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BEFORE THE
PUBLIC UTILITES 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

OHIO POWER COMPANY'S APPLICATION FOR REHEARING

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On December 14, 2011, the Commission issued an Opinion and Order in the above-captioned cases (Opinion and Order), modifying and adopting the September 7, 2011 Stipulation and Recommendation (Stipulation). The Opinion and Order, among other things, adopted a modified Electric Security Plan (ESP) for Ohio Power Company (OPCo) and Columbus Southern Power Company (CSP) and approved the proposed merger of CSP and OPCo. In conformance with the modified Stipulation adopted by the Commission, CSP merged into OPCo effective at the end of 2011. Accordingly, OPCo (also referred to as "AEP Ohio") also represents, and is the successor in interest to, the interests of CSP.

On December 29, 2011, AEP Ohio filed a Revised Detailed Implementation Plan (Revised DIP) to ensure in a transparent and open fashion that all interested stakeholders understood the details associated with implementing the Opinion and Order. On January 13, 2012, AEP Ohio and other parties filed applications for rehearing related to the Opinion and Order. The Commission issued an Entry on January 23, 2012 indicating that it was interpreting and enforcing the Opinion and Order (Compliance Entry). AEP Ohio submits that the Compliance Entry adopts additional modifications to the Stipulation and discloses new and different interpretations of the Opinion and Order that have a material and adverse impact on AEP Ohio.

On that basis, and pursuant to §4903.10, Ohio Rev. Code, and §4901-1-35 (A), Ohio Admin. Code, AEP Ohio (OPCo) seeks rehearing of the Compliance Entry as

further explained below. Specifically, the Compliance Entry is unlawful and unreasonable in the following respects:

I. It exceeds the Commission's jurisdiction and violates the statutory rehearing process for the Compliance Entry to significantly expand the Opinion and Order outside the statutory rehearing process (and impose substantial incremental financial cost to AEP Ohio).

A. The five new "interpretations" are not supported by the plain language and stated intention of the Opinion and Order.

1. The Opinion and Order did not create a new and separate aggregation Set-Aside

2. The Opinion and Order's aggregation accommodation did not include the pre-November 2011 communities

3. The Opinion and Order's aggregation-related accommodation was based on residential customers and opt-out aggregation programs on the ballot and should not now be expanded to include mercantile customers

4. Retaining continuing jurisdiction to make future changes to a final adjudicatory order was not reflected in the Opinion and Order and is unlawful.

5. The Opinion and Order modified the January pro rata re-allocation and did not affect the initial September *pro rata* re-allocation.

B. The Compliance Entry exceeds the Commission's jurisdiction and violates the statutory rehearing process (as well as the Commission's own rules), by prejudging contested matters as part of a Compliance Entry and inaccurately portraying those pending issues as being previously resolved.

II. The expanded remedies adopted in the Compliance Entry are not supported by the manifest weight of the record, violate R.C. 4903.09 and are arbitrary and capricious. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 209 (2006).

III. It is unreasonable and unlawful for the Compliance Entry to modify and adopt the package settlement imposing long-term obligations on AEP Ohio while simultaneously preserving the option to further modify the RPM-priced set-aside levels in the future in the name of continuing jurisdiction. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360 (2007).

IV. The Compliance Entry's expansion of the Stipulation's capacity pricing is unlawful and forces AEP Ohio to involuntarily provide a below-cost subsidy supporting a competitive retail service offering. *Forest Hills Utility Co. v. Pub. Util. Comm.*, 31 Ohio St.2d 46, 55 (1972); Ohio Rev. Code Ann. 4928.02(H).

V. The Compliance Entry is unlawful and unreasonable in retreating from the RPM-priced capacity set-aside limitations without an explanation for departing from its own precedent. *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 307 (2006).

A memorandum in support is attached and sets forth the specific grounds supporting the above-listed errors.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

The Compliance Entry imposes five new or enhanced obligations on AEP Ohio that go beyond the Opinion and Order, each of which involves significant financial cost to AEP Ohio, as follows:

- The Compliance Entry (page 5) now provides that the aggregation-based modification of the set-aside will be "over and above the pro rata allocation provided to customers in the Stipulation for 2012," whereas the Opinion and Order (page 54) ordered that the RPM set-aside to be adjusted as needed to "accommodate" the specified aggregation programs that complete the process to take service by the end of 2012.

- The Compliance Entry (page 4) now explains that the modification "is meant to include all communities that have established governmental aggregation programs, up to and including those communities that approved government aggregation programs in the November 2011 election," notwithstanding the fact that the language in the Opinion and Order related only the November 2011 ballot communities (twice referenced on page 54) and repeatedly characterized its modification as being made to include the communities that passed ballots in November 2011 (pages 64 and 65).

- The Compliance Entry (page 6) directs that mercantile customers (large commercial and industrial customers) "should not be excluded from RPM-priced capacity that may be available to non-mercantile customers in eligible governmental aggregation communities," while the Opinion and Order's modification of the set-aside was made in order to accommodate governmental aggregation communities with ballot initiatives (by definition referring to opt-out programs that necessarily exclude mercantile customers) and was made so as to include residential customers as beneficiaries of the set-aside and given the Commission's belief that "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."

- The Compliance Entry (page 5) now asserts continuing jurisdiction over the set-aside levels "to ensure that retail shopping through governmental aggregation does not unintentionally displace individual shopping in 2013 and 2014, even though the Opinion and Order unequivocally provided (page 54) that individual customers would be restricted to shop "within the RPM set aside to the extent it is available."

- The Compliance Entry (pages 3-4) indicates that the modification to the *pro rata* allocation of the RPM-priced capacity set-aside level "goes back to the initial allocation among the customer classes based on September 7, 2011, data, regardless of whether any customer class is now over-subscribed," even though the Opinion and Order indicated (page 55) that it was modifying a different provision related to reversion of set-aside as of January 1, 2012.

An important consideration on whether to delay the requirement for filing additional revisions to the Revised DIP is the resulting financial impact on AEP Ohio. Each of these new or enhanced obligations involve incremental costs that would be imposed on AEP Ohio. The cost of some of these requirements can be estimated and the cost of others is less clear. But it cannot be disputed that the outcome of the issues addressed in the Compliance involves significant financial cost to AEP Ohio and are not mere clarifications of the Opinion and Order. As supported in the attached workpapers,[1] the table below reflects AEP Ohio's present estimates of the incremental costs associated with the expanded modifications (to the extent they can be projected). The potential cost is actually much higher, as reflected in the attached workpapers.

[1] AEP Ohio proffers the information shown in the attached workpapers as an example of what could be demonstrated if the Commission grants rehearing to explore the financial impact of the various components. The assumptions used in developing these calculations are stated in the attached workpapers. Presently, there is not record support for the Compliance Entry's novel interpretations and no record basis to suggest that the Commission could have possibly understood the financial impact of those interpretations.

Expansion of Modification	Projected Incremental Impact Over ESP Term
Inclusion of Mercantile Customers	$237 M
Addition of Pre-Nov. 2011 Communities	$80 M
Elimination of September Reallocation	$15 M
Aggregation to be Above Set-Aside in 2012	$21 M
Aggregation to be Above Set-Aside beyond 2012	$83 M
Total	**$437 M**

As further noted below, because the Compliance Entry makes decisions regarding matters not explored in the evidentiary record, there was no discussion about the financial impacts of such matters. Thus, to the extent the above-stated financial impacts are also beyond the record and need to be further verified or discussed, the Commission should grant rehearing to explore the consequences associated with its novel interpretations if it intends to retain the overbroad remedies.

