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 CONTRA THE APPLICATIONS FOR REHEARING
OF
OHIO POWER COMPANY,
OMA ENERGY GROUP,
THE OHIO HOSPITAL ASSOCIATION
AND RETAIL ENERGY SUPPLY ASSOCIATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK

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On Behalf of the Appalachian Peace and Justice Network

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MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING OF OHIO POWER COMPANY, OMA ENERGY GROUP, THE OHIO HOSPITAL ASSOCIATION AND RETAIL ENERGY SUPPLY ASSOCIATION BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE APPALACHIAN PEACE AND JUSTICE NETWORK

I. INTRODUCTION

As part of advocating that residential consumers receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") and the Appalachian Peace and Justice Network ("APJN") file this memorandum contra several applications for rehearing of the Opinion and Order ("O&O") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned proceedings on December 14, 2011. Specifically, OCC and APJN respond to the applications for rehearing filed separately by some (but not all) of the signatories to the Stipulation and Recommendation ("Stipulation") in these proceedings,[1] being Ohio Power Company ("OPC," "AEP Ohio" or "Company"),[2] OMA Energy Group ("OMAEG"), Ohio Hospital Association ("OHA") and Retail Energy Supply Association

[1] Signatories Joint Ex. 1.

[2] Effective at the end of 2011, OPC and Columbus Southern Power Company ("CSP") (both of which were operating companies of AEP Ohio) merged, with OPC becoming the successor in interest to CSP. See OPC at 2.

("RESA") (collectively, "signatory parties") on January 13, 2012.[3] OCC and APJN are authorized to file this memorandum contra under Ohio Adm. Code 4901-1-35(B).[4]

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

The signatory parties claim five general assignments of error in the O&O:

1. OPC claims that it was unreasonable and unlawful for the Commission to cut in half the base generation rate increases that were proposed in the Stipulation, based on a PUCO finding that disallowing half of the proposed increase made the proposed ESP more favorable the proposed ESP is more favorable in the aggregate than the expected results that would occur under a market rate offer ("MRO").[5]

2. OPC claims that the Commission unlawfully expanded the statutory criteria applicable to the Generation Resource Rider ("GRR") by diminishing the GRR's purpose and by holding that projects will not be approved under the GRR unless generation needs cannot be met through market-based solutions.[6]

3. All four signatory parties claim that it was unreasonable and unlawful for the Commission to modify the level of the set-aside of capacity with pricing based on PJM's reliability pricing model ("RPM") to accommodate governmental aggregation.[7]

4. OPC claims that the Commission should reverse and/or clarify the governmental aggregation modification to avoid exposing AEP Ohio to indeterminate financial risk during the term of the ESP because the Company would otherwise need to exercise its

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[3] In addition to the four applications for rehearing mentioned above, OCC and APJN filed a joint application for rehearing of the O&O, and First Energy Solutions ("FES"), Industrial Energy Users Ohio ("IEU") and Ormet Aluminum Company each filed separate applications for rehearing. Citations to the applications for rehearing in this Memorandum Contra will refer only to the party filing the application for rehearing (e.g., "OPC at __").

[4] If OCC and APJN do not respond to a specific argument made by a signatory party in its application for rehearing, that fact should not be construed as acquiescence by OCC and APJN to that argument.

[5] OPC at 6-24.

[6] Id. at 24-29.

[7] Id. at 29-37; OMAEG at 4-9; OHA at 4-6; RESA at 7-10.

statutory right to withdraw from the modified ESP and the Stipulation.[8]

5. OPC claims that it was unreasonable and unlawful for the Commission to defer ruling on full approval of the Stipulation's corporate separation proposal because it is based on an inconsistent application of the law, discriminatory treatment of AEP Ohio and violation of state policy provisions to encourage competition.[9]

The signatory parties are wrong in their assessment of the O&O. As the Commission found, the ESP presented in the Stipulation was not more favorable in the aggregate than the expected results under an MRO.[10] The modifications the Commission made to the ESP proposed in the Stipulation not only helped the Commission to make the finding required by R.C. 4928.143(C)(1), they also helped to make the Company's ESP a just and reasonable program based on the evidence in the record, the determination the Commission must make regarding stipulations, according to the Supreme Court of Ohio.[11] Although other errors in the Commission's reasoning resulted in the O&O being unreasonable and unlawful,[12] as discussed in the application for rehearing filed by OCC and APJN, the signatory parties have provided no foundation for the Commission to change the O&O as they requested. The Commission should thus deny the applications for rehearing filed by the signatory parties to the Stipulation.

