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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

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

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INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING

I. INTRODUCTION

On December 14, 2011, the Public Utilities Commission of Ohio ("Commission") issued its Opinion and Order approving a Stipulation and Recommendation ("Stipulation") filed on September 7, 2011. In that Opinion and Order, the Commission authorized Ohio Power Company and Columbus Southern Power Company ("OP", "CSP", and "Companies" as appropriate) to implement a modified version of the electric security plan ("ESP") proposed in the Stipulation ("Stipulation ESP"). Further, the Commission authorized shopping caps that effectively make most customers captive to the Companies' higher electric bills by limiting access to lower priced generation capacity service otherwise available from PJM Interconnection LLC's ("PJM") Reliability Pricing Model ("RPM"). OP for itself and as the successor to CSP, FirstEnergy Solutions Corp. ("FES"), Industrial Energy Users-Ohio ("IEU-Ohio"), Retail Energy Supply Association ("RESA"), the Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network ("OCC/APJN"), Ormet Primary Aluminum Corp. ("Ormet"), the Ohio Hospital Association ("OHA"), and the OMA Energy Group ("OMAEG") filed Applications for Rehearing on January 13, 2012.

For the reasons discussed below, the Companies' Application for Rehearing should be denied.[1] Customers are already facing significant arbitrary rate increases

[1] IEU-Ohio's Memorandum Contra addresses primarily the assignments of error raised by the Companies. The Applications for Rehearing filed by the Retail Energy Supply Association ("RESA"), the Ohio Hospital Association ("OHA"), and the Ohio Manufacturers' Association Energy Group ("OMAEG") raise additional issues regarding the modifications the Commission made to the two-tiered generation

while being deprived of the opportunity to exercise their statutory right to shop under the terms the Commission authorized in the Opinion and Order. Granting the Companies' Application for Rehearing would add further insult to injury.

Instead, the Commission should use the Entry on Rehearing to reject the illegal and unreasonable retail and wholesale rate increases and restraints on customer choice contained in the Stipulation. IEU-Ohio respectfully requests that the Commission grant IEU-Ohio's Application for Rehearing and further modify the Stipulation ESP to remove the unlawful and unreasonable provisions that were not removed by the December 14, 2011 Opinion and Order. Additionally, IEU-Ohio renews its request for an order that the rates be collected subject to reconciliation.

II. ARGUMENT

A. Approval of the Stipulation ESP

In their first assignment of error, the Companies allege that the Commission erred when it modified the Stipulation ESP by reducing the proposed base generation rate increase. In support of the assignment of error, the Companies argue that the Commission did not consider the "non-price benefits" and "other less quantifiable" aspects of the Stipulation ESP,[2] improperly excluded the proposed higher capacity costs approved as part of the Stipulation in pricing the market rate offer ("MRO"), and improperly included costs of the Turning Point Solar facility ("Turning Point") in the Stipulation ESP.[3] Finally, the Companies argue that the Commission should have

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capacity service pricing scheme. Those issues are addressed as appropriate in the sections dealing with the Companies' assignments of error.

[2] Ohio Power Company's Application for Rehearing at 2 & 11-17 (Jan. 13, 2012) ("Cos. Application for Rehearing").

[3] *Id.* at 2-3 & 17-21.

limited any adjustment to the Stipulation ESP to only that amount necessary to balance the ESP and MRO.[4] The Companies' arguments in support of the assignment of error, however, are not supported by the applicable law or the record. Moreover, the Companies continue to ignore the statutory requirement that an ESP be specific to an electric distribution utility ("EDU"). The Companies also fail to account for the effect of the last twelve months of the Stipulation ESP in their argument. When the last twelve months are included in the ESP versus MRO test, the Stipulation ESP, even with the Commission's modifications, fails the test and should not be approved.

1. *Wrong Starting Points*

Because the Companies' first assignment of error rests on the wrong starting points, the Commission should reject it. As the basis for their assignment of error, they rely on the Commission's findings that are based on a combined-EDU basis.[5] Section 4928.141, Revised Code, however, requires that an EDU apply to the Commission to establish a standard service offer ("SSO").[6] OP is an EDU, as is CSP. The combined companies were not a legal entity until sometime after the Commission's approval of the Stipulation. The Companies' attempt to justify the Stipulation ESP thus violates the express requirements of Sections 4928.141 and 4928.143, Revised Code, and should be rejected.

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[4] *Id.* at 3 & 21-23.

[5] Opinion and Order at 7-8 (Commission denies IEU-Ohio's motion to dismiss) and 31-32 (supporting testimony and FES Table 3 use a combined-EDU basis).

[6] The full explanation of this argument is set out in IEU-Ohio's Initial Brief at 7-18 (Nov. 10, 2011) and Application for Rehearing at 15-19 (Jan. 13, 2012) ("IEU-Ohio App. for Rehearing"). The arguments are incorporated by reference.

Additionally, the Companies attempt to recalculate the Commission's findings without accounting for the last twelve months of the Stipulation ESP. The Companies argue that the Stipulation ESP would pass the ESP versus MRO test by $93 million if certain adjustments are made.[7] The $93 million "advantage" is the difference between the "disadvantage" the Commission found in its initial review of the Stipulation ESP versus the MRO ($325 million[8]) and the sum of three factors the Companies suggest the Commission should consider before it modified the Stipulation ESP ($418 million[9]). The Companies, however, ignore the effects of the last twelve months of the Stipulation ESP on the ESP versus MRO test.[10] If the last twelve months are properly included in the ESP versus MRO test, the Stipulation ESP fails by $714 million.[11] Thus, even if the Commission accepted *every* change proposed by the Companies to the calculation of the ESP versus MRO test which, as argued below, would violate the statutory requirements, the Stipulation ESP would still fail the test by nearly $300 million.

2. *"Non-Price Benefits"*

Starting with the incorrect assumption that the Stipulation ESP failed the ESP versus MRO test by $325 million, the Companies argue that the Commission would have found that the Stipulation ESP was more favorable if it had considered several

[7] Cos. Application for Rehearing at 10.

[8] Opinion and Order at 31.

[9] Cos. Application for Rehearing at 10 (sum of $153 million for the Phase-In Recovery Rider ("PIRR") "benefit", $35 million for payments to Partnership with Ohio ("PWO") and the Ohio Growth Fund ("OGF"), and $230 million in capacity prices in the MRO). As discussed below, each of these adjustments, individually or collectively, do not warrant a finding that the Commission should have approved the Stipulation ESP.

[10] As noted in IEU-Ohio's Application for Rehearing, the Commission failed to properly consider the effect of the last twelve months. IEU-Ohio App. for Rehearing at 11. The Companies have taken advantage of that error to argue that the Commission should accept the Stipulation ESP.