Further evidence of the Compliance Entry's departure from mere interpretation and into the realm of substantive modifications is found in the separate opinion expressed by Commissioner Roberto. In her opinion dissenting in part from the Compliance Entry, she aptly made the following observations:

> Although I fully support the development of competitive markets in this state, I believe that the clarification on government aggregation is inconsistent with the letter and intent of the Opinion and Order in these proceedings. The Opinion and Order clearly contemplates that, once retail shopping for any customer class reaches 21 percent through any combination of individual shopping and government aggregation in 2012, the capacity set asides will be available only for additional customers through government aggregation for the balance of the year. The

> clarification in today's Entry greatly expands the set asides available to individual shoppers significantly altering the balance of benefits in the stipulation. Accordingly, I concur, in part, and dissent, in part, from the Entry.

(Emphasis added.) AEP Ohio is filing this additional application for rehearing to request that the Commission reconsider the incremental impact and propriety of the Compliance Entry's five new modifications and interpretations.

It was unlawful for the Commission to modify the Opinion and Order outside of the statutory rehearing process. Further, the Compliance Entry's modifications lacked a basis in the record or a sufficient explanation. As such, the requirements described in the Compliance Entry were unlawfully and unreasonably imposed without a record basis and without knowledge of the financial impacts on AEP Ohio. In order to cure this flawed rehearing process, the Commission should use the Opinion and Order as a starting point and further consider AEP Ohio's January 13 Application for Rehearing – such that AEP Ohio is no longer prejudiced by the additional modifications implemented outside of the statutory rehearing process and beyond the Commission's jurisdiction. Otherwise, AEP Ohio stands to suffer irreparable financial harm if the Compliance Entry is implemented or relied upon.

The Commission should also be mindful that the Company has developed IT systems to implement the Commission's December 14, 2011 Opinion and Order and systems are in place that implement the Detailed Implementation Plan. To the extent further changes are needed due to modifications, the Commission should direct the Company to work with the Commission Staff to establish a reasonable schedule to implement the necessary changes to the IT systems.

ARGUMENT

I. It exceeds the Commission's jurisdiction and violates the statutory rehearing process for the Compliance Entry to significantly expand the Opinion and Order outside the statutory rehearing process (and impose substantial incremental financial cost to AEP Ohio).

The plain language of the Opinion and Order does not support the "interpretations" adopted in the Compliance Entry. Further, the new and enhanced obligations are not based on the record. Given that rehearing applications were filed asking for the same expansions of the Opinion and Order, it is evident that the Compliance Entry taints the rehearing process by prematurely prejudging the issues that were properly raised (and only properly addressed) through the statutory rehearing process. As further discussed below, these circumstances render the Compliance Entry unlawful and unreasonable.

A. The five new "interpretations" are not supported by the plain language and stated intention of the Opinion and Order.

1. The Opinion and Order did not create a new and separate aggregation Set-Aside

There is no basis in the Opinion and Order to support the Compliance Entry's new interpretation (at 5) that the Commission intended to establish a "separate allotment" that is "over and above the pro rata allocation provided to customers in the Stipulation for 2012." Rather, the Opinion and Order required (at 54) modification of the 2012 set-aside limitation "to accommodate" the load of any community that approved a governmental aggregation program in the November 8, 2011, election, provided that the aggregation programs complete the steps necessary to take service under the program in 2012.

Similarly, the Opinion and Order (at 54) provided that the RPM set-aside level "shall be adjusted to accommodate such governmental aggregation programs for each subsequent year of the Stipulated ESP, *to the extent, and only, if necessary.*" (Emphasis added.)

While AEP Ohio disagreed with expanding the set-aside, there was at least testimony and arguments considering the impact of accommodating the specified aggregation programs even if such an accommodation causes the set-aside level to be exceeded. More importantly, there is no basis in the language used in the Opinion and Order to suggest (as the Compliance Entry does) that a completely new and separate set-aside level was being created for aggregation. Rather, the Opinion and Order (at page 54) ordered AEP Ohio to "adjust" the existing set-aside "to accommodate" the load associated with the November 2011 election. Use of the "adjust" and "accommodate" language clearly suggests an expansion of the existing set-aside and in no way required that a new and separate set-aside be created for aggregation.

The Compliance Entry's new interpretation also ignores the key qualification that the set-aside levels be modified "to the extent, and only, if necessary." As Commissioner Roberto accurately observed in her dissenting opinion regarding the Compliance Entry, "the clarification on government aggregation is inconsistent with the letter and intent of the Opinion and Order in these proceedings." (Emphasis added.) Further, as noted above, the incremental financial impact of this additional modification is approximately $21 million on AEP Ohio. In sum, the Compliance Entry has no basis in the Opinion and Order's language.

To the extent the Commission retains the aggregation-related accommodation at all on rehearing (over AEP Ohio's objection), the Stipulation's set-aside level should be

expanded only to the extent necessary to accommodate the non-mercantile governmental aggregation load that is completed within a reasonable period of time. In particular, if the Commission is going to retain the aggregation accommodation over AEP Ohio's objection, it should reject the notion that a new and separate set-aside be created for aggregation above the established limits and, instead, reiterate the Opinion and Order's requirement that the set-aside levels be adjusted to the extent necessary to accommodate the non-mercantile load associated with qualifying programs that take service by December 31, 2012 (or by an earlier date as was advocated in AEP Ohio's January 13 application for rehearing).

2. The Opinion and Order's aggregation accommodation did not include the pre-November 2011 communities

Contrary to the Compliance Entry's "clarification" (at page 4) that the Opinion and Order was meant to also include communities that authorized aggregation prior to the November 2011 ballot initiatives, the language in the Opinion and Order clearly tailors its set-aside modification to November 2011 ballot communities. The notion that additional communities now need to be included is clearly a substantive (and material) change from the Opinion and Order – not a clarification. The Opinion and Order explained the modification to the RPM set-aside:

> Although currently shopping customers will not be adversely affected by the capacity set-aside provisions, the Commission is greatly *concerned that governmental aggregations approved by communities across the state in the November 2011 election will be foreclosed from participation* by the September 7, 2011 Stipulation. It is the state policy to ensure the availability of unbundled and comparable retail electric service to all customer classes, including residential customers, and governmental aggregation programs have proven to be the most likely means to get substantial numbers of residential customers to become the customer of a CRES provider. For these reasons, we find it necessary to modify the

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

Opinion and Order at 54 (emphasis added).

Thus, the modification made by the Commission was limited to accommodating the load associated with communities that approved a governmental aggregation program in the November 8, 2011 election, not any aggregation that may occur by the end of 2012. That the Commission's modification was limited to the November 2011 election is also unequivocally confirmed elsewhere in the Opinion and Order. The Opinion and Order indicated (at 64) that it already addressed concerns about shopping caps "by modifying the Stipulation to include governmental aggregation *ballots that passed this November.*" (Emphasis added.) The Opinion and Order also referenced (at 65) that the above "modification of the capacity plan allows for all of the communities and municipalities that *recently passed governmental aggregation initiatives this November* to take advantage of CRES suppliers' offers that may be lower than what AEP-Ohio is offering to its customers." (Emphasis added.) While AEP Ohio does not agree with the modification, it is obvious that the whole point of the Commission's change was to give communities access to RPM-priced capacity who may have relied on RPM being available when they actively pursued ballot initiatives for opt-out aggregation initiatives. In addition, opt-in aggregation could be done at any time under the normal set aside limits and would not require a modification of the Stipulation's set aside limits.

As supported in the attached workpapers, the Compliance Entry's expansion to include the pre-November communities could result in increasing the size of the aggregation set-aside from 7,217 GWh to up to 11,049 GWh (if mercantile load is excluded, then it goes from 2,524 GWh to 4,490 GWh), which involves substantial increases. The Compliance Entry's aggregation set-aside expansion added 33 communities to the 51 that were involved with the November 2011 ballot initiative group, *thus expanding the list of communities by 65%.* As noted above, the incremental financial impact of this additional modification is up to $130 million per year on AEP Ohio (if a projected impact is calculated using the assumptions shown in the attached workpapers, it goes to approximately $80 million). Nothing about this dramatic change can be fairly referred to as mere clarification or minor adjustment to the explicit language and stated intention of the Opinion and Order. There is no other way to describe this before/after comparison than to say it represents a major change involving a substantial additional cost to AEP Ohio.

