McNees Wallace & Nurick LLC

21 East State Street • 17th Floor • Columbus, OH 43215-4288
Tel: 614.469.8000 • Fax: 614.469.4653

Frank P. Darr
(614) 719-2855-Direct Dial
fdarr@mwncmh.com

February 21, 2012

Betty McCauley
Docketing Division Chief
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793

Re: Case Nos. 11-346-EL-SSO, 11-348-EL-SSO, 11-349-EL-AAM, 11-350-EL-AAM, 10-343-EL-ATA, 10-344-EL-ATA, 10-2376-EL-UNC, 10-2929-EL-UNC, 11-4920-EL-RDR, and 11-4921-EL-RDR

Dear Madame Secretary:

Attached find a revised version of Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's Application for Rehearing.

Please contact me if there are any questions regarding this filing.

Sincerely,

McNEES WALLACE & NURICK LLC

Frank P. Darr
Of Counsel

FPD/kb
Enclosure

cc: Parties of Record

{C36787: }

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	))))	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders.	))))	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders.	)))	Case No. 10-344-EL-ATA
In the Matter of the Commission Review Of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	))))))	Case No. 11-4921-EL-RDR

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA OHIO POWER COMPANY'S APPLICATION FOR REHEARING REVISED

Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph Oliker
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

February 21, 2012

Attorneys for Industrial Energy Users-Ohio

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	)	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders.	)	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders.	)	Case No. 10-344-EL-ATA
In the Matter of the Commission Review Of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	)	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)	Case No. 11-4921-EL-RDR

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA OHIO POWER COMPANY'S APPLICATION FOR REHEARING

I. INTRODUCTION

On December 14, 2011, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order modifying and approving a Stipulation and Recommendation ("Stipulation") filed on September 7, 2011. As part of its approval for a broader agreement, the Commission approved provisions that created a two-tiered generation capacity service pricing scheme ("shopping caps"). Although the Commission approved the creation of shopping caps, it also made two modifications. First, it did not permit Ohio Power Company ("OP") to include governmental aggregation programs in the calculation of the load that determined which customers would receive capacity priced through PJM Interconnection LLC's ("PJM") Reliability Pricing Model ("RPM-priced capacity").[1] Second, the Commission rejected the reallocation of unallocated capacity that was eligible for RPM-priced capacity.[2]

On December 29, 2011, OP filed a Revised Detailed Implementation Plan ("revised DIP") that set out the manner in which it planned to implement the modifications to the shopping caps the Commission ordered in the Opinion and Order.[3]

[1] Opinion and Order at 54 (Dec. 14, 2011).

[2] *Id.* at 55. Under the terms of the Stipulation and Appendix C, 21% of OP's total retail load was eligible to secure RPM-priced capacity. Stipulation at 21. After a four month period, any capacity that was not "consumed" by a customer class would be available to other customer classes. *Id.* at 22. If the allotment to any customer class exceeded 21% on September 7, 2011, the allocation of the remaining classes would be reduced on a pro rata basis so that the total allotment did not exceed 21%. *Id.*, Appendix C at 3 (referred to herein as the "January 2012 reallocation").

[3] RPM Set-Aside Allotment Rules; Detailed Implementation Plan (Dec. 29, 2011) ("Dec. 29, 2011 Filing" or "revised DIP").

Because OP used the December 29, 2011 filing to rewrite the modifications the Commission had ordered, Industrial Energy Users-Ohio ("IEU-Ohio") and FirstEnergy Solutions Corp. ("FES") on December 30, 2011 filed a motion[4] and objections,[5] respectively, requesting that the Commission order OP to bring the revised DIP into compliance with the Opinion and Order.

On January 23, 2012, the Commission issued an Entry ("January 23, 2012 Entry") addressing the objections raised by IEU-Ohio and FES.[6] In the January 23, 2012 Entry, the Commission determined that the restrictions on customers access to RPM-priced capacity that OP attempted to introduce through its December 29, 2011 filing were not consistent with the Commission's Opinion and Order, finding that:

(1) the capacity allotments for each customer class were to remain at 21% and any unused allotment could not be reallocated to other customer classes;

(2) load related to capacity used by governmental aggregation programs was outside the Stipulation's shopping caps;

(3) all governmental aggregation programs were eligible for access to RPM-priced capacity outside of the Companies' shopping caps if they took the necessary steps to take service prior to December 31, 2012;

(4) mercantile customers were eligible to participate in the governmental aggregation programs; and

---

[4] Motion of Industrial Energy Users-Ohio for Orders Modifying the Ohio Power Company's and Columbus Southern Power Company's Revised Implementation Plan and Request for Expedited Ruling and Supporting Memorandum (Dec. 30, 2011).

[5] FirstEnergy Solutions Corp.'s Objections to AEP Ohio's Proposed Compliance Filing and Request for Expedited Commission Action (Dec. 30, 2011).

[6] January 23, 2012 Entry.

(5) the Commission was retaining jurisdiction over the Companies' shopping caps to determine if adjustments to the shopping caps in 2013 and 2014 would be necessary.[7]

Based on these findings, the Commission ordered OP to revise and refile the revised DIP.[8]

Rather than comply with the Commission's January 23, 2012 Entry, OP responded by filing a motion to stay the Commission's order to refile the DIP[9] (which the Commission granted on February 3, 2012[10]) and an Application for Rehearing.[11] In the Application for Rehearing, OP alleges that the January 23, 2012 Entry illegally and unreasonably expanded the scope of the modifications to the shopping caps in the Opinion and Order. Although couched in various legal theories, the central and repeated theme of OP's memorandum in support is that OP seeks to frustrate customer choice by limiting the availability of RPM-priced capacity. The supporting arguments, however, ignore the express legal and factual findings the Commission made on December 14, 2011 and other applicable legal requirements governing OP's utility operations and the rehearing process. Because