[11] *Id.*, Attachment; IEU-Ohio Ex. 9A, KMM-11.

"non-price" and "less quantifiable" benefits. The "benefits" the Companies attribute to the Stipulation ESP, however, do not justify a change in the Commission's finding that the Stipulation ESP should not be approved as filed.

The Companies initially claim that the Commission did not consider the "benefits" of the 5.34% carrying charge for the recovery of OP deferrals through the PIRR and thereby failed to credit the Stipulation ESP with a $153 million benefit.[12] The Commission cannot adopt the Companies' adjustment because the PIRR is not part of the Stipulation ESP.

Under Section 4928.143(C)(1), Revised Code, the Commission may approve or modify and approve an ESP only if it finds that the ESP "so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." The section requires the Commission to consider only the terms and conditions of the Stipulation ESP. Although presented as part of the Stipulation, the PIRR was not a term of the Stipulation ESP. Section IV.1 of the Stipulation contains the provisions related to the Stipulation ESP. Section IV.6 separately addresses issues related to the PIRR and securitization. The Companies themselves recognized that the PIRR was not part of the Stipulation ESP and sought recovery of the deferral through a separate filing.[13] The Commission further held that "the phase-in is not part of this proceeding but was the

[12] Cos. Application for Rehearing at 13. As in other instances, the Companies are now claiming the benefits at their nominal value rather than their net present value. Compare *id.* with Cos. Ex. 4 at 18-19 and WAA-4. By ignoring the net present value of "benefits" which accrue over time, the Companies overstate their value.

[13] *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, *et seq.*

order of the Commission in the Companies' previous ESP case."[14] Because the PIRR is not a term or condition of the Stipulation ESP, any "benefit" that may have resulted from the reduction of the carrying charge rate cannot be included in the ESP versus MRO test.[15]

The Companies next assert that the Commission should have considered the benefit of the payments to PWO and OGF before determining that the Stipulation ESP failed the ESP versus MRO test.[16] The nominal amount at issue is $35 million over the life of the Stipulation ESP.[17] Given that the Stipulation ESP failed the ESP versus MRO test by at least $325 million, the payments of $35 million paid to PWO and OGF are not sufficient to support the Companies' assignment of error.

The Companies' claim that the Commission erred in applying the ESP versus MRO test fares no better when the Companies point to "less quantifiable" alleged benefits. First, the Companies argue that customers gain some benefit by "an earlier transition to fully market-based prices (about three and a half years) than would be possible through an MRO."[18] Whether the Companies are asserting that customers will benefit from being able to secure market-based prices from competitive retail electric service ("CRES") providers or, more likely, that the SSO will be based on a competitive

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[14] Opinion and Order at 57.

[15] As IEU-Ohio demonstrated in its Application for Rehearing, the Commission authorized an excessive carrying charge on the PIRR. IEU-Ohio App. for Rehearing at 63-65. The Commission should grant rehearing to reduce the carrying charge to a rate nearer the BBB seven year bond rate. IEU-Ohio Ex. 8 at 14-15.

[16] Cos. Application for Rehearing at 13-14.

[17] In their testimony supporting the Stipulation, the Companies recognized that the more conservative net present value of these payments was $17 million. Cos. Ex. 4, WAA-4.

[18] Cos. Application for Rehearing at 16.

bidding process ("CBP") in three and a half years, the argument does not warrant a finding that the Stipulation ESP is more favorable in the aggregate.

If the Companies are arguing that customers will be able to take advantage of competitive rates in a fully open market, then they are ignoring the fact that the Stipulation takes rights from customers to participate in the competitive market that they had before the Commission's approval of the shopping caps for more than three years. Under the prior ESP and the Commission's December 8, 2010 Entry in Case No. 10-2929-EL-UNC, customers were not arbitrarily (and in some cases, retroactively) assigned to "queues" if they wished to shop, and CRES providers were not presented with the non-comparable and unduly discriminatory two-tiered generation capacity service prices.[19] It is illogical to claim a benefit results when the effect of approving the Stipulation is to take away customers' rights[20] and thereby condemn them to higher electric bills.

Additionally, the Companies would be claiming this intangible benefit from a part of the Stipulation that is not a part of the Stipulation ESP. The provisions concerning capacity pricing do not affect the retail generation prices, terms, and conditions of the Stipulation ESP.[21] As with the PIRR, they cannot be considered a term or condition for applying the ESP versus MRO test.

If, instead, the Companies are arguing that customers will benefit from the move to a CBP under the Stipulation ESP, then the "benefits" should be reflected in a proper

[19] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No 10-2929-EL-UNC, Entry at 2 (Dec. 8, 2010).

[20] IEU-Ohio Ex. 9A at 48.

[21] The provisions related to the capacity and the shopping caps, apart from the CBP, are contained in Section IV.2 of the Stipulation. The provisions related to the Stipulation ESP are contained in Section IV.1.

calculation of the ESP versus MRO test. That test considers the effect of the proposed rates and the alternative under an MRO, including the blending of rates based on the prior ESP and a CBP for each EDU.[22] When the Commission tested the Stipulation ESP under the ESP versus MRO test, however, the Stipulation ESP failed by $325 million, and it would fail by $389 million more if the last twelve months of the Stipulation ESP are included, as they must be, in the test.[23]

The Companies also argue that the Commission should assign some value to the elimination of the provider of the last resort ("POLR") charge.[24] The Commission, however, concluded that elimination of the POLR charge was not a benefit based on its decision in the *ESP I* remand case.[25] The Companies do not provide any basis to overturn the Commission's conclusion.

Finally, the Companies list four other provisions they claim that the Commission should have considered in assessing the Stipulation before determining that it failed the ESP versus MRO test: an agreement to discuss rate decoupling; an agreement to discuss customer-sited generation; the discontinuance of a charge for environmental plant investment; and "rate certainty."[26] Of these, rate decoupling and customer-sited generation are highly speculative, and the latter is not properly considered a part of the

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[22] Section 4928.143(C)(1), Revised Code.

[23] IEU-Ohio App. for Rehearing, Attachment; IEU-Ohio Ex. 9A, KMM-11.

[24] Cos. Application for Rehearing at 16-17.

[25] Opinion and Order at 30. See *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO *et al.*, Entry on Remand (Oct. 3, 2011) ("*ESP I*").

[26] Cos. Application for Rehearing at 17.