And there is no reasonable or equitable basis to include the pre-November communities if a new aggregation set-aside is to be established. All of the pre-November communities had years to implement aggregation programs and switch customers. Any of those communities could have easily completed the process before January 2012 (the earliest when the Stipulation's set-aside would be gone for residential customers) and in fact, several communities have done so and received RPM-priced capacity. All they had to do was to enter into a contract (through passage of an ordinance) and complete the streamlined PUCO process for filing their opt-out notification and certification. Most of the pre-November communities passed their ballot initiative years ago and, in fact, had

completed their PUCO certification/notification process years ago. In most cases, the certifications were kept current.

In reality, the pre-November communities could have secured RPM-priced capacity even if they waited until after the Stipulation was filed to complete their process. After all, each of the pre-November communities had already passed a ballot initiative, which is the most time-consuming step of the process. As demonstrated in the evidentiary record, the remaining part of the process can be completed in 2-3 months and can be done faster if activities are undertaken simultaneously (*i.e.*, in parallel). (FES Ex. 1 at 33; Tr. VI at 994-995.) The pre-November communities had ample time to complete aggregation after September and prior to January – if they had desired to do so. The Commission's concern for the November 2011 ballot communities, based on their active pursuit of aggregation, simply has no application to the pre-November communities. The concern stated by the Commission was that communities on the most recent ballot would be foreclosed from the chance to seek the RPM option. By contrast to the November ballot communities, the opportunity for RPM-priced capacity always existed for the pre-November communities clear through the end of 2011. The only barrier to their eligibility was their own action, or inaction, not an intervening ballot action beyond their control. There is a difference between providing an opportunity for communities that faced being foreclosed from the opportunity, which was the concern addressed in the Opinion and Order, and extending an opportunity fully available at the time to communities that chose not to exercise it.

Thus, the Commission should not extend the aggregation set-aside to the pre-November communities, especially in light of those communities' ostensible lack of

interest to date and the substantial cost exposure for AEP Ohio involved with this expansion. If the Commission does extend the RPM opportunity for any of the pre-November communities, it should only do so for those that has maintained an active certification and took some action toward implementing aggregation after passage of SB 221.

3. The Opinion and Order's aggregation-related accommodation was based on residential customers and opt-out aggregation programs on the ballot and should not now be expanded to include mercantile customers

The Revised DIP properly limits the qualifying aggregation load to non-mercantile customers, in conjunction with the requirement under Ohio law that opt-out aggregation programs exclude mercantile customers. As already discussed above, the Opinion and Order's modification of the set-aside levels is focused on communities that adopted November 2011 ballot initiatives. Ballot initiatives are only required for opt-out aggregation initiatives – R.C. 4928.20(B) requires that any proposed opt-out initiative must be placed on the ballot and passed by a majority of the electors before it can be pursued. R.C. 4928.20(A) prohibits mercantile customers from being subjected to opt-out aggregation, providing that "aggregation of mercantile customers *shall occur only with the prior, affirmative consent* of each such person owning, occupying, controlling, or using an electric load center proposed to be aggregated." (Emphasis added.) To the extent that mercantile customers can voluntarily opt in to an existing aggregation program after it is established should not change the nature and intent of the Commission's modification based on a concern for opt-out aggregation customers and the November 2011 ballot initiatives – all of which were necessarily opt-out programs.

As referenced above, the Commission's modification was based in large part on the notion that "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." This concern for residential customers has nothing to do with subsequent industrial opt-in to an existing program. And the electorate is made up of residential and small commercial customers, not large industrial customers. Large industrial customers were not part of the General Assembly's design for governmental aggregation and were not part of the November 2011 ballot initiatives approved by the communities that the Commission was concerned about. Expanding the Opinion and Order's modification for November 2011 opt-out aggregation programs to include subsequent opt-in decisions by industrial customers is not supported by the existing language in the Opinion and Order and would unnecessarily create a substantial additional financial burden and uncertainty for AEP Ohio.

It would be incongruous and completely unnecessary to now require that mercantile customers be included as part of the new and separate "aggregation set-aside." The Opinion and Order plainly indicated that the accommodation for governmental aggregation was added out of concern for residential customers:

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

Opinion and Order at 54. Thus, it would depart from the stated intention of the Opinion and Order to now include the substantial load of mercantile customers (especially if the Commission now includes the pre-November communities in the aggregation set-aside).

Of course, there is a hefty price tag for creating such artificial competitive opportunities through the proliferation of below-cost pricing for AEP Ohio's capacity resources. As noted above, the incremental financial impact of this additional modification is projected to be $237 million over the term of the plan on AEP Ohio. The mercantile customers in the November and pre-November communities represent 14.0% of AEP Ohio's total load.

It is also unnecessary and unfair to do so. Mercantile customers are large customers (individually or through a national account) and possess bargaining power to negotiate generation service contracts without relying on an aggregation program. Doing so also allows them to obtain pricing offers that reflect their unique load characteristics, unlike individual residential customers who generally need to rely on aggregation programs to gain bargaining power and receive a pricing advantage. The General Assembly specifically provided in R.C. 4928.20 that mercantile customers are not to be included in opt-out aggregation (the brand of aggregation that requires a ballot measure to be passed). And the fact is that mercantile customers do not typically participate in aggregation programs – both because they do not need to do so and because aggregation programs are not designed to address the mercantile customers' particular circumstances.

As a separate matter, mercantile customers already receive substantial benefits under the unmodified Stipulation and do not need additional benefits, especially given that expanding the RPM-priced capacity set-aside for mercantile customers is costly to AEP Ohio and does not fulfill or address any of the aggregation concerns stated in the Opinion and Order. Moreover, mercantile customers received substantial additional (and unexpected) benefits beyond those reflected in the Stipulation through the Opinion and

Order's decision to cut in half the agreed base generation rate increases. If the Compliance Entry's effort to expand the RPM-priced capacity to include mercantile customers was intended to further mitigate the rate impacts to smaller industrial and commercial customers (some of which are mercantile customers), there are more direct and narrowly-tailored solutions to address those issues - to the extent the Commission determines it is necessary to do so.

In this regard, AEP Ohio notes that related issues are already pending on rehearing. For example, OMAEG sought expansion or re-allocation of the GS-2 shopping credit for customers experiencing "notable increases." (OMAEG Application for Rehearing at 10-11.) AEP Ohio also notes that individual small industrial and commercial customers have docketed letters in this proceeding raising similar concerns; while those letters do not constitute applications for rehearing filed by parties to the case, they arguably provide support for the issues that were raised in OMAEG's application for rehearing. In making its argument, OMAEG also noted (at10) that GS-2 customers are generally low load factor customers; those are the customers that are shouldering the cost of the Load Factor Provision to the benefit of high load factor customers. As referenced above, there is overlap between the statutory definition of mercantile customers and those GS-2 customers that may be experiencing relatively higher rate increases under the modified Stipulation. Methods for addressing the GS-2 rate impact concern include: (i) expanding eligibility for the shopping credit similar to the notion advocated by OMAEG in their application for rehearing, (ii) earmarking dollars within the Ohio Growth Fund for GS-2 rate impact mitigation, and/or (iii) redesigning the Load Factor Provision to mitigate the early impact of the rider on low load factor GS-2 customers (*e.g.*, implement

a revenue-neutral phase-in of the GS-2 LFP demand charge offset by a commensurate reduction to the GS-3/4 LFP energy credit, such that the GS-2 LFP demand charge is 25% of $3.29/kW in 2012, 50% in 2013, 75% in 2014 and 100% in 2015). AEP Ohio is not opposed to such solutions provided they are revenue-neutral to the Company - to the extent the Commission determines those issues need to be addressed and wants to pursue a direct and more narrowly-tailored remedy to address matters affecting mercantile customers (versus the sweeping expansion of RPM set-aside levels described in the Compliance Entry). Depending on what, if any, remedy the Commission entertains in this regard, the Commission may wish to direct AEP Ohio to make a compliance filing that details the impacts of such a remedy so that the Commission may specifically consider and separately approve the final remedy.

