test. The statutory test addresses the terms and conditions of the Stipulation ESP.[41] Moreover, whether the process is smoother is itself highly speculative, as the Stipulation itself suggests, with its various hold-backs if the separation process at the federal level is delayed.[42]

The Commission also points to the benefits of the modified commitments to the PWO and OGF as a basis for approving the modified ESP. These commitments might be counted as real benefits, but they are not qualitative. They have a stated value of $8 million annually over the life of the modified ESP.[43] The annual $8 million payment that

---

[40] See, e.g., IEU-Ohio Ex. 9B at 9-10. Some of this increase is reflected in the fact noted by the Commission that the Stipulation ESP in June 2014 and 2015 finally became more favorable under the ESP versus MRO test as detailed in FES Table 3. *Id.* at 31.

[41] Section 4928.143(C)(1), Revised Code. As noted elsewhere, the Commission refused to consolidate the application regarding corporate separation with the ESP review, clearly recognizing that review of the ESP was independent of the review of the Companies' request to complete corporate separation. Opinion and Order at 61.

[42] Stipulation at 15-16.

[43] *Id.* at 17. The Opinion and Order removed the contingency affecting payment of these funds. Opinion and Order at 64.

the Companies will provide to fund these programs is dwarfed by the over $300 million they will extract from customers if the improperly approved Stipulation ESP is not substantially modified or rejected outright.

C. Non-Comparable and Unduly Discriminatory Capacity Charge Increases

The Stipulation proposed that the Companies be permitted to implement a two-tiered generation capacity service pricing scheme based on shopping caps limiting the availability of capacity priced by PJM Interconnect LLC's ("PJM") Reliability Pricing Model ("RPM") auctions to a percentage of the Companies' total annual megawatt hours, beginning with 21% in 2012; the balance would be set at a rate of $255 per megawatt-day ("MW-Day"). The set-aside amounts would initially be distributed based on equivalent percentages of RPM priced capacity (i.e. 21% of residential MWH would be eligible for RPM-priced capacity; 21% of commercial MWH would be eligible, and 21% of industrial MWH would be eligible), with any unused allotments from one class reassigned to other customer classes that had exhausted their allotments.[44] As became clear during the hearing, the commercial class had exhausted its allotment, the industrial class probably also had, and the residential class would lose a portion of its allotment to cover the requests made by the other two classes.[45] No provision was made in the Stipulation to account for governmental aggregation programs that had

---

[44] Detailed Implementation Plan at 5 (Oct. 5, 2011).

[45] OCC Ex. 6.

been approved or for those communities that had ballot issues seeking approval of authority to establish governmental aggregation programs in November 2011.

To address concerns raised by FES and the Ohio Consumers' Counsel ("OCC") regarding the availability of capacity to governmental aggregation programs and the treatment of the residential class, the Commission ordered changes to the Stipulation. First, it modified the shopping caps to accommodate customers that were part of governmental aggregation programs.[46] Second, the Commission modified the Stipulation so that the full percentage amount of the capacity available under the shopping caps was available to each customer class.[47]

Even with these modifications, the Commission's approval of the two-tiered generation capacity service pricing scheme is illegal and unreasonable in several ways. First, the capacity pricing scheme is unduly discriminatory. Second, the Commission's Opinion and Order frustrates customer choice in violation of state law, and any finding to the contrary is not supported by the manifest weight of the evidence. Third, the Commission unreasonably and illegally permits the Companies to recover stranded costs.

A further complication is presented by the Companies' attempt to avoid the effects of the Commission's modifications of the shopping caps.[48] As filed, the Detailed

---

[46] Opinion and Order at 54.

[47] *Id.* at 55.

[48] RPM Set-Aside Allotment Rules Detailed Implementation Plan (Dec. 29, 2011).

Implementation Plan ("DIP") does not comply with the Commission's orders, and the Commission should direct the Companies' to file complying tariffs.[49]

8. The Generation Capacity Service Charge Increase Authorized by the Commission's Opinion and Order Is Unlawful and Unreasonable Because It Is Arbitrary, Retroactive, Outside the Commission's Authority, and Results in Rates and Services that Are Unduly Discriminatory and Non-Comparable.

The Commission's Opinion and Order authorized the Companies to retroactively[50] increase the capacity charge component of generation service imposed on CRES suppliers to $255 per megawatt day ("MW Day"). There is no evidence in the record that explains the basis for the $255 charge; it is simply an arbitrary amount proposed to the Commission by the Stipulation.[51] The evidence also demonstrates that the purpose of the increase is to economically constrain the "customer choice" right that is the centerpiece of Chapter 4928, Revised Code.

As approved by the Commission, the capacity charge increase is selectively applied to customers receiving the same or similar service under substantially similar circumstances, a clear violation of Sections 4905.22 and 4905.33, Revised Code. The selective application of the capacity charge increase is purely a function of when the "customer choice" associated with the generation capacity service commenced (prior to

---

[49] By the terms of the Commission's Opinion and Order, the tariffs and other compliance filings made by the Companies became effective on January 1, 2012. *Id.* at 65.

[50] The applicability parameters for this capacity charge increase trigger exposure to the higher charge in cases where shopping occurred after September 7, 2011, well before the effective date of the new and increased capacity charge. The Commission also authorized the higher capacity charges to go into effect January 1, 2012 on a bills rendered basis meaning that usage prior to January 1, 2012 covered by the bills rendered on and after January 1, 2012 imposed the higher charges. Even if the Commission has authority to increase capacity charges, it has no authority to do so retroactively.

[51] Tr. Vol. II at 177 & 192 (Cross-examination of Kelly Pearce).

the beginning of the term of the Stipulation ESP) or commences (in the future during such term).

The Commission is a creature of statute; it has only that authority provided to it by the General Assembly. There is nothing in the Chapter 4928, Revised Code, that would support the Commission's Opinion and Order to set or increase generation capacity service charges.[52] Generation service, moreover, is a competitive retail electric service by operation of law and, except as otherwise specified by Ohio law, the Commission has no jurisdiction over competitive retail electric service.[53] The Opinion and Order does not identify the source of the Commission's authority to increase the capacity charge that applies to CRES suppliers for the purpose of erecting economic barriers to shopping or to increase such charge by an arbitrary amount. Irrespective of what is contained within the Opinion and Order, there is no such authority. Accordingly, the arbitrary capacity charge increase is unlawful and unreasonable. But even if the General Assembly had provided the Commission with authority to approve an increase in the generation service capacity charge that applies to CRES suppliers, the Commission may not approve an arbitrary increase and may not approve an increase that results in undue discrimination, non-comparable service or both. And, as importantly, the Commission has an affirmative duty to promote customer choice, comparable and non-discriminatory service and the Commission violated this duty by

---

[52] *Discount Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53 ¶ 51 (2007) (*citing Reading v. Pub. Util. Comm.*, 2006-Ohio-2181 ¶ 13).

[53] Sections 4928.01(B) and 4928.03, Revised Code.

enabling the arbitrary, discriminatory and non-comparable capacity charge increase approved in the Opinion and Order.

The state policy in Section 4928.02, Revised Code, and various sections in Chapter 4928, including Sections 4928.06, and 4928.15, Revised Code, require the Commission to ensure that rates, services and practices associated with competitive and non-competitive retail electric service rates are comparable and non-discriminatory. This duty runs not just to retail electric consumers; the duty extends to suppliers.[54] Section 4928.02(A), Revised Code, provides that it is the State's policy to "[e]nsure the availability to consumers of ... nondiscriminatory ... retail electric service." The definition of "standard service offer" in Rule 4901:1-35-01(L), OAC, highlights the importance of the role of the nondiscriminatory and comparable requirements that are imposed by Chapter 4928, Revised Code: "'Standard service offer' means an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Similarly, Section 4928.40(D), Revised Code, states that "no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service." Thus, the policy of the State to ensure non-discrimination and comparability in pricing applies to consumers as well as competitive suppliers.

[54] For example, Sections 4928.15 and 4928.35(C), Revised Code, require electric distribution service to be available to all consumers and suppliers on a nondiscriminatory and comparable basis.

In the case of generation capacity service, the Companies' witness Nelson explained the Companies' view that the resale of service is a wholesale transaction, or sale for resale. [55] By the terms of the Stipulation ESP, some capacity will be charged at the lower RPM price; the balance will be charged at a significantly higher $255 per MW-day price.[56] The Signatory Parties uniformly testified that the $255 per MW-day rate is not based on cost,[57] and it clearly is not based on market. As the testimony also demonstrated, whether a CRES supplier is charged the RPM price or the $255 per MW-day price depends only on where and when its customer stands in the line created by the Stipulation and Appendix C's five classes of customers.[58] In all other respects, the capacity generation service supplied by the Companies is identical.[59]

Neither the Companies nor any party supporting the Stipulation offered any evidence to demonstrate that the bifurcated generation service capacity charge structure and the significantly increased, discriminatory and non-comparable capacity charge is lawful. As Mr. Fein offered during cross-examination:

> Q. You also believe that the Commission should avoid discriminatory pricing policies; do you not?
>
> A. I do.
>
> Q. So similarly situated customers receiving the same service shouldn't be required to pay different prices for that service, correct?

---

[55] Tr. Vol. XII at 2184-85, 2230-31 (Cross-examination of Philip Nelson).

[56] Stipulation at 20-21.

[57] Tr. Vol. II at 191 (Cross-examination of Kelly Pearce); Tr. Vol. V at 737 (Cross-examination of Philip Nelson); Tr. Vol. V at 810, 845 (Cross-examination of Joseph Hamrock).

[58] Tr. Vol. VI at 973 (Cross-examination of David Fein).

[59] *Id.* at 972 (Cross-examination of David Fein).

A. That's correct.[60]

Yet, under the Stipulation's capacity charge proposal approved by the Commission, discrimination and non-comparability are guaranteed: similarly situated customers and suppliers will see two different prices for generation capacity service based on nothing more than whether they took or signed up for competitive retail electric service soon enough.

The Opinion and Order does not address the discriminatory and non-comparable service results of its decision to approve the two-tiered generation capacity service pricing scheme and the significant capacity charge increase. The Opinion and Order neither acknowledges this important issue nor suggests that the discrimination between similarly situated customers is somehow justified. As discussed above, the discriminatory and non-comparable outcomes violates state law and policy. Thus, the Commission should grant rehearing and modify the Stipulation ESP so that all generation service capacity is provided by the Companies at a uniform price equal to the RPM-based price previously approved by the Commission.

9. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Approved a Two-tiered Generation Capacity Service Pricing Scheme That Purposely Erects Barriers to Customer Choice in Violation of State Law and Energy Policy.

10. The Commission's Opinion and Order Approving a Two-Tiered Generation Capacity Service Pricing Scheme Is Unlawful and Unreasonable in That a Finding That the Scheme as Modified Does Not Violate Any Important Regulatory Principle or

---

[60] Tr. Vol. VI at 971 (Cross-examination of David Fein).

Practice Is Not Supported by the Manifest Weight of the Evidence.