Stipulation ESP.[27] The claimed benefit from the elimination of an environmental rider is already reflected in the Stipulation ESP's generation rate, and the Companies did not make any demonstration that the elimination of the former rider provides any net advantage to the Stipulation ESP. Finally, the suggestion that customers are benefiting from rate certainty is not supported because the Stipulation ESP contains rate increases and placeholder riders that make the rates neither stable nor certain.[28] The only thing that is certain is that the rates will increase some indeterminate amount, and customers will not be able to shop to avoid the increases. The fog and unauthorized implementation details that the Companies have added to the Stipulation ESP, as modified by the Commission, are also working to deprive customers of their ability to predict the extent to which (and when) their consumption will cause SSO electric bill increases and how or when the increase might be avoided through customer choice.

3. *Capacity Prices and Placeholder Riders*

In its second set of arguments addressing the calculation of the ESP versus MRO test, the Companies advance questionable claims that the Commission improperly priced the MRO using only an RPM capacity price and improperly included a cost for Turning Point. Once again, the Companies fail to demonstrate a legal or factual basis for ordering rehearing.

Initially, the Companies argue that the Commission should have priced the MRO using the two-tiered generation capacity service pricing scheme[29] and then provide a

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[27] IEU-Ohio App. for Rehearing at 51-52 (no provision in Section 4928.143(B)(2), Revised Code, to support cost recovery for customer-sited generation).

[28] IEU-Ohio App. for Rehearing at 51-52.

[29] Cos. Application for Rehearing at 18.

"conservative estimate" that the Commission overstated the MRO's advantage by $230 million.[30] The Companies, however, do not include a citation to support this estimate. Furthermore, the assumption that the CBP would be subject to the two-tiered generation capacity service pricing scheme is contrary to the record. As part of his criticism of the Companies' application of the ESP versus MRO test, Mr. Murray testified that that the MRO's CBP would not include the two-tiered generation capacity service pricing scheme.[31] Thus, the Companies fail to demonstrate that the Commission erred when it used the RPM capacity price to calculate the pricing outcome of the MRO's CBP.

The Companies also assert that the Commission improperly assigned a cost to Turning Point when it applied the ESP versus MRO test based on three claims.[32] First, the Companies state the Commission should not include the cost of Turning Point because the Companies' estimate is "speculative"[33] and "stale."[34] Because the evidence on which the Commission relied to identify the cost of Turning Point was the Companies' estimate,[35] the Commission should disregard the Companies' attempt to disown their own numbers.[36]

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[30] *Id.*

[31] IEU-Ohio Ex. 9B at 26-27 & 35-38.

[32] Cos. Application for Rehearing at 19-20.

[33] *Id.* at 19.

[34] *Id.*

[35] Staff Ex. 4, Attachment A; Tr. Vol. X at 1695.

[36] The Companies did not examine Mr. Fortney or offer any testimony to support the new assertion that the estimates are stale. In *ESP I*, the Companies objected to IEU-Ohio's use of extra-record information to demonstrate that the Commission analysis was flawed. In that case, the Commission concluded that it should address the matter on the record before it. *ESP I*, Entry on Rehearing at 49-51 (July 23, 2009). If properly presented, IEU-Ohio continues to maintain that new information should be the basis for granting rehearing. *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm. of Ohio*, 10 Ohio St. 3d 12 (1984).

Second, the Companies argue that the cost of Turning Point should be ignored because the Commission would not approve the project unless there were net benefits.[37] Again, however, there is no support for this assertion in the record or the Commission's Opinion and Order. In fact, as Ms. Claytor testified, solar facilities have a capacity rating that is "not good," and "that affects the effected [*sic*] cost per kilowatt-hour customers see."[38]

Third, the Companies, relying on testimony from Laura Thomas, assert that they would be permitted to recover the Generation Resource Rider ("GRR") under an MRO and thus it should not affect the ESP versus MRO test.[39] The Commission did not find that her conclusion was wrong, but in applying the ESP versus MRO test, the Commission did not use her approach, and instead based its decision on the testimony of Mr. Fortney and Table 3 in the FES Initial Brief.[40] Mr. Fortney and FES Table 3 do not include the GRR in the MRO. Thus, the evidence on which the Commission made its findings does not support the Companies' position.

Moreover, the exclusion of the GRR from the MRO-side of the ESP versus MRO test is required by Section 4928.143(C)(1), Revised Code.[41] Under that section, the ESP includes any terms and conditions, which in this case would include the GRR. The MRO is a blend of the prior EDU-specific ESP (for which there was no approval of a

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In this instance, however, the unsupported assertion that the information is stale is an inadequate showing that circumstances warrant rehearing.

[37] Cos. Application for Rehearing at 20-21.

[38] Tr. Vol. V at 653 (Cross-examination of Peggy Claytor).

[39] Cos. Application for Rehearing at 21 (relying on the testimony of Laura Thomas).

[40] Opinion and Order at 31.

[41] For a further explication, see IEU-Ohio Ex. 9A at 41.

GRR or any Turning Point costs) and a CBP.[42] Thus, there was and is no legal basis for including the GRR on the MRO-side of the ESP versus MRO test.

The Companies' argument concerning what should be included and excluded from the ESP and the MRO also highlights the fact that the Commission understated the cost of the Stipulation ESP because it failed to assign costs to the Stipulation ESP for each of the three "placeholder" riders.[43] If the Commission properly authorized the placeholder riders (an assumption that is not supported by the applicable law[44]), the Commission also should have considered the costs of the placeholder riders as required by Section 4928.143(C)(1), Revised Code. Under that section, the Commission must consider all terms and conditions of the ESP. The Commission, however, assigned a cost to only the GRR [but did not include a value for Muskingum River 6 ("MR6")], and did not assign any cost for the other placeholder riders.[45] In the case of the PMR, this result was particularly inconsistent with the law since an estimate of the cost of the PMR was available to the Commission.[46] As a result of the Commission's failure to hold the Companies to their burden of proof[47] and to assign

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

[43] IEU-Ohio App. for Rehearing at 19-22. The Commission authorized three placeholder riders, the GRR, Opinion and Order at 38-40, the Pool Modification Rider ("PMR"), *id.* at 49-50, and a rider to recover the cost of customer sited generation, *id.* at 55-56.

[44] *In re Columbus S. Power Co.*, 132 Ohio St. 3d 512, 520 (2011) (the Commission may not approve provisions of an ESP not listed in Section 4928.143(B)(2), Revised Code).

[45] Section 4928.143(C)(1), Revised Code. By failing to assign values to the placeholder riders, the Commission understated of the cost of the Stipulation ESP.

[46] FES Ex. 4 at 19.