[8] OPC at 38-45.

[9] Id. at 45-57.

[10] See O&O at 30.

[11] *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367.

[12] Including a failure to meet the statutory test that the ESP is more favorable in the aggregate than the expected results under an MRO. See OCC/APJN at 10-12; FES at 9-13; IEU at 10-23.

II. ARGUMENT

A. The Commission acted reasonably and lawfully in halving the base generation rate increases proposed in the Stipulation.

OPC claims that the Commission's ESP/MRO comparison and the modifications it made to the ESP proposed in the Stipulation were flawed. First, OPC asserts that the Commission erred by failing to include the "quantifiable non-price benefits" of the proposed ESP (i.e., the reduction in the carrying cost for the Phase-in Recovery Rider ("PIRR") and the Company's commitments to provide funding for the Partnership With Ohio ("PWO") and Ohio Growth Fund initiatives) in comparing the value of the proposed ESP to the cost of an MRO.[13] The Company states that the aggregate nominal value of these benefits is $188 million.[14] In addition, the Company contends that the Commission gave no meaningful credit to non-quantitative aspects of the proposed ESP, such as the absence of provider of last resort ("POLR") charges from base generation rates, the Company's commitment to pursue a distribution decoupling mechanism and alternative customer-sited generation resources, the lack of a collection mechanism for future environmental costs and the certainty of base generation rates over the transition period.[15] The Company's assertions, however, are wrong.

If anything, the Commission in many instances overstated the "benefit" that may accrue to customers from these aspects of the proposed ESP. There is no customer benefit in having the Company's version of certainty regarding base generation rates over the transition period (i.e., guaranteed rate increases for the Company) because the base generation rates proposed in the ESP (and those approved in the O&O) are not cost-

[13] OPC at 8.

[14] Id.

[15] Id. at 16-17.

based.[16] Thus, customers may pay more than is reasonable for the Company's electric service during the ESP term, without any review of the reasonableness of the rates. In addition, as OCC and APJN noted, the Company is proposing to spend $2 million less per year to fund the PWO than it spent in its first ESP.[17] In this regard, the proposed ESP offered less of a benefit.

There is also no actual benefit in the Company's commitments to "pursue" a distribution decoupling mechanism and alternative customer-sited generation resources because there is no guarantee that either of these projects will come to fruition. The Company is only required to pursue these projects; there is no requirement that the Company implement the projects within the term of the ESP, or ever.

The Company is also wrong regarding the value the Commission placed on removal of the POLR charge from ESP rates. The Commission properly recognized that removal of the POLR charge is not a benefit of the ESP because the Commission had mandated that the POLR charge be removed from the ESP.[18] Removal of a charge for which the Commission had determined there was no evidentiary support is not a "benefit."

Second, the Company claims that the Commission erred by failing to make all of the necessary pricing-related corrections to PUCO Staff Witness Fortney's ESP/MRO pricing comparison.[19] Specifically, the Company asserts that Mr. Fortney's analysis assumed that RPM prices would apply for all capacity made available to competitive

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[16] See OCC/APJN at 8-10.

[17] See id. at 11-12.

[18] O&O at 30.

[19] OPC at 18.

suppliers and did not consider the impact of $255/MW-Day capacity pricing on non-set aside capacity that the O&O approved.[20] As a result, the Company claims, the Commission also failed to take into account the effects of the modified Stipulation capacity pricing on the MRO cost estimates and thus produced MRO pricing that is higher than what Mr. Fortney calculated using only RPM pricing for all capacity.[21] This assignment of error lacks basis in the record.

The Commission is required by law to base its decisions solely on the facts in the record. R.C. 4903.09 requires that "[i]n all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made … and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." PUCO decisions must provide in sufficient detail the facts **in the record** upon which the Commission bases its decision and the reasoning followed in reaching the decision.[22]

A review of the record of this proceeding provides no basis for the Commission to make the changes in Mr. Fortney's calculations suggested by the Company in its application for rehearing. The Company does not point to anything in the record that shows Mr. Fortney's calculations to be in error. Thus, if the Commission were to make the changes suggested by the Company, the Commission would be violating R.C. 4903.09 and the directive of the Supreme Court of Ohio.

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[20] Id.

[21] Id.

[22] See *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87.

