

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for Approval of an) Case No. 11-5333-EL-UNC
Amendment to its Corporate Separation)
Plan.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In order to protect residential consumers of Ohio Power Company (“OP”)¹ from unreasonable rates, the Office of the Ohio Consumers’ Counsel (“OCC”) files this application for rehearing of the Finding and Order (“F&O”) issued by the Public Utilities Commission of Ohio (“Commission” or “PUCO”) in the above-captioned proceeding on January 23, 2012. OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The F&O approved, with modifications, the corporate separation plan filed in this proceeding on September 30, 2011.

The F&O was unreasonable and/or unlawful in the following respects:

- A. The Commission erred in finding that the transfer of generating assets should be at net book value, instead of market value. Its finding is not based on specific findings of fact and is not supported by the record in violation of R.C. 4903.09.
- B. The Commission erred by allowing the transfer of generating assets at net book value, violating R.C. 4928.02(H) and R.C. 4928.17(B).

¹ Under the modified ESP Stipulation, Columbus Southern Power merged into OPCo effective at the end of 2011. Accordingly, Ohio Power (also referred to as AEP Ohio) represents and is the successor in interest to the interests of CSP. *See 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order (Dec. 14, 2011).

- C. The Commission erred in failing to require the Company to state the market value of the generating assets to be transferred and how the market value was determined as is required under Ohio Admin. Code 4901:1-37-09(C)(4). This error was caused when the Commission waived the rule, without finding good cause.
- D. The Commission erred in unreasonably failing to give value to customers for the stranded generation costs that they previously paid through the regulatory asset charges collected from them under PUCO-approved regulatory transition charges.
- E. The Commission erred in unlawfully and unreasonably determining that it could use its order approving the Duke Stipulation² as precedent to justify its approval of the Company's transfer of assets at net book value.
 - 1. The Commission's ruling is unlawful because it is not based on findings of fact supported by the record, in violation of R.C. 4903.09.
 - 2. The Commission's use of the stipulation as binding precedent ruling was unreasonable because it is contrary to the express provisions of the stipulation and will have a chilling effect on parties' willingness to enter into stipulations. As such, it is contrary to public policy that encourages the settlement of issues.

The grounds for this application for rehearing are set forth in the accompanying Memorandum in Support.

² *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Opinion and Order (Nov. 22, 2011).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 30, 2011 Ohio Power filed an application for approval to amend its corporate separation plan to implement structural separation. Its application followed on the heels of a September 7, 2011 Stipulation in the Company’s electric security plan (“ESP”) proceeding. In that Stipulation, AEP Ohio had requested that the Commission grant full legal separation to it and that it be permitted to transfer its generation assets to an unregulated generating company. The PUCO, however, concluded that “there is still the need for additional analysis of the corporate separation plan terms and conditions” and advised that it would continue to review “remaining issues” in an expeditious manner in the corporate separation case.³

Comments and reply comments were filed by OCC and others in this docket. On January 23, 2012, the Commission issued a Finding and Order approving the corporate separation plan, subject to certain conditions. OCC files this Application for Rehearing on the basis of the PUCO’s unlawful and unreasonable determinations made with respect to the transfer value of the generating assets.

³ *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO et al., Opinion and Order at 61 (Dec. 14, 2011).

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC filed a motion to intervene in this proceeding on December 8, 2011, which was granted in the F&O. OCC also filed comments and reply comments regarding the Application.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” In addition, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.” The statute also provides: “If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the statutory standard for modifying the F&O is met here.

III. ASSIGNMENTS OF ERROR

- A. **The Commission erred in finding that the transfer of generating assets should be at net book value, instead of market value. Its finding is not based on specific findings of fact and is not supported by the record in violation of R.C. 4903.09.**

The Commission found that “[b]ecause OP seeks to transfer its generating assets to an affiliate within the same parent corporation, in compliance with the mandate of Section 4928.17, Revised Code, we agree that it is appropriate for OP to transfer the assets at net book value and note that this approach is consistent with our recent decision in II-3549 [Duke SSO].”⁴ This conclusion by the Commission however, is insufficient to meet the mandates of the Ohio Revised Code.⁵

A legion of cases establishes that the Commission abuses its discretion if it renders an opinion on an issue without record support.⁶ The need for record support is mandated under R.C. 4903.09. Under R.C. 4903.09 in all contested cases heard the commission “shall file, with the records of such cases, finding of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” As recognized by the Ohio Supreme Court the primary purpose of this statute is to provide the Court “with sufficient details to enable [it] to determine, upon

⁴ Id.