[47] Section 4928.143(C)(1), Revised Code, places the burden of proof on the EDU to demonstrate the ESP is more favorable than an MRO.

costs to each of the placeholders, the Commission unreasonably and unlawfully understated the cost of the Stipulation ESP.[48]

4. *Stealing Back Benefits*

Finally, the Companies argue that the Commission went farther than permitted in reducing the base generation rate increases so that the Stipulation ESP satisfied the ESP versus MRO test. According to the Companies, the Commission's modification "must be calibrated so that it remedies the disadvantage."[49] The Companies do not point to any legal authority to support this conclusion and the "application" of their argument results in the Companies' absurd claim that they be permitted to obtain ESP revenue in an additional amount equal to the customer "benefits."

Initially, the Companies argue, without citation, that the Commission must limit any modification so that "[a]ny downward adjustment [is] limited to the minimum necessary to achieve balance, in the aggregate, between the ESP and an alternative MRO."[50] The argument, however, is not supported by Section 4928.143(C)(1), Revised Code. That section requires the Commission to find that the Stipulation is "more favorable."[51] "Balancing" the ESP and the MRO is not legally sufficient.

The Companies then argue that rates should be increased by the $42 million "benefit" that resulted from the Commission's modification of the increases of the base

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[48] IEU-Ohio App. for Rehearing at 14-22.

[49] Cos. Application for Rehearing at 22.

[50] *Id.* at 21.

[51] Section 4928.143(C)(1), Revised Code.

generation rate increases.[52] Following this line of reasoning that they should be permitted to increase rates to offset benefits, the Companies list several additional benefits that should drive additional base generation rate increases.[53]

As discussed above, none of the changes to the ESP versus MRO test advocated by the Companies is supported by a proper reading of the applicable law and the record. The statutory requirement is for the ESP to be more favorable than the MRO before the Commission can approve an ESP. Furthermore, the Companies are seeking to increase rates to recover the benefits they claim the Stipulation provides. By increasing rates to recover the claimed difference in the PIRR carrying charge, for example, the Companies would be moving the carrying charge revenues of $153 million they agreed would not be collected from customers through the PIRR to base generation rates. Customers, as a result, would not see any "benefit," if there was one, from the reduction of the carrying charge rate to 5.34%.[54] It is an absurd outcome that the Commission cannot and must not endorse.

In summary, the Companies have not provided any legal or factual basis to grant rehearing on the Commission's decision to reduce the base generation rate increases. The Stipulation ESP, as all parties testified, did not satisfy the threshold test, and as a result the Commission was obligated to modify or reject it. As noted above and in IEU-Ohio's Application for Rehearing, however, the Commission should have gone much farther because the Companies failed to satisfy the statutory requirements to present an

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[52] Cos. Application for Rehearing at 23-24.

[53] *Id.*

[54] The Companies' attempt to increase rates for recovery of the payments to OGF is particularly egregious because the Companies explicitly agreed that OGF payments would not be recovered from customers. Stipulation at 17.

ESP for an EDU, the Commission did not properly consider the effects of the last twelve months of the Stipulation ESP, and the Commission authorized placeholder riders without statutory authority while unreasonably and unlawfully blocking shopping.

B. Generation Resource Rider[55]

In their second assignment of error, the Companies argue that the Commission illegally expanded the criteria for approving projects for cost recovery under the GRR to include a showing of "market failure."[56] They base this assignment of error on three unrelated arguments: (1) that the Commission's decision was premature; (2) that the Commission imposed a requirement not found in the statute; and (3) that the additional requirement would contravene other state policies and make developing projects more difficult. The simple response to the Companies' arguments would be to recognize that there was no authority to authorize a placeholder rider in the first place.[57] If the Commission grants rehearing and properly removes the GRR from the Stipulation ESP, then it need not address the Companies' remaining arguments.

On the merits, the Companies' assignment of error misconstrues the Commission's Opinion and Order. In response to the concern that the GRR would adversely affect competitive entry because the Companies' customers would subsidize plant construction, the Commission stated it would look first to the market to build needed capacity.[58] The Companies complain that this statement and some related

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[55] In their Application for Rehearing, the Companies state that the GRR is not ripe for review. Cos. Application for Rehearing at 26. However, the GRR has a direct effect on the calculation of the ESP versus MRO test, and the Commission correctly attributed some costs to the GRR in conducting the test. For these reasons the GRR is ripe for review.

[56] *Id.* at 3 & 24-29.

[57] IEU-Ohio App. for Rehearing at 50-52.

[58] Opinion and Order at 39.

discussion creates an additional requirement for approval of cost recovery through the GRR. As often occurs when phrases are pulled from a decision out of context, the Companies ignore the balance of the Commission's discussion. As the Commission explained, "generation projects under the GRR, or any surcharge authorized by Section 4928.143(b)(2), Revised Code, must be based upon a demonstration of need under the integrated resource planning process and be narrowly tailored to advance the policy provisions contained in Section 4928.02, Revised Code, or the statutory mandates contained in Section 4928.64, Revised Code."[59] Thus, the Commission's Opinion and Order did not create any new requirement for the Companies to satisfy.

The Companies also assert that approval of the GRR was supported by state policy because Turning Point may serve as a valuable cost-based hedge against market-based generation.[60] The witness on which the Companies rely, however, had no idea on what basis this "cost-based hedge" was to be approved or how the cost was to be determined.[61] Moreover, hedging is not a concern raised by the requirements of Section 4928.14(B)(2)(b) or (c), Revised Code, which addresses a determination of need. Furthermore, in the case of Turning Point, the requirements of Section 4928.64, Revised Code, will not permit the Companies to recover a non-bypassable charge to

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[59] *Id.* at 39-40. IEU-Ohio does not endorse the conclusion that the Commission may consider concerns raised by Section 4928.64, Revised Code, to establish need for a non-bypassable charge under Section 4928.143(B)(2)(b) or (c), Revised Code. IEU-Ohio has strongly disagreed with the Commission Staff ("Staff") that the Commission may approve the need for Turning Point in a forecasting case on the basis of the Companies' requirement to satisfy renewable energy credits and is currently opposing a Stipulation between the Companies and the Staff that attempts to graft such a result into the forecasting process. *In the Matter of the 2010 Long Term Forecast Report of the Ohio Power Company,* Case No. 10-501-EL-FOR, *et seq.*, Motion to Strike, Motion in Limine, and Memorandum in Support (Dec. 12, 2011).

[60] Cos. Application for Rehearing at 27.

[61] Tr. Vol. III at 244-47.

recover the cost of compliance with alternative energy benchmarks. Thus, the Companies have not demonstrated any statutory basis for the Commission to grant rehearing.