Third, OPC claims that the reduction the Commission made to the Stipulation's proposed base generation rate increases is not rationally related to the $325 million differential that the Commission calculated in the O&O.[23] The Company claims that the Commission acknowledges this error in the O&O "when it concedes that reducing the proposed base generation rates by one half would produce ESP rate benefits that exceed the purported $325 million ESP disadvantage by over $42 million."[24] The Company asserts that the Commission "unjustifiably diminished the value of the ESP by over $42 million too much."[25]

Although the Commission approved base generation rates that are not cost-based without explaining this departure from its precedent,[26] the Commission's halving of the base generation rate increases has a basis in the record. The Commission recognized that "[w]hile many Signatory Parties correctly point out that the numeric price test is only a factor and should not be the sole consideration pursuant to Section 4928.142, Revised Code, the fact that there is a gap of over $325 million between the proposed ESP and MRO is significant enough that we believe it is necessary to make modifications to the proposed ESP."[27] The Commission also found that "[b]ased on Mr. Fortney's testimony in the record and in looking to Mr. Fortney's statutory test Attachment A, it is apparent that the base generation rates are a significant factor in the MRO being more favorable than the proposed ESP in the numeric price test."[28] As a result, the Commission found

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[23] OPC at 21-23.

[24] Id. at 22.

[25] Id. at 10.

[26] OCC/APJN at 10-12.

[27] O&O at 31.

[28] Id. (citation omitted).

that it "must modify the Stipulation to adjust the proposed automatic base generation rate increases in order for the proposed ESP to meet the statutory provisions of Section 4928.143, Revised Code."[29] Although the reduction in the base generation rate increases did not make the ESP exactly quantitatively equal to the result expected from an MRO, it is supported by the record. The Commission should deny the Company's request for rehearing on this issue.

B. The Commission acted reasonably and lawfully by holding that projects will not be approved under the GRR unless generation needs cannot be met through market-based solutions.

In the O&O, the Commission adopted the GRR as a placeholder rider for the Company's Turning Point Solar project and proposed MR6 generating plant. In so doing, the Commission stated:

> Although we will first look to the market to build needed capacity, the proposed GRR provides a lifeline in the event that market-based solutions do not emerge for this state's generation needs. While Section 4928.143(b)(2), Revised Code, provides the Commission with authority to order construction of new generation facilities in Ohio, such new generation or capacity projects will only be authorized when generation needs cannot be met through the competitive market.[30]

The Company claims that the Commission's statement – which OPC calls a "market failure" test – has no basis in R.C. 4928.143(B)(2)(b) and (c), and thus "unlawfully modifies the controlling statutory standard."[31] The Company claims that "[a]s a practical matter, the prospect of imposing a 'market failure' test on top of the criteria that are already included in the statute will serve to undermine AEP Ohio

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[29] Id.

[30] O&O at 39.

[31] OPC at 26.

successful pursuit of these potentially beneficial projects and prejudges the merits of a future case."[32] The Company is wrong.

R.C. 4928.143(B)(2)(b) allows an ESP to include "[a] reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility…." In addition, "no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process." Both R.C. 4928.143(B)(2)(b) and (c) also state that "[n]o such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility." Logically included in the Commission's determination as to the need for the facility would be whether the Company's generation needs may be met through the market.

Although the Commission erred in the approving the GRR as a placeholder rider without taking the cost of the projects into consideration as part of the ESP/MRO comparison,[33] the Commission acted lawfully in placing a qualification on the need for projects whose costs would be recovered through the rider. The Commission should deny OPC rehearing on this issue.

C. The Commission acted lawfully and reasonably in modifying the RPM-priced capacity set-aside level to accommodate governmental aggregation and residential customers.

OPC, OMAEG, OHA and RESA all seek rehearing of the O&O's revision to the Stipulation's RPM-priced capacity set-aside provision. OPC first claims the Commission was not justified in specifically protecting aggregation because communities would have

[32] Id. at 27.

[33] OCC/APJN at 12-13.

had ample time after the Stipulation was docketed on September 7, 2011 to pass a resolution and sign a contract to implement aggregation.[34] OPC's assertion, however, assumes that communities would have been aware of the provision in the Stipulation and would have acted without knowing whether the Commission would have approved the Stipulation as filed. This is not a valid assumption.