Since the adoption of Senate Bill 3 ("SB 3"), the State has pursued a policy of competition in the pricing and delivery of competitive retail electric generation service. It is the policy of the State to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs" and to "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers."[61]

Throughout these proceedings, the Companies have made clear that their desired outcome was to frustrate customer choice. Soon after the ESP Applications were filed in early 2011, Michael Morris, the Chief Executive Officer of AEP, the parent of OP and CSP, stated that he expected the Companies to be better able to retain customers under the new ESP.[62]

The Stipulation was designed to achieve the same restrictions on customer choice envisioned in the Application. On September 7, 2011, the day the Stipulation was filed with the Commission, Richard Munczinski, speaking on behalf of the Companies was very clear that shopping under the Stipulation's two-tiered generation capacity service pricing scheme would be constrained:

---

[61] Sections 4928.02(B) and (C), Revised Code.

[62] FES Ex. 1, Ex. TCB-7.

> What happens is those customers that get the discount as Brian [Tierny] mentioned are allowed—are priced out at the RPM prices. So the $100, the $16, and I think the $26 going forward. Over those percentages, if you want to shop, you pay the full cost of $255 per megawatt day. So the thought and the theory is that the shopping will be constrained to the RPM price.[63]

He continued, "So basically, we should see no more shopping than the 20%, 30%, 40% levels that are included in the stipulation."[64] Thus, it is clear that the purpose of two-tiered generation capacity service pricing scheme and the significant and arbitrary increase in the generation capacity charge selectively applied was and is to limit the "customer choice" right that is the centerpiece of Chapter 4928, Revised Code.

The Companies' ability to limit customer choice is practically guaranteed because of the way they will be able to control competitive retail electric service pricing under the Stipulation ESP as modified by the Commission's Opinion and Order. Under the current Fixed Resource Requirements ("FRR") election by the Companies, the Companies are responsible for satisfying the total system generation service capacity requirement established by PJM pursuant to approvals provided by the Federal Energy Regulatory Commission ("FERC").[65] Because the Companies voluntarily elected the FRR option, this responsibility resides with the Companies for both shopping and non-shopping customers. As a result, CRES suppliers serving retail customers in the Companies' service areas rightfully look to the Companies to satisfy the PJM capacity requirement for any retail customers they may serve within the Companies' service areas and the

---

[63] *Id.*, Ex. TCB-8.

[64] *Id.*, Ex. TCB-9.

[65] FES Ex. 2 at 8; Tr. Vol. IV at 541-42 (Cross-examination of Teresa Ringenbach).

CRES suppliers have previously compensated the Companies (at the RPM-based rates) for electing to take on this responsibility.[66]

Since CRES suppliers are captive capacity service customers of the Companies, the arbitrary, discriminatory, non-comparable and much higher $255 per MW-Day charge means that CRES suppliers will not be able to compete profitably for customers within the OP or CSP service areas. All reasonable projections in the record and discussed below indicate that the two-tiered generation capacity service pricing structure and the much higher new capacity charge will block customer choice above the shopping percentages which define the cut-off point for an RPM-based generation capacity charge.

As Mr. Schnitzer demonstrated (and Mr. Murray confirmed), CRES suppliers including the CRES supplier affiliated with the Companies are offering electric bill reduction opportunities where generation capacity service compensation is tied to the RPM-based price. These bill reduction opportunities exist during the term of the Stipulation ESP through sometime in 2014. When the generation capacity service price is raised to $255 per MW-Day, there is no savings opportunity until sometime in 2014, and thereafter the room available to a CRES supplier to offer a price competitive with the Companies' default service offering is minimal.[67] Thus, setting the generation service capacity price at $255 MW-Day prevents shopping, and customers are stuck with the unjustified and higher ESP prices (the purpose and design of the higher

[66] The Commission did not make any finding that CRES providers cannot supply their own capacity until June 1, 2015. Opinion and Order at 51-55.

[67] FES Ex. 3 at 34-36.

generation service capacity charge). As Mr. Schnitzer concluded, "once AEP Ohio no longer has to provide capacity to CRES suppliers at RPM market prices, the Stipulation effectively shuts down the opportunity for customers to shop by making it very difficult for customers to shop for price savings. Thus, the higher base generation rates and other 'bypassable charges' included in the Stipulation become non-bypassable in practical terms."[68] Mr. Murray agreed. After describing the structure of capacity rates and set-asides proposed by the Stipulation, he concluded, "This structure will effectively block shopping at the amounts that have access to market-based capacity price."[69]

The CRES Signatory Parties agreed with the analysis provided by Mr. Schnitzer and Mr. Murray. Ms. Ringenbach, on behalf of the Retail Energy Supply Association ("RESA"), for example, stated that increased capacity costs in the range of one and a half to two and a half times RPM would be significant and have the effect of deterring offers.[70] Similarly, David Fein, testifying on behalf of Constellation NewEnergy, stated that an increase of two hundred percent in capacity prices over RPM prices, all else being equal, would adversely affect shopping.[71]

Only the Companies offered testimony suggesting that there was headroom for competitive offers available to CRES suppliers paying $255 per MW-Day for capacity. To advance this contrarian view, Mr. Allen testified that he had taken the

---

[68] *Id.* at 36.

[69] IEU-Ohio Ex. 9A at 17.

[70] Tr. Vol. IV at 542-43 (Cross-examination of Teresa Ringenbach).

[71] Tr. Vol. VI at 971 (Cross-examination of David Fein).

administratively-determined and defective benchmark price of Ms. Thomas and removed two components of that price (the Transaction Risk Adder and the Retail Administration costs) to come up with some headroom.[72] As demonstrated in the confidential version of his testimony, the amount of headroom was miniscule and in one year actually negative.[73] Additionally, his analysis simply did not make any sense. The benchmark price administratively determined by Ms. Thomas was presented as the "all-in" requirements for a competitive price;[74] there was no proof that CRES suppliers would or could forgo a part of the price developed by Ms. Thomas and then arbitrarily reduced by Mr. Allen to find headroom.[75] Mr. Allen also indicated he did not know what margins would be acceptable to CRES providers.[76] Notably, the Commission did not rely on this ridiculous argument to support approval of the two-tiered generation service capacity scheme.[77] Thus, the Companies, the opposing parties, and the CRES suppliers supporting the Stipulation all agreed that the provisions regarding generation service capacity pricing would have the effect of blocking customer access to CRES suppliers offering better prices.

---

[72] Cos. Ex. 20A at 7-9.

[73] *Id.* at 8.

[74] Cos. Ex. 5 at 4; Tr. Vol. XII at 2105 (Cross-examination of William Allen).

[75] Mr. Allen further suggested that CRES suppliers would either sell at a loss or below market rates. Without any basis in fact, he asserted that CRES suppliers will enter into contracts for substantial periods during part of which the CRES suppliers will suffer losses. Cos. Ex. 20A at 8-9. Alternatively, he assumed CRES suppliers will sell in an economically irrational manner at below market prices that even he found difficult to explain. Tr. Vol. XII at 2107-09. Rather than relying on these contrived explanations, the Commission would do better by accepting the word of the Companies and signatory CRES suppliers that the higher capacity charges will limit consumer choice.

[76] Tr. Vol. XII at 2091-92 (Cross-examination of William Allen).

[77] Opinion and Order at 50-55 (the Commission notes the testimony of the Signatory Parties, but does not base its modifications or approval on this testimony).

Blocking access to CRES providers by approval of the two-tiered generation service capacity pricing scheme translates into real losses for customers; a cost that the Commission ignored in approving the Stipulation. Just as the future competitive price is projected by the Companies to exceed the administratively-set ESP price in 2014-2015, the Stipulation as modified and approved in the Opinion and Order provides that all default service will be priced by an auction.[78] Most customers are locked into an ESP that violates the statutory test until at least 2015 and then rates will move to the higher anticipated market rates. It is the worst of both worlds for customers: higher and effectively non-bypassable rates now and then, on the Companies' schedule, a flash-cut to default generation supply prices determined by an auction process at a time when everyone anticipates higher market electric rates.

Without any findings regarding the effects on customer choice, the Commission approved the two-tiered generation capacity charge pricing scheme, noting only that doing so resolves two cases at FERC and appears to be a reasonable compromise.[79] Certainly, any claimed resolution of FERC cases does not address the fundamental defects created by the two-tiered generation service capacity pricing scheme. Moreover, the manifest weight of the evidence demonstrates that the Commission could not make the necessary findings to conclude that this pricing scheme was reasonable when customer choice is thwarted. The manifest weight of the evidence also does not support any claim that customers will benefit, making the Commission's approval of the scheme arbitrary, unreasonable, and unlawful. Therefore, the Commission should grant

---

[78] IEU-Ohio Ex. 9A at 18.

[79] Opinion and Order at 55.

rehearing and modify the Stipulation ESP so that all generation service capacity is provided by the Companies at a uniform price equal to the RPM-based price previously approved by the Commission in December 2010.[80]

11. The Commission's Opinion and Order Is Unlawful and Unreasonable in That the Commission Permits the Recovery of Transition Revenue Through the Two-Tiered Generation Capacity Service Pricing Scheme Outside the Market Development Period and the Transition Period.

In its approval of the arbitrary, discriminatory and non-comparable two-tiered generation service capacity pricing scheme, the Commission concluded that SB 3 and the resulting electric transition plan ("ETP") cases for the Companies did not affect the ability of the Companies to pursue a cost-based generation service capacity charge rate because the Commission concluded that SB 3 and the ETP cases affected retail transactions.[81] The Commission did not otherwise address the evidence that demonstrated that the effect of the two-tiered generation capacity service pricing scheme results in the collection of transition revenue (sometimes called "stranded costs") outside the MDP and the Transition Period established by SB 3. Because the two-tiered generation capacity service pricing scheme allows the Companies to recover transition revenue, the Commission's Opinion and Order approving it is unlawful and unreasonable.

---

[80] *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, Entry at 2 (Dec. 8, 2010)

[81] Opinion and Order at 55.

In the Opinion and Order, the Commission rejected an argument that SB 3 and the ETP cases precluded the Companies from pursuing an additional and new transition revenue collection opportunity through cost-based generation service capacity rates because the ETP cases affected retail rates. The Commission's reasoning seems to ignore the legal fact that the Commission's ESP authority is strictly limited to retail electric service. The reasoning also implies that the Commission somehow has the authority to consider and approve the collection of transition revenue so long as the collection opportunity is disguised as cost-based generation capacity service charges..[82] But this reasoning, finds no support in the State law. Section 4928.38, Revised Code, states the operable limits on an EDU's ability to receive transition revenue: "The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. *The commission shall not authorize the receipt of transition revenues* ***or any equivalent revenues*** *by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.*" (Emphasis added.) Section 4928.38, Revised Code, makes no distinction between retail and wholesale transactions; it precludes the Commission from authorizing the recovery of any transition revenue in any form after the MDP.