C. Shopping Caps

The Commission's modifications to the shopping caps also provoked assignments of error by the Companies.[62] In one assignment of error, they allege that the Commission should not have modified the two-tiered generation capacity service pricing scheme to accommodate governmental aggregation programs. In a separate assignment of error, they encourage the Commission to endorse the shopping limitations the Companies have included in the revised Detailed Implementation Plan ("DIP"). While these assignments of error should be rejected, the Commission needs to do more to protect customers from the effects of the two-tiered generation capacity service pricing scheme. Instead of tinkering at the edges of this scheme to limit shopping, the Commission should instead reject it as an illegal and unreasonable restriction on customer choice as IEU-Ohio urges in its rehearing application.

1. *Opt-out Aggregation*

Initially, the Companies argue that the Commission's decision to permit governmental aggregation programs to secure RPM-priced generation service capacity outside the shopping caps violates legislative intent by favoring opt-out aggregation over opt-in aggregation.[63] After pointing out that the General Assembly has required

[62] Cos. Application for Rehearing at 4 & 29-45. RESA, OMAEG, and OHA also filed Applications for Rehearing raising assignments of error concerning the shopping caps. These assignments of error are addressed below with the relevant arguments raised by the Companies.

[63] *Id.* at 4 & 31-34.

additional steps to initiate an opt-out governmental aggregation program, the Companies conclude that "[t]he Commission should have made its decision to approve the capacity set-aside provisions without regard to promoting opt-out aggregation at all costs."[64]

The premise of the Companies' argument that the Commission favored one form of aggregation over another is incorrect. The Commission ordered that the shopping caps be adjusted to ensure that any customer located in a governmental aggregation community will qualify for the RPM-priced capacity.[65] Appropriately, there is no distinction in the Commission's Opinion and Order between opt-in and opt-out aggregation.

The Companies also point to the reason the Commission ordered the modification, *i.e.*, its concern about those communities that had ballot issues seeking approval for a governmental aggregation program, as a basis for suggesting that the Opinion and Order improperly "focused" on opt-out aggregation.[66] The Companies, however, are reading into the Commission's decision an intent that is not expressed there. The Commission recognized that the limited availability of RPM-priced capacity due to the proposed shopping caps would frustrate the state policy to ensure the availability of unbundled and comparable retail electric service to all customer classes.[67] The Commission found that an effective means of achieving customer choice was to

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[64] *Id.* at 32.

[65] Opinion and Order at 54.

[66] Cos. Application for Rehearing at 33.

[67] Opinion and Order at 54.

make RPM-priced capacity available to governmental aggregators.[68] It then ordered a modification to the Stipulation to accommodate the communities that approved governmental aggregation in November 2011 elections and for each subsequent year so as to assure that "any customer located in a governmental aggregation community will qualify for RPM set aside."[69] Thus, the Commission's decision is not limited to favoring opt-out aggregation.

The Companies further argue that the Commission should not modify the Stipulation so as to "guarantee the success of opt-out aggregation."[70] This argument ignores the simple fact that there is no guarantee: CRES providers seeking to serve governmental aggregation communities will have to compete for the business. There is no guarantee that they will be successful.

Finally, the Companies argue that "the oft-cited provision in R.C. 4938.20(K) [*sic*] does not help the Commission justify the aggregation-related modification, as that provision only directs the Commission to promote large-scale aggregation in the form of adopting rules."[71] This argument on its face does not make sense. The Commission did not rely on Section 4928.20(K), Revised Code, to support its decision. Instead, it found that the modification it ordered was to further the state policy to ensure customer choice.[72] Moreover, governmental aggregation programs have long been an approved

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[68] *Id.*

[69] *Id.*

[70] Cos. Application for Rehearing at 33. Instead, and as a part of their ongoing campaign to deprive customers of their customer choice rights, the Companies urge the Commission to guarantee the failure of governmental aggregation programs.

[71] *Id.*

[72] Opinion and Order at 54.

tool for promoting customer choice. Since the enactment of Section 4928.20, Revised Code, in Amended Substitute Senate Bill 3 ("SB 3"), the General Assembly has authorized the use of governmental aggregation as a means of implementing customer choice, and the General Assembly reaffirmed and strengthened that commitment with the changes made in Amended Substitute Senate Bill 221 ("SB 221") in 2008. If the goal is to provide customers with choice, governmental aggregation in both forms (opt-in and opt-out) is a tool to accomplish that goal.

2. *Accommodation of Governmental Aggregation*

The Companies also challenge the Commission's decision to allow adjustments to the shopping caps if governmental aggregation programs or CRES providers serving those programs complete the necessary steps to take service by December 31, 2012 ("service date").[73] According to the Companies, the record does not support a service date beyond mid-March 2012.[74] To support the March 2012 service date, the Companies argue that the testimony upon which the Commission relied "only advocated for consideration of a 3-4 month process after the election for completing opt-out aggregation."[75] They then argue that the Commission extended the service date too far into the future to accommodate the communities that approved governmental aggregation programs in the November 2011 elections.[76]

The testimony on this issue identified a much larger problem than the effects of shopping caps on the November 2011 election results. FES witness Tony Banks

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[73] Cos. Application for Rehearing at 34-36.

[74] *Id.* at 35.

[75] *Id.*

[76] *Id.* at 35.

testified that the application of the shopping caps on governmental aggregation affected those communities that had already approved governmental aggregation programs and those with elections scheduled in November 2011 and May 2012.[77] He further noted that the communities that had not had elections would likely not be eligible for RPM-priced capacity due to the operation of the shopping caps.[78] "Thus, they [the communities] would all face AEP-Ohio's significantly higher $255/MW-day capacity price and will not receive the benefits of governmental aggregation."[79] He also stated that three to four months was the minimum time necessary to complete enrollments.[80]

Based on the testimony offered by Mr. Banks, the Commission's decision to permit access to RPM-priced capacity for those communities that complete the process by December 31, 2012 is appropriate. If consideration is given for the May 2012 elections and the amount of time it takes to enroll customers, there is no reason for the Commission to change the service date.

Also, the uncalled-for RPM-based capacity price eligibility mystery that the Companies have perpetuated through the so-called DIP (as implemented without needed details) has worked to run the clock on communities that want to move forward with aggregation programs. In view of the Companies' conduct, the Commission should modify the service date so that it is twelve months after the Companies fully and completely disclose all the details on the availability of the RPM-priced capacity as well as the application of the $255 generation capacity service charge. The Commission's

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[77] FES Ex. 1 at 32.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 33.

well-intended specification of December 31, 2012 as the service date is being abused by the Companies as part of their quest to kill customer choice.