OPC next claims that there is no basis in the record to support keeping the set-aside level open through the end of 2012 to accommodate governmental aggregation.[35] The Company contends that the record supports only a brief extension of the deadline for governmental aggregators to apply for the RPM-priced set-aside, and thus it was unreasonable and without basis in the record for the Commission to give governmental aggregators until the end of 2012 to qualify for the set-aside.[36] OPC asserts that R.C. 4938.20(K) [sic][37] "only directs the Commission to promote large-scale aggregation in the form of adopting rules" and does not justify the modification made in the O&O.[38] OPC, however, is wrong.

OPC ignores the overriding state policy to "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers" found in R.C. 4928.02(C). Providing consumers with greater access to governmental aggregation programs is an important part of the Commission's role in furthering this state policy. In addition, although R.C. 4928.20(K) uses the term "large-scale" governmental aggregation programs, that term is not defined in the statute.

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[34] OPC at 29-30.

[35] Id. at 34-36.

[36] Id.

[37] There is no R.C. 4938.20(K). The Company likely was referring to R.C. 4928.20(K).

[38] Id. at 33.

There is no minimum number of customers or amount of load associated with the term. The provision in the O&O keeping the RPM-priced set-aside capacity available until the end of 2012 helps to ensure that a broad range of communities may have access to the set-aside.

OPC's last claim of error in this regard is that because the aggregation-related modification was discussed in the section of the O&O addressing violation of important regulatory principles or practices, the modifications ordered by the Commission should be justified as being needed in order to avoid the Stipulation violating an important regulatory principle or policy.[39] OPC claims that the Commission did not link the modification to a particular regulatory practice or principle and narrowly tailor its modification to being only that which was needed to avoid the perceived violation. The Company, however, ignores that the Commission recognized that "[i]t 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 become the customer of a CRES provider."[40] The Commission's decision is narrowly tailored to further the state policy, and thus the Company's claim of error is without basis.

OHA, OMAEG and RESA all make similar arguments for rehearing on the RPM-priced set-aside issue. Both OHA and OMAEG argue that the Stipulation represented a balancing of interests attained solely through the negotiation process, and that the Commission radically upset this balance by arbitrarily rearranging the benefits and

[39] OPC at 36-37.

[40] O&O at 54.

detriments of the Stipulation.[41] RESA contends that the Commission's modification of the RPM-priced set-aside provision is unreasonable and unlawful because it establishes restrictions to access of RPM-priced capacity that did not exist in the Stipulation.[42] These arguments, however, are not persuasive.

The Commission's role in reviewing a stipulation is not to rubber-stamp the stipulation, as OHA, OMAEG and RESA would have it. Rather, the Supreme Court of Ohio has recognized that the Commission must undertake what is essentially de novo review of any stipulation before it:

> A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.[43]

The signatory parties themselves acknowledged this in the Stipulation by including the provision that the Stipulation is a recommendation and is not binding upon the Commission.[44]

As part of its determination of whether a stipulation is just and reasonable, the Commission should not only look at whether the terms of the stipulation resulted in a balancing of the interests of the parties signing the stipulation, but also the reasons why some parties did not sign the document. To do otherwise would yield an incomplete view of the negotiations and the stipulation itself. Here, the Commission properly considered the views of all parties to the proceeding – signatory and non-signatory parties alike –

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[41] OHA at 5; OMAEG at 4-9.

[42] RESA at 7.

[43] *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367.

[44] See Signatories Joint Ex. 1 at 3.

and concluded that a just and reasonable result could only be attained through modification of the RPM-priced set-asides.

The Commission's modification of the RPM-priced capacity set-asides of the ESP proposed in the Stipulation in this proceeding helps to produce a just and reasonable result. The Commission should deny the requests for rehearing submitted by the signatory parties.

D. The Company's Request that the Commission reverse and/or clarify the governmental aggregation modification to avoid exposing AEP Ohio to indeterminate financial risk during the term of the ESP does not seek rehearing of the O&O, but instead is an inappropriate reiteration of the Company's response to objections to its compliance plan.

The Company criticizes the Commission's modification of the Stipulation that allowed the RPM-priced capacity set-aside for residential customers to continue past 2011 to ensure that residential customers are not foreclosed from their share of the capacity at RPM rates.[45] The Company claims that expanding the initial set-aside to 21% for residential and industrial classes would exceed the overall limit of 21%, and would be "a material and costly modification that goes beyond anything discussed in the Opinion and Order."[46] The Company asks the Commission to "clarify on rehearing the details of its intended modification to the Stipulation's RPM-priced capacity set-aside so that AEP Ohio can decide whether unacceptable financial uncertainty remains that would cause AEP Ohio to withdraw from the modified ESP and the Stipulation as a whole."[47] The

[45] OPC at 38-45.

