BEFORE THE
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 Revs. 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

FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING OF OHIO POWER COMPANY, THE RETAIL ENERGY SUPPLY ASSOCIATION, THE OHIO HOSPITAL ASSOCIATION AND THE OMA ENERGY GROUP

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INTRODUCTION

The Applications for Rehearing filed by Ohio Power Company ("AEP Ohio"), the Retail Energy Supply Association ("RESA"), the Ohio Hospital Association ("OHA") and the OMA Energy Group ("OMAEG") fail to state valid grounds for rehearing. AEP Ohio argues that the Commission's December 14, 2011 Opinion and Order (the "Order") unreasonably and unlawfully cut in half AEP Ohio's base generation rate increases, but AEP Ohio's claims of non-price benefits were properly considered, and in many cases properly rejected, by the Commission. Indeed, as shown in the Application for Rehearing of FirstEnergy Solutions Corp. ("FES"), the Commission erred by not doing more to protect customers and approving an ESP that is not more favorable in the aggregate than the expected results of an MRO.[1]

Further, the Commission did not err in explaining in its Order that it can approve nonbypassable cost recovery of generation investment through the Generation Resource Rider ("GRR") only if generation needs cannot be met through the competitive market. This market-failure test is firmly grounded in R.C. § 4928.143(B)(2)(b) and (c), which were adopted as part of S.B. 221 as a safety valve to be used only if the competitive markets otherwise encouraged by R.C. Chapter 4928 and coordinated by PJM Interconnection fail.

The Commission also did not err in modifying the RPM set-aside program to accommodate governmental aggregation, although clarification of the Order is necessary as described in FES' Application for Rehearing.[2] AEP Ohio is simply wrong that opt-out governmental aggregation is "disfavored." To the contrary, it is the most effective method for extending the benefits of competitive markets to residential and small commercial customers,

[1] *See* FES Application for Rehearing ("AFR"), pp. 3-8.

[2] *See id.*, pp. 38-48.

and Ohio law requires the Commission to adopt rules to *encourage* governmental aggregation. Thus, the Commission did not err in making accommodations for governmental aggregation.

Lastly, the Commission did not err in approving AEP Ohio's corporate separation, while reserving for future consideration review of the terms and conditions relating to the sale and/or transfer of AEP Ohio's generation assets. Incredibly, although AEP Ohio believes a "cornerstone" and a "fundamental underpinning" of the Partial Stipulation is AEP Ohio's desire to transfer its generating assets to a newly-formed affiliate at book value, the Partial Stipulation contains no such provision. To the contrary, and in stark contrast to the stipulation submitted for Commission approval in Duke Energy Ohio's ("Duke") ESP proceeding, the Partial Stipulation provides only that Commission approval thereof will serve as approval of "full legal corporate separation" with AEP Ohio retaining transmission and distribution assets and GRR assets.[3] Also, in contrast to the Duke ESP Stipulation, AEP Ohio's Partial Stipulation does not address any of the preconditions for approval of an asset transfer set out in O.A.C. 4901:1-37-09(B), (C) and (D).[4] Thus, the Commission did not err in approving exactly what the Partial Stipulation recommended – full legal corporate separation – while reserving for future determination the many details of that separation that were not included in the Partial Stipulation.

[3] Stip. § IV.1(q). *See In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO et al., Stipulation and Recommendation at pp. 25-28 (Oct. 24, 2011) (the "Duke ESP Stipulation").

[4] *Compare* Stip. IV.1(q) *with* Duke ESP Stipulation, pp. 25-28.

ARGUMENT

I. THE COMMISSION DID NOT ERR IN MODIFYING AEP OHIO'S PROPOSED BASE GENERATION RATE INCREASE.

AEP Ohio contends that the Commission's Order improperly modified the base generation rate increase contained in the Partial Stipulation.[5] AEP Ohio is wrong. Not only were the Commission's modifications to the base generation rate appropriate, the Commission should have modified the base generation increase further. As demonstrated in FES' Application for Rehearing, the modification made by the Commission actually should have been larger by hundreds of millions of dollars to account for the PMR costs and AEP Ohio's own forecasted fuel costs in the ESP v. MRO price analysis.[6] Despite these errors in AEP Ohio's favor, which indicate the Proposed ESP is less favorable in the aggregate than an MRO by $402 million to $665 million,[7] AEP Ohio has reiterated several arguments which have already been considered and rejected by the Commission. As shown below, each of these arguments lacks merit.

A. The Commission Appropriately Considered All Quantifiable Non-Price Benefits Of The Proposed ESP, Including The PIRR, PWO, and OGF.

AEP Ohio claims that the Commission erred by failing to include quantifiable non-price benefits of the Proposed ESP, specifically referring to the alleged benefits associated with the Phase-In Recovery Rider ("PIRR"), the Partnership with Ohio ("PWO"), and the Ohio Growth Fund ("OGF").[8] This claim is not accurate; nor is it relevant. The Commission did consider these issues as part of its Order and as part of its *in the aggregate* analysis of the Proposed ESP.[9]

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[5] AEP Ohio AFR, pp. 6-24.

[6] *See* FES AFR, pp. 3-9.

[7] *See* FES AFR, pp. 4, 9.

[8] *See* AEP Ohio AFR, p. 12-13.

[9] *See* Order p. 28 (discussing alleged PIRR benefit of $104 million and alleged PWO and OGF benefit of $27 million).

1. The Alleged PIRR "Benefit" Was Incorrectly Calculated By AEP Ohio Witness Allen, And That "Benefit" Is Unreasonably Speculative.

AEP Ohio claims that the Commission did not properly evaluate its concession relating to the PIRR.[10] Although at the hearing AEP Ohio used the Net Present Value ("NPV") of this "benefit" of $104 million, AEP Ohio now claims a "benefit" of a nominal value of $153 million.[11] AEP Ohio is apparently now uses nominal values for this argument, given that its own witness showed a negative $108 million net present value of the ESP v. MRO price test.[12] Thus, for the purposes of rehearing AEP Ohio pretends that the alleged "benefit" associated with the PIRR is larger.

Regardless, AEP Ohio Witness Allen claimed that since the Partial Stipulation would lower the carrying charge of the regulatory asset from 11.15% to 5.34%, customers would receive a NPV benefit of $104 million from this provision of the Proposed ESP.[13] This benefit is overstated because: (1) the PIRR deferral amount and carrying costs are incorrectly calculated; and (2) once securitization occurs, the benefit will be gone.

As explained in FES' post-hearing brief,[14] Mr. Allen calculated this purported benefit by including the entire amount of the PIRR regulatory asset. In the Remand Order, however, the Commission required AEP Ohio to reduce the amount of this fuel cost deferral to reflect its decision that the POLR charge was unwarranted.[15] Despite this direction from the Commission, Mr. Allen failed to adjust his PIRR calculation accordingly.[16] Mr. Allen admitted that if the

[10] *See* AEP Ohio AFR, p. 13.

[11] *See* Allen Direct, WAA-6., AEP Ohio AFR, p. 13.

[12] See Allen Direct, WAA-6 ($116 million negative nominal value).

[13] Allen Direct, p. 16, WAA-6.