At a bare minimum, if the Commission does decide to keep the mercantile customer load as part of the aggregation set-aside (over AEP Ohio's objections), it should ensure that mercantile customers cannot join an aggregation in order to secure RPM-priced capacity allotment and then leave the aggregation in order to shop with another CRES provider. Under the Stipulation and the Revised DIP, a customer that receives an award of RPM-priced capacity keeps that allotment until mid-2015. Making an RPM-priced capacity allotment transportable for mercantile customers of an aggregation program would add insult to the injury of allowing mercantile customers to initially obtain an RPM allotment as part of an aggregation.

In short, the potential mercantile customer load is significant (as is the attendant cost of providing below-cost capacity) while the equities do not favor providing additional benefits to all mercantile customers in the form of a substantially expanded

set-aside level. The Commission should either clarify that the mercantile customer load is not included in the aggregation set-aside (though mercantile customers individually are permitted to opt in to the aggregation program) or tailor a more narrow and direct remedy to address rate impact issues for small mercantile customers.

4. Retaining continuing Jurisdiction to make future changes to a final adjudicatory order was not reflected in the Opinion and Order and is unlawful.

The Compliance Entry (at 5) now asserts continuing jurisdiction over the set-aside levels "to ensure that retail shopping through governmental aggregation does not unintentionally displace individual shopping in 2013 and 2014. It would be revisionist history to suggest that this new requirement was already embedded in the text or even between the lines of the Opinion and Order. As part of the ESP rate plan and AEP Ohio restructuring being done in reliance on the necessary transition plan and end state, AEP Ohio and its investors need to understand the implications of the plan. While it may have been unintentional, the continuing jurisdiction language in the Compliance Entry injects substantial financial uncertainty to future implementation of the modified Stipulation. If there is no established and enforceable limit on RPM-priced capacity under the Commission's view of the modified Stipulation, there can be no financial certainty for AEP Ohio. That result is unacceptable to AEP Ohio and should be undesirable for its regulator. Consequently, this continuing jurisdiction language should be clarified and narrowly interpreted in order to avoid unraveling the entire agreement.

The Opinion and Order's language explaining the aggregation accommodation modification specifically indicated (at 54) that the 2013 and 2014 set-aside levels would be adjusted to accommodate qualifying governmental aggregation load "to the extent, and

only, if necessary." This is an affirmative and intentional indication by the Commission that it did not intend to leave the 2013 and 2014 set-aside limits open for further review. If there was any remaining doubt about this point, the Opinion and Order unequivocally provided (page 54) that individual customers would be restricted to pursue RPM-based shopping "within the RPM set aside to the extent it is available." Notwithstanding the Compliance Entry's attempt to indicate that its continuing jurisdiction theory was consistent with the Opinion and Order, the Opinion and Order set forth a defined and limited provision for adjustment of the 2013 and 2014 set-aside limits. Moreover, as further discussed below in Part III, the lawful and reasonable concept of continuing jurisdiction is limited to enforcement and implementation issues and does not include the prospect of revisiting previously-adjudicated issues that are part of a final order.

On a more practical level, leaving the set-aside levels open for further adjustment in the future could render a key feature of the Stipulation meaningless and unravel the key compromise struck between the Staff, the intervenors and the Company in signing the Stipulation. For example, prior to completely exposing the company to fully market-based SSO environment, the Stipulation provides for a brief but important transition period for AEP Ohio to achieve divestiture of its generation assets and amend or dissolve the 1951 vintage AEP Interconnection Agreement ("AEP Generation Pool"). The provisions for corporate separation and AEP Generation Pool modification are essential components of the restructuring needed for AEP Ohio to transition from a regulated ESP plan to an auction-based SSO. Completion of these steps is necessary for commencement of the SSO auction for delivery beginning in mid-2015. Opening up the RPM set-aside limits would eviscerate this fundamental part of the bargain struck in the Stipulation.

As a related matter, the Commission should not blindly rely on a policy of promoting shopping in deciding this case, without consideration of the results both for customers and to the utility. AEP Ohio's underlying goal is certainly not to undermine shopping but to avoid allowing its capital-intensive investments to be used at rates below cost by CRES providers in order to stimulate artificial, uneconomic shopping. AEP Ohio's corporate policy is to support retail shopping and to comply with all laws and rules and there is no factual basis in any Commission finding or order to the contrary. As shown in the record, the business model of CRES providers – who have all refused to self-supply capacity – only works well if they are permitted to commandeer AEP Ohio's capital-intensive generation resources at below-cost RPM rates. Thus, the Commission should not be enticed into a decision based on the false notion that more shopping is always better for customers.

Exelon witness Dominguez made the following compelling point:

> Exelon would have preferred an earlier date, but *the practical problem in this case has always been a timing mismatch between the originally proposed 29-month ESP term and PJM's forward capacity market.* A properly functioning procurement design aligns competitive procurements of energy and capacity. Here, however, *the reality was that the capacity auction "ship" had sailed long before AEP Ohio even filed its ESP.*
>
> As I explained in my direct testimony, the PJM Reliability Pricing Model ("RPM") Base Residual Auctions (the competitive capacity auctions) are held three years in advance of the delivery date for the capacity. Capacity that could have been delivered during the proposed January 1, 2012 to May 31, 2014 ESP term was auctioned months - in some cases years – before AEP Ohio filed its proposed ESP plan in January 2011. AEP Ohio did not participate in those capacity auctions and, instead, filed a Fixed Resource Requirement ("FRR") plan to self-supply capacity. *Although many parties spent considerable ink in their respective testimonies explaining why PJM's competitively bid RPM capacity auctions are better than the FRR plans that AEP Ohio used, the fact remains that there is no way to go backwards in time and have AEP Ohio participate in capacity auctions that already concluded.*

(Exelon Ex. 1 at 3 (emphasis added; internal notes omitted).) Thus, arguably the most cogent factor supporting the start of an auction-based SSO in mid-2015 is to coincide with the earliest date that AEP Ohio can become an RPM entity in the PJM market.

The Commission should recognize and uphold the need for a brief transition period while remaining focused on the outcome of this proceeding – an end state where AEP Ohio is restructured and providing an auction-based SSO after corporate separation, AEP Pool dissolution and becoming an RPM entity in the PJM market. Leaving the RPM set-aside levels open ended upsets the balance struck in the Stipulation and exposes AEP Ohio to indeterminate financial risk. The Commission should avoid taking such an approach that would jeopardize the key outcomes being achieved under the modified Stipulation (that are not otherwise achievable in litigation). Rather, the Commission should reaffirm clear boundaries for the set-aside levels throughout the transition period and clarify that its intention in retaining continuing jurisdiction is limited to enforcement and implementation issues related to the modified Stipulation.

5. The Opinion and Order modified the January pro rata re-allocation and did not affect the initial September pro rata re-allocation.

The Compliance Entry (at 3-4) indicates that the modification to *pro* rata allocation of the RPM-priced capacity set-aside level "goes back to the initial allocation among the customer classes based on September 7, 2011, data, regardless of whether any customer class is now over-subscribed." By contrast, the Opinion and Order indicated (at 55) that it was modifying a different provision related to reversion of set-aside as of January 1, 2012. This is another instance where the Compliance Entry inaccurately portrays the new result as being a clarification.