⁵ See e.g. *Erie-Lackawanna Rd. Co. v. Pub. Util. Comm.*(1969), 18 Ohio St. 2d 112 (PUCO reversed where facts cited were insufficient to support PUCO order); *General Tel. Co. v. Public Utilities Comm.*(1972), 30 Ohio St. 2d 271(PUCO reversed where Court found the record was incomplete and no decision as to the reasonableness of the determined rate of return could be made); *New York C. & S. L. R. Co. v. Pub. Util. Comm.* (1964), 176 Ohio St. 81, 83 (PUCO reversed where it made no findings of fact with respect to the factors considered by it in making the allocation required by Section 4907.47, Revised Code, and gave no reasons for the allocation which it made, making it “impossible for this court to determine whether the allocation made by the commission is either reasonable or lawful.”).

⁶ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 163, 166.

appeal, how the commission reached its decision.”⁷ Some factual support for commission determinations must exist in the record, an obligation which the Commission itself has recognized in its orders.⁸

Without adequate facts and reasons to support the PUCO’s decision, the Court would not be able to determine if an opinion and order is reasonable and lawful under R.C. 4903.13. Additionally, lack of a record stymies a complaining party’s effort in demonstrating prejudice⁹, a necessary element to obtain reversal of a Commission order by the Ohio Supreme Court.¹⁰

Here, the Commission merely cites to R.C. 4928.17 and finds it is appropriate to allow the transfer at net book value. R.C. 4928.17 however, does not require transfer at net book value. That statute speaks to preventing an unfair competitive advantage from being gained by virtue of an affiliated business’ relationship with an electric distribution utility (“EDU”), and declares that prior Commission approval is needed before an electric distribution utility sells or transfers any generating asset.

While the Commission seems to emphasize that the transfer is to an affiliate, rather than an unaffiliated company, it does not explain the importance of the distinction nor link it to the need for the transfer to be at net book value. Indeed, the fact that the transfer is to an affiliate of an EDU would seem to be all the more reason to guard against transfer at a value that is advantageous to the affiliate. Net book value is likely to be less

⁷ *Cleveland Elec. Co. v. Pub. Util. Comm.* (1983), 447 N.E.2d 746, 748; *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 513 N.E.2d 337, 343.

⁸ See e.g. *In re Petition of Studer & Numerous Other Subscribers of Neapolis Exchange of ALLTEL Ohio*, Case No. 88-481-TP-PEX, Entry on Rehearing (Sept. 6, 1990).

⁹ See *Tongren v Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 92-93.

¹⁰ *Id.*, citing *Holliday Corp. v. Pub. Util. Comm.*, (1980), 61 Ohio St.2d 335, syllabus.

than fair market value and if the transfer value is too low it may end up providing the affiliate with a competitive advantage, which is unlawful under R.C. 4928.17(B) and R.C. 4928.02(H).

Furthermore, noting that its approach is consistent with its decision in Duke's SSO case¹¹ is not the same as providing facts or reasons to support the Commission's decision in this case. The Commission's decision in the Duke SSO case was not a decision in which the transfer value of Duke's generating assets was evaluated on a stand-alone basis —and that case certainly didn't reach any facts about AEP's transfer. In the Duke case, the transfer of generating units at net book value was merely one provision in a total case stipulation package. The standard of review in that case included, *inter alia*, a determination of whether the stipulation *as a package*, benefits ratepayers and the public interest.¹² In contrast, in this proceeding the Commission must make the determination that the transfer of the generating assets, at net book value, is in the public interest when considered *on its own merits*.¹³

Yet, while concluding that the transfer should occur at net book value, the Commission does not provide the facts or the basis that support its decision. There is not sufficient detail from the bare statements presented in the Commission's Order to permit the Court to determine the basis of the Commission's reasoning. The Commission, thus, has violated R.C. 4903.09. Rehearing should be granted and the Commission should allow an appropriate record to be developed before deciding on this issue.

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Opinion and Order (Nov. 22, 2011).

¹² *Id.* at 27.

¹³ See Ohio Admin. Code 4901:1-37-09(E).

B. The Commission erred by allowing the transfer of generating assets at net book value, violating R.C. 4928.02(H) and R.C. 4928.17(B).

The Commission determined that the Company should transfer its generating assets to one of its unregulated affiliates, based on a net book value, instead of market value.¹⁴ This decision was made despite comments and arguments to the contrary.¹⁵ And, more importantly, it was made without benefit of evidence showing the market value of the assets.

Looking at the market value of the assets to be transferred is part of the analysis that the Commission should undertake as part of its approval process. Indeed, under Ohio Admin. Code 4901:1-37-09(C))(4), the electric utility seeking to sell or transfer its generating assets must state the fair market value and book value of the property to be transferred and must state the basis of the fair market value.