[14] *See* FES Brief, p. 75.

[15] Order, p. 30.

[16] Tr. Vol. III, p. 430.

amount of the deferral is reduced, the carrying charge would be lower.[17] Other than this admission, there is no evidence that addresses this correction; e.g., AEP Ohio failed to provide a corrected calculation of the PIRR "benefit." Because Mr. Allen based his calculation on a fuel deferral which is no longer accurate, his PIRR "benefit" is overstated.

In addition to the PIRR calculation issues, there is little benefit to customers associated with the Partial Stipulation's agreements regarding the PIRR deferral amount. Mr. Allen's purported benefit is calculated by determining the effect of the reduction in the carrying charge from 11.15% to 5.34% over a seven-year recovery period.[18] Yet, once AEP Ohio securitizes the fuel deferral (which it plans to complete in 2012),[19] the supposed "benefit" from the reduction in carrying costs will be eliminated for all future years. Any benefits of securitization result from the recently-enacted securitization legislation and cannot be credited to the Partial Stipulation.[20] AEP Ohio did not recognize or quantify the risk that securitization could occur, and therefore its claim of a $153 million PIRR "benefit" arising from the Partial Stipulation is invalid. The Commission did not err in rejecting this claimed benefit.

2. The Commission Properly Credited AEP Ohio's Agreements Regarding The PWO and OGF.

AEP Ohio also claims that the Commission erred by failing to adjust its price calculation in its ESP v. MRO analysis for the contributions to the PWO and OGF.[21] The Commission considered the non-price benefits associated with the PWO and OGF in the same way that AEP Ohio did -- through the testimony of Ms. Thomas and Mr. Allen, who separately discussed price

[17] Tr. Vol. III, p. 429.

[18] Allen Direct, p. 16.

[19] Tr. Vol. V, p. 839.

[20] *See* FES AFR, p. 76.

[21] Similar to the PIRR, AEP has once again used nominal numbers ($35 million) instead of the NPV numbers ($27 million) used previously by Mr. Allen. *See* AEP Ohio AFR, p. 13; AEP Ohio Ex. WAA-6. The record is unclear as to whether corporate support of this type would be available in an MRO.

and non-price factors.[22] This is also the same way that Mr. Fortney conducted his analysis.[23] There is no dispute that the Commission clearly recognized the quantified benefits of these contributions, expressly finding them to be a benefit of the Proposed ESP.[24] Therefore, the only issue remaining is whether the Commission is required to also expressly incorporate this alleged benefit into its ESP v. MRO price test discussion. However, as discussed above, there is nothing in Ohio law which requires the Commission to consider non-price factors together with price factors in one section of its Opinion. There is a difference between considering these issues as part of the Partial Stipulation as a whole, and considering them when discussing the price difference between an ESP and an MRO. The Commission understood this difference, as did AEP Ohio's own witnesses. Indeed, AEP Ohio's own price analysis was conducted by Ms. Thomas, while Mr. Allen considered the non-price issues such as the PIRR, PWO, and OGF. It is disingenuous for AEP Ohio to object to the Commission's consideration of these issues in the exact same way as they were addressed by AEP Ohio's own witnesses. There is nothing inappropriate about the Commission's separate review of the prices which would be imposed on customers under the Proposed ESP and an MRO, and AEP Ohio has cited no authority suggesting that the Commission's review was improper. The record clearly reflects that the Commission took these non-price factors into account, and so this objection lacks merit.

[22] *See* Allen Direct, Exhibit WAA-6.

[23] *See* Fortney Direct, Attachment A.

[24] Order p. 32 ("PWO and OGF, are significant benefits that should be included when considering this proposed ESP in the aggregate.")

B. The Commission Appropriately Considered Qualitative Non-Price Factors.

AEP Ohio also objects to the Commission's failure to give "meaningful credit" to the qualitative factors[25] of the Proposed ESP.[26] This argument fails because the Commission did give AEP Ohio credit for non-price factors. The Order specifically discussed these issues and found some of them to be benefits of the Proposed ESP.[27] AEP Ohio apparently claims that non-price qualitative factors should somehow be considered expressly in the Commission's quantitative ESP v. MRO analysis. Of course, AEP Ohio never says how this would be possible. The qualitative factors at issue inherently do not lend themselves to quantitative precision; so no mathematical analysis is possible. More importantly, reading R.C. § 4928.143 to permit arbitrary assignment of quantitative values to qualitative factors would eviscerate the statutory test. The Commission is required to compare the results of an ESP with the results of an MRO. If the Commission were authorized to do what AEP Ohio suggests, then there would be no bounds on the Commission's discretion. The Commission could simply assign any value that it deemed proper without the need to relate that value to anything. These determinations would thus be incapable of review by the parties or the Supreme Court. The Commission wisely rejected such a fool's errand. The Commission's separate consideration of qualitative and quantitative factors was appropriate.

AEP Ohio's qualitative argument also fails because the qualitative benefits relied on are often not benefits at all. For example, AEP Ohio claims that the earlier transition to market is a qualitative benefit of the Proposed ESP.[28] However, this benefit is anything from certain, as the

[25] AEP Ohio AFR, pp. 16-17 (citing earlier transition to market, elimination of POLR charges, distribution decoupling, etc.).

[26] AEP Ohio AFR, p. 16.

[27] Order pp. 61-65.

[28] AEP Ohio AFR, p. 16.

Proposed ESP contains at least two contingencies before a Competitive Bid Process ("CBP") may occur: (1) corporate separation; and (2) pool modification or termination.[29] The transition to full market pricing under MRO could easily occur faster than as outlined in the Proposed ESP.[30] As this benefit is contingent at best and may not be a benefit at all, it is not appropriate for consideration in the ESP v. MRO test.

Similarly, AEP Ohio claims that the elimination of POLR charges is a significant benefit to customers.[31] Once again, this is simply inaccurate. As specifically found by the Commission, the removal of the POLR charge was not a benefit created by the Partial Stipulation, but was instead mandated by the rulings of the Commission and the Ohio Supreme Court.[32] It is not credible to ask for the POLR charge removal to be considered a benefit of the Proposed ESP when it was not effectuated by the Proposed ESP.

Because the Order gave appropriate consideration to the alleged qualitative benefits of the Proposed ESP, AEP Ohio has not stated grounds for rehearing.

C. AEP Ohio's Objections To Mr. Fortney's Price Test Are Wrong.

1. The RPM Capacity Prices Used By Mr. Fortney Are Appropriate.

AEP Ohio claims that Mr. Fortney's analysis was flawed because he used RPM pricing in his ESP v. MRO analysis, rather than the negotiated capacity pricing contained in the Partial Stipulation. FES has previously explained in detail that the above-market capacity prices contained in the Proposed ESP are inappropriate, and will not repeat that analysis here.[33] However, it is important to note that these above-market prices are roughly four times higher

[29] Stip., § IV.1(t); FES Brief, pp. 93-94; FES AFR, p. 10.

[30] *See* FES AFR, p. 11.

[31] AEP Ohio AFR, p. 16.

[32] Order, p. 30.