3. *Regulatory Principles*

Finally, the Companies allege that the Commission failed to identify any regulatory principle to support the modifications it ordered to address governmental aggregation programs.[81] The Companies' argument, however, is not supported by the Commission's Opinion and Order. The Commission specifically noted that it was seeking to ensure the availability of unbundled and comparable retail electric service to all customers, a clear reference to Section 4928.02, Revised Code.[82]

The Companies also suggest no change is necessary to the two-tiered generation capacity service pricing scheme because it serves other state policies such as ensuring nondiscriminatory retail rates, preventing anticompetitive subsidies, and giving customers effective choice.[83] First, the suggestion that the two-tiered generation capacity service pricing scheme ensures nondiscriminatory rates ignores the fact that the scheme creates two rates for the same service for similarly situated customers. As demonstrated in IEU-Ohio's Application for Rehearing, the resulting rates are non-comparable and unduly discriminatory.[84] Similarly, the Companies' statement that the scheme avoids anticompetitive subsidies is not supported by the record. As IEU-Ohio has previously demonstrated, the scheme permits the Companies to illegally recover

[81] Cos. Application for Rehearing at 36-37.

[82] Opinion and Order at 54.

[83] Cos. Application for Rehearing at 36.

[84] IEU-Ohio App. for Rehearing at 25-29.

anticompetitive transition costs.[85] Finally, the statement that the scheme enhances customer choice ignores what the Commission itself recognized, that modifications to the scheme were required because choice was stifled by the two-tiered generation capacity service pricing scheme.[86]

The Companies further argue that the two-tiered generation capacity service pricing scheme "fosters considerable potential for expansion of competitive market-based rates" and point to the relative size of the loads that would be eligible for RPM-priced capacity from 2012 to 2015.[87] As the Commission found, however, RPM-priced capacity for two customer classes was exhausted for 2012 when the Stipulation was signed.[88] The lack of available capacity for some customer classes that need it today, in fact, is such a concern that RESA, OMAEG, and OHA have filed Applications for Rehearing seeking to have the Commission remove a modification that prevents the reallocation of unused allotments of RPM-priced capacity.[89] The Companies' suggestion that the two-tiered generation capacity service pricing scheme will "foster" expansion of competitive-based rates is a sad joke to those customers that will be locked into the Companies' above-market rates in 2012 and beyond.

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[85] *Id.* at 36-39.

[86] Opinion and Order at 54.

[87] Cos. Application for Rehearing at 37.

[88] Opinion and Order at 54.

[89] RESA Application for Rehearing at 7 (Jan. 13, 2012) ("RESA App. for Rehearing"); OHA Application for Rehearing at 5 (Jan. 13, 2012) ("OHA App. for Rehearing"); OMAEG Application for Rehearing at 7 (Jan. 13, 2012) ("OMAEG App. for Rehearing"). Apparently, the shopping caps supported by RESA, OHA and OMAEG through their endorsement of the Stipulation were only "reasonable" and "lawful" if they deprived others of their customer choice rights.

In order to ensure customer choice as required by the state energy policy, the Commission should abandon its endorsement of the illegal and deeply flawed two-tiered generation capacity service pricing scheme. Customer choice, in fact, has already moved beyond the limits the scheme would impose in 2012.[90] The Companies, however, have indicated that they will continue to throw up barriers to customer choice. Unless the Commission does more than tinker with the scheme, the only beneficiaries of it are the Companies: they will collect higher rates from customers that will not be permitted to exercise their right to choose a lower-priced retail electric generation service provider.[91]

4. *Limiting Choice Through the Revised DIP*[92]

In an attempt to further limit customer choice, the Companies filed a revised DIP[93] on December 29, 2011 and argue in their Application for Rehearing that the Commission should reverse or clarify its Opinion and Order to conform with the Companies' revisions to the DIP.[94] If the Commission does not accept their rewrite of the Commission's Opinion and Order, the Companies once again threaten to withdraw from the Stipulation and the Stipulation ESP,[95] an act that would lower electric bills and

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[90] OCC Ex. 6; OMAEG App. for Rehearing at 8.

[91] IEU-Ohio Ex. 9A at 15.

[92] On January 23, 2012, the Commission issued an Entry directing the Companies to refile the Detailed Implementation Plan ("DIP") to address some of the concerns raised by IEU-Ohio and FES. Because the same matters also were presented in the Companies' Application for Rehearing, IEU-Ohio has also provided a response to the Companies' assignment of error in this Memorandum Contra. IEU-Ohio further requests that the Commission require the Companies to comply with the statutory requirements to file tariffs to implement the two-tiered generation capacity service pricing scheme and to collect rates subject to refund. See below.

[93] RPM Set-Aside Allotment Rules; Detailed Implementation Plan at 7 (Dec. 29, 2011).

[94] Cos. Application for Rehearing at 38.

[95] *Id.* at 38-39.

fully restore customers' choice rights. The Commission should not grant rehearing or clarification as requested by the Companies. If the Commission does not reject the two-tiered generation capacity service pricing scheme because it is unlawful and unreasonable, however, the Commission should order the Companies to conform the DIP to the Commission's Opinion and Order and should further order the Companies to file tariffs for Commission approval that detail the manner in which the scheme will operate.[96]

At least three issues are presented by the Companies' DIP.[97] First, they improperly limit those communities with governmental aggregation programs eligible for RPM-priced capacity to those that approved programs in November 2011 elections.[98] Second, they seek to exclude mercantile customers from access to RPM-priced capacity through those same governmental aggregation programs.[99] Third, they seek to treat the load represented by governmental aggregation programs as being within the shopping caps, thereby pushing out customers that would otherwise be eligible for RPM-priced capacity.[100]

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[96] *See* Motion of Industrial Energy Users-Ohio for Orders Modifying the Ohio Power Company's and Columbus Southern Power Company's Revised Implementation Plan and Request for Expedited Ruling and Memorandum in Support (Dec. 30, 2011) ("Dec. 30, 2011 Motion"); IEU-Ohio App. for Rehearing at 39-43.

[97] In addition to the three matters identified by IEU-Ohio, FES also noted that the DIP improperly permits the reallocation of residential capacity. *See* Objection to AEP Ohio's Compliance Filing and Request for Expedited Commission Action (Dec. 30, 2011). OHA and OMAEG have sought rehearing on this issue as well. See OHA App. for Rehearing at 5; OMAEG App. for Rehearing at 7.

[98] DIP at 7.

[99] *Id.* at 7-8.

[100] *Id.* at 8.