[46] Id. at 40.

[47] Id. at 45.

Company suggested that the Commission adopt the revised Detailed Implementation Plan ("Revised DIP") the Company filed in these proceedings on December 29, 2011.[48]

This issue, however, is inappropriate for an application for rehearing. The Company's argument is one that OPC already made in its response to objections to the Company's compliance tariff filing docketed by FES and IEU in this proceeding.[49] In fact, the argument is nearly verbatim of the argument made in the Company's January 4, 2012 filing.[50] The Company thus is not seeking "rehearing" of the O&O, but instead is attempting to get a second bite of the apple regarding Commission approval of the compliance filing. This does not belong in an application for rehearing. R.C. 4903.10 provides the following: "**After** any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters **determined** in the proceeding." (Emphasis added.) The Commission did not make a determination – in the O&O or elsewhere – regarding the Company's compliance filing, and thus there is no basis for the Company to seek rehearing on this issue. The Commission should thus deny the Company's request for rehearing.

E. The Commission acted lawfully and reasonably in declining to approve the Company's corporate separation within the context of the ESP proceeding.

In the O&O adopting but modifying the Stipulation, the Commission declined to approve the Company's corporate separation within the context of the ESP proceeding as

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[48] Id.

[49] Memorandum of Ohio Power Company in Opposition to Industrial Energy Users-Ohio's Motion and FirstEnergy Solutions' Objections/Request for Relief (January 4, 2012) at 3-8.

[50] Compare id. to OPC at 39-45.

the signatory parties had requested.[51] Instead the Commission ruled that it needed "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 AEP subsidiary."[52] In doing so it explicitly overruled the signatory parties' arguments that the Commission had the necessary information to approve the corporate separation under R.C. 4928.17.

The Commission also noted that R.C. 4928.17 requires due process for parties to provide comments or objections regarding the corporate separation plan.[53] The Commission concluded that approval of the corporate separation plan would have to occur in the separate corporate separation docket, Case No. 11-5333-EL-UNC, consistent with the Attorney Examiners' ruling denying the motion to consolidate the two dockets.[54] The Commission advised that AEP Ohio should divest its competitive generation assets from its noncompetitive electric distribution utility to its separate competitive retail generation subsidiary.[55] The Commission also ruled that it would continue to review the remaining issues regarding corporate separation in an expeditious manner in the corporate separation docket.

The Company argues that the O&O's modification regarding corporate separation is unreasonable and unlawful because it is inconsistent with the Commission's recent

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[51] See Joint Signatories Ex. 1, ¶ IV.1 ("[a]pproval 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)….").

[52] O&O at 60.

[53] Id. at 61.

[54] See Tr. V at 639-640 (ruling that the motion for consolidation was denied because "there needs to be additional review with that case before we actually address that." (Oct. 11, 2011)). The Company did not take an interlocutory appeal of the ruling and did not raise the propriety of the ruling in its Initial Brief, even though it had the right to do so under Ohio Adm. Code 4901-1-15(F).

[55] O&O at 61.

decision in the Duke Ohio proceeding, Case No. 11-3549-EL-SSO.[56] In the Duke Ohio proceeding, the Commission approved a unanimous and unopposed Stipulation.[57]

Consistent with the terms of the Duke ESP Stipulation, the Commission approved, *inter alia*, Duke Ohio's full corporate separation, including the transfer of generating assets at net book value. The Commission found the corporate separation plan complied with R.C. 4928.17 and the applicable provisions of the Ohio Administrative Code. According to the Commission, the provisions of the Duke ESP Stipulation provided "the necessary safeguards to ensure that the statutory mandates pertaining to Duke's sale of generation assets and corporate separation are adhered to and the policy of the state carried out."[58] There was no separate hearing held, nor was a market value study done of the generating assets that were to be transferred.[59]

The Company also alleges that the Commission's "inconsistent application of its corporate separation efforts" violates R.C. 4928.17, 4928.06, and 4928.02(H).[60] The Company's application for rehearing on these issues, nonetheless, should be denied as explained below.

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[56] OPC at 45-52.