[33] *See* FES AFR, pp. 25-33.

than market prices and bear no relationship to AEP Ohio's actual cost to provide that capacity.[34] As this has already been discussed in detail in FES' Application for Rehearing, this brief will focus only on the flaws in AEP Ohio's argument.

AEP Ohio claims that the capacity price used by Mr. Fortney should be the $255/MW-day negotiated price, because this is the price which would be charged to CRES providers during the ESP term. AEP Ohio's analysis fails to recognize that the above-market $255/MW-day capacity pricing it proposes was created solely for the Partial Stipulation, exists only as an element of the Partial Stipulation, and would not be a component of an MRO. Indeed, AEP Ohio Witness Thomas admitted that the capacity prices in the Partial Stipulation only apply if the Proposed ESP is approved.[35] Thus, it is unreasonable to assume that the negotiated prices contained in the Partial Stipulation would be incorporated into the expected results of an MRO. What AEP Ohio is proposing is to test the Proposed ESP by comparing it to itself, not to an MRO. AEP Ohio does not address this issue but claims instead, without any support, that Mr. Fortney's analysis is incorrect.[36]

AEP Ohio has failed to explain why a change to the state compensation mechanism created by the Partial Stipulation should also be used on the MRO side of the ESP v. MRO equation. Therefore, AEP Ohio's argument should be rejected.

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[34] *Id*.

[35] Tr. Vol. IV, p. 579.

[36] AEP quantifies this error "based on the record evidence" as being approximately $230 million. AEP Ohio Brief, p. 18. However, AEP Ohio does not cite any record (or even non-record) support for this calculation, nor does it explain where it came up with this number. It appears AEP Ohio expects the other parties to comb through the entire record for this unsupported number if they wish to verify AEP Ohio's claim. The $230 million claim cannot be given any weight.

2. Mr. Fortney Appropriately Included Costs Associated With The Turning Point Project In His Analysis.

Mr. Fortney included AEP Ohio's own projected net costs associated with the Turning Point project as costs associated with the Proposed ESP.[37] The Commission agreed that it was appropriate to include these costs in the ESP v. MRO test because AEP Ohio had produced an estimate of the costs of this facility and claimed the facility as a benefit of the Proposed ESP.[38] AEP Ohio challenges this determination, claiming that the costs associated with the GRR should not be included in an ESP v. MRO analysis. AEP Ohio is wrong.

AEP Ohio's primary objection to the inclusion of Turning Point costs is that the GRR is a placeholder until the Commission approves project-specific costs to be included in the rider.[39] AEP Ohio claims that it is not appropriate to consider any costs associated with the GRR because a future proceeding authorizing charges under the GRR may not result in a charge comparable to that which AEP Ohio has projected.[40] As a preliminary matter, AEP Ohio could have addressed this concern had it complied with the statutory requirements of R.C. § 4928.143(B)(2)(c) and presented all relevant evidence in this hearing as required by that statute. But AEP Ohio chose to pursue a placeholder rider instead. AEP Ohio's evidentiary failures aside, AEP Ohio has cited no authority suggesting that "placeholder" riders like the GRR can or should be excluded from

[37] Tr. Vol. X, p. 1694-95.

[38] Order, p. 30.

[39] AEP Ohio AFR, p. 20.

[40] AEP Ohio AFR, p. 20. AEP Ohio's argument regarding the cost estimate is disingenuous and misleading. The cost estimate for Turning Point was created by AEP Ohio itself. It is unfair for AEP Ohio to argue that its own estimate is misleading at this late date by claiming that "some of the underlying projected costs have gone down." *Id*. The language used by AEP Ohio in this sentence is particularly illuminating. AEP Ohio does not affirmatively represent to the Commission that the total costs associated with Turning Point have gone down. Instead, it says that some of the projected costs have gone down. The total projected costs could be higher than were originally projected, and thus the cost to customers higher, and this sentence would still be accurate. The Commission should not credit such transparent efforts to avoid AEP Ohio's own estimates without even a commitment that costs will not exceed a specific dollar amount, particularly in light of Mr. Hamrock's testimony that the Turning Point estimates were still valid at the time of the hearing in this case. Tr. Vol. V, p. 863.

the ESP v. MRO test. As AEP Ohio has cited no authority suggesting placeholder riders may be ignored by the Commission, the Commission should not alter its decision on rehearing.

The ESP v. MRO test measures the Proposed ESP against the results of an MRO. If the costs associated with the GRR and other placeholder riders (such as the PMR) are not included in this test because they are not yet certain, then the entire statutory test loses any meaning. Without evidence regarding all of the riders in the Proposed ESP, there is no way for the Commission or a reviewing Court to determine whether the Proposed ESP will be more favorable to customers than an MRO after all costs associated with the ESP are taken into account. As this is the object of the ESP v. MRO test, AEP Ohio's argument lacks merit.

AEP Ohio also claims that the Commission should not include the costs associated with the GRR without considering the benefits of GRR projects. Once again AEP Ohio has cited no record authority suggesting what those benefits may be, or how they can be included in the ESP v. MRO test. Under AEP Ohio's proposal, literally any project included in the GRR, no matter how costly to customers, should be excluded from the ESP v. MRO test since the Commission will have somehow determined that its unarticulated benefits outweigh its costs. This is not Ohio law, and AEP Ohio has cited no authority in support of this illogical position. More importantly, this result does not make sense in the context of the ESP v. MRO test, as projects included in the GRR by definition could only exist on the ESP side of the equation under R.C. § 4928.143(B)(2)(c). There is no corresponding provision in R.C. § 4928.142, so none of these costs could possibly appear on the MRO side of the equation. If the legislature had meant to exclude R.C. § 4928.143(B)(2)(c) projects from the ESP v. MRO test in R.C. § 4928.143(C)(1), it could have done so. It did not, and therefore these costs must be considered by the

Commission. The Company cannot have the Commission now pretend that such figures do not exist.[41]

AEP Ohio also claims that the GRR is a non-bypassable rider and should thus be ignored for the purposes of the ESP v. MRO test.[42] AEP Ohio never explains the legal basis for this position. The GRR is allegedly authorized by R.C. § 4928.143(B)(2)(c), and no corresponding provision appears in R.C. § 4928.142. Simply put, the GRR would not exist in an MRO. There is no statutory support for the assertion that non-bypassable riders created in an ESP like the GRR can be ignored in the ESP v. MRO test. The GRR would not exist in an MRO, and therefore it is a provision of the Proposed ESP which must be taken into account.

If AEP Ohio does not want the Turning Point project costs included in the ESP v. MRO test, then it should remove the GRR from the Proposed ESP. Until that time comes, AEP Ohio's own estimates of the projected net costs of Turning Point must be included in the analysis of the Proposed ESP, as was recognized by the Commission's Order.

D. The Commission Is Not Required To Limit The Reduction In Base Generation Prices To The Exact Amount Of The Projected MRO.

AEP Ohio claims that the Commission erred by reducing ESP prices to a greater level than required to make the ESP more favorable than an MRO. Once again, AEP Ohio provides no authority suggesting that this result is required by law.