Notably, this requirement, though absent from the Staff's proposed corporate separation rules, was incorporated by the Commission into the final rules, which rules became Chapter 4901:1-37 of the Administrative Code.¹⁶ OCEA¹⁷ had argued that such

¹⁴ *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, Opinion and Order at 21.

¹⁵ See Comments of OCC at 10-11; Comments of FES at 4-5.

¹⁶ *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, Entry on Rehearing at ¶36 (Feb. 11, 2009).

¹⁷ OCEA refers to the Ohio Consumer and Environmental Advocates which included the Office of Consumers' Counsel, NOPEC; the Sierra Club Ohio Chapter; Ohio Partners for Affordable Energy; Greater Ohio; Ohio Interfaith Power and Light; Ohio State Legal Services Association and Appalachian People's Action Coalition; Communities United for Action and Legal Aid of Southwest Ohio; Citizens for Fair Utility Rates, Neighborhood Environmental Coalition, Cleveland Housing Network, Empowerment Center for Greater Cleveland, and Counsel for Citizens Coalition and The Legal Aid Society of Cleveland; Citizen Power; AARP Ohio; the Ohio Environmental Council; Natural Resources Defense Council; Lucas County; the Edgemont Neighborhood Coalition of Dayton and Advocates for Basic Legal Equality; City of Toledo; Ohio Farmers Union; and Environment Ohio-Environmental Advocate.

information was essential to determining whether the transfer is in the public interest.¹⁸

The Commission found that “this additional information could be helpful in determining whether the transfer is in the public interest.”¹⁹

Yet here the Commission did not require the market value (or the book value) of the generating assets to be stated by the Company and thus the record lacks such information. Such information should have been produced in order to determine whether the transfer is in the public interest. When an affiliate receives property from an electric utility, the electric utility should show that it has been properly compensated for such property. If the electric utility has not been properly compensated, i.e. the compensation is too low, the affiliate receives a competitive advantage, which is unlawful under R.C. 4928.17(B) and R.C. 4928.02(H).

R.C. 4928.17 in numerous subsections refers to the “competitive advantage and abuse of market” that the law seeks to prevent through the filing of a corporate separation plan. In subsection (a)(2), the Commission is tasked with evaluating a corporate separation plan to determine if it “satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.” Additionally, the Commission must determine under subsection (a)(3) whether the plan is sufficient to ensure that the utility will not extend any “undue preference or advantage” to its affiliate. Section (B) of the statute requires the PUCO to adopt rules regarding corporate

¹⁸ *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, OCEA Comments at 76 (July 22, 2008).

¹⁹ *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, Entry on Rehearing at ¶36 (Feb. 11, 2009).

separation that include limitations on affiliate practices “to prevent unfair competitive advantage.”

R.C. 4928.02(H) also conveys this theme but uses slightly different terminology. It establishes that one of the state policies is to ensure effective competition by avoiding anticompetitive subsidies flowing from a non-competitive retail service to a competitive retail service. This is one of the state policies the PUCO must ensure is effectuated under R.C. 4928.06.²⁰

When the Commission determined to allow the transfer of generating units at net book value, it violated R.C. 4928.17, 4928.02, and 4928.06 of the Code. Use of net book value instead of market value is likely to result in compensation that is too low, which provides the Company’s affiliate with an unfair competitive advantage and results in anticompetitive subsidies flowing between the Company and its affiliate. This is not in the public interest as it threatens the development of a competitive generation market, the centerpiece of S.B. 221. This is contrary to the policy of the state to ensure the diversity of electricity supply and suppliers.²¹

Rehearing should be granted. The Commission should allow the record to be developed that includes market value of the transferred assets. Parties should be given the opportunity to put forth arguments about how the premium associated with market value of the assets should be allocated.

²⁰ See *Elyria Foundry Co. v. Pub. Util. Comm.* 114 Ohio St.3d 305 2007-Ohio-4164 (holding that policies of R.C. 4928.02 must be followed).

²¹ See R.C. 4928.02(C).

- C. The Commission erred in failing to require the Company to state the market value of the generating assets to be transferred and how the market value was determined as is required under Ohio Admin. Code 4901:1-37-09(C)(4). This error was caused when the Commission waived the rule, without finding good cause.**

In its September 30, 2011 Application, OP requested authority to transfer its generating assets at net book value, and “to the extent necessary” sought a waiver of Ohio Admin. Code Rule 4901:1-37-09(C)(4).²² The Commission found that OP’s request for a waiver “is reasonable and should be granted pursuant to Rule 4901:1-37-02(C).”²³ Notably, Ohio Admin. Code 4901:1-37-02(C) allows the Commission to “waive any requirement of this chapter, other than a requirement mandated by statute, for ‘good cause shown.’”