[57] *In the Matter of the Application of Duke Energy Ohio, Inc 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 Nos. 11-3549-EL-SSO et al, ("Case No. 11-3549") Opinion and Order (Nov. 22, 2011) ("Duke ESP Order").

[58] Id. at 46.

[59] See Case No. 11-3549, Stipulation and Recommendation at 1 (Oct. 24, 2011) ("Duke ESP Stipulation").

[60] OPC at 53-55.

1. The Commission's decision was reasonable, lawful, and should be upheld.

R.C. 4928.17 requires the Commission to approve the transfer or sale of generating assets by an electric distribution utility.[61] Subsection (B) of R.C. 4928.17 requires that the Commission adopt rules for corporate separation and procedures for filing and approval of a corporate separation plan. The law specifically requires that the Commission rules "shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections." The PUCO adopted rules, pursuant to the Legislature's directive. Those rules can be found in Ohio Adm. Code 4901:1-37.

The specific process for reviewing a corporate separation plan is set out in Ohio Adm. Code 4901:1-37-09(B)-(D). These are the rules that work in conjunction with R.C. 4928.17 to ensure that the corporate separation satisfies the public interest and is legally sufficient. These rules require the separate filing of an application which shall at a minimum show: the object and purpose of the sale or transfer; a demonstration of how the sale will affect current and future standard service offers; a demonstration of how the sale will affect the public interest; and the fair market value and book value of property to be transferred.[62] Additionally, the rules allow the PUCO to fix a time and place for a hearing if the application appears to be unjust, unreasonable, and not in the public interest.[63] These rules provide safeguards to ensure customers' interests are protected in the corporate separation process by requiring an open, transparent process with standards

[61] R.C. 4928.17(E).

[62] Ohio Adm. Code 4901:1-37-09(C).

[63] Ohio Adm. Code 4901:1-37-09(D).

to be met before corporate separation is approved. It is these rules nonetheless that the Company wants to disregard.

If the Company's application for rehearing is granted, the Commission would bypass these detailed rules and filing requirements. The "me too" approach the Company urges the Commission to follow means that the PUCO would grant the Company's corporate separation with no more process or filings. This means no hearing, waivers of filing requirements (including a market study) and identical treatment of contractual obligations arising before corporate separation – despite the fact that the treatment was not proposed in the Stipulation in these proceedings, is without record support and has not been subjected to cross-examination.[64]

The Commission correctly found that it needed additional time to determine and understand the terms and conditions relating to the sale and transfer of generating assets, and acknowledged that interested parties must be given an opportunity to provide comments. The Commission's finding was reasonable and complied with the law; it should not be disturbed. The Company's application for rehearing should be denied.

2. The Company's allegations about inconsistent treatment being accorded to it on corporate separation are not ripe for the Commission's consideration.

In an effort to predetermine the outcome of its corporate separation proceeding, the Company has sought rehearing on an issue that the Commission recently determined is not ripe for consideration. Of course, OCC is referring to the Commission's Entry on Rehearing in the Duke Ohio SSO case, Case No. 11-3549-EL-SSO, et al.

[64] The Company has just recently introduced this new proposal regarding the treatment of its contractual obligations in its application for rehearing. The proposed treatment is without record support and cannot be adopted by the Commission under the Ohio Supreme Court's holding in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶¶ 22-36.

There, as here, the Company complained, through an application for rehearing, about the alleged disparate corporate separation treatment being accorded to Duke in its SSO case. Unlike this proceeding, the Duke ESP case presented a unanimous and unopposed Stipulation for the Commission to consider which was ultimately approved by the PUCO in the Duke ESP Order.

In denying the Company's "inappropriate" application for rehearing, the Commission noted that it had not yet issued its final decision on the AEP Ohio corporate separation plans.[65] Thus, it concluded that "the ultimate issue AEP is complaining about is not yet ripe for consideration and will not be ripe for rehearing until the Commission issues its order in the *AEP Corporate Separation Case*."[66] The Commission explained that the divestiture of AEP Ohio's generation assets was approved in the ESP proceeding, but is "contingent upon statutorily required due process and the Commission's final review in the *AEP Corporate Separation Case*."[67] Finally it noted that once its decision in the AEP Corporate Separation Case is issued, "if AEP does not agree with the outcome, it can file for reconsideration in that docket."[68] Consistent with its Entry on Rehearing in Duke's SSO proceeding, the Commission should deny AEP Ohio's application for rehearing because it is not ripe for consideration.