AEP Ohio's argument is refuted by *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402 (2011). In that case, AEP Ohio argued that the Commission could not reduce ESP rates on rehearing unless the ESP rates were higher than market rates.[43] The Court

[41] AEP Ohio contends that the cost figures that it previously provided by the Company for the Turning Point Project are now "stale." AEP Ohio AFR, p. 19. AEP Ohio fails to explain – and certainly never provided any evidence – as to exactly how these figures were "stale" and what corrected "updated" figures would be.

[42] AEP Ohio AFR, p. 21.

[43] *Id*. at 406.

summarized AEP Ohio's position as: "if the [ESP] plan's rates are under market, the commission may not make them any lower, for any reason."[44] The Court rejected this argument, stating that "the statute contradicts that claim."[45] There is no requirement that the Commission limit the modification to the minimum necessary to satisfy the ESP v. MRO test. AEP Ohio's statutory remedy if it is unwilling to accept this modification is clear – it may withdraw the Proposed ESP.[46]

Leaving aside the lack of statutory or common law authority for AEP Ohio's position, AEP Ohio's suggested rule does not make practical sense. If, as AEP Ohio and others suggest, the Commission can and should consider qualitative benefits of an ESP, then the Commission should also be able to consider as part of the "in the aggregate" test the qualitative disadvantages of the Proposed ESP – e.g., restrictions on shopping, discriminatory pricing, to name a few. The Commission is not required to modify the Proposed ESP to bring the cost of the Proposed ESP down to one penny less than the cost of an MRO. AEP Ohio's suggestion otherwise is unsupported and unreasonable. The Commission should reject rehearing on these grounds.

Moreover, if AEP Ohio were permitted to propose a substantially above-market ESP, secure in the knowledge that the burden would be on the Commission to approve a modified ESP which was one penny less than an MRO, then AEP Ohio would have little incentive to propose a reasonable ESP in the first instance. This cannot be the law in Ohio, as this rule would impose additional burdens on all parties and likely result in higher prices for Ohio consumers. AEP Ohio's argument creates no grounds for rehearing.

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[44] *Id*. at 407.

[45] *Id*.

[46] R.C. § 4928.143(C)(2)(a).

II. THE ORDER DID NOT UNREASONABLY DIMINISH THE GRR'S PURPOSE.

AEP Ohio mistakenly claims that the Order unlawfully expanded the statutory criteria set forth in R.C. §§ 4928.143(B)(2)(b) and (c) when discussing their applicability to the GRR.[47] However, AEP Ohio's argument ignores the plain language of these statutory provisions.

Both R.C. §§ 4928.143(B)(2)(b) and (c) establish as a precondition for approval of a nonbypassable surcharge a Commission finding that the generating facility at issue is needed based on resource planning projections.[48] This precondition must be read in context with R.C. Chapter 4928's strong preference for competitive markets and deregulation of retail electric generation service.[49] Competitive markets use price signals rather than administrative determinations to guide generation investment, which benefits consumers by making investors responsible for investment decisions with no guarantee of cost recovery.[50] The guaranteed cost recovery available to EDUs under R.C. §§ 4928.143(B)(2)(b) and (c) is an exception to Ohio's pro-market policy that comes with a dangerous risk: the regulatory process significantly underestimates the risks of electric generation facility construction and operation.[51] Thus, any order approving cost recovery under R.C. § 4928.143(B)(2)(b) or (c) could impose on consumers, rather than investors, the risk of uneconomic investments for many years into the future.[52] As such, the Commission reasonably stated in the Order that the Commission "will first

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[47] AEP Ohio AFR, pp. 24-29.

[48] As explained in FES' Application for Rehearing, this "need" is not satisfied by an EDU's requirement to comply with alternative energy benchmarks. *See* FES AFR, pp. 23-25.

[49] *See* R.C. §§ 4928.02, .03, .05, .06; Lesser Direct, p. 3. *See generally* 1999 Am. Sub. S.B. 3; *IEU-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 2008-Ohio-990, ¶ 23 (noting "legislature's deregulation of the electric-utility industry" and rejecting Commission's attempt to blur the legislative distinction between distribution and electric generation service).

[50] Testimony of Michael M. Schnitzer on Behalf of FirstEnergy Solutions Corp. ("Schnitzer Direct"), p. 38.

[51] Schnitzer Direct, p. 38. These risks include the risk associated with technological choices, excess supply problems and cost overruns. *Id.*

[52] Schnitzer Direct, p. 38.

look to the market to build needed capacity" and that "new generation or capacity projects will only be authorized when generation needs cannot be met through the competitive market."[53]

Contrary to AEP Ohio's complaints, the Commission is not "pre-judging" future GRR filings.[54] Instead, the Commission is describing the statutory provisions applicable to a filing made under R.C. § 4928.143(B)(2)(b) or (c). If the Commission were pre-judging AEP Ohio's future GRR application, it would be offering an opinion as to whether or not AEP Ohio could satisfy the statutory criteria under a certain set of facts. The Commission has not done that here. Instead, it merely has outlined for all parties the statutory criteria that any applicant must satisfy. The Commission did not err in doing so.

If AEP Ohio hopes to satisfy a different purpose with the GRR – such as hedging, shale-gas development, or job creation[55] – that hope cannot alter the plain language of R.C. § 4928.143(B)(2)(b) and (c). The future AEP entity that will hold generation assets is free to pursue shale gas development and to construct generating plants in Ohio, with the risk of these actions properly resting on AEP shareholders and not on Ohio consumers. Because R.C. §§ 4928.143(B)(2)(b) and (c) shifts the risk of generating facility development to Ohio consumers through a nonbypassable surcharge for the life of the facility, it is not available to AEP Ohio for these purposes. As the Commission correctly observes in the Order, nonbypassable cost recovery is available only when the competitive market fails to provide needed generation resources.

[53] Order, p. 39.

[54] AEP AFR, pp. 25-26.

[55] AEP AFR, pp. 28-29.

III. THE ORDER'S MODIFICATIONS TO THE PARTIAL STIPULATION TO ACCOMMODATE GOVERNMENTAL AGGREGATION WERE NECESSARY TO BRING THE PARTIAL STIPULATION IN LINE WITH STATE POLICY.

Only three Signatory Parties take issue with the Commission's modifications as to governmental aggregation: AEP Ohio, and two trade associations, OHA and RESA, whose members expected to have access to RPM-priced capacity.[56] AEP Ohio argues that the Order's modifications to accommodate governmental aggregation somehow violate state policy and are unduly burdensome to AEP Ohio. However, the Commission was properly concerned about the negative impact of the Partial Stipulation on governmental aggregation in AEP Ohio's service territory.[57] Modifications were *necessary* to *remedy* the violations of state policy that would have otherwise resulted from the Partial Stipulation. In fact, as set forth in FES' Application for Rehearing, additional modifications need to be made to ensure that the Partial Stipulation fully conforms to state policy. Regardless, the minimal modifications included in the Order with regard to governmental aggregation are appropriate and lawful.

[56] Notably, while OMAEG also complains about industrial customers losing access to residential customers' pro rata share of the RPM-priced capacity, which is addressed below in Section IV.A, OMAEG "does not take issue with" the Order's accommodation for residential governmental aggregation customers. OMAEG AFR, p. 5.

[57] *See* Order, p. 54.