Under the SB 3 scheme, transition revenue was based on a determination of transition costs. Transition costs under Ohio law are defined as the EDU's net, verifiable generation-related costs, prudently incurred, that are not recoverable in a

---

[82] *Id.*

competitive market and that the utility would otherwise be entitled to recover.[83] During the MDP, EDUs were given the opportunity to seek transition revenue to recover those generation-related transition costs. Once the MDP was over, however, the opportunity to seek and obtain transition revenue **or any equivalent revenue** ended by operation of law.

The change in regulatory structure effected by Amended Substitute Senate Bill 221 ("SB 221") does not change that conclusion. As the General Assembly has made clear, "[a] standard service offer... shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan."[84] Thus, once the MDP ended, nothing in SB 221 permitted the recovery of any further transition revenue or gave the Commission authority to permit such recovery.

Nevertheless, the Commission has authorized the Companies to collect transition revenue or "equivalent revenues" through the two-tiered generation capacity service pricing scheme. As the Commission noted, the Companies base their right to set capacity rates on a cost basis on the fact that RPM-priced capacity charges do not generate sufficient revenue for the Companies to cover their generation capacity costs.[85] The RPM-based price is the market-based price of generation capacity service established through the PJM competitive bidding process. The amount not recoverable

---

[83] Section 4928.39, Revised Code.

[84] Section 4928.141(A), Revised Code.

[85] Opinion and Order at 52.

under RPM rates, the above-market portion, by definition, is transition revenue. Because the Companies' opportunity to recover transition revenue through a Commission-approved rate is long over, the Commission should grant rehearing and modify the Stipulation ESP so that all generation service capacity is provided by the Companies at a uniform price equal to the RPM-based price previously approved by the Commission.

12. The Commission's Opinion and Order Approving the Two-Tiered Generation Capacity Service Pricing Scheme Is Unlawful and Unreasonable in that the Commission Failed to Order the Companies to File Tariffs Detailing the Manner in Which Capacity Service Charges Will be Determined as Required by the Ohio Revised Code.

As a result of the Commission's Opinion and Order approving the two-tiered generation capacity service pricing scheme, the Commission has authorized the Companies to significantly and selectively increase the charge previously approved by the Commission in the December 8, 2010 Entry in Case No. 10-2929-EL-UNC.[86] Under Ohio law, each EDU is required to file tariffs detailing the "charges for service of every kind furnished by it, and all rules and regulations affecting them."[87] The public utility's charges are then governed by those filings.[88] To date, however, the Companies have

[86] *See* page 2 of AEP-Ohio's Dec. 22, 2011 and Dec. 29, 2011 cover letters to compliance tariff filings. The Commission has previously recognized that it has authority to require tariffs governing the regulation of gas pooling arrangements necessary to support gas transportation service. *In the Matter of the Complaint of the Ohio Gas Marketers Association v. The East Ohio Gas Company*, Case No. 94-2010-GA-CSS, Entry at 2 (Dec. 29, 1994). This matter presents a similar circumstance in that the Commission has asserted jurisdiction over capacity charges as a result of the terms of the PJM RPM structure and now must have in place the tariff provisions that define the duties and obligations of the parties.

[87] Section 4905.30, Revised Code.

[88] Section 4905.32, Revised Code.

not filed any detailed tariff with the Commission, relying instead on the so-called revised DIP,[89] and have argued at length in a separate filing that no detail is required.[90] The Commission's failure to order the Companies to file tariffs complete with all the details associated with the implementation of the two-tiered generation capacity service pricing scheme renders the Commission's Opinion and Order unlawful and unreasonable.

The DIP contains language that generally describes how the amount of shopping eligible for RPM-priced capacity will be determined during the term of the ESP. For generation capacity service associated with shopping that is not eligible for the RPM-based capacity price, however, a higher charge of $255 per MW-Day is to apply effective January 1, 2012 on a bills rendered basis. But there is nothing in the DIP that identifies how the load and usage characteristics of customers will result in the MW-Day billing determinant and the application of the $255 charge.

The PJM resource adequacy obligation provides the foundation for the establishment of a generation service capacity charge that may be billed to and collected from a CRES supplier serving retail customers in the Companies' service area. The PJM tariff dictates that the generation service capacity charge shall be based on RPM but also provides for an alternative charge established through a state retail access plan (assuming the state regulator has authority to approve such an alternative

---

[89] The Companies filed the DIP initially on October 10, 2011. On December 29, 2011, the Companies filed the revised version.

[90] Memorandum of Ohio Power Company in Opposition to Industrial Energy Users-Ohio's Motion and FirstEnergy Solutions' Objections/Request for Relief (Jan. 4, 2012).

charge and properly exercises such authority).[91] Presently, the PJM resource adequacy obligation of the Companies is an unspecified part of the overall resource adequacy obligation of the pool of affiliated operating companies otherwise known as AEP East. The missing DIP detail described above is detail that is required to: Synchronize the PJM resource adequacy obligation with the state plan approved (lawfully or otherwise) by the Commission; Identify implementation consequences of the two-tiered generation service capacity charge that have billing significance; and, Ensure that the overall compensation available to the Companies through the two-tiered generation service capacity charge structure is not improperly enhanced through the Companies' discretionary specification of the MW Day billing determinant.

PJM's manuals indicate that capacity charges are billed in the following manner. The capacity charge rate is multiplied by a customer's Peak Load Contribution ("PLC") [or the aggregated PLC for customers of a Load Serving Entity ("LSE")] and then multiplied by a final zonal scaling factor and multiplied by the forecast pool requirement factor.

Given the role of the PLC in the PJM resource adequacy structure, the detail included in the Companies' documentation on how the two-tiered generation service capacity charge structure shall be applied must identify how a shopping customer's PLC will be determined. This documentation must also identify the means by which this PLC specification will be synchronized with the overall resource adequacy obligation of AEP East and the means by which such obligation shall be allocated between shopping and

---

91 PJM, Resource Adequacy Agreement, Sch. 8.1(D)(8), available at Http://pjm.com/~/media/documents/agreements/raa.ashx.

non-shopping customers. The documentation must also identify how the resource adequacy obligation and the PLC will be modified as a result of the periodic changes made by PJM to the resource adequacy requirement and how the PLC will be modified to reflect changes in a customer's load and usage characteristics.

Once the synchronization detail and documentation are supplied in proper form, the $255 per MW-Day charge should apply, where lawful and applicable, to the integrated sum of the PLCs of shopping customers served by a CRES provider and the RPM-based charge should apply to the integrated sum of the PLCs of the balance of shopping customers served by a CRES. This approach will cause each CRES provider to receive a capacity invoice from AEP-Ohio (the Fixed Resource Requirement or "FRR" entity) or PJM (the billing, collection and remitting entity) that is the weighted average of the two-tiered generation service capacity charge structure with sufficient detail to audit the invoice based on the PLC data that is synchronized with PJM's resource adequacy requirement as modified (both in the aggregate and in the case of individual customers) during the term of the ESP. The PLC factor of each account should have been documented in detail in advance of any application of the two-tiered generation capacity service pricing scheme but this detail is required nonetheless. The detail will allow customers and their CRES suppliers to make sure that the per MW-Day value which drives generation service capacity charges are consistent with the PLC values recognized by PJM.[92] In the event that a discrepancy in PLC values is discovered,

---

[92] Each PJM Electric Distribution Company ("EDC") is responsible for allocating the previous summer's weather normalized peak to end-use customers in the zone (both retail and wholesale) and providing this information to PJM by December 31 prior to the start of the Delivery Year.

there must be a means to contest the $255 per MW-Day capacity charges billed to the CRES supplier.

If, as represented by the Companies in their letter to the FERC, the Opinion and Order set the state compensation mechanism for purposes of the Companies' FRR election, then these matters need to be specified and approved by the Commission through a formal tariff filing. That tariff then would afford the parties with a "common understanding" and legally enforceable set of rates and procedures for determining generation capacity service charges. As things now stand, however, the Companies seem to be proceeding as though they unilaterally determine the terms of the implementation of and compliance with the Commission's Opinion and Order.[93] Thus, the Commission should grant rehearing and order the Companies to file tariffs complete with all the details associated with the implementation of the two-tiered generation capacity service pricing scheme as required by State law.

13. The Commission Should Grant Rehearing to Clarify Its Order Directing the Companies to Apply RPM-based Prices to Generation Service Capacity Associated with Customers Shopping Through Governmental Aggregation Programs.

The DIP filed on December 29, 2011 also includes language proposed by the Companies to address the Commission's modification to the Stipulation ESP regarding the application of RPM-based generation capacity service pricing to customers shopping through governmental aggregation programs. The Companies' DIP, however,

[93] AEP-Ohio circulated the revised DIP to parties on December 22, 2011 and requested comments by December 27, 2011. Comments were returned by FirstEnergy Solutions, IEU-Ohio, and OCC. The implementation plan filed on December 29, 2011 is substantively the same as that circulated on December 22, 2011.

is inconsistent with the Commission's Opinion and Order and Ohio law in several respects.[94]

First, the Companies' language limits the application of RPM pricing to non-mercantile customers shopping through governmental aggregation programs.[95] That language is unreasonable and unlawful: it should be stricken. While it is correct that governmental aggregation programs are prohibited from involuntarily including mercantile customers pursuant to Section 4928.20(B), Revised Code, mercantile customers are expressly permitted to participate in governmental aggregation programs by affirmative election ("opting in"). Therefore, RPM pricing must apply to all mercantile and non-mercantile customers shopping through a governmental aggregation program.

Second, the DIP limits the amount of RPM-priced generation capacity service to customers participating in the aggregation programs of only those communities that passed ordinances during the November 2011 general election.[96] The Commission's Order requires that RPM-priced generation capacity service pricing apply to any community that completes the necessary process to take service by December 31, 2012.[97] There will also need to be some clarification as to how governmental programs in future years will be addressed, as required by the Commission's Opinion and Order.[98]

---

[94] IEU-Ohio asked the Commission for an order to address these problems through a motion and request for expedited ruling filed on December 30, 2011. The issues are renewed in the Application for Rehearing because the Commission had not ruled on the motion at the time the Application for Rehearing was due.

[95] DIP at 7-8.

[96] *Id.* at 7 and attachment.

[97] Opinion and Order at 54.

Finally, the Companies are counting customers served through a governmental aggregation program as first in the queue for the RPM-priced generation capacity service.[99] The Commission's Order, however, states that RPM pricing applies to customers served through a governmental aggregation programs and that RPM-pricing applies to 21%, 31% and 41% of all other shopping customers. The Commission must intervene to make sure that the Companies' implementation of the Commission's Opinion and Order does not compress the shopping opportunity beyond the compression that the Commission (rightly or wrongly) intended.

D. Base Generation Rate Increase

14. The Commission's Opinion and Order Is Unlawful and Unreasonable In That It Authorizes an Increase in Base Generation Rates Without a Cost Justification in Violation of Commission Precedent.