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[65] *In the Matter of the Application of Duke Energy Ohio, Inc 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 Nos. 11-3549-EL-SSO et al, Entry on Rehearing, ¶ 14 (January 18, 2012).

[66] Id.

[67] Id.

[68] Id.

3. The Commission should reject the Company's arguments that it is receiving inconsistent treatment based on the Duke ESP Stipulation and the Commission's order approving the Duke ESP Stipulation.

The Duke ESP Stipulation expressly prohibits the Company, as a signatory party, from using the terms of the Stipulation in a number of respects. Under the Stipulation, the signatory parties' agreement to the Stipulation in its entirety is not to be "interpreted in a future proceeding before this Commission as their agreement to only an isolated provision of this Stipulation."[69] Moreover, under the terms of the Duke ESP Stipulation, neither the Stipulation nor a PUCO order considering the Stipulation shall be deemed to be binding "in any other proceeding."[70] The Duke ESP Stipulation also declares that it may not be offered or relied upon in any other proceedings, except for enforcement purposes.[71] The Company, however, in violation of the Duke ESP Stipulation, attempts to use the results of the Stipulation to argue that the Commission must give the Company the same treatment in this proceeding as Duke received in its ESP proceeding. The Company's use of the Duke ESP Stipulation in these cases is highly inappropriate under the terms of that settlement.

A stipulation, such as the Duke Ohio Stipulation, represents a resolution of a number of issues in a proceeding or multiple proceedings. A stipulation is a package composed of many different provisions – provisions which may not be acceptable on a stand-alone basis, but when put together with other terms constitute an acceptable compromise. Indeed as the Duke Ohio Stipulation stated "[t]his stipulation represents an

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[69] Duke ESP Stipulation at 40.

[70] Id. at 2

[71] Id.

agreement by all Parties to a package of provisions rather than an agreement to each of the individual provisions included within the Stipulation."[72] It is in the words of the signatory parties "a comprehensive compromise of issues raised by Parties with diverse interests."[73] It simply does not represent the positions that parties would have taken outside the context of a package agreement. To extricate the distinct corporate separation provisions of the Duke ESP Stipulation and argue that by law, these must be applied, perverts the whole settlement process.

Allowing a PUCO-adopted stipulation and a PUCO Order adopting the stipulation to be cited to as precedent means that it is being used in violation of the terms expressly agreed upon. The Commission should not sanction such misuse. Further, the Commission should recognize that such misuses, if allowed, will have a chilling effect on the willingness of parties to enter into future negotiations. If the Commission wishes to encourage future settlements and encourage respect for terms of past settlements, it must treat a breach of the settlement as a serious matter. It should deny the Company's application for rehearing for this reason.

[72] Id.

[73] Id. at 3.

4. The Commission did not violate R.C. 4928.17, 4928.06, or 4928.02(H) in ordering corporate separation treatment for Duke Energy Ohio different from the Company's.

a. R. C. 4928.17(A)(3) is directed to preventing a utility from extending any preference or advantage to "any affiliate, division, or part of its own business." It does not apply to the Commission allegedly granting any preference or advantage to Duke Ohio.

The Company argues that "as a threshold matter" R.C. 4928.17 requires the Commission to ensure that an approved corporate separation plan "does not extend an undue advantage or preference in the provision of competitive electric services." This is an incomplete and misleading statement of the law.

R.C. 4938.17(A)(3), the only subsection that addresses "undue advantage or preference," clearly is directed to ensuring that there is no undue preference or advantage granted to an entity by the affiliated electric utility. The words of the statute make this quite clear. The electric utility must implement and operate under a corporate separation plan, approved by the Commission, that is consistent with the policy of R.C. 4928.02 and achieves three objectives, which *inter alia*, include that "[t]he plan is sufficient to ensure that the utility will not extend any undue preference or advantage to *any affiliate, division, or part of its own business* engaged in the business of supplying the competitive retail electric service…." (Emphasis added.)

The Company's claim here is that the Commission (not the electric utility) has extended an undue advantage or preference to Duke Ohio because it approved Duke Ohio's corporate separation plan, and did not do the same for the Company. If the Company believed the treatment given to Duke Ohio was unwarranted, it should have applied for rehearing of the Commission's Order in the Duke case, as required by R.C.