A. The Order's Modifications For Governmental Aggregation Are Well-Supported By Numerous State Policies, And AEP Ohio's Arguments Regarding A "Preference" For Opt-In Aggregation Establish No Basis On Which To Reverse The Modifications.

AEP Ohio complains that the Commission's Order did not tie a specific regulatory policy or practice to the Commission's modifications for governmental aggregation,[58] but the modifications are supported by numerous state policies and practices. The Commission specifically noted the Signatory Parties' arguments that the availability of RPM-priced capacity "preserve[s] and expand[s] retail shopping" and competition.[59] Those goals are established in several parts of R.C. § 4928.02:

> It is the policy of this state to do the following throughout this state: . . .
>
> (B) Ensure 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;
>
> (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities; . . .
>
> (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment; [and]
>
> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates . . . .[60]

[58] AEP Ohio AFR, pp. 36-37.

[59] Order, p. 52.

[60] R.C. § 4928.02.

The Commission's charge to "ensure competitive retail electric service" is also found in R.C. § 4928.06, which directs the Commission to ensure its regulatory practices further the state's policy goals, and in the Commission's mission statement.[61] The Order specifically noted these policies in making the modifications for governmental aggregation:

> It is the state policy to ensure the availability of unbundled and comparable retail electric service to all customer classes, including residential customers, and governmental aggregation programs have proven to be the most likely means to get substantial numbers of residential customers [to shop].[62]

Moreover, the Commission is required to "adopt rules to encourage and promote large-scale governmental aggregation in this state."[63] Thus, AEP Ohio's arguments regarding the lack of a regulatory or policy basis for the Order's modifications are plainly wrong. The Commission's modifications are well supported in the Order and in the state's law and policy.

AEP Ohio also suggests that certain statutory provisions express a "preference" for opt-in aggregation that requires the Commission to ignore opt-out aggregation.[64] However, those provisions reflect regulatory safeguards that apply to opt-out aggregation according to the inherent differences between opt-out and opt-in aggregation.[65] The sole fact that the General Assembly expressly contemplated that communities could offer opt-out government aggregation programs refutes the idea that opt-out programs are somehow "disfavored."

Ohio law offers communities two options for governmental aggregation: opt-out and opt-in aggregation. Customers have choices under either option. But, a community's exercise of

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[61] *See* R.C. § 4928.06; Banks Direct, p. 5.

[62] Order, p. 54 (emphasis added).

[63] R.C. § 4928.20(K).

[64] AEP Ohio AFR, pp. 31-34.

[65] For example, R.C. § 4928.20(D)'s requirement for customer disclosures regarding automatic enrollment is appropriate to the opt-out process and irrelevant to opt-in aggregation. Other requirements for "do not aggregate" lists and termination provisions are also safeguards tailored to the opt-out process but do not express any disfavor for that process. *See* R.C. §§ 4928.20(D), (E); 4928.21.

discretion as to how best to provide their residents and businesses with aggregation savings should not be limited by the Partial Stipulation's arbitrary limits on RPM-priced capacity and its prejudicial preference for immediately distributing the limited RPM-priced capacity to industrial and commercial customers. As the Order recognizes, numerous communities have determined that opt-out aggregation best fits their communities' needs, including the thirty or more communities that put opt-out aggregation on the November 2011 ballot.[66] Thus, the Commission's Order properly sought to protect "governmental aggregation," without reference or discriminatory preference to opt-in or opt-out aggregation.[67]

AEP Ohio's additional arguments regarding the allegedly significant increase in shopping provided for by the unmodified Partial Stipulation also should be disregarded. As set forth in FES' and other opponents' Post-Hearing Briefs, substantial record evidence establishes that the originally proposed Caps offer no material increase in shopping in AEP Ohio's territory, where shopping is already at the lowest levels in the state.[68] Indeed, as can be seen in the Applications for Rehearing submitted by OHA, OMAEG and RESA, Signatory Parties also have come to the realization that the Partial Stipulation will severely curtail shopping by commercial and industrial customers. Their basis for arguing that the proposed Partial Stipulation allowed for an increase in shopping was apparently tied to additional shopping opportunities for only commercial and industrial customers resulting from the expected transfer of residential set-aside capacity to their customer classes. The Commission properly recognized that state law and policy requires (and the current economic challenges warrant) that residential customers have equal access to the savings opportunities provided by competition. Governmental aggregation provides the best

[66] *See* Order, p. 54; FES Brief, pp. 121-122.

[67] Order, p. 54.

[68] *See* FES Brief, pp. 100-101.

opportunity for those customers and an important mechanism for communities to improve their local economies through options for taxpayers of all types. Thus, the Commission's accommodations for governmental aggregation are well-supported by state policy.

B. If RPM-Priced Capacity Is Not Made Available To All Governmental Aggregation, Allowing Communities Until December 2012 To Complete Aggregation Is Not Unreasonable Given The Uncertainty Surrounding AEP Ohio's Partial Stipulation.

As set forth in FES' Application for Rehearing, the Commission should further modify the Order to provide the same access to RPM-priced capacity for all governmental aggregation programs in AEP Ohio's territory, regardless of the date on which aggregation was approved or completed.[69] The Order did not provide any basis on which to distinguish the November 2011 ballot communities from those communities that already have established governmental aggregation, nor is there any rational basis on which to make such a distinction. In contrast, AEP Ohio argues that the November 2011 communities serve as a reasonable limitation. Yet AEP Ohio also argues that "the whole point of the Commission's change . . . was to give communities who may have relied on RPM availability in pursuing ballot initiatives access to RPM-priced capacity."[70] Such an argument affirms that, at a minimum, all communities that approved governmental aggregation on or before the November 2011 ballot should be entitled to receive an allotment of RPM-priced capacity. All of the communities that approved aggregation before the Partial Stipulation was filed also relied on RPM-priced capacity, which was previously available to *all* AEP Ohio customers.

[69] FES AFR, pp. 38-43.

[70] AEP Ohio AFR, p. 43.

Providing communities with a period of time (greater than the "two weeks" that have already passed) to complete aggregation is also reasonable based on the significant confusion that has resulted from the Partial Stipulation's proposals. All parties to the process – suppliers, customers, and communities – have faced numerous questions about the impact of the Partial Stipulation and the associated queue process. It should be expected that communities would seek some certainty before undertaking the time and cost associated with the aggregation process. Moreover, AEP Ohio has as much certainty regarding the November 2011 governmental aggregation programs as it does with the queue as a whole. AEP Ohio has prepared a compilation of the November 2011 ballot communities and the load associated with those communities, and can budget and prepare accordingly.

Further, there is no reason why four months should be the limit of the time by which communities should complete the governmental aggregation process for purposes of RPM-priced capacity. The four-month period discussed by Mr. Banks and others was a minimum. Indeed, as the record shows, numerous communities which had enacted governmental aggregation ordinances before November, 2011 were still in the midst of completing the process to offer governmental aggregation programs to their residents. Also, in light of the fact that the Commission did not change the proposed ESP's requirements for residential customers' eligibility for RPM-priced capacity, each customer must apply separately for such capacity once the governmental aggregation program is established in a community. This will require yet more time, beyond the four-month community enrollment time mentioned by several witnesses.