"It is the policy of this state to do the following throughout this state: (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[100] Further, the General Assembly has provided that an EDU seeking to implement an ESP must demonstrate that in the aggregate the ESP is more favorable than an MRO.[101] As explained to some extent already and further discussed below, the Commission's determination that the modified ESP

---

[98] *Id.*

[99] DIP at 8.

[100] Section 4928.02(A), Revised Code.

[101] Section 4928.143(C), Revised Code.

satisfies the ESP versus MRO test was both unlawful and unreasonable. The errors in the Commission's decision to approve the modified ESP, moreover, are compounded by the Commission's approval of annual rate increases without cost or any justification.

The Opinion and Order approved arbitrary annual increases in the Companies' base generation rates, raising the average rate to 2.27¢/kWh in 2012, 2.33¢/kWh in 2013, and 2.41¢/kWh in 2014 and the first five months of 2015.[102] In support of even larger arbitrary increases, the Companies' rate witness testified that there was no cost of service study to support those increases.[103] In approving the rate increases after cutting the average rate increase by 50%, the Commission first pointed to its authority under Section 4928.143(B)(2)(e), Revised Code, to order automatic rate increases as part of an ESP.[104] Citing this authority, it concluded that "the record demonstrates the automatic base increases are reasonable." The Commission then explained that the arguments of the non-signatory parties pointing out the lack of cost justification for the rate increases were meritless because there was no statutory requirement for a cost of service study.[105]

First, there was no demonstration that the arbitrary annual rate increases are needed by the Companies to cover any cost of providing service. The Staff initially

---

[102] Opinion and Order at 32 and 42.

[103] Tr. Vol. I at 113 (Cross-examination of David Roush). Mr. Roush indicated that the level was based on the agreement. *Id.*

[104] Opinion and Order at 42.

[105] *Id.* at 42.

opposed the larger annual rate increases proposed by the Companies because there was no cost-based rationale for the increases.

> Q. Now, in your testimony filed [August 4, 2011] with respect to the ESP proposed by the company you also disagreed with the company's proposal to increase its generation rate, correct?
>
> A. Correct.
>
> Q. And the premise of your disagreement was that there was no cost-based rationale to the company's proposal, correct?
>
> A. That was my initial testimony, yes.
>
> Q. And because there was no cost-based rationale you testified that the staff had no reason to believe that such an increase in revenue was warranted at that time; is that correct?
>
> A. I don't know. I assume you're reading from my initial testimony so yes.
>
> Q. That is a correct assumption. Now, under the proposed stipulation there are increases in generation rates for each year of the years 2012 through 2015; are there not?
>
> A. There are proposed increases in the base generation rates, but those base generation rates no longer represent what they initially did in the application.
>
> Q. And these generation rate increases are not based on cost, are they?
>
> A. Not to my knowledge.[106]

As Mr. Fortney further testified, the Commission has not previously approved non-cost based increases in ESP cases.

> Q. Can you identify, Mr. Fortney, any specific examples of Commission practice with respect to ESPs where the PUCO has allowed noncost-based elements or provisions in an electric security plan?
>
> A. And, again, are we talking about distribution? Was that part of the question?

[106] Tr. Vol. X at 1716-17 (Cross-examination of Robert Fortney).

> Q. Of an–an electric security plan of an electric utility.
>
> A. Not that I'm aware of. There have been several approvals of riders, but all of them have some cost-based mechanism for adjustment.[107]

Mr. Fortney's testimony was consistent with the Commission's Opinion and Order in the Companies' first ESP case. In that case, the Companies sought annual automatic increases in the base generation rates. The Commission rejected non-cost based increases because "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."[108]

In this proceeding, neither the Companies nor anybody else attempted to establish a cost basis for the annual ESP rate increases. When this fatal deficiency is added to the fact that the rates do not satisfy the ESP versus MRO test, it is readily apparent that the proposed rate increases cannot satisfy the requirements stated in Commission precedent.

The suggestion that there was no requirement for a cost of service study does not solve the legal problem caused by the Commission's decision. The Commission determined in the first ESP case for OP and CSP that a similar proposal for annual increases could not be sustained without cost justification. In this case, however, the Commission provides no explanation as to why it has abandoned its prior determination

---

[107] *Id.* at 1719 (Cross-examination of Robert Fortney).

[108] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 30 (Mar. 18, 2009) (citations omitted) ("*ESP I*").

that there be some cost basis to support an annual ESP rate increase. This unexplained change from the Commission's prior treatment of automatic increases is unlawful and unreasonable.[109]

Rather than require cost support for any approved annual rate increases, the Commission pointed to the discontinuance of the Environmental Investment Cost Recovery Rider ("EICCR") and the bypassability of the base generation rates, and offered that the rates would ensure rate stability and certainty through the transition period.[110] Taken in pieces or together and assuming that the Commission can rightfully authorize the increases without cost support, these additional attempts to justify the rate increases simply do not make any sense.

The EICCR was approved in the Companies' first ESP proceeding and was a bypassable rider. Although the Stipulation did not seek to continue the rider, the Companies offered no evidence that the discontinuance of the EICCR was in any way tied to the base generation increases. As noted previously, the Companies testified that the rate increases were not cost-based. Thus, there is no basis to conclude that the termination of the EICCR in any way justifies the rate increases authorized by the Commission.

Likewise, the bypassability of the rate increases for those customers not grandfathered into RPM-priced capacity or participating in governmental aggregation programs is practically meaningless. Customers who face arbitrary rate increases as a

---

[109] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, (1975).

[110] Opinion and Order at 42.

result of the Commission decision will have no opportunity to avoid those increases by shopping due to the shopping restrictions imposed by the shopping caps. The substantially higher, arbitrary, discriminatory and non-comparable generation capacity service price that the Commission has authorized the Companies to charge CRES suppliers will prevent those CRES providers from making competitive offers to those retail customers who are facing higher SSO prices approved by the Commission. The overarching structure of the Stipulation ESP as modified and approved by the Commission thus guarantees that rates for default generation supply service will increase annually and customers will be blocked from bypassing increased charges that might otherwise be bypassable by the toll booth that the Commission has permitted the Companies to erect on the shopping highway.

The Commission's confusing and confused analysis thus renders the decision arbitrary, unlawful and unreasonable. It has approved annual rate increases without any cost justification, in violation of its own precedent and without any explanation for varying from that precedent. The off-target explanations offered by the Commission to justify the annual increases in base generation rates have no support in the record or are plainly contradicted by it. In summary, the Commission does not provide a legal and reasoned basis for the annual increases in base generation rates, rehearing should be granted and the Commission should direct that the Stipulation ESP be further modified to remove fully the automatic increases in base generation charges.

E. Placeholder Riders

15. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Held That It Could

Authorize a Placeholder Rider Pursuant to Section 4928.143, Revised Code.

The Commission's authorization of placeholder riders is unlawful and unreasonable as it exceeds the Commission's authority. It is well-established that the Commission is a creature of statute.[111] By approving placeholder riders, i.e., PMR, GRR, and the CHP Rider, as part of the Stipulation ESP, the Commission exceeded its statutory authority. Therefore, the Commission's Order approving the placeholder riders is unlawful and unreasonable.

The items that may be approved as part of an ESP are limited to Sections 4928.143(B)(1) and (2), Revised Code.[112] Section 4928.143(B)(1), Revised Code, authorizes the EDU to include provisions in the ESP relating to the supply and pricing of retail generation service.[113] All other provisions, that is everything other than the retail generation service component, may only be authorized under the nine enumerated provisions of (B)(2).[114] As the Ohio Supreme Court recently explained, "[b]y its terms, R.C. 4928.143(B)(2) allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any' provision. So if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[115] Thus,

---

[111] *Discount Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53 ¶ 51 (2007) (*citing Reading v. Pub. Util. Comm.*, 2006-Ohio-2181 ¶ 13) ("The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.").

[112] Section 4928.143(A), Revised Code, further provides that the Commission is directed to authorize an ESP "as prescribed under division (B) of this Section."

[113] Section 4928.143(B)(1), Revised Code.

[114] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d at 520.

[115] *Id.*

the Commission may only authorize an ESP that contains provisions setting an EDU's retail generation service component[116] and provisions that "fit within one of the" (B)(2) categories.[117]

In its Order approving the Stipulation in this proceeding, the Commission found that it was authorized to create placeholder riders under Section 4928.143, Revised Code.[118] The Commission, however, did not specifically find that placeholder riders "fit within" one of the (B)(2) categories, nor did it find that a placeholder rider could be authorized as a provision that related to the supply and pricing of electric generation service for SSO customers. Because no provision under Section 4928.143(B), Revised Code, authorizes placeholder riders, the Commission must grant rehearing and further modify the Stipulation ESP by removing these unlawful and unreasonable placeholder riders.

16. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Generation Resource Rider Without Statutory Authority to Do So.

The Commission must also reverse its approval of the GRR because the record evidence will not permit the Commission to make the findings required before it can

---

[116] *See* Section 4928.143(A)-(B)(1), Revised Code.

[117] *See In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d at 520.

[118] Order at 39 ("[t]he Commission also notes that in order to consider [future projects] we need to approve the placeholder mechanism pursuant to Section 4928.143, Revised Code.").

lawfully authorize a non-bypassable generation rider under Section 4928.143(B)(2)(b) or (c), Revised Code.[119]

As the Commission's decision demonstrates,[120] there is no record to support the approval of a rider for new generation resources under either of the provisions that may serve as the basis for a non-bypassable generation-related rider. Sections 4928.143(B)(2)(b) and (c), Revised Code. Section 4928.143(B)(2)(b), Revised Code, allows for a "non-bypassable surcharge" to be established to provide for a "reasonable allowance" for CWIP, but the authorization for a charge under this Section is subject to the CWIP "limitations of section 4909.15 of the Revised Code" and may not be authorized "*unless* the commission first determines in the proceeding that there is a need for the facility based on resource planning projections submitted by the [EDU]," and "*unless* the facility's construction was sourced through a competitive bid process.[121] The Companies did not present any evidence "in the proceeding" to support a finding of need for any generating facility based on resource planning projections, did not identify any generating facility sourced through a CBP, and have not identified costs categorized as CWIP subject to the limitations in Section 4909.15, Revised Code. Thus, Section 4928.143(B)(2)(b), Revised Code, cannot serve as a lawful basis to authorize the GRR.

---

[119] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d at 520.

[120] *See* Opinion and Order at 39-40.

[121] Section 4928.143(B)(2)(b), Revised Code (emphasis added).

Additionally, the Companies failed to provide any evidence to support the authorization of the GRR under Section 4928.143(B)(2)(c), Revised Code.[122] Under that Section, the Commission can authorize a non-bypassable charge only if it finds that the generating facility for which a non-bypassable charge is sought was sourced through competitive bids, that there is a need for the facility based on resource planning projections submitted by the EDU, and that the capacity, energy, and the rate associated with the cost of that facility has been dedicated to Ohio consumers. Once again, there is no evidence to support the threshold findings which the Commission must make before it can authorize a rider under Section 4928.143(B)(2)(c), Revised Code.