Paragraph IV.2.b.3 of the Stipulation provides that the initial RPM-priced set aside allocation for each class will be established pursuant to Appendix C. The original DIP filed under the terms of Appendix C provided in Par. 4(a) that if the allotment to any customer class as of September 7, 2011 exceeds 21%, then the allocation to the remaining classes shall be reduced on a pro rata basis such that the total allotment does not exceed 21%. This provision was not modified by the Opinion and Order. Rather, the Opinion and Order (at 55) explicitly modified Paragraph IV.2.b.3's provision that as of January 2012 "any kWhs of RPM-priced capacity that have not been consumed by a customer class will be available for customers in any customer class based on the priority set forth in Appendix C." The Opinion and Order explicitly quoted the above language which only involves the reversion to other classes of unused capacity allotments as of January 2012 – it does not relate to the initial calculation of the classes' set-aside. As the evidentiary record abundantly made clear and discussed, the initial set-aside for the residential and industrial classes was slightly lower than 21% for 2012 because of the pre-existing oversubscription of the commercial class as of September 7, 2011 (the date the Stipulation was executed).

The Opinion and Order's modification (at 55) explicitly changed the January 2012 reversion of capacity set-aside "to ensure that residential customers are not foreclosed from their share of the capacity at RPM rates." The modification did not go back to the initial allocation among the classes based on September 7, 2011 data. Expanding the initial set-aside to 21% for residential and industrial classes would exceed the overall limit of 21% -- that would be a material and costly modification going beyond anything discussed in the Opinion and Order or agreed to in the Stipulation. As noted

above, the incremental financial impact of this additional modification is up to $15 million on AEP Ohio.

B. The Compliance Entry exceeds the Commission's jurisdiction and violates the statutory rehearing process (as well as the Commission's own rules), by prejudging contested matters as part of a Compliance Entry and inaccurately portraying those pending issues as being previously resolved.

As set forth above in Part I.A, the Compliance Entry undeniably alters the Opinion and Order in several respects – while related issues were pending based on rehearing requests that were not yet fully briefed for the Commission's consideration. The issues involved in the new and enhanced modifications were raised in applications for rehearing that were pending. The Compliance Entry was issued prior to completion of the process for hearing those applications for rehearing and without discussing the arguments raised either in support or in opposition to the rehearing requests. In short, the Commission short-circuited the statutory rehearing process and its own procedural rules in issuing the Compliance Entry.

The Commission was aware of the fact that the January 13, 2012 applications for rehearing had been filed and raised several issues regarding the scope and meaning of the Opinion and Order. At the outset of the Commission's January 18, 2012 public meeting, it was announced that the previously-scheduled ruling on the compliance issues were being delayed in light of those recent applications for rehearing. Yet, the Commission went forward with the Compliance Entry and unveiled the new and enhanced obligations prior to the deadline for parties to respond to the rehearing applications (that were filed on January 13) and without addressing the arguments raised in the rehearing

applications.[2] It was improper for the Commission to prematurely render a decision related to those matters outside of the rehearing process and in violation of its own procedural rules. Consequently, the Compliance Entry violates the statutory rehearing process and exceeds the Commission's jurisdiction.

The Supreme Court has recognized that the appropriate method for changing an order of the Commission (such as the Opinion and Order in question here) is through the statutory rehearing process. It has long been established that the Commission cannot modify one of its adjudicatory orders absent an application for rehearing and following the statutory rehearing process. *Greer v. Pub. Util. Comm.*, 172 Ohio St.361 (1961); *Polliz v. Pub. Util. Comm.*, 98 Ohio St. 445 (1918). The primary exception to this principle involves cases that do not involve *res judicata*, where the result can be prospectively altered after a complaint is filed under R.C. 4905.26 based on establishing reasonable grounds for entertaining a modification such as changed circumstances. *Allnet Comm. Serv. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117-118 (1987). That exception has no application to the Compliance Entry.

Only recently, the Supreme Court has again reinforced this well-established principle that R.C. 4903.10 permits the Commission "to modify an order only after granting an application for rehearing." *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360 (2007). Because the Commission in the *Discount Cellular* case had not granted rehearing, the Court held that the Commission "acted beyond its statutory authority when it cited in its rehearing order an additional reason for dismissing

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[2] Rule 4901-1-35(B), Ohio Admin. Code provides for the filing of an application within the statutory timeline and for filing of memoranda in opposition to the rehearing applications within ten days. This deadline had not passed when the Compliance Entry was issued.

Discount's complaint." *Discount Cellular*, 112 Ohio St.3d at 375. Thus, the Court strictly held that, absent granting rehearing, the Commission could not even add an additional reason supporting the same decision and same result. In other words, the Commission cannot even change the rationale for its order on rehearing without a pending rehearing request and after granting rehearing.

These principles apply with greater force here. As demonstrated in Part I.A above, the Commission pervasively altered the Opinion and Order's findings in five distinct and material ways. This was not only done without granting rehearing, it was done while pending rehearing requests were being actively prosecuted that raised related issues.[3] The Compliance Entry's changes were made prior to the time allowed under the Commission's procedural rules for even responding to the pending rehearing requests. As such, the Compliance Entry violated the statutory rehearing process and exceeded the Commission's jurisdiction.

II. The expanded remedies adopted in the Compliance Entry are not supported by the manifest weight of the record, violate R.C. 4903.09 and are arbitrary and capricious. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 209 (2006).

The Compliance Entry significantly expands AEP Ohio's obligations under the modified Stipulation without a sufficient record-based justification. In the same manner that a Commission would not blindly approve utility costs for collection from customers, the Commission should refrain from arbitrarily imposing costs on a utility without

[3] On February 1, 2012, the Commission granted the applications for rehearing filed on January 13 by AEP Ohio and some of the intervenors, for purposes of taking additional time to consider the arguments. Of course, this subsequent grant of rehearing cannot serve to validate any of the actions previously taken in the January 23, 2012 Compliance Entry.

understanding the propriety, nature and extent of such costs. Yet, that is what the Compliance Entry does: the Commission expanded remedies beyond the record and beyond the scope of the issues addressed in testimony and on brief. As further discussed below, the record does not reflect the load (or the costs associated with providing RPM-priced capacity to that load) associated with the pre-November 2011 ballot communities. Likewise, the record does not reflect the mercantile customer load associated with any of the communities. Thus, the financial impact of imposing such additional impacts simply was not known by the Commission when it decided to impose the costs. In reality, as shown in the attached workpapers, the financial impact of the new and enhanced obligations is substantial for AEP Ohio. The Commission should reconsider its expansion of remedies beyond the record and, if it retains the aggregation accommodation at all (over AEP Ohio's objection), narrowly tailor the modification to resolve the issues that were addressed in the record.

Section 4903.09, Revised Code, requires that, in all contested cases, the Commission must make a complete record of its proceedings and issue findings of fact and written opinions setting forth the reasons prompting its decisions, based upon those findings of fact. Where the Commission's order fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the Commission's order were based, the order fails to comply with the requirements of Section 4903.09, Revised Code, and is, therefore, unlawful. *Motor Service Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 5 (1974); *Allnet Comms. Serv. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209 (1994) (holding that the Commission must at least "suppl[y] some factual basis and reasoning based thereon in reaching the conclusion.") Stated differently, a

"legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 90 (1999). Similarly, the Court has categorically held that Commission orders which merely make summary rulings and conclusions without developing the supporting rationale or record are reversed and remanded. *MCI Telecommunications,* 32 Ohio St.3d 306, 312.

An examination of the record reflects an aggregation debate focused on redressing the needs of small customers in communities actively pursuing aggregation through the November 2011 ballot initiatives. FES witness Banks expressed concern that "none of the customers of the November and May ballot communities are likely to fall under the cap as beneficiaries of governmental aggregation." (FES Ex. 1 at 32.) Mr. Banks also presented his aggregation arguments as favoring "small governmental aggregation commercial customers. (*Id.* at 34.) On brief, FES maintained that governmental aggregation "provides significant benefits for residential and smaller commercial customers, who without the aggregation of their interests may not be able to secure such benefits in the competitive market." (IEU Brief at 117.) Further, FES witness Banks and the FES Brief focused on the timeline required to get the aggregation process completed for the November 2011 election communities and argued the equities suggesting that the November 2011 communities relied on the availability of RPM-priced capacity. (FES Brief at 118, 121-122.) Similarly, IEU witness Murray articulated concerns about facilitating opt-out aggregation and blindsiding the communities that successfully complete the November 2011 ballot process. (IEU Ex. 9 at 24.) AEP Ohio witness Allen focused on residential aggregation load of the November 2011 ballot communities and

provided the residential load for the November ballot communities as evidence that the 2012 set-aside level was sufficient. (AEP Ohio Ex. 20 at 12-13.)