4903.10. The Company chose instead to not seek review of the Commission's Order in the Duke ESP case or challenge the reasonableness or lawfulness of the order approving the Duke Stipulation.[74]

Moreover, even if it were true that the Commission is extending undue advantage to Duke Ohio (which it is not), this statute would not prohibit such behavior. The Company's reliance on this statute is unfounded and untenable.

b. R.C. 4928.02(H) does not prohibit the Commission from treating Duke Ohio's corporate separation in a manner different from the Company's. It applies to subsidies arising between and among the unbundled components of service provided by a single electric utility.

The Company argues that the policy provisions of R.C. 4928.02(H) are violated when the PUCO treats the corporate separation plans of two separate electric distribution utilities differently. According to the Company, inconsistent application of the corporate separation rules provides one entity (Duke Energy Ohio) "subsidies and a competitive advantage."[75] Again, this statement of law is incomplete and misleading.

R.C. 4928.02(H) contains one of the State's electric services policies. That policy is that the State shall "[e]nsure 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."

[74] See Duke ESP, Entry on Rehearing, ¶ 13 (finding that AEP did not state a statutory ground for rehearing of any matter determined in the Duke 2011 ESP case).

[75] OPC at 54.

The words refer quite simply to subsidies arising from within a single electric distribution utility pertaining to its offering of competitive and noncompetitive retail service, and its offerings of generation, transmission, and/or distribution service. These words convey the S.B. 3 concept of unbundling all three major components of electric service-generation, distribution and transmission. It was the unbundling of components that "ensured that an electric utility would not subsidize the competitive generation portion of its business by allocating generation expenses to the regulated distribution service provided by the utility. Conversely, it ensured that distribution service would not subsidize the generation portion of the business."[76]

The Company's claim here is that the Commission has violated this policy because it approved Duke Ohio's corporate separation plan, and did not do the same for the Company. This has nothing to do with the different unbundled components of a single electric utility and how it has used one of those three unbundled components to subsidize another component. The Company's reliance on this statute is misguided. The Commission should reject the Company's application for rehearing.

c. R.C. 4928.06 does not preclude the Commission from treating Duke Ohio's corporate separation in a manner different from OPC's.

The Company alleges that the Commission has created an "unequal competitive playing field" by the "disparate treatment of Duke Energy Ohio's new GenCo affiliate versus AEP Ohio's new GenCo affiliate."[77] Such a situation cannot survive scrutiny

[76] *Elyria Foundry Co. v. Pub. Util Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 53 citing *Migden Ostander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio 3925, ¶ 4 (concluding that R.C. 4928.02(G) (now 4928.02(H)) prohibits cross-subsidization between two or the three major electric service components of a single electric utility).

[77] OPC at 55.

under the factors set forth in R.C. 4928.06(D) because it "operates to stifle the development of a competitive retail electric generation market."[78]

This subsection of R.C. 4928.06(D) relates back to the PUCO's ability to monitor and evaluate the provision of retail electric service in order to determine whether any noncompetitive electric service should be available on a competitive basis and whether any competitive retail electric service is no longer subject to effective competition.[79] It also pertains to the Commission determining whether there is a decline or loss of effective competition such that the Commission shall take steps to ensure that service is provided at compensatory, fair and non-discriminatory prices and terms and conditions.[80] R.C. 4928.06(D) merely lists factors for the Commission to consider in its responsibilities under R.C. 4928.06(B) and (C). These factors are to be used to determine whether there is effective competition or reasonably available alternatives. The factors are agued when a party seeks a determination of the existence of competition or lack of competition.

In its application for rehearing, AEP Ohio is not seeking a determination of the existence of competition or lack of competition. Rather it is using the factors to support the illogical argument that there is a disparate playing field created by the Commission that they are unhappy about. These statutory factors have nothing to do with AEP Ohio's arguments. They should be disregarded and the application for rehearing rejected.

III. CONCLUSION

The applications for rehearing filed by OPC, OHA, OMAEG and RESA present arguments that have no real support in the record of this proceeding or in law. These

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[78] Id.

[79] See R.C. 4928.06(C).

[80] See R.C. 4928.06(B).

signatory parties have not shown that the Commission's O&O was unlawful or unreasonable. The Commission should deny the applications for rehearing filed by the signatory parties.

Respectfully submitted,

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On Behalf of the Appalachian Peace and Justice Network

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic transmission, to the persons listed below, on this 23rd day of January 2012.

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

Summary: Memorandum Memorandum Contra the Applications for Rehearing of Ohio Power Company, OMA Energy Group, The Ohio Hospital Association and Retail Energy Supply Association by the Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.