The lack of findings is not excused because Commission states that the Companies must "meet their burden set forth in Section 4928.143(B)(2), Revised Code" in a future proceeding (to determine cost recovery under the GRR).[123] Because the Commission may only approve ESP provisions under (B)(2) that are specifically enumerated[124] and because the Companies failed to satisfy the prerequisites of (B)(2)(b) and/or (B)(2)(c), the Commission did not have any authority to authorize the GRR.

17. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission Approved a Pool Modification or Termination Rider ("PMR") Not Authorized by

---

[122] Section 4928.143(B)(2)(c), Revised Code.

[123] Opinion and Order at 39.

[124] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d at 520.

Law and Which Exposes Customers to Nearly Unlimited Costs of Pool Termination.

In its Order, the Commission found that the PMR was authorized under Section 4928.143(B), Revised Code.[125] As explained in the Stipulation, the PMR would allow the Companies to recover the "entire impact" of pool termination/modification on the Companies if the total impact during the ESP exceeded $50 million.[126] As explained by FES witness Schnitzer, the total impact will likely be calculated as "lost capacity revenues."[127] As demonstrated in the arguments above, the Commission lacks authority to approve provisions of an ESP not specifically enumerated under Section 4928.143(B)(1) or (2), Revised Code.[128] In approving the PMR, the Commission unlawfully and unreasonably approved a rider that is not otherwise authorized by statute.

Section 4928.143(B)(1), Revised Code, only includes the authority to set an EDU's base generation rates in an ESP. The PMR, and the costs proposed to be recovered through it, do not relate to the Companies' retail electric generation rates, and, thus, cannot be authorized under Section 4928.143(B)(1), Revised Code. Additionally, the Commission did not identify any one of the nine provisions under (B)(2) that might authorize the approval of the PMR, and none in fact would authorize

---

[125] Opinion and Order at 50.

[126] Stipulation at 25.

[127] FES Ex. 3 at 19

[128] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d at 520.

recovery.[129] Thus, the Commission must grant rehearing and further modify the Stipulation ESP by removing the PMR, which is not authorized under Section 4928.143(B), Revised Code.

Further, the regulation of the Interconnection Agreement is a matter exclusively within the jurisdiction of the FERC. Even if the Companies were able to demonstrate some cost they incurred because the pool is terminated or modified, the Commission does not have legal authority to authorize recovery of pool termination costs within an ESP or otherwise.

Even if the Commission believes it has the statutory authority to authorize the rider (which it does not), the Commission's Order also is unreasonable in that it does not place a cap on the potential costs that could be included in the rider. While the Commission disallowed the first $50 million the Companies may incur due to termination or modification of the pool agreement, customers are exposed to all costs exceeding $50 million.[130] Therefore, the Commission erred in failing to constrain the risk the customers will face and reflect that risk in the evaluation of the Stipulation ESP.

F. Market Transition Rider

18. The Commission's Opinion and Order Is Unlawful and Unreasonable In That It Approved a Market Transition Rider ("MTR") Without Statutory Authority to Do So.

---

[129] *See* Opinion and Order at 50 (holding that the PMR was authorized under Section 4928.143(B), Revised Code, but failing to identify which provision specifically would authorize the rider).

[130] *Id.*

The Commission over objection authorized the MTR. The MTR, a non-bypassable rider, resets the rates resulting from the proposed redesign discussed previously by limiting the increases and the decreases, but is "charged" to both SSO and shopping customers because it is non-bypassable.[131] While it appears that the Commission approved the MTR pursuant to Section 4928.143(B)(2)(d), Revised Code, stating, the "MTR is consistent with state policy by providing certainty and stability to AEP-Ohio customers while AEP-Ohio transitions its rate structure"[132] and "rate stability is an essential tool in order to promote economic development," the Commission's decision did not point to anything in the record that supports these conclusions.

Moreover, the MTR would not satisfy the requirements of Section 4928.143(B)(2)(d), Revised Code. That section provides, in relevant part, that an ESP may include provisions including "terms, conditions, or charges relating to ... . default service ... as would have the effect of stabilizing or providing certainty regarding retail electric service." "Stabilizing" plainly denotes that retail electric service is made steady or constant. "Certainty" denotes that the retail electric service is made probable of occurrence. "Retail electric service" is statutorily defined to mean "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption."[133] The burden of demonstrating that the charge makes more certain the provision of retail electric service

---

[131] Cos. Ex. 2 at 11-12.

[132] Opinion and Order at 37-38.

[133] Section 4928.01(A)(27), Revised Code.

rests with the Companies.[134] No evidence was cited to or presented to support the finding necessary for the MTR to be authorized under Section 4928.143(B)(2)(d), Revised Code.

The MTR also violates state policy contained in Section 4928.02, Revised Code, in at least three ways. First, the MTR distorts purchasing decisions of customers, lowering rates for customers more likely to shop and raising rates for customers less likely to shop.[135] Sections 4928.02(A) and (B), Revised Code, provide that the state policy is to ensure reasonably priced electricity and the availability of unbundled and comparable retail electric service. Neither policy is advanced by rates that distort price signals. Second, Section 4928.02(C), Revised Code, further provides that it is the state policy to ensure diversity of electric supplies by giving consumers effective choices. Yet the effect of the MTR is to limit shopping for customers more likely to shop in direct violation of the goal of giving customers choices. Third, because the MTR is collected through a non-bypassable charge, it is effectively a generation charge that is being collected as a distribution charge or transmission charge. Section 4928.02(H), Revised Code, requires the Commission to avoid subsidies flowing from a noncompetitive electric service to a competitive electric service.[136] At minimum, the Commission should direct the Companies to collect the MTR through a bypassable charge to prevent the MTR from operating as a subsidy.

---

[134] Section 4928.143(C), Revised Code.

[135] FES Ex. 2 at 43.

[136] *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St. 3d 340 (2007). Although this decision predates the adoption of SB 221, the policy goal of preventing subsidies to generation service of SB 3 reflected in the decision was retained in SB 221.

Thus, the MTR is part of the plan to frustrate customer choice embedded in the Stipulation and unfortunately approved by the Commission. Because there is no legal authority to authorize the MTR and because it also violates state policy, the Commission's Opinion and Order is unlawful and unreasonable.

19. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Market Transition Rider that Increases the Revenue Generated by the ESP Rates by $24 Million Without Findings of Fact or Supporting Opinion in Violation of Section 4903.09, Revised Code.

The MTR is also unlawful and unreasonable inasmuch as it provides AEP-Ohio up to $24 million of additional revenue without making findings of fact or demonstrating the reasoning the Commission followed in making its decision. Section 4903.09, Revised Code, requires the Commission to identify the facts in the record upon which its order is based. The Commission, however, failed to discuss the additional revenue or identify any evidence to support the $24 million that may be generated by the MTR.

20. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Market Transition Rider That Increases the Revenue Generated by the ESP Rates by $24 Million Without a Cost Justification or Explanation for the Commission's Failure to Follow Its Own Precedent.

In authorizing $24 million of additional revenue, the Commission also violated Commission precedent, which requires cost-justification for generation rate increases. In *ESP I*, as noted previously, the Commission rejected the Companies' proposed automatic rate increases because they lacked cost justification.[137] That justification is not present in the Commission's Opinion and Order approving the $24 million collected in 2012 through the MTR. The failure to explain this departure from Commission precedent is unlawful[138] and should be addressed in a rehearing.

G. Phase-In Recovery Rider

21. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Phase-In Recovery Rider ("PIRR") That Violates Regulatory Principles and Statutory Requirements Requiring the Alignment of Costs and Benefits.

Under Section 4928.144, Revised Code, the Commission may authorize a "just and reasonable phase-in of any electric distribution rate or price." In *ESP I*, OP and CSP were authorized to defer collection of the rate increases and recover those deferrals through a phase-in mechanism.[139] This proceeding is the Commission's first opportunity to review the rate that will be implemented to collect the surcharge pursuant to Section 4928.144, Revised Code. Over the objections of IEU-Ohio, the Commission authorized the PIRR as proposed in the Stipulation. Because the Opinion and Order approves a PIRR that misaligns costs and benefits, violates Section 4928.20(I), Revised Code, is based on an excessive carrying charge, and is calculated without the removal accumulated deferred income taxes ("ADIT"), the Opinion and Order is unlawful and unreasonable.

---

[137] *ESP I*, Opinion and Order at 30 (March 23, 2009).

[138] *In re Application of Columbus S. Power Company*, 128 Ohio St. 3d 512, 523 (2011).

[139] *ESP I* at 22-24.

Since CSP customers paid their rate increases in their entirety, there are no CSP deferrals to recover.[140] OP has accumulated approximately $624 million in deferrals.[141] In its Opinion and Order, the Commission authorized the collection of the OP deferrals from both CSP and OP customers based on the merger of CSP and OP, stating "[i]t is not uncommon or unreasonable for the new entity to levelize the liabilities and benefits of the merger across all former CSP and OP customers."[142] The Commission's decision fails to make a finding that spreading the costs across OP's and CSP's customers yields a just and reasonable result. Nor can the Commission make such a finding based on the evidence because the PIRR misaligns costs and benefits.

In determining reasonableness, it is a fundamental regulatory principle that the costs and benefits are aligned in setting rates.[143] The PIRR as proposed does not comply with that principle. As Mr. Bowser testified, "the recommended PIRR produces a mismatch between the customers that received benefits and the customers who end up being responsible for paying for the benefits."[144] The Commission, however, fails to correct that misalignment.[145] .

---

[140] IEU-Ohio Ex. 8 at 12-13.

[141] *Id.*

[142] Opinion and Order at 57.

[143] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc., and Related Matters*, Case No. 00-220-GA-GCR, Opinion and Order at 12 (Sept. 25, 2001).

[144] IEU-Ohio Ex. 8 at 13; *see also* IEU-Ohio Ex. 9A at 21-22.

[145] Opinion and Order at 57. The Commission's Opinion and Order suggests but does not cite to *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, PUCO Case No. 05-765-EL-UNC, Opinion and Order (November 9, 2005). That decision, however, predates the adoption of SB 221 and the result is inconsistent with the statutory

The Commission's error is compounded because the Commission does not make the findings required to assign phase-in surcharges to aggregation customers. Section 4928.20(I), Revised Code, provides:

> *Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits,* as determined by the commission, that electric load centers within the jurisdiction of the governmental aggregation as a group receive.

(Emphasis added.) Despite this provision, the Commission did not make the necessary finding.

The Commission further stated that a review was unnecessary because the phase-in was approved in the *ESP I* case.[146] The Commission, however, did not attempt to set the surcharge in the prior proceeding.[147] The Commission's suggestion that it did not need to make the finding that the surcharge was proportionate to the benefits received by governmental aggregation customers does not excuse it from doing so when it sets the surcharge in this proceeding.

Because the PIRR illegally and unreasonably recovers deferrals from CSP customers and the Commission has failed to determine that customers that are part of governmental aggregation have received benefits in proportion to the surcharge imposed by the PIRR, the Commission's Opinion and Order is unlawful and unreasonable.