Therefore, the Order's established December 2012 timeframe for the completion of governmental aggregation is not unreasonable.[71]

C. The Order Properly Omits Any Distinction Between Mercantile And Non-Mercantile Governmental Aggregation Customers.

AEP Ohio's Application for Rehearing essentially asks the Commission to preclude mercantile customers from being eligible for governmental aggregation in AEP Ohio's service territory. This argument is also based on the unwarranted and incorrect notion that Ohio law and the Commission's Order prefer opt-in over opt-out governmental aggregation. However, the Commission rejected this argument in its January 23, 2012 Entry. In addition, as set forth in FES' Application for Rehearing, Ohio law allows and anticipates that all types of customers are entitled to participate in governmental aggregation.[72] Thus, it was appropriate that the Commission's Order did not include any distinction between mercantile and non-mercantile customers.[73] Rather, the Commission's Order simply provided that it was "necessary to modify the capacity set-asides during the term of this ESP . . . to accommodate *governmental aggregation*" and that the "RPM set-aside level shall be adjusted to accommodate such governmental aggregation *programs*."[74] There is no legitimate basis on which to distinguish amongst governmental aggregation customers and, if it did, the Order would violate state policy and would be unlawful and discriminatory. The Commission should confirm that the Order's provisions for governmental aggregation apply equally to the load of mercantile and non-mercantile governmental aggregation customers.

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[71] As set forth herein and in FES' Application for Rehearing, the Partial Stipulation should be further modified to remove any disparate treatment among governmental aggregation programs. To the extent no further modifications are made, the modifications contained in the Commission's Order are not unreasonable.

[72] FES AFR, pp. 42-43.

[73] *See* Order, p. 54.

[74] Order, p. 54 (emphasis added).

IV. THE ORDER'S MODIFICATIONS TO THE CAPS PROPERLY PROTECT RESIDENTIAL AND GOVERNMENTAL AGGREGATION CUSTOMERS AND SHOULD BE CLARIFIED TO CONFIRM THEIR APPLICATION TO THE APPENDIX C PROCESS.

A. The Signatory Parties' Concerns About The Order's Reservation Of RPM-Priced Capacity For Residential Customers Reflect The Problems With The Negotiations And The Harm That Would Otherwise Be Suffered By Residential Customers Absent The Commission's Modifications.

OHA and OMAEG argue that the Commission should not have modified the Partial Stipulation to ensure that residential customers have access to their proportionate share of RPM-priced capacity because these parties expected (and were assured) that that capacity would be available to commercial and industrial customers.[75] OHA and OMAEG acknowledge that they only agreed to the Partial Stipulation because they believed residential customers' pro rata share would be available to their members as of January 1, 2012.[76] These acknowledgments only confirm FES' and others' concerns about the negotiations leading up to the Partial Stipulation – specifically, that residential customers would be disadvantaged relative to other customer classes under the Partial Stipulation. The complaint of AEP Ohio and the Signatory Parties is that the disadvantage that they built into the Partial Stipulation against residential customers should remain. That is hardly fair; nor is it consistent with Ohio law.

OMAEG notes that AEP Ohio provided inconsistent (and inaccurate) information regarding the availability of RPM-priced capacity and the capacity allocated to already-shopping industrial customers.[77] Thus, it should not be surprising that certain Signatory Parties are now complaining that the deal they thought they were agreeing to was not actually there. Regardless,

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[75] OHA AFR, pp. 4-6; OMAEG AFR, pp. 4-9; *see also* RESA AFR, pp. 8-10 (requesting clarification on the procedures for reserving capacity for governmental aggregation and customer-class allocation).

[76] In fact, the protests by the Signatory Parties on this issue only proves the obvious regarding the whole RPM-priced capacity cap regime: that it limits shopping for customers above the caps.

[77] OMAEG AFR, p. 8.

the Signatory Parties' expectations cannot take priority over the Commission's determination that the Partial Stipulation must be modified to "ensure a fair share of RPM capacity for the residential class."[78] State policy requires that retail electric service be available on a non-discriminatory basis to all customers.[79] Therefore, it was reasonable and lawful for the Commission to make modifications to ensure that the Partial Stipulation does not unduly burden or discriminate against residential customers.

The Signatory Parties also suggest that they are concerned that allotments of RPM-priced capacity may not be claimed if the remaining cap space is reserved for residential customers.[80] However, as is apparent from the industrial and commercial customers' eagerness for RPM-priced capacity and the significant number of communities that approved governmental aggregation on the November 2011 ballot, the opportunity to shop with RPM-priced capacity provides valuable savings opportunities for all customers. Therefore, residential customers are likely to take up the limited available cap space. Further, the more appropriate modification to ensure that all RPM-priced capacity is used, given the Commission's concerns regarding residential customers' access, would be to expand the governmental aggregation communities to whom the RPM-priced capacity is available.

B. AEP Ohio's Arguments Regarding The Calculation Of The Cap Percentages Are Not Consistent With The Intent Of The Order.

Several parties have requested clarification of the Commission's Order regarding the calculation of the percentage Caps. As set forth in FES' Application for Rehearing (and its Objections to AEP Ohio's Compliance Filing), the proper interpretation of the Commission's Order is to protect the 21% pro rata share available to residential customers by modifying the pro

[78] Order, p. 54.

[79] *See* R.C. § 4928.02(A).

[80] *See* OMAEG AFR, p. 8.

rata shares available to industrial and commercial customers to recognize the currently shopping load. This interpretation is consistent with the Order's expressed intent to ensure that "currently shopping customers will not be adversely affected by the capacity set-aside provisions"[81] and to ensure that "no RPM-priced capacity can be allocated to a customer in another class."[82] This interpretation was confirmed by the Commission's January 23, 2012 Entry. AEP Ohio argues that the Order's reference to Section IV.2(b)(3) of the Partial Stipulation means that the initial reduction of residential customers' pro rata share should be made.[83] However, this would result in RPM-priced capacity being allocated to a customer in another class, given the pre-existing over-subscription for commercial customers.[84] In order to prevent the undue burden on residential customers and to carry out the intent of the Order, residential and industrial classes must receive their own 21% pro rata share, while the commercial class remains (full) at 29% in order to protect currently shopping customers.

C. AEP Ohio's Arguments Regarding The Calculation Of The Reservations Of RPM-Priced Capacity For Governmental Aggregation Are Not Consistent With The Intent Of The Order.

The Order implemented modifications to accomplish two related, but separate, goals: "to accommodate governmental aggregation and to ensure a fair share of RPM capacity for the residential class."[85] The Commission modified the Partial Stipulation "to adjust the RPM set-aside levels" as necessary to accommodate governmental aggregation load and also noted that "customers in a non-governmental aggregation communit[y] still have the ability to pursue a

[81] Order, p. 54.

[82] Order, p. 55.

[83] AEP Ohio AFR, p. 40.

[84] FES Exh. 18; Tr. Vol. XII, pp. 2071-78.