In their Application for Rehearing, the Companies argue that the DIP properly limits access to RPM-priced capacity to those communities that approved programs in the November 2011 elections.[101] In support of their argument, they quote at length the Commission's basis for modifying the terms of the two-tiered generation capacity service pricing scheme to accommodate governmental aggregation programs, emphasizing the Commission's concern that those communities with November 2011 elections would likely be shut out of RPM-priced capacity due to the shopping caps.[102] The quotation from the Opinion and Order the Companies use to support this claim, however, also states that the Commission-ordered modification is "to ensure that *any customer located in a governmental aggregation community* will qualify for RPM set aside."[103] Thus, the Opinion and Order extends the modification to any customer in a program, not just those in communities that approved a governmental aggregation program in November 2011. The Commission further expands on what it is requiring in a portion of the Opinion and Order not cited by the Companies: "The RPM set-aside level shall be adjusted to accommodate such governmental aggregation programs for each subsequent year of the Stipulation ESP, to the extent, and only, if necessary."[104] Through their selective emphasis, the Companies would have the Commission significantly narrow the Commission's modification. The Commission should reject the

[101] Cos. Application for Rehearing at 42.

[102] *Id.*

[103] Opinion and Order at 54.

[104] *Id.* RESA has requested clarification of this modification so that the amount of capacity set aside for governmental aggregation does not decrease the amount available under the shopping caps. RESA App. for Rehearing at 7-9. A fair reading of the Commission's decision indicates that the amounts available to governmental aggregation programs are in addition to those provided under the shopping caps.

Companies' attempt to narrow the scope of the modification and order the Companies to file the appropriate revisions.[105]

Second, the Companies seek to exclude mercantile customers from being included in governmental aggregation programs identified by the Commission's modification on the theory that mercantile customers cannot be required to participate in opt-out aggregation.[106] Here, contrary to their reasoning regarding the claim that the Commission improperly discriminated in favor of opt-out aggregation, the Companies reverse direction and urge the Commission to favor opt-out aggregation. As noted in IEU-Ohio's December 29, 2011 Motion, the argument misapplies a statutory provision that prohibits including a mercantile customer in a governmental aggregation program without its consent.[107] There is no legal constraint on a mercantile customer's choice to participate in a governmental aggregation program, whether the program is an opt-in or opt-out program. Thus, the Companies' revision of the DIP to exclude mercantile customers from securing RPM-priced capacity through participation in a governmental aggregation program is just one more example of their unreasonable and illegal efforts to restrict choice.

Third, the Companies treat any capacity required to provide service through governmental aggregation as not affecting the overall shopping cap percentage.[108] That result, however, is not consistent with the Commission's Opinion and Order. The Commission directed the Companies to adjust the shopping caps "to ensure that any

[105] As discussed below, the Commission should direct the Companies to file the revisions in a formal tariff subject to Commission review and approval.

[106] Cos. Application for Rehearing at 44-45; DIP at 7-8.

[107] Dec. 30, 2011 Motion at 8-9 (discussing Section 4928.21(B), Revised Code).

[108] Cos. Application for Rehearing at 40-42; DIP at 8.

customer located in a governmental aggregation community will qualify for the RPM set aside."[109]

The Companies' attempts to restrict the access to RPM-priced capacity in the DIP emphasize the need for the Commission to order the Companies to file tariffs to detail the pricing and implementation of the scheme. Currently, there is nothing in the Companies' tariff books that details the method by which the capacity rates are calculated[110] or the manner in which the Companies implement the allocation of capacity. If, as represented by the Companies in their letter to the Federal Energy Regulatory Commission ("FERC"), the Opinion and Order set the state compensation mechanism for purposes of the Companies' Fixed Resource Requirements ("FRR") election, then these matters must be specified and approved by the Commission through a formal tariff filing.[111] That tariff then would afford the parties with a "common understanding" and legally enforceable set of rates and procedures for determining capacity charges. As things now stand, however, the Companies are proceeding as though they unilaterally determine the terms of the implementation of and compliance with the Commission's Opinion and Order.[112] Until the Commission orders the

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[109] Opinion and Order at 54.

[110] IEU-Ohio provided a detailed explanation of what the process should be for establishing the CRES capacity assignment and billing in its December 30, 2011 Motion. *See* Dec. 30, 2011 Motion at 5-8.

[111] Section 4905.30, Revised Code, requires that all rates and charges, as well as all rules and regulations affecting the rates billed or collected by a utility, are those set forth in a schedule on file with the Commission. A public utility may not charge a rate different from that specified in its schedule filed with the Commission. Section 4905.32, Revised Code. See, also, Section 4905.33, Revised Code (no public utility may charge greater or lesser compensation for services rendered except as provided by statute than it charges any other person). The antidiscrimination provisions apply to EDUs regulated under Chapter 4928, Revised Code. See Section 4928.07, Revised Code. See, also, Section 4928.15, Revised Code (services must be provided pursuant to schedule filed with the Commission).

[112] The Companies circulated a draft of the DIP to parties on December 22, 2011 and requested comments by December 27, 2011. Comments were returned by FES, IEU-Ohio, and OCC. The

Companies to comply with the statutory requirements to have tariffs filed and approved by the Commission, the Companies will continue their unilateral attempts, so far successful, to manipulate the availability (and potentially the pricing) of capacity to prevent customer choice.

As already discussed above, the uncalled-for RPM-based capacity price eligibility mystery that the Companies have perpetuated through the so-called DIP (as implemented without needed details) has worked to run the clock on communities that want to move forward with aggregation programs. In view of the Companies' conduct, the Commission should modify the service date so that it is twelve months after the Companies fully and completely disclose all the details on the availability of the RPM-priced capacity as well as the application of the $255 generation service capacity charge. The Commission's well-intended specification of December 31, 2012 as the service date is being abused by the Companies as part of their quest to kill customer choice.

D. Corporate Separation

The Companies claim that the Commission has improperly modified the Stipulation because the Companies did not receive the same approval for corporate separation that Duke Energy Ohio ("Duke") recently received.[113] To support this assignment of error, the Companies argue that the Commission applied the statutes differently to the two cases, that the result of the Commission's Opinion and Order is discriminatory, and that the Commission's Opinion and Order frustrates state policy.

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implementation plan filed on December 29, 2011 is substantively the same as that circulated on December 22, 2011.

[113] Cos. Application for Rehearing at 4 & 45-55.

Because the Companies' arguments raise issues that are not ripe and have no basis in law or fact, the Commission should deny the assignment of error.

Initially, it is important to note that the Commission has not ruled on the Companies' application to amend its corporate separation plan. Although the Companies assert that there might be inconsistencies in the resolution of the *Duke ESP* case and the *Corporate Separation Case*,[114] there has not been a determination of any substantive issue affecting the Companies at this time. The Companies' basis for the assignment of error is obviously premature.[115]

Even if the issue were ripe for decision, the differences in the cases do not support the Companies' assertion that they should be given approval of corporate separation and transfer of generation assets through rehearing of this Opinion and Order. First, the *Duke ESP* was resolved through an unopposed stipulation. This proceeding and the Companies' *Corporate Separation Case*, however, are contested.[116] The waiver requests in the two proceedings also are different. Duke in the unopposed *Duke ESP* Stipulation expressly requested a waiver of each of the requirements

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[114] *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 11-5333-EL-UNC ("*Corporate Separation Case*"). On January 23, 2012, the Commission issued a Finding and Order approving relief requested in the application with modifications. The Companies as part of their Application for Rehearing of the Opinion and Order modifying and approving the Stipulation asked for rehearing of the Commission's modification of the provisions pertaining to corporate separation. IEU-Ohio is responding to the assignment of error and is not waiving any rights it has to file an application for rehearing in the *Corporate Separation Case* of the Finding and Order issued on January 23, 2012.