---

requirements of Section 4928.20(I), Revised Code. Thus, it is not dispositive of the treatment of the PIRR.

[146] Opinion and Order at 57-58.

[147] *ESP I*, Opinion and Order at 22 (collection of surcharge delayed until after 2011).

22. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved a Phase-In Recovery Rider that is Not Just and Reasonable when the Commission Failed to Remove the Accumulated Deferred Income Taxes (ADIT) from the Calculation of the Deferred Amounts and Imposed a Debt-Based Carrying Charge Rate that Exceeds a Reasonable Amount.

The PIRR is also unjust and unreasonable because the 5.34% carrying charge to be collected on the unamortized balance is excessive. The Commission does not dispute that newly issued seven-year BBB rated corporate bonds are being issued at an interest rate of 3.75%.[148] Rather the Commission stated a higher rate was authorized in *ESP I* and that "we will not revise based on IEU's claims that there exists a basis for arguing for a better deal."[149]

That a higher rate was authorized during the deferral period is irrelevant to the findings that must be made to establish a reasonable rate in this proceeding. Mr. Allen admitted that the proposed carrying charge is designed to compensate the Companies during the amortization period from 2012-2018.[150] Moreover, a carrying charge is not reasonable just because parties agreed to it. A settlement is not a substitute for record evidence, and "[w]hile the commission 'may place substantial weight on the terms of a stipulation,' it 'must determine, *from the evidence*, what is just and reasonable.'"[151] As the only evidence regarding the current cost of debt demonstrated, that it was in the

---

[148] IEU-Ohio Ex. 8 at 15.

[149] Opinion and Order at 58.

[150] Tr. Vol. XII at 2051-52.

[151] *In re Application of Columbus Southern Power for Approval of its Portfolio Plan*, 129 Ohio St.3d 46, 49 (2011).

range of 3.75%, it was unreasonable for the Commission to authorize the higher rate proposed in the Stipulation.

The Commission's approval of the PIRR without adjusting for ADIT is also unlawful and unreasonable. As established by the testimony of IEU-Ohio witness Bowser[152] and supported by IEU-Ohio Exhibit 4,[153] regulatory principles require adjusting the deferral balance to remove ADIT. Because ADIT operates as an interest-free loan, the Companies need not finance the entire cost of the deferrals equal to the amount of ADIT.[154] Thus, the accepted regulatory principle is to remove the ADIT when calculating the deferral amount.

The Commission, however, failed to modify the deferrals for ADIT, stating that Section 4928.144, Revised Code, precludes the adjustment. As the Commission explained, that section provides that the Commission may order the Companies to establish a deferral in accordance with generally accepted accounting principles ("GAAP").[155] There was no evidence suggesting that leaving ADIT in the deferral amounts conformed with GAAP. Moreover, there was substantial and unrefuted evidence that calculating the deferrals without removing ADIT violates regulatory principles.

---

[152] IEU-Ohio Ex. 8 at 14.

[153] IEU-Ohio Ex. 4 (Testimony of Stephen Baron before the Public Service Commission of West Virginia in Case No. 09-0177-E-GI).

[154] IEU-Ohio Ex. 8 at 14; IEU-Ohio Ex. 4.

[155] Opinion and Order at 58.

23. The Attorney Examiner Inappropriately Granted the Companies' Motion to Strike Portions of the Direct Testimony of IEU-Ohio Witness Bowser.

The Attorney Examiner improperly granted the Companies' oral motion to strike IEU-Ohio witness Bowser's testimony, IEU-Ohio Exhibit 8, from page 21, line 5, through page 26, line 18, on the ground that the testimony related to issues decided in the remand of the Companies' *ESP I* case.[156] As noted previously, this proceeding was used by the Companies to establish the PIRR. The testimony that was stricken was relevant as to the issue of the total amount authorized to be collected through the PIRR. Specifically, the testimony addressed the effect of the Supreme Court's April 2011 decision reversing and remanding the *ESP I* decision to the Commission on the outstanding OP deferral amounts. Because this testimony was relevant to the Commission's authorization and implementation of the Companies' PIRR in this proceeding,[157] the Attorney Examiner's ruling striking the testimony materially and detrimentally affected the presentation of IEU-Ohio's case and should be reversed through rehearing.

H. Corporate Separation

24. The Commission's Opinion and Order Is Unlawful and Unreasonable Because the Commission Approved the Transfer of Generation Assets Without Requiring Compliance With the Relevant Statute and Commission Rules.

---

[156] Tr. Vol. VIII at 1493

[157] IEU-Ohio Ex. 8, Revised Direct Testimony of Joseph G. Bowser (October 13, 2011). This testimony that the Attorney Examiner struck was proffered. Tr. Vol. VIII at 1493.

In the Stipulation, the Companies requested approval of full corporate separation.[158] The Commission modified this portion of the Stipulation, stating that it needed additional time to determine and understand the terms and conditions of the generation transfer and the amendment to the corporate separation plan.[159] Despite these concerns, the Commission determined that "subject to our approval of the corporate separation plan, the Companies should divest its [*sic*] competitive generation assets ... ."[160] The Commission is correct that the amendment to the corporate separation plan and the transfer of generation assets are interconnected, but each has separate requirements that must be satisfied.[161] The Commission's decision, therefore, is unlawful and unreasonable inasmuch as corporate separation compliance does not automatically reflect compliance with the requirements to transfer generation assets. On rehearing, the Commission must modify the Opinion and Order to require the Companies to obtain independent approval of the corporate separation plan and generation asset transfer.

I. Customer Benefits and the Public Interest Findings

25. The Commission's Opinion and Order is Unlawful and Unreasonable Because the Commission's Finding that the Stipulation, as Modified and Taken as a Package, Benefits Ratepayers and the Public Interest, Is Not Supported by the Manifest Weight of the Evidence.

---

[158] Stipulation at 11.

[159] Opinion and Order at 60-61.

[160] Opinion and Order at 61.

[161] Section 4928.17, Revised Code; Chapter 4901:1-37, OAC.

To approve the Stipulation, the Commission must find that the Stipulation, taken as a package, benefits ratepayers and the public interest.[162] After making some modifications, the Commission concluded the Stipulation satisfied the public interest standard.[163] In support of its conclusion, the Commission identified the transition to a CBP, stable SSO rates, the removal of shopping barriers, assistance to Ohio's industrial customers through the rate design modifications, the GRR, the Commission's modifications to limits on access to RPM capacity, the lowering of the base generation rate increase, and the increase in a shopping credit for commercial customers as benefits of the Stipulation.[164] Notably absent from the Commission's discussion is any review of the costs imposed by the Stipulation, even after the Commission's modifications. When viewed in a balanced manner, the Stipulation results in substantial costs to customers and restriction and elimination of choices they now have.

Initially, the Commission found that there were benefits from a quicker transition to a CBP for the SSO and removal of shopping barriers. As demonstrated above, customers stand to over $300 million more under the Stipulation ESP than they would under an MRO. Thus, customers will not see any benefit to moving to a CBP as a result of the ESP adopted by the Commission. Additionally, whatever value might exist in the transition to a CBP is limited by the multiple conditions contained in the Stipulation that the Commission does not address. That value is further limited by the fact, which the

[162] *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 69 Ohio St. 3d 547 (1994); Opinion and Order at 27.

[163] Opinion and Order at 61-65.

[164] *Id.* at 63-65.

Commission notes,[165] that the Companies made no commitment to continue a CBP beyond the last twelve months of the Stipulation ESP. Similarly, the Commission notes that the Stipulation removes shopping barriers, but fails to address the offsetting concern that shopping beyond the shopping caps (with some modification for governmental aggregation) will be very unlikely.[166] Thus, removing shopping barriers will be valueless (to the extent that some value can be assigned) for most customers.

The Commission also points to rate stability, Rates, however, are not stable; on average they increase each year of the ESP. They also are subject to further increases as a result of the various placeholder riders the Commission unlawfully approved.

The modifications to customers' access to RPM-priced capacity, likewise, do not offset the harm caused by the two-tiered generation capacity service pricing scheme and the substantial negative effects of the ESP itself. As noted previously, SSO customers will be locked into higher rates with little opportunity to shop during a period when alternatives to the SSO are less expensive. Just when choice opens to customers in 2015, the expected price of competitive alternatives is expected to go up and the price of the SSO will be set by a CBP. The modifications the Commission made to the generation capacity service pricing scheme do little or nothing to change that result.

In summary, the Commission's finding that the Stipulation benefits ratepayers and the public interest is based on a one-sided view of the Stipulation. Customers will

---

[165] *Id.* at 64.

[166] See discussion above regarding the effect of the capacity shopping caps on customer choice.

be responsible for the higher arbitrary rate increases. Customers are locked out of choice by the generation capacity service pricing scheme. Customers may shoulder the burden of the GRR, the PMR, and the customer sited generation. When the costs are included in the review, the benefits are more than offset.

J. The Motions to Dismiss

26. The Commission Unlawfully and Unreasonably Denied the Motions to Dismiss by IEU-Ohio.

On May 10, 2011, IEU-Ohio filed a written Motion to Dismiss and Memorandum in Support in Case Nos. 11-346-EL-SSO, *et al.* At the close of the Companies' direct case, IEU-Ohio moved to dismiss the Application and the Stipulation.[167] IEU-Ohio then supplemented its oral motion with detailed support in its Initial Brief.[168] OCC, Appalachian Peace and Justice Network ("APJN") and FES joined IEU-Ohio's motion to dismiss.[169] The motions collectively raised three issues. First, the Companies failed to file an Application or Stipulation that properly invoked the Commission's jurisdiction because the Application was for an ESP for an entity, AEP-Ohio, that was not an EDU. Second, the Applications and the materials filed in support of the Application failed to satisfy the filing and evidentiary requirements governing an application to authorize an ESP. Third, the Companies at the close of their direct case had not remedied the second problem and had failed to provide evidence that the ESP, as proposed in the

---

[167] Tr. Vol. VI at 956.

[168] Initial Brief of Industrial Energy Users-Ohio at 8 (Nov. 10, 2011).

[169] Tr. Vol. VI at 958.

Stipulation, satisfied the ESP versus MRO test. The Attorney Examiners took the oral motion to dismiss under advisement.[170]

In its Opinion and Order, the Commission denied the oral motion to dismiss and apparently the May 2011 Motion as well.[171] In denying the motions, the Commission concluded that it understood that AEP-Ohio was intended to be a designation for the two Companies and that it was sufficient that the Application and Stipulation "affect CSP and OP."[172] The Commission also noted that the Stipulation related to terms that the Commission could not have authorized in an ESP and that sufficient evidence had been presented to demonstrate that the "matter" was within the Commission's jurisdiction.[173]

In finding that it had jurisdiction to proceed, the Commission was in error. Neither the Application filed on January 27, 2011 in Case Nos. 11-346-EL-SSO, *et al.*, nor the Stipulation proposes to establish an ESP for an EDU. Both propose an ESP for an entity named AEP-Ohio. AEP-Ohio is not a legal entity and is not an EDU.[174] Rather, CSP and OP are each an EDU in their own right as defined by Ohio law.[175]

---

[170] Tr. Vol. VI at 961.