[85] Order, p. 54.

shopping rate within the RPM set aside to the extent it is available."[86] Thus, the Cap allotment allocated to residential customers (21%/31%/41%) must be expanded to allow for governmental aggregation load on top of that allocated to residential customers and the caps would then be adjusted to the extent necessary to accommodate both the standard retail shopping and the governmental aggregation shopping.[87] The Commission confirmed this interpretation in its January 23, 2012 Entry. However, AEP Ohio argues that the governmental aggregation load should be subsumed within the already minimal Cap percentages. But, under such a scenario, residents or small businesses located in non-governmental aggregation communities would have little to no opportunity to access RPM-priced capacity. AEP Ohio has acknowledged that the load of the November 2011 governmental aggregation communities would essentially fill the remaining cap space.[88] Therefore, under AEP Ohio's view of the world, the Partial Stipulation would allow only commercial and industrial customers shopping as of September 8, 2011, and the November 2011 governmental aggregation communities to access RPM-priced capacity. As set forth in FES' Post-Hearing Brief, no other customers would have any material opportunity for savings from competition.[89] To argue that such limitations further the state's policy of ensuring effective competition and to laud the Partial Stipulation as expanding competition in AEP Ohio's service territory is laughable. In order to provide any increase in competition and in order to further any transition to the competitive market, the governmental aggregation load should be guaranteed RPM capacity, and the caps should be adjusted to the extent necessary to

[86] Order, p. 54.

[87] RESA appears to agree that the load associated with governmental aggregation for 2013 and 2014 should not receive all of the incremental increases in the Cap in those years, and thereby "reduc[e] . . the full intended increment in 2013 and 2014 / 2015 for shopping customers." RESA AFR, pp. 9-10.

[88] AEP Ohio Reply Brief, pp. 80-81.

[89] FES Brief, pp. 94-102.

ensure that the articulated percentages of customers can still obtain RPM priced capacity should that level of customers choose to shop.

D. AEP Ohio Created A Partial Stipulation That Exposes It To Uncertainty, Regardless Of The Commission's Modifications.

AEP Ohio argues that the Order's modifications "expos[e] AEP Ohio to indeterminate financial risk" and are, therefore, improper.[90] However, those arguments should fall on deaf ears. First, AEP Ohio created the Partial Stipulation, which imposed risks on AEP Ohio even without the Order's modifications. The Partial Stipulation's Appendix C process and changes allowed for in the proposed Appendix C process – for increases in usage for already shopping customers and the expected shifting of RPM-priced capacity amongst different customer classes – means that AEP Ohio was going to face risk, regardless. The reservations of RPM-priced capacity for governmental aggregation allow for some certainty. Given the multi-month aggregation process, AEP Ohio will have notice of additional customers eligible for RPM-priced capacity well in advance of the provision of service to those customers. Second, and more importantly, uncertainty is a fundamental tenet of the competitive market and encourages or allows for the benefits that competition provides to customers and the economy. The uncertainty of the market – and the fact that the uncertainty is placed on suppliers – creates incentives for suppliers to improve efficiencies, to make prudent business decisions, and to adapt their product offerings to the changing market and changing customer needs.[91] AEP Ohio's overdue transition to the competitive market has imposed risks and costs on its customers. That AEP Ohio may also feel some discomfort in the transition is not only normal, but appropriate and necessary.

[90] AEP Ohio AFR, p. 38.

[91] *See* FES Brief, pp. 87-89.

V. THE COMMISSION PROPERLY APPROVED THE REQUEST FOR CORPORATE SEPARATION CONTAINED IN THE PARTIAL STIPULATION, AND NOTHING MORE.

AEP Ohio's attempts to blame the Commission for not providing a broader approval of AEP Ohio's corporate separation are more properly directed back at AEP Ohio. AEP Ohio and the Signatory Parties requested approval of the Partial Stipulation and, as to corporate separation, that is what AEP Ohio received. The Order approved AEP Ohio's full corporate separation and directed AEP Ohio to notify PJM of its intent to participate in the 2015 Base Residual Auction. Those are the two provisions set forth in the Partial Stipulation.[92] Yet AEP Ohio now complains that the Commission did not go beyond the language of the Partial Stipulation to make findings that were not supported by the Partial Stipulation or the record. AEP Ohio goes so far as to suggest that the transfer of generation assets out of the EDU at net book value was a "critical underpinning" for the Partial Stipulation.[93] **But, this "critical underpinning" appears <u>nowhere</u> in the Partial Stipulation.** Indeed, the Signatory Parties provided no details regarding any proposed transfer of generation assets and, thus, it should come as no surprise that "the Commission still needs additional time to determine and understand the terms and conditions relating to the sale and/or transfer of the generation assets from the electric distribution utility to the AEP subsidiary."[94]

The bulk of AEP Ohio's complaints regarding the Commission's Order on corporate separation are based on its allegations that the Commission treated AEP Ohio differently than Duke.[95] However, such arguments and allegations of discrimination are, at best, disingenuous.

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[92] *See* Partial Stip., IV.1(q).

[93] *See* AEP Ohio AFR, p. 48.

[94] Order, p. 60.

[95] AEP Ohio attached the Opinion and Order in the Duke case, Case No. 11-3549-EL-SSO, to its Application for Rehearing. Simply attaching a document to an application for rehearing does not make that document part of the

The Stipulations applicable to AEP Ohio and Duke, respectively, are materially different with regard to corporate separation. The sheer difference in length of the provisions regarding corporate separation confirms that Duke's Stipulation provides more detail, as can be seen in the side-by-side comparison set forth in Exhibit A. While AEP Ohio's request fills one paragraph, Duke's request extends over two pages. On closer examination, the material differences between AEP Ohio's and Duke's requests for corporate separation become even more obvious, and those differences wholly justify the Commission's differing orders in response to those requests. For example:

- Duke's Stipulation states that the parties agreed that the transfer of generation assets will occur at book value. AEP Ohio's does not.[96]

- Duke's Stipulation provides that Staff shall audit Duke's transfer of assets and will ensure that no competitive generation affiliate receives any advantage due to its affiliation with Duke. AEP Ohio's does not.

- Duke's Stipulation specifically requests a waiver of O.A.C. 3901:1-37-09(B), (C), and (D), and states the parties' agreement that no hearing is required. AEP Ohio's does not.

- Duke's Stipulation precludes Duke from loaning, guaranteeing, or assuming liability for the competitive generation affiliate without prior Commission approval. AEP Ohio's does not.

- Duke's Stipulation sets forth the terms and status of the transfer of certain contractual obligations from Duke to the competitive generation affiliate. AEP Ohio's does not.

- Duke's Stipulation limits Duke's competitive generation affiliate from using or relying on the credit rating(s) of Duke. AEP Ohio's does not.

- Duke's Stipulation provides that the parties "expressly agree that full legal corporate separation is in the public interest." AEP Ohio's does not.

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evidentiary record in this case, and this Opinion and Order should not be considered to be part of the evidentiary record.

[96] AEP Ohio complains that requiring disclosure of the market value of its generating assets is "unprecedented," but it plainly is a requirement of the Commission's Rules. *See* O.A.C. 4901:1-37-09(C).