Here however, the Commission granted the waiver using the wrong standard. The PUCO used a standard of “reasonable.” But good cause is the standard, not “reasonable.” And there is nothing on the record that shows good cause to waive the filing of market values for the transferred assets. Indeed it appears that AEP Ohio either has developed or is in the process of developing a market value for the transferred assets.²⁴ A statement by the Company in its application seeking waiver, with no reason or rationale to back up the need for the waiver, fails to equate to good cause for granting a waiver, let alone establish that a waiver is “reasonable.”

²² *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, Application at 10 (Sept. 30, 2011).

²³ *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 Finding and Order at ¶36.

²⁴ See *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO et al, Tr. V at 705-707.

The Commission's granting of the waiver without sufficient grounds is a mistake, compounded by the fact that the Commission utilized the wrong standard. This mistake has greatly prejudiced OCC as well. Without the market values being produced, OCC, other parties, and the Commission are stymied in their efforts to assess whether the transfer of generating assets is in the public interest, or whether the transfer to the Company's affiliate creates an unfair competitive advantage, contrary to numerous provisions of the Revised Code. Rehearing should be granted, the waiver should be denied, and the Company should be ordered to produce the information required under the rules. Parties should be then given the opportunity to refute such evidence.

D. The Commission erred in unreasonably failing to give value to customers for the stranded generation costs that they previously paid through the regulatory asset charges collected from them under PUCO-approved regulatory transition charges.

Specifically, in AEP Ohio's electric transition plan filing, Case No. 99-129-EL-ETP et al., the Commission approved a stipulation permitting AEP Ohio, *inter alia*, to implement a "regulatory transition charge" to collect "stranded generation-related regulatory assets" from customers over a seven (OP) or eight year period (CSP)²⁵. Regulatory transition charges collected from CSP customers amounted to \$191.15 million. Regulatory transition charges collected from OP customers were \$425.23 million.²⁶ And yet, the PUCO failed to consider this fact when evaluating the value to assign to the units transferred to the Company's affiliate.

²⁵ *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP et al., Opinion and Order at 11 (Sept. 28, 2000).

²⁶ *Id.*, see also Stipulation and Recommendation, Attachment 1 (May 8, 2000).

Instead it found the transfer of assets to be in the public interest, without even looking at the fair market value of the assets and evaluating that value in light of past stranded investment costs charged to customers. This was unreasonable.

The Commission should have given value to customers for their funding of the stranded generation assets. They could have done so by requiring a market value of the generating assets to be provided and netting a portion of the market premium against what customers have paid for the regulatory transition charges. This would have restored symmetry to the process by establishing that a portion of the benefits (market premium over and above the net book value) from the generating assets flows to those who shouldered the detriments (stranded generation asset charges) of the units. Doing so would have been in keeping with the policies of R.C. 4928.02: ensuring that consumers have reasonably priced retail electric service and are protected from market deficiencies and market power.²⁷

E. The Commission erred in unlawfully and unreasonably determining that it could use its order approving the Duke Stipulation²⁸ as precedent to justify its approval of the Company's transfer of assets at net book value.

1. The Commission's ruling is unlawful because it is not based on findings of fact supported by the record, in violation of R.C. 4903.09.

In the Opinion and Order the Commission indicated that while the Signatory parties of the Duke ESP Stipulation agreed not to be bound by provisions of the Stipulation in any subsequent proceeding, "that limitation does not extend to the

²⁷ See R.C. 4928.02(A), (I).

²⁸ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Opinion and Order (Nov. 22, 2011).

Commission.”²⁹ The Commission then went on to use its order approving the Duke ESP Stipulation in part as a basis for justifying its approval for OP to transfer the assets at net book value.

The Commission’s reliance on its Order adopting the Duke ESP Stipulation as precedent in this proceeding was wrong. The Stipulation binds the Commission, despite the Commission’s conclusion otherwise.

The specific provisions within the Duke ESP Stipulation that preclude using the Commission order as precedent make no distinction between the Signatory Parties and the Commission. The same words that convey this are found twice within the body of the Stipulation and are as follows:

This Stipulation is submitted for purposes of these proceedings only, and neither this Stipulation or any Commission Order considering this Stipulation shall be deemed binding in any other proceeding***.”³⁰

There is no mention that the restriction on considering the Stipulation as binding is directed solely to the Signatory Parties. The language on its face applies to all, including the Commission itself.