[171] Opinion and Order at 7-8. The Commission never ruled on the May 2011 Motion to Dismiss. However, IEU-Ohio incorporated the arguments it made in the May 2011 Motion when it provided a written version of the May 2011 Motion in its Initial Brief. Initial Brief of Industrial Energy Users-Ohio at 8 n.15 (Nov. 10, 2011). On that basis, IEU-Ohio believes that the Commission intended to deny the May 2011 Motion as well by its Opinion and Order. The Commission, nonetheless, should clarify this matter.

[172] Opinion and Order at 8

[173] *Id.*

[174] Tr. Vol. V at 783-84 (Cross-examination of Joseph Hamrock). In fact, American Electric Power Company, Inc. has claimed that it is not a public utility and, as a result, the Commission lacks jurisdiction over it: "AEP posits that it is not a public utility as that term is defined in Section 4905.02, Revised Code, and therefore, the Commission lacks jurisdiction over AEP." *In the Matter of the Complaint of Brian Tomlin v. Columbus S. Power Company*, Case No. 02-46-EL-CSS, Opinion and Order (Dec. 12, 2002).

As discussed in IEU-Ohio's May 2011 Motion and Initial Brief, the statutory structure for approval of an ESP requires an application by an EDU that sets the terms of service for the EDU. As was apparent in the Application, the Stipulation, and the Companies' evidence, the entity for which the Companies were seeking an ESP was AEP-Ohio. Thus, the Commission did not have before it an Application, a Stipulation or evidence by which it could or did authorize an ESP for an EDU as required by Sections 4928.141 and 4928.143, Revised Code.

The Commission's statement that it commonly uses the AEP-Ohio notation to mean the two EDUs does not address the statutory problem. Whether one understands that AEP-Ohio means OP and CSP does not correct the fact that the Application, Stipulation, and evidence was presented not for the individual EDUs, as required by the applicable law, but for the combined entity. Thus, the "notation" does not "fix" the problem the Companies created by their application for AEP-Ohio.

Moreover, the Commission in its discussion of the motion to dismiss does not address the failure of the Companies to file or introduce the information the Commission requires as part of its review of an ESP. The Commission's rules detail the information that must be filed as part of the application for an ESP, and Section 4928.143(C)(1), Revised Code, places the burden of proof on the Companies to demonstrate their Application and, in this case, the Stipulation ESP satisfy the statutory and administrative

---

[175] Tr. Vol. V at 783 (Cross-examination of Joseph Hamrock); *see also* Section 4928.01(A)(6), Revised Code.

requirements. Several examples demonstrate the manner in which the Companies failed to satisfy the filing requirements or to meet their burden of proof.

The Stipulation[176] envisions the use of "securitization" for purposes of addressing a phase-in deferral. Rule 4901:1-35-03(C)(9)(e), OAC, states (emphasis added):

> Division (B)(2)(f) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for the securitization of authorized phase-in recovery of the standard service offer price. If a phase-in deferred asset is proposed to be securitized, the electric utility *shall* provide, at the time of an application for securitization, a description of the securitization instrument and an accounting of that securitization, including the deferred cash flow due to the phase-in, carrying charges, and the incremental cost of the securitization. The electric utility will also describe any efforts to minimize the incremental cost of the securitization. The electric utility *shall* provide all documentation associated with securitization, including but not limited to, a summary sheet of terms and conditions. The electric utility shall also provide a comparison of costs associated with securitization with the costs associated with other forms of financing to demonstrate that securitization is the least cost strategy.

None of the information required by Rule 4901:1-35-03(C)(9)(e), OAC, was filed with the Commission or made a part of the evidentiary record.

The Stipulation (Section IV.2.b) contains provisions that have the effect of preventing, limiting, or inhibiting customer shopping for retail electric generation service. The Companies have publicly admitted that the provisions in the Stipulation that impose a $255 per MW-Day capacity charge on CRES suppliers are designed to limit shopping for retail electric generation service.[177] Other witnesses testifying in support of the

---

[176] Stipulation at 25-26.

[177] FES Ex. 1, TCB-8, TCB-9; IEU-Ohio Ex. 13; Tr. Vol. X at 1693-94 (Cross-examination of Robert Fortney); Tr. Vol. III at 395 (Cross-examination of William Allen); Tr. Vol. IV at 542-43 (Cross-examination of Teresa Ringenbach); Tr. Vol. VI at 970-71 (Cross-examination of David Fein).

Stipulation confirmed that the Stipulation is designed to limit and will inhibit customer shopping for retail electric generation service.[178] The testimony of parties not supporting the Stipulation also confirms that the Stipulation is designed to limit customer shopping for retail electric generation service.[179] The limitations on shopping triggered additional filing requirements. Rule 4901:1-35-03(C)(9)(c)(i), OAC, states (emphasis added):

> Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, *shall* include, *at a minimum*, the following information:
>
> (i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification shall be provided.

The information required by Rule 4901:1-35-03(C)(9)(c)(i), OAC, however, was not submitted.

The Stipulation also affects governmental aggregation programs (so much so that the Commission ordered modifications of the section addressing capacity shopping

---

[178] Tr. Vol. X at 1693-94 (Cross-examination of Robert Fortney); Tr. Vol. III at 395 (Cross-examination of William Allen); Tr. Vol. IV at 542-43 (Cross-examination of Teresa Ringenbach); Tr. Vol. VI at 970-71 (Cross-examination of David Fein); IEU-Ohio Ex. 9A at 9-21, 24; FES Ex. 1 at 4-6, 17-37; FES Ex. 14 at 4, 16-23, 31-32; FES Ex. 3 at 4-5, 35-37, & 40-41.

[179] IEU-Ohio Ex. 9A at 9-21, 24; FES Ex. 1 at 4-6, 17-37; FES Ex. 14 at 4, 16-23, 31-32; FES Ex. 3 at 4-5, 35-37, 40-41.

caps). The effect of the Stipulation on aggregation triggered additional filing requirements. Rules 4901:1-35-03(C)(6) and (7), OAC, state that an SSO application containing an ESP must include: "[a] description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I),[180] (J),[181] and (K)[182] of section 4928.20 of the Revised Code," and, "[a] description of the effect on large-scale governmental aggregation of any unavoidable generation charge proposed to be established in the ESP." Section 4928.20(K), Revised Code, requires the Commission to adopt rules to encourage and promote large-scale governmental aggregation and, in the context of a proposed ESP, the Commission must consider the effect of any provisions that would, if approved, impose non-bypassable generation charges, "*however collected*" on such large-scale aggregation programs. Common sense and the evidence supplied by parties opposing the Stipulation demonstrate that the Stipulation works against large-scale aggregation programs,[183] but the information required by Rules 4901:1-35-03(C)(6) and (7), OAC, was not submitted.

---

[180] Section 4928.20(I), Revised Code, limits the amount of any non-bypassable charge associated with a Section 4928.144, Revised Code, phase-in that may be applied to customers that are part of a governmental aggregation program. The non-bypassable phase-in charge must not exceed an amount that is proportional to the benefits received by such customers. The PIRR proposed in the Stipulation would, if approved, make CSP customers responsible for an OP phase-in deferral. Stipulation at 26. The PIRR is illegal on its face.

[181] Section 4928.20(J), Revised Code, allows a governmental aggregation program to elect, on behalf of the program's customers, to not receive and pay for standby service within the meaning of Section 4928.143(B)(2)(d), Revised Code. Upon such election, any program customer returning to the SSO shall pay the "market price" of power incurred by the EDU plus an allowance for the EDU's cost of compliance with the portfolio requirements in Section 4928.64, Revised Code.

[182] Section 4928.20(K), Revised Code, requires the Commission to adopt rules to encourage and promote large-scale governmental aggregation and to consider, in the context of a proposed ESP, the effect of any non-bypassable generation charges on such aggregation.

[183] IEU-Ohio Ex. 8 at 12-13; IEU-Ohio Ex. 9A at 21-22; FES Ex. 1 at 9,12-13, 18-20, 25-26, 31-35, 46, 56.

The Stipulation (Section IV.1.n) calls for the establishment of a DIR, effective January 1, 2012, based on post-2000 investment and including components for certain taxes, depreciation, and an unsupported and high rate of return on plant. Rule 4901:1-35-03(C)(9)(g), OAC, provides detailed filing requirements, but the information required by Rule 4901:1-35-03(C)(9)(g), OAC, was not provided.

In addition to the failure to satisfy filing requirements, the Companies also failed to demonstrate how the Application and Stipulation avoided prohibitions contained in Ohio law. Section 4928.40(D), Revised Code, states that "no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service." Despite the prohibitions contained in Section 4928.40(D), Revised Code, and the burden of proof obligation contained in Section 4928.143(C), Revised Code, the Companies did not offer any evidence to demonstrate that the bifurcated capacity charge structure recommended by the Stipulation can be lawfully approved by the Commission.

Finally, the Companies failed to carry the burden of going forward with evidence that would support a finding that the ESP satisfied the statutory test that the ESP was more favorable in the aggregate than an MRO. Section 4928.143(C)(1), Revised Code, imposes on the Companies the burden of proof. As part of that burden, an EDU must demonstrate that the proposed ESP "including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." Again, the Companies did not provide evidence showing that the ESP proposed in the Stipulation is more favorable in the aggregate than the expected results that would otherwise apply under Section 4928.142, Revised Code.

The failure of proof extended to other areas of the Companies' case in support of the Stipulation. Mr. Hamrock acknowledged that many of the provisions in the Stipulation look to provisions in the ESP Application to identify the procedural and substantive significance of the provisions in the Stipulation ESP.[184] For example, the rate design and revenue distribution are not specified in the Stipulation.[185] There was no demonstration for the continuation of the gridSmart or PEV Riders,[186] and the Stipulation proposes to continue the Enhanced Service Reliability Rider as proposed without any support.[187] Thus, many parts of the Stipulation were reliant on the Application and the supporting testimony that was part of the Application, but the neither was offered into evidence.

A company's failure to comply with the statutory requirements and administrative rules is ground for dismissing an EDU's proposed ESP. As the Commission recently determined in the *Duke MRO* case:

> As we stated throughout this order, the Commission finds that Duke's application does not comply with the statute and, therefore, this case can not proceed as filed. *It is required that Duke provide the information*

---

[184] Tr. Vol. V at 821-25 (Cross-examination of Joseph Hamrock).

[185] Stipulation at 4.

[186] *Id.* at 7.

[187] *Id.* at 11.

dictated by the statute and delineated in the Commission's rules, in order for the Commission to determine if the application satisfies the statutory requirements. Duke readily concedes that it did not provide certain information because it was outside of its two-year proposal. *Accordingly, the Commission can not find that Duke satisfied the requirements set forth in Rules 4901:1-35-03 and 4901:1-35-11, O.A.C.*[188]

Based on the *Duke MRO* decision and the facts laid out in the motions, the Commission should have granted the motion to dismiss.