In sum, Duke's Stipulation addressed the relevant terms and conditions of the transfer of generation assets, while AEP Ohio's Partial Stipulation did not. And the terms of the Stipulations are not the only differences between the two requests. Duke's Stipulation was supported by all of the parties to that proceeding, and AEP Ohio's was not. Further, AEP Ohio is party to a unique and complicated pooling agreement that may impact its transfer of generation assets.[97] AEP Ohio's original ESP application and the Partial Stipulation also reflect that AEP Ohio seeks to continue to favor its competitive generation services, which suggests that its transfer of generation assets should not be treated lightly. Accordingly, the Commission's Order on corporate separation was properly founded on the terms of the Partial Stipulation before it, and was appropriately more limited than the Commission's approval of Duke's Stipulation.

AEP Ohio's argument that the Commission's Order is unsupported in its disparate treatment of AEP Ohio and Duke also is offered out of both sides of its mouth. On the one side, it argues there are no differences between the EDUs' requests. On the other, it offers to accept the (different) terms set forth in Duke's request. AEP Ohio's offer is inappropriate at this stage, and it would be unreasonable and unlawful for the Commission to accept it. AEP Ohio's Partial Stipulation did not include the terms of the Duke Stipulation, and the AEP Ohio Stipulating Parties did not agree to any such terms. Staff's request for further information and further approval processes confirms that not all of the Stipulating Parties support AEP Ohio's argument that the same details were contained in the Partial Stipulation or that approval should be rushed without further support and examination.[98] Because the additional terms included in Duke's Stipulation were not included in AEP Ohio's Partial Stipulation, the parties did not explore those terms during the course of the hearing and, thus, the record also has not been established for the

[97] FES Brief, pp. 95-97; Tr. Vol. V, pp. 765-766.

[98] *See* Staff's Comments, Case No. 11-5333-EL-UNC, filed Dec. 15, 2011.

Commission's determination. The Order properly recognized that R.C. 4928.17 "requires due process for parties with real and substantial interests in the corporate separation"[99] and the interested parties have not been afforded due process with respect to the terms and conditions of AEP Ohio's proposed transfer of generation assets.

Accordingly, the Commission is under no purported obligation to – and, in fact, could not – issue the unsupported additional approvals that AEP Ohio asks for in its Application for Rehearing.

VI. CONCLUSION

For the reasons set forth above, FES respectfully requests that the Commission deny the Applications for Rehearing filed by AEP Ohio, RESA, OHA, and OMAEG.

[99] Order, p. 60.

Respectfully submitted,

s/ Laura C. McBride

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EXHIBIT A

Requests for Corporation Separation

AEP Ohio's Partial Stipulation § IV.1(q)	**Duke's Full Stipulation** §VIII
"Approval of this Stipulation will serve as the Commission's approval of full legal corporate separation (as contemplated by R.C. § 4928.17(A) and also known as structural corporate separation) such that the transmission and distribution assets of AEP Ohio will be held by the [EDU] while any GRR assets will remain with the [EDU]. Full legal corporate separation will be implemented as soon as reasonably possible after other necessary approvals are obtained. Provided that the Commission has approved full legal separation as proposed through a final order (even if any appeals before the Supreme Court of Ohio have been filed), AEP Ohio will provide notice to PJM in March of 2012 (per Schedule 8.1 of the Reliability Assurance Agreement) that it intends to participate in the Base Residual Auction for delivery years 2015-2016. Generation-related costs associated with implementing corporate separation shall not be recoverable from customers."	"A. The Parties agree that [Duke] will transfer title, at net book value, to all of its Generation Assets out of [Duke]. Such transfer shall occur on or before December 31, 2014, and [Duke] commits to using its best commercial efforts to complete the transfer as soon as practicable upon its acceptance of a Commission order approving the Stipulation and upon receipt of necessary regulatory approvals. Staff, or an independent auditor at the Commission's discretion and with costs thereof to be recovered through Rider SCR, shall audit the terms and conditions of the transfer of the Generation Assets to ensure compliance with this Section VIII of the Stipulation and shall also audit Duke Energy Ohio's compliance with R.C. 4928.17 and the Commission's Corporate Separation Rule, O.A.C. 4901:1-37 and any successors to that rule, to ensure that no subsidiary or affiliate of [Duke] that owns competitive generation assets has any competitive advantage due to its affiliation with [Duke]. The Parties further expressly support [Duke]'s request for a waiver of the Commission's rule requirements, as set forth in O.A.C. 4901:1 -3 7-09(B), (C), and (D), relating to the sale or transfer of generating assets. The Parties agree that approval of this Stipulation shall constitute the Commission consent required by paragraphs (A) and (E) of that rule, and that no hearing is required under paragraphs (D) and (E) of that rule. Further, the Parties agree that this paragraph provides the Commission Staff with access to books and records in compliance with paragraph (F) of that rule. B. Approval of this Stipulation will serve as the Commission's approval of full legal

AEP Ohio's Partial Stipulation § IV.1(q)	**Duke's Full Stipulation** §VIII
	corporate separation (as contemplated by R.C. 4928.17(A) and also known as structural corporate separation) such that the transmission and distribution assets of [Duke] will continue to be held by the distribution utility and all of [Duke]'s Generation Assets shall be transferred to an affiliate. Full legal corporate separation will be implemented as soon as reasonably possible after necessary regulatory approvals are obtained. Following the transfer of the Generation Assets, [Duke] shall not without prior Commission approval: 1) provide or loan funds to; 2) provide any parental guarantee or other security for any financing for; and/or 3) assume any liability or responsibility for any obligation of subsidiaries or affiliates that own generating assets, provided however, that contractual obligations arising before the signing of the Stipulation shall be permitted to remain with [Duke] without Commission approval for the remaining period of the contract but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities for [Duke] if [Duke] were to transfer such obligations to its subsidiary or affiliate. On and after the signing of this Stipulation, [Duke] shall ensure that all new contractual obligations have a successor-in-interest clause that transfers all [Duke] responsibilities and obligations under such contracts and relieves [Duke] from any performance or liability under the contracts upon the transfer of the Generation Assets to its subsidiaries. This provision does not restrict [Duke]'s ability to receive and pass through to the subsidiary(ies) that own the Generation Assets equity contributions from its parent that are in support of the Generation Assets, nor does it restrict [Duke]'s ability to receive

AEP Ohio's Partial Stipulation § IV.1(q)	**Duke's Full Stipulation** §VIII
	dividends from the subsidiary(ies) that own the Generation Assets and pass through such dividend(s) to its parent. Generation related costs associated with implementing corporate separation shall not be recoverable from customers. Any subsidiary of [Duke] to which Generation Assets are transferred shall not use or rely upon the rating(s) from credit rating agency(ies) for [Duke]. If such subsidiary currently does not maintain separate rating(s) from the credit rating agency(ies), then upon transfer of any of the Generation Assets, it shall either seek to establish such rating(s) or shall tie its credit rating to Duke Energy Corp. as soon as practicable but no later than six months following such transfer."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Memorandum Contra the Applications for Rehearing of Ohio Power Company, The Retail Energy Supply Association, the Ohio Hospital Association and the OMA Energy Group* was served this 23rd day of January, 2012, via e-mail upon the parties below.

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Summary: Memorandum Contra the Applications for Rehearing of Ohio Power Company, the Retail Energy Supply Association, the Ohio Hospital Association and the OMA Energy Group electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.