In contrast where the Signatory Parties wanted to bar “parties” only from using or relying on the Stipulation in other proceedings, they expressly did so by including such restrictive language. This language directly follows the above quoted passages:

“***nor shall this Stipulation or any such Order be offered or relied upon by any Party in any proceedings except as necessary to enforce the terms of this Stipulation.”

²⁹ *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, Finding and Order at ¶32.

³⁰ Duke Stipulation at 2, 42.

While the offering of or reliance on the Stipulation or Order is specifically prohibited for the Signatory Parties –“any Party in any proceedings,” the agreement that the Commission order shall not be deemed binding is not restricted to the Signatory Parties. It includes the Commission and was intended by the Signatory Parties to include the Commission. The Commission should merely have applied the unambiguous words of the stipulation—there was no need for interpretation.

The Commission’s interpretation of the Stipulation was a mistake and is clearly not supported by record evidence. Its finding fails to meet the requirements of R.C.4903.09—that the Commission in its Order set forth findings, based on facts in the record. Rehearing should be granted.

2. The Commission’s use of the stipulation as binding precedent ruling was unreasonable because it is contrary to the express provisions of the stipulation and will have a chilling effect on parties’ willingness to enter into stipulations. As such, it is contrary to public policy that encourages the settlement of issues.

The Commission’s misuse of an isolated provision in the Duke Stipulation to validate its approval of the Company’s net book value transfer not only violates the terms of the Stipulation, but also is contrary to the inherent nature of a stipulation. A stipulation, such as the Duke ESP Stipulation, represents a resolution of a number of issues in a proceeding or multiple proceedings. A Stipulation is a package composed of many different provisions—provisions which may not be acceptable on a stand-alone basis, but when put together with other terms constitute an acceptable compromise. Indeed as the Duke ESP Stipulation stated “[t]his stipulation represents an agreement by all Parties to a package of provisions rather than an agreement to each of the individual

provisions included within the Stipulation.”³¹ It is in the words of the Signatory Parties “a comprehensive compromise of issues raised by Parties with diverse interests.”³²

Similarly, a Commission order adopting a stipulation is made on the basis of, *inter alia*, whether the stipulation “as a package” benefits ratepayers and the public interest. While distinct provisions of the stipulation may not have passed the “public interest” standard, the Commission’s Order adopting the stipulation package does not necessitate such a finding. To extricate a distinct provision of a Stipulation package (net book asset transfer) and use it on a stand alone basis as precedent for a different company, under a different set of facts, perverts the whole stipulation process.

The Commission’s misuse of the Duke ESP Stipulation, in violation of the terms expressly agreed to, will have a chilling effect on the willingness of parties to enter into future negotiations. If parties to a settlement are not assured that the terms of the settlement agreement, agreed to and eventually approved by the PUCO, will be held inviolate, parties will not be inclined to sign onto settlements.

Sound regulation should not discourage dispute-resolution through settlements. Because there is the potential for cost savings and regulatory certainty, the PUCO should not discourage settlements. OCC, therefore, urges the Commission to grant rehearing on this issue and reverse its holding that relies upon the Duke settlement as a basis for permitting OP to transfer its generating assets at net book value.

³¹ Duke Stipulation and Recommendation at 2.

³² Id. at 3.

IV. CONCLUSION

While the transfer of generating assets may assist the Company in fulfilling its commitments under the electric security plan, the Commission must nevertheless determine in this proceeding that the transfer, under the terms proposed, is in the public interest. That determination must be based on evidence in the record, and must be explained by the Commission in its opinion and order. R.C. 4903.09 requires this. R.C. 4903.09, however has not been met. In allowing the transfer of assets at net book value, without evidence as to the market value, the Commission has failed to fulfill its duties under R.C. 4903.09 but has also skirted its duties under another provision of the code, R.C. 4928.17.

That provision requires the Commission to ensure that the plan satisfies the public interest in preventing an unfair competitive advantage for the Company's affiliate. This task cannot be done without record evidence of the market value of the assets. Such information should have been produced and fully vetted, so that parties would have the opportunity to challenge the value and argue for an allocation of the market premium associated with that value. Only then will it be known that the plan meets R.C. 4928.17—that it is in the public interest and does not create a competitive advantage for the Company's affiliate.

A competitive advantage given to the Company's affiliate will be detrimental to the emerging competitive market. And if market competition should fail due to an unfair competitive advantage being created through the transfer of generating assets, this will be detrimental to Ohio's electric customers. Rehearing as requested should be granted to protect the interests of the Company's customers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via regular U.S. Mail, postage prepaid, this 16th day of February, 2012.

/s/ Maureen R. Grady

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