The Opinion and Order's modification was related to that same focus on ensuring shopping opportunities for residential customers in the November 2011 ballot initiative communities. As discussed above in Part I.A.2, however, the Compliance Entry departs from the Opinion and Order's findings and unreasonably expands the aggregation accommodation to include inactive communities that authorized aggregation years ago and, in many cases, have allowed their PUCO certification to lapse through their own inaction and ostensible disinterest. Further, the Compliance Entry unreasonably expands the aggregation set-aside to include a large mercantile load that dwarfs the prior version of the aggregation load. The Compliance Entry's expansions are not only unreasonable, they also lack a basis in the record.

More to the point, the Compliance Entry's expansions were not sufficiently explained or justified based on record testimony. For example, the list of communities that authorized aggregation prior to November 2011 is not in the evidentiary record and was not considered by the Commission either at the time of the Opinion and Order or the Compliance Entry. Likewise, the electric load of those pre-November communities, either including or excluding mercantile customer load, is not in the evidentiary record and was not considered by the Commission either at the time of the Opinion and Order or the Compliance Entry. Further, the mercantile customer load associated with the November 2011 ballot initiative communities is not in the evidentiary record and was not considered by the Commission either at the time of the Opinion and Order or the Compliance Entry (only the residential customer load was quantified in testimony). And

the impact of undoing the September reallocation of RPM-priced set-aside capacity to residential, commercial and industrial customer classes was, thus, not known by the Commission.

The Supreme Court has only recently reversed the Commission for modifying a stipulation without sufficient explanation and record basis:

> In this matter, the commission made several modifications on rehearing without any reference to record evidence and without thoroughly explaining its reasons. *** The commission approved other modifications without citing evidence in the record and with very little explanation. The commission cannot justify the modifications made on rehearing merely by stating that those changes benefit consumers and the utility and promote competitive markets. The commission's reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders.
>
> For these reasons, we hold that the commission failed to comply with the requirements of *R.C. 4903.09* when it modified its September 29 order on rehearing. Accordingly, we remand this matter to the commission for further clarification of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, the commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings.

Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 309 (2006). Similarly, in issuing the Compliance Entry, the Commission has failed to explain its rationale and support its findings based on the record. As demonstrated above in Part I.A, there are five key aspects of the Compliance Order that depart from the Opinion and Order without explanation and record support. On rehearing, the Commission should reinstate the plain meaning and intent of the Opinion and Order with respect to those five major changes (if it does not reverse the modifications as advocated by AEP Ohio in its January 13, 2012 application for rehearing).

III. It is unreasonable and unlawful for the Compliance Entry to modify and adopt the package settlement imposing long-term obligations on AEP Ohio while simultaneously preserving the option to further modify the RPM-priced set-aside levels in the future in the name of continuing jurisdiction. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360 (2007).

As discussed above in Part I.B, the Commission cannot change final adjudicatory orders outside of the rehearing process. The Compliance Entry (at 5) asserts "continuing jurisdiction" for the purpose of reserving the right to modify the Commission's decision in the future. Continuing jurisdiction normally is used for enforcement of an agreement or ongoing supervision over implementation of a decision – not to hold open the decision being adjudicated. Final orders of the Commission are supposed to fully adjudicate the issues presented and, while the Commission can monitor and enforce the decisions, the Commission subsequently loses jurisdiction to modify a final order (both while the decision is pending before the Supreme Court of Ohio on appeal and after that time). *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 375 (2007). The Commission cannot simply reserve judgment to re-visit and subsequently modify a final order – and attempting to do so is particularly unfair and inappropriate when the Company is obligated under the adopted settlement to undertake long-term actions that in some instances are irreversible and permanent. Thus, separate and apart from the fact that the Compliance Entry as a whole violates the statutory rehearing process, the Compliance Entry's assertion of continuing jurisdiction for the purpose of reopening a final adjudicatory order in the future is unlawful and unreasonable.

It would also violate AEP Ohio's due process to induce AEP Ohio to make long-term and lasting changes in reliance on the Stipulation having been adopted only to learn

in the future that the Commission is exercising continuing jurisdiction by expanding the residential set-aside in order to ensure that individual shopping is not "unintentionally displaced." And there are several long-term and permanent obligations imposed on AEP Ohio as part of the settlement package:

- Proceed with permanent structural corporate separation/generation divestiture
- Make the RPM election in the PJM market, which covers 3 years in advance and requires AEP Ohio to remain an RPM entity for at least 5 years.
- Enter into a 5 ½ year ESP rate plan
- Proceed with dissolving the 1954-vintage AEP generation Pool
- Proceed with the 20-year Timber Road renewable energy purchase agreement
- Give up full WACC recovery in connection with the 7-year collection of deferred fuel regulatory assets
- Forego the opportunity for recovery of the costs of compliance with USEPA rules
- Forego recovery of any portion of the cost of providing POLR service during the years preceding the auction-based SSO

It is unlawful and unreasonable to not only expand the RPM set-aside but for the Commission to ambiguously preserve the ability to subsequently revisit and modify a final order. The finality and certainty of Commission orders is critical to providing due process and conducting proceedings in a fair and lawful manner. Moreover, the "moving target" approach gives the wrong signal to both investors and customers of AEP Ohio. The Commission should also be mindful that the Company has developed IT systems to implement the Commission's December 14, 2011 Opinion and Order and systems are in place that implement the Detailed Implementation Plan. To the extent further changes are needed due to modifications, the Commission should direct the Company to work with the Commission Staff to establish a reasonable schedule to implement the necessary changes to the IT systems.

The Commission should restore the balance struck in the Stipulation (or even the modified Stipulation per the Opinion and Order) by recognizing and enforcing the reasonable transition period, including the established RPM-priced capacity set-aside limits.

IV. The Compliance Entry's expansion of the Stipulation's capacity pricing is unlawful and forces AEP Ohio to involuntarily provide a below-cost subsidy supporting a competitive retail service offering. *Forest Hills Utility Co. v. Pub. Util. Comm.*, 31 Ohio St.2d 46, 55 (1972); Ohio Rev. Code Ann. 4928.02(H).

AEP Ohio willingly agreed to preserve and expand retail competition in its territory through a substantial commitment to provide below cost RPM-priced capacity in substantial measure (levels equal to the load of Toledo Edison, DP&L and Duke Energy Ohio in 2012, 2013 and 2014, respectively) – as part of the package deal bargained for in the Stipulation. But it did not agree to the substantial expansion of the set-asides without any rebalancing of the Stipulation package. It was unreasonable and unlawful for the Commission to impose new and costly obligations on AEP Ohio without understanding the costs involved and providing an avenue for recovery of those costs. Implementing the new and enhanced obligations set forth in the Compliance Entry will result in irreparable harm on AEP Ohio, in the form of imposing significant financial costs and losing retail customers.

As demonstrated in Part II above, the Commission did not have a basis for reckoning the impact of the new and enhanced obligations created therein. Just as the Commission would not permit recovery of costs without reviewing them and developing an understanding the nature and extent of the costs, the Commission should not blindly

impose costs without a record basis or without reflecting the costs as part of a utility's authorized rates. Indeed, the Supreme Court has held that the Commission cannot order a utility to undertake additional obligations for service without permitting rate recovery of the costs associated with undertaking that additional obligation. In particular, the Supreme Court held as follows in a similar context:

> The commission cannot reasonably order a utility to make improvements, authorize that utility to incur debt to pay for the improvements and then establish a rate for the utility which does not recognize such indebtedness. We hold such action of the commission to be unreasonable and unlawful.

Forest Hills Utility Co. v. Pub. Util. Comm., 31 Ohio St.2d 46, 55 (1972). Thus, the Commission needs to understand the costs associated with its orders and provide a path for recovery of the costs rather than imposing new obligations without understanding the associated costs and providing an opportunity for compensation.

AEP Ohio has previously demonstrated the cost-based support for the $255/MW-Day capacity charge and will not repeat those arguments here. (Joint Signatory Parties Brief at 87-124; Joint Signatory Parties Reply Brief at 64-82.) Imposing additional RPM-priced capacity obligations on AEP Ohio falls well short of being compensatory based on actual cost. As such, implementation of the Compliance Entry would cause substantial and irreparable financial harm to AEP Ohio.

If the Commission presses forward with imposing the new requirements described in the Compliance Entry, it should grant rehearing and consider approving a mechanism for recovery of the additional costs through: (i) a new retail charge that provides compensation to AEP Ohio, (ii) an upward adjustment to the generation rates approved in the Opinion and Order, or (iii) deferral for future recovery of the costs incurred. Under the first option, the additional cost associated with the increased obligation could be

added back into the target annual revenue requirement associated with the base generation rates. Regarding the second option, a new retail charge for that purpose is legally justified under R.C. 4928.143(B)(2)(d) or (e) and could be explored on rehearing in order to restore the balance achieved in the Stipulation in a manner similar to that which was recently approved for Duke Energy Ohio. Without adopting either option, the Compliance Entry's imposition of substantial additional costs without recovery exacerbates the adverse impact of the Opinion and Order's erroneous MRO test results, which were already unlawfully and unreasonably used as the basis to slash the Stipulated base generation rates (as described in AEP Ohio's January 13 application for rehearing). The third alternative is a tool available to the Commission under its general accounting authority and under R.C. 4928.144.

V. The Compliance Entry is unlawful and unreasonable in retreating from the RPM-priced capacity set-aside limitations without an explanation for departing from its own precedent. *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 307 (2006).

The Compliance Entry's decision (at 5) to retreat from the Opinion and Order's modified approval of the RPM-priced capacity set-aside limits is an unexplained departure from the Commission's precedent. To the extent that the RPM set-aside levels are considered a cap on shopping (which they should not be as previously demonstrated by AEP Ohio), adopting such shopping limits is expressly authorized by the General Assembly as part of an ESP. *See* R.C. 4928.143(B)(2)(d). The Opinion and Order's decision to modify and adopt the RPM set-aside limits was lawful and in keeping with the Commission's precedent and the slippage from that position in the Compliance Entry is an unexplained departure from precedent. *See Consumers' Counsel v. Pub. Util.*

Comm., 111 Ohio St.3d 300, 307 (2006). In fact, the precedent involved here (discussed below) was defended before the Supreme Court of Ohio and was affirmed.

In addressing a situation analogous to the Stipulation's two-tiered capacity discount system designed to preserve and expand retail shopping in AEP Ohio's service territory, the Supreme Court upheld a part of FirstEnergy's rate-stabilization plan that called for different levels of shopping credits depending on the length of the customer's contract with a competitive supplier. The shopping credits were a "deduction against [FirstEnergy's] own generation charges on the bills of customers who switch to a competitive supplier for their generation services" and were "designed to encourage customer shopping . . . ." *Consumers' Counsel*, 109 Ohio St. 3d at 336 (internal quotations omitted). For some customers, the shopping credits were "enhanced", meaning "their credit includes, in addition to the proposed generation rate, a percentage of the rate-stabilization charge." *Id.* OCC and several governmental aggregators claimed that these differing credits violated R.C. 4905.33 and R.C. 4905.35. The Supreme Court found that "[s]ince customer qualification for these shopping credits is based upon a rational distinction, there has been no violation of . . . R.C. 4905.33, or R.C. 4905.35." *Id.*

As with the limited shopping credits involved in the *Consumers' Counsel* case, the Stipulation's first-come, first-served RPM-priced set aside is fair and reasonable. Just because the price paid by one customer is different than the price for a similar service, that does not mean it is unduly or unreasonably discriminatory. A customer who shops at an earlier time and secures the RPM-priced capacity is not in the same situation as a customer who shops later and only receives the second tier discount for capacity.

Further, because the two-tiered discounts are reasonably designed to preserve and expand retail shopping in AEP Ohio's service territory, in advancement of R.C. 4928.02's policy of promoting retail competition and ensuring diversity of electric service supplies and suppliers. Even without the second tier of discount, the 21%, 29%/31% and 41% RPM-priced capacity allotments are reasonable.

The most direct and applicable precedent on this issue comes from the FirstEnergy ETP cases. In the FirstEnergy operating companies' ETP cases under SB 3 (Case Nos. 99-1212-EL-ETP et al.), FirstEnergy agreed to provide 1,120 MW of capacity to help stimulate retail competition in its service territories, referred to in the settlement as market support generation (MSG), on a first-come, first-served basis. (Section V.1 of the April 13, 2000 Stipulation and Recommendation.) The same settlement also provided shopping credits to certain customers in order to promote competition on a rationed basis. (*Id.* at Section V.2.) That settlement was signed on behalf of FirstEnergy by the current CEO, Mr. Anthony Alexander. Not only did Mr. Alexander sign the Stipulation, he testified in support of the agreement. (*See* April 26, 2000 Direct Testimony of Anthony J. Alexander.) This Stipulation was also supported by IEU. AEP Ohio is not citing this past Stipulation as being binding on the parties or the Commission as a precedent; rather, the Commission's adoption of the Stipulation as its order in that case demonstrates that the result was not unlawful and does not violate any important regulatory principle or practice. With regard to the Stipulation's proposed 1,120 MW capacity set-aside, Mr. Alexander touted the provision as a "tangible benefit to consumers and the public" and as being designed to promote competition. (*Id.* at 6, 10-11.) In its July 19, 2000 Opinion and Order at 66, the Commission found that none of the Stipulation's provisions,

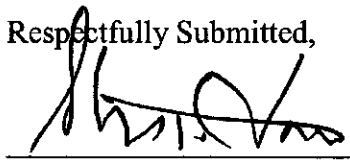
including the 1,120 MW capacity set-aside, violated any important regulatory principle or practice; the Commission adopted the FirstEnergy Stipulation as its lawful order.

The Compliance Entry's apparent reluctance to uphold the RPM set-aside limits represents an unjustified departure from precedent; on rehearing, the Commission should reconsider this point and reaffirm the Opinion and Order.

CONCLUSION

For the foregoing reasons, the Commission should grant the foregoing application for rehearing submitted by Ohio Power Company.

Respectfully Submitted,



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WORKPAPERS

Lost Revenues ($/MWh)

Year	Base "G"	Capacity Offset	Total
2012	22.70	-2.07	20.63
2013	23.30	-1.80	21.50
2014	24.10	-6.21	17.89
2015	24.10	-9.36	14.74

Expansion of Modification	Maximum Incremental Impact Over ESP	Projected Incremental Impact Over ESP
Inclusion of Mercantile Customers	$434 M	$237 M
Addition of Pre-Nov. 2011 Communities	$130 M	$80 M
Elimination of September Reallocation	$26 M	$15 M
Aggregation to be Above Set-Aside in 2012	$52 M	$21 M
Aggregation to be Above Set-Aside beyond 2012	$115 M	$83 M
Total	$757 M	$437 M

	Maximum Financial Impact				
Expansion of Modification	Incremental Impact in 2012	Incremental Impact in 2013	Incremental Impact in 2014	Incremental Impact in 2015	Incremental Impact Over ESP
Inclusion of Mercantile Customers	$135 M	$141 M	$117 M	$40 M	$434 M
Addition of Pre-Nov. 2011 Communities	$41 M	$42 M	$35 M	$12 M	$130 M
Elimination of September Reallocation	$26 M	$0 M	$0 M	$0 M	$26 M
Aggregation to be Above Set-Aside in 2012	$52 M	$0 M	$0 M	$0 M	$52 M
Aggregation to be Above Set-Aside beyond 2012	$0 M	$54 M	$45 M	$15 M	$115 M
Total	$254 M	$238 M	$198 M	$68 M	$757 M

	Projected Financial Impact				
Expansion of Modification	Incremental Impact in 2012	Incremental Impact in 2013	Incremental Impact in 2014	Incremental Impact in 2015	Incremental Impact Over ESP
Inclusion of Mercantile Customers	$51 M	$88 M	$73 M	$25 M	$237 M
Addition of Pre-Nov. 2011 Communities	$18 M	$29 M	$24 M	$8 M	$80 M
Elimination of September Reallocation	$15 M	$0 M	$0 M	$0 M	$15 M
Aggregation to be Above Set-Aside in 2012	$21 M	$0 M	$0 M	$0 M	$21 M
Aggregation to be Above Set-Aside beyond 2012	$0 M	$39 M	$33 M	$11 M	$83 M
Total	$105 M	$157 M	$130 M	$45 M	$437 M

	GWh			
Expansion of Modification	Maximum Incremental Impact in 2012	Projected Incremental Impact in 2012	Maximum Incremental Impact in 2013	Projected Incremental Impact in 2013
Inclusion of Mercantile Customers	6,560	2,449	6,560	4,092
Addition of Pre-Nov. 2011 Communities	1,966	878	1,966	1,368
Elimination of September Reallocation	1,275	744	-	-
Aggregation to be Above Set-Aside in 2012	2,524	1,028	-	-
Aggregation to be Above Set-Aside beyond 2012	-	-	2,524	1,826
Total	12,324	5,099	11,049	7,286

Total Potential Aggregation Load (GWh) With Mercantile

Class	Nov 2011 Communities	Pre-Nov 2011 Communities	Total
Residential	1,822	1,081	2,903
Commercial	1,403	1,770	3,173
Industrial	3,992	981	4,973
Total	7,217	3,832	11,049

Assumptions:

PIPP Load	10.1%
Individual Residential Shopping	6.3%
Residential Opt-Out Rate	10.0%
Commercial Opt-Out Rate	10.0%
Commercial Customers that are Mercantile	50.0%
Commercial Mercantile Opt-In Rate	85.0%
Commercial Customers Currently Shopping w/RPM	30.0%
Commercial Customers Currently Shopping w/o RPM	7.0%
Commercial Customers Currently Shopping w/o RPM Opt-In	75.0%
Industrial Customers that are Mercantile	100.0%
Industrial Mercantile Opt-In Rate	75.0%
Industrial Customers Currently Shopping w/RPM	17.0%
Industrial Customers Currently Shopping w/o RPM	5.0%
Industrial Customers Currently Shopping w/o RPM Opt-In	100.0%

Expected Aggregation Load at Year End 2012 (GWh)

Class	Nov 2011 Communities	Pre-Nov 2011 Communities	Total
Residential	1,381	820	2,201
Commercial	852	1,075	1,927
Industrial	2,535	623	3,158
Total	4,768	2,517	7,286

Expected Aggregation Load During 2012 (GWh)	**4,355**	**9.3%**

Total Potential Aggregation Load (GWh) With Mercantile

Monthly Spread

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Nov 2011													
Residential	0%	0%	20%	35%	50%	70%	90%	100%	100%	100%	100%	100%	
Commercial	0%	0%	15%	30%	45%	60%	80%	95%	100%	100%	100%	100%	
Industrial	0%	0%	10%	25%	40%	65%	85%	95%	100%	100%	100%	100%	
Pre-Nov 2011													
Residential	50%	60%	70%	80%	90%	90%	90%	90%	90%	90%	90%	90%	
Commercial	25%	30%	45%	60%	65%	75%	85%	90%	90%	90%	90%	90%	
Industrial	0%	0%	20%	40%	60%	80%	85%	90%	90%	90%	90%	90%	
Load (Nov)													
Residential	-	-	-	-	-	81	104	115	115	115	115	115	760
Commercial	-	-	11	21	32	43	57	67	71	71	71	71	515
Industrial	-	-	21	53	84	137	180	201	211	211	211	211	1,521
Total	-	-	32	74	116	260	340	383	397	397	397	397	2,795
Load (Pre-Nov)													
Residential	-	-	-	-	-	61	61	61	61	61	61	61	430
Commercial	22	27	40	54	58	67	76	81	81	81	81	81	748
Industrial	-	-	10	21	31	42	44	47	47	47	47	47	382
Total	22	27	51	75	89	170	182	189	189	189	189	189	1,560
Total Load													
Residential	-	-	-	-	-	142	165	177	177	177	177	177	1,190
Commercial	22	27	51	75	90	110	133	148	152	152	152	152	1,263
Industrial	-	-	32	74	116	179	224	247	258	258	258	258	1,902
Total	22	27	82	149	206	431	522	572	586	586	586	586	4,355

Total Potential Aggregation Load (GWh) Without Mercantile

Class	Nov 2011 Communities	Pre-Nov 2011 Communities	Total
Residential	1,822	1,081	2,903
Commercial	702	885	1,587
Industrial	-	-	-
Total	2,524	1,966	4,490

Assumptions:

PIPP Load	10.1%
Individual Residential Shopping	6.3%
Residential Opt-Out Rate	10.0%
Commercial Opt-Out Rate	10.0%
Commercial Customers Currently Shopping w/RPM	30.0%
Commercial Customers Currently Shopping w/o RPM	7.0%
Commercial Customers Currently Shopping w/o RPM Opt-In	75.0%

Expected Aggregation Load at Year End 2012 (GWh)

Class	Nov 2011 Communities	Pre-Nov 2011 Communities	Total
Residential	1,381	820	2,201
Commercial	444	548	992
Industrial	-	-	-
Total	1,826	1,368	3,193

Expected Aggregation Load During 2012 (GWh) **1,906 4.1%**

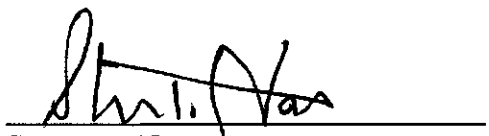
Total Potential Aggregation Load (GWh) Without Mercantile

Monthly Spread

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Nov 2011													
Residential	0%	0%	20%	35%	50%	70%	90%	100%	100%	100%	100%	100%	
Commercial	0%	0%	15%	30%	45%	60%	80%	95%	100%	100%	100%	100%	
Industrial	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	
Pre-Nov 2011													
Residential	50%	60%	70%	80%	90%	90%	90%	90%	90%	90%	90%	90%	
Commercial	50%	60%	70%	80%	90%	90%	90%	90%	90%	90%	90%	90%	
Industrial	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	
Load (Nov)													
Residential	-	-	-	-	-	81	104	115	115	115	115	115	760
Commercial	-	-	6	11	17	22	30	35	37	37	37	37	268
Industrial	-	-	-	-	-	-	-	-	-	-	-	-	-
Total	-	-	6	11	17	103	133	150	152	152	152	152	1,028
Load (Pre-Nov)													
Residential	-	-	-	-	-	61	61	61	61	61	61	61	430
Commercial	23	27	32	37	41	41	41	41	41	41	41	41	448
Industrial	-	-	-	-	-	-	-	-	-	-	-	-	-
Total	23	27	32	37	41	103	103	103	103	103	103	103	878
Total Load													
Residential	-	-	-	-	-	142	165	177	177	177	177	177	1,190
Commercial	23	27	38	48	58	63	71	76	78	78	78	78	716
Industrial	-	-	-	-	-	-	-	-	-	-	-	-	-
Total	23	27	38	48	58	205	236	253	255	255	255	255	1,906

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Ohio Power Company's Application for Rehearing has been served upon the below-named counsel and Attorney Examiners by U.S. Mail and by electronic mail to all Parties this 10th day of February, 2012.



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