[115] *In the Matter of 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 No. 11-3549-EL-SSO, *et al.*, Entry on Rehearing at 7 (Jan. 18, 2012) ("*Duke ESP*").

[116] Because they are contested, the Commission is providing the process due the parties who are involved in the Companies' *Corporate Separation Case*. *Id.*; Opinion and Order at 60-61.

contained in Rule 4901:1-37-09, Ohio Administrative Code ("OAC").[117] In contrast, the Companies filed for a waiver in the *Corporate Separation Case*, and the Companies sought waivers of only Rules 4901:1-37-09(C)(4) and (D), OAC.[118] Both waiver requests have been contested.[119] Because the *Duke ESP* and the *Corporate Separation Case* were presented to the Commission in substantially different procedural postures and the Companies' application has been contested, there is no basis for the Commission to find that it acted unlawfully or unreasonably when it modified the Stipulation's provision concerning corporate separation so that it was conditioned on the completion of the *Corporate Separation Case*.

The Companies' reliance on the *Duke ESP* Stipulation and the Commission's *Duke ESP* decision also violates the terms of the *Duke ESP* Stipulation. The Companies were parties and signed the Stipulation.[120] One of the terms of the Stipulation states:

> This Stipulation is submitted for purposes of these proceedings only, and neither this Stipulation nor any Commission Order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation.[121]

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[117] *Duke ESP*, Stipulation at 25-26. IEU-Ohio took no position regarding Duke's request for a waiver. *Id.* at 3.

[118] *Corporate Separation Case*, Joint Motion for Waiver at 1 (Oct. 18, 2011).

[119] Staff has noted in the *Corporate Separation Case* that the Companies have not attempted to show good cause for granting a waiver of the requirement to submit the market value of all property to be transferred. *Corporate Separation Case*, Staff Review and Recommendations at 5 (Dec. 15, 2011).

[120] *Duke ESP*, Stipulation at 48 (Oct. 24, 2011).

[121] *Id. at 2.*

Based on this provision, neither the Companies nor the Commission may rely on the *Duke ESP* Stipulation or the Opinion and Order approving that Stipulation to support rehearing in these proceedings.

In further support of their assignment of error, the Companies claim that the Commission's modification of the Stipulation does not ensure effective competition and frustrates state energy policy.[122] While the Companies point to several provisions of state law to support their argument, all that the Companies demonstrate is that their application in the *Corporate Separation Case* is delayed while the Commission reviews it. They fail to demonstrate how the Commission's decision to subject the application to further review will injure the public interest. Given the lack of information the Companies have offered in support of the *Corporate Separation Case*, there is no reason for the Commission to endorse the rush to judgment the Companies demand.

The Companies also claim that it is unlawful and unreasonable to require the Companies to notify PJM of its intent to participate in the 2015-2016 RPM auction until the Companies receive full approval to complete corporate separation. The Companies' claim is meritless because the Companies have not demonstrated that corporate separation is a prerequisite to participating in competitive markets.[123] In fact, the Companies previously procured the default supply for Monongahela Power customers through a CBP, and, in *ESP I*, the Companies proposed that a portion of the default supply be procured through a CBP.[124] While the election to enter the RPM auction is different from those other forays into markets, there has been no demonstration that the

[122] Cos. Application for Rehearing at 53-55.

[123] *Id.* at 56-57.

[124] *ESP I*, Opinion and Order at 15 (Mar. 18, 2009).

Companies cannot make the RPM election before the Commission completes its review of the *Corporate Separation Case*.

E. Additional Relief

In its January 23, 2012 Entry, the Commission denied IEU-Ohio' request that rates be collected subject to reconciliation, stating that the matter should be addressed in rehearing.[125] Based on that direction but without waiving any right to rehearing of the January 23, 2012 Entry, IEU-Ohio renews its request that the Commission order that rates be collected subject to reconciliation and incorporates by reference its argument contained in its December 20, 2011 Motion.[126] Given the material legal problems that are presented by the Opinion and Order, IEU-Ohio requests that the Commission order as part of the Entry on Rehearing that rates be collected subject to reconciliation.[127]

As noted previously, the Commission can and recently has ordered the collection of rates and charges subject to refund when the legality of the rates was in issue.[128] A similar order is appropriate in this proceeding when so many important legal issues are presented. Without such an order, customers will be required to pay rates that should

[125] Entry at 7 (Jan. 23, 2012).

[126] Motion by Industrial Energy Users-Ohio for an Order Directing the Companies to Serve Tariffs and Supporting Workpapers on the parties and for an Order that New Rates and Charges Be Billed Subject to Reconciliation, and a Request for Expedited Ruling and Memorandum in Support at 6-7 (Dec. 20, 2011).

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

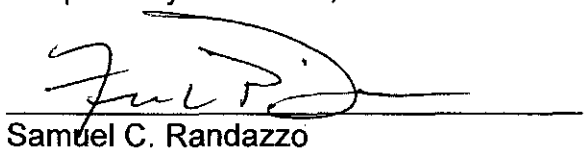
[128] As a result of the remand of its Opinion and Order in the Companies' first ESP application, the Commission directed that then-current rates be collected subject to refund until such time as the Commission completed its review of the remanded issues. *ESP I*, Entry at 3-4 (May 25, 2011).

be found to be unlawfully and unreasonably authorized without recourse to refund.[129] Such a result would be unreasonable.

III. CONCLUSION

For the reasons discussed above, IEU-Ohio urges the Commission to deny the Companies' Application for Rehearing. The Commission, however, should also use the rehearing process to address the many problems identified throughout these proceedings with the Stipulation ESP and the two-tiered generation capacity service pricing scheme. As approved, the Stipulation ESP will extract a heavy and excessive price from the Companies' customers. As approved, the two-tiered generation capacity service pricing scheme will prevent those customers from seeking available lower cost alternatives. These results are both illegal and unreasonable and will affect those customers and Ohio's economy for years to come. To avoid these outcomes, IEU-Ohio respectfully requests the Commission grant its Application for Rehearing.

Respectfully submitted,



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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Applications for Rehearing* was served upon the following parties of record this 23th day of January 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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