Instead of granting IEU-Ohio's motion, the Commission found that "sufficient and adequate evidence has been provided in the record by the Companies and the Signatory Parties .[that] indicates that this matter is within the Commission's jurisdiction and should be further considered by the Commission."[189] However, the Commission does not explain what evidence it is relying upon to draw that conclusion. As discussed above, it could not point to anything in the record for those parts of the Stipulation that relied upon the application for an ESP. Moreover, to the extent that it is relying on evidence of Signatory Parties, it has effectively reassigned the burden of proof regarding the ESP in a manner that does not conform to the statutory requirement that the EDU has the burden of proof.

Thus, the Commission should have dismissed the Companies' Application because the Companies did not properly invoke the Commission's jurisdiction by failing to seek an ESP for an EDU, failing to satisfy the Commission's filing requirements, and failing to provide a case that satisfied the Companies' burden of proof. The

---

[188] *Duke MRO*, Opinion and Order at 49 (emphasis added).

[189] Opinion and Order at 8.

Commission's decision to deny the motions to dismiss, therefore, was unlawful and unreasonable.

27. The Commission Should Grant Rehearing and Order that Rates Be Collected Subject to Reconciliation.

According to the Commission's Opinion and Order, the new tariffs were approved on a bills rendered basis and were effective January 1, 2012,[190] subject to final review by the Commission.[191] Given the material legal problems that are presented in this Application for Rehearing, IEU-Ohio requests that the Commission order as part of the Entry on Rehearing that rates be collected subject to reconciliation.[192]

The Commission can and recently has ordered the collection of rates and charges subject to refund when the legality of the rates was in issue.[193] Under the circumstances presented in these cases, it similarly would be proper to direct that the

---

[190] The Opinion and Order at page 67 indicates that the new tariffs are to be effective on bills rendered rather than service rendered basis. If the new rates and charges were to be effective on a service rendered basis, the new rates and charges would apply to all service rendered on or after January 1, 2012. By making the new rates and charges effective on a bills rendered basis, the new rates and charges will apply to electricity consumed prior to January 1, 2012, thereby producing a retroactive consequence. The practical consequence of this retroactive aspect of the Opinion and Order escalates the importance of the relief requested in this Motion. The new rates and charges that the Companies are now positioned to bill and collect effective January 1, 2012 will be imposed on consumers with no advanced notice and imposed on consumption occurring prior to the date the Opinion and Order was issued.

[191] *Id.* at 65.

[192] On December 20, 2011, IEU-Ohio filed a motion seeking to have the tariffs collected subject to reconciliation until such time as the Commission formally approves the Companies' compliance filing. The Commission indicated by entry on December 22, 2011 that it would rule on that motion by separate entry. IEU-Ohio incorporates the December 20, 2011 motion herein by reference.

[193] As a result of the remand of its Opinion and Order in the Companies' first ESP application, the Commission directed that then-current rates be collected subject to refund until such time as the Commission completed its review of the remanded issues. *Id.*, *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO *et al.*, Entry at 3-4 (May 25, 2011).

rates be collected subject to reconciliation until such time as the Commission completes its review and determines whether the tariffs that the Commission has made effective January 1, 2012 comply with the legal requirements to approve the Stipulation ESP and the other material terms of the Stipulation.[194] Without such an order, customers subject to the tariffs will be required to pay rates that should be found to be unlawfully and unreasonably authorized without recourse to refund.[195] Such a result would be unreasonable.

III. CONCLUSION

Fundamental decisions that will affect customer choice for years to come rest on the outcome of this Opinion and Order. At stake is the ability of customers to exercise the rights they were provided in SB 3 and SB 221. The current decision fails to protect those rights. For the reasons discussed above, the Commission should grant rehearing.

Respectfully submitted,

Samuel C. Randazzo
Frank P. Darr
Joseph Oliker
McNees Wallace & Nurick LLC

194

195 *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d 512 (2011). While a stay of execution is statutorily available, see Section 4903.16, Revised Code, it is not practically available to customers due to the bonding requirements.

21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 13th day of October 2011, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

Frank P. Darr

Matthew J. Satterwhite
Steven T. Nourse
Anne M. Vogel
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street
Columbus, OH 43215
dconway@porterwright.com

ON BEHALF OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

Dorothy K. Corbett
Amy Spiller
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Dorothy.Corbett@duke-energy.com
Amy.spiller@duke-energy.com

Philip B. Sineneng
Terrance A. Mebane
THOMPSON HINE LLP
41 S. High St., Suite 1700
Columbus, OH 43215
Philip.Sineneng@ThompsonHine.com
Terrance.Mebane@ThompsonHine.com

ON BEHALF OF DUKE ENERGY RETAIL SALES, LLC

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

ON BEHALF OF THE OHIO ENERGY GROUP

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

ON BEHALF OF ENERNOC, INC.

Bruce J. Weston
Terry L. Etter
Maureen R. Grady
Jeffrey L. Small
Office of the Ohio Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215-3485
etter@occ.state.oh.us
grady@occ.state.oh.us
small@occ.state.oh.us

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

OH BEHALF OF OHIO HOSPITAL ASSOCIATION

John W. Bentine
Mark S. Yurick
Zachary D. Kravitz
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, OH 43215
jbentine@cwslaw.com
myurick@cwslaw.com
zkravitz@cwslaw.com

ON BEHALF OF THE KROGER CO.

Terrence O'Donnell
Christopher Montgomery
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com

ON BEHALF OF PAULDING WIND FARM II LLC

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F Lang
Laura C. McBride
N. Trevor Alexander
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
aehaedt@jonesday.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org

ON BEHALF OF THE APPALACHIAN PEACE AND JUSTICE NETWORK

Lisa G. McAlister
Matthew W. Warnock
Thomas O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
lmcalister@bricker.com
mwarnock@bricker.com
tobrien@bricker.com

ON BEHALF OF OMA ENERGY GROUP

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
jejadwin@aep.com

ON BEHALF OF AEP RETAIL ENERGY PARTNERS LLC

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
smhoward@vorys.com

ON BEHALF OF PJM POWER PROVIDERS GROUP AND THE RETAIL ENERGY SUPPLY ASSOCIATION

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, PA 19406
gthomas@gtpowergroup.com

Laura Chappelle
4218 Jacob Meadows
Okemos, MI 48864
laurac@chappelleconsulting.net

ON BEHALF OF PJM POWER PROVIDERS GROUP

M. Howard Petricoff
Michael Settineri
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com

Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

ON BEHALF OF THE COMPETE COALITION

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Shannon Fisk
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
sfisk@nrdc.org

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
callwein@williamsandmoser.com

ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL AND THE SIERRA CLUB

M. Howard Petricoff
Michael J. Settineri
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
smhoward@vorys.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC. , DIRECT ENERGY SERVICES, LLC

David I. Fein
Vice President, Energy Policy – Midwest
Constellation Energy Group, Inc.
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
david.fein@constellation.com
cynthia.brady@constellation.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC.

Pamela A. Fox
C. Todd Jones,
Christopher L. Miller,
Gregory H. Dunn
Asim Z. Haque
Schottenstein Zox and Dunn Co., LPA
250 West Street
Columbus, OH 43215
pfox@hillardohio.gov
cmiller@szd.com
gdunn@szd.com
ahaque@szd.com

ON BEHALF OF THE CITY OF HILLIARD, OHIO, THE CITY OF GROVE CITY, OHIO AND THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO

Sandy I-ru Grace
Assistant General Counsel
Exelon Business Services Company
101 Constitution Ave., NW
Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

Jesse A. Rodriguez, Esq.
Public Policy & Affairs Manager
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348
jesse.rodriquez@exeloncorp.com

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com

David M. Stahl
Arin C. Aragona
Scott C. Solberg
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com
aaragona@eimerstahl.com
ssolberg@eimerstahl.com

Anastasia Polek-O'Brien
Exelon Generation Company, LLC
10 S. Dearborn Street, 49th Floor
Chicago, IL 60603

ON BEHALF OF EXELON GENERATION COMPANY, LLC

Gary A Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@aol.com

ON BEHALF OF DOMINION RETAIL, INC.

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
kpkreider@kmklaw.com
dmeyer@kmklaw.com

Holly Rachel Smith
Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, VA 20115
holly@raysmithlaw.com

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
Bentonville, AR 72716-0550
Stephen.Chriss@wal-mart.com

ON BEHALF OF WAL-MART STORES EAST, LP AND SAM'S EAST, INC.

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, OH 43212
tsantarelli@elpc.org

ON BEHALF OF THE ENVIRONMENTAL LAW & POLICY CENTER

Nolan Moser
Trent A. Dougherty
Camille Yancy
Cathryn Loucas
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
nolan@theoec.org
trent@theoec.org
camille@theoec.org
cathy@theoec.org.

ON BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL

Douglas G. Bonner
Emma F. Hand
Keith C. Nusbaum
Clinton A. Vince
Daniel D. Barnowski
SNR Denton US LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
doug.bonner@snrdenton.com
emma.hand@snrdenton.com
keith.nusbaum@snrdenton.com
clinton.vince@snrdenton.com
daniel.barnowski@snrdenton.con

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

ON BEHALF OF HESS CORPORATION

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Jacqueline Lake Roberts,
Counsel of Record
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

ON BEHALF OF CPOWER, INC., VIRIDITY ENERGY, INC., ENERGYCONNECT INC., COMVERGE INC., ENERWISE GLOBAL TECHNOLOGIES, INC., AND ENERGY CURTAILMENT SPECIALISTS, INC.

Robert Korandovich
KOREnergy
P.O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

ON BEHALF OF KORENERGY

Benita Kahn
Lija Kaleps-Clark
Vorys Sater, Seymour and Pease LLC
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
bakahn@vorys.com
lkalepsclark@vorys.com

William Wright
Werner Margard
Thomas Lindgren
John H. Jones
Assistant Attorneys' General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
william.wright@puc.state.oh.us

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Jon Tauber
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINERS

Attachment: Final 12 Months of Stipulation ESP

	Ohio Power Company	
1	ESP Benefits June 2015-May 2016 (A)	-$8.61
2	Annual SSO Sales (kwh) (B)	26,029,500,007
3	ESP Cost (Line 1 x Line 2/1000)	-$224,113,995
	Columbus Southern Power Company	
4	ESP Benefits June 2015-May 2016 (C)	-$9.44
5	Annual SSO Sales (kwh) (D)	17,474,000,002
6	ESP Cost (Line 4 x Line 5/1000)	-$164,954,560
7	Total ESP Cost Last 12 Months Line 3 + Line 6	-$389,068,555

Sources

A IEU-Ohio Ex. 9-B (KMM-11) page 1 or 2, line 34

B Ohio Power Co. E-4, col D, line 53

C IEU-Ohio Ex. 9-B (KMM-11) page 2 of 2, line 34

D Columbus Southern Power Co. E-4, col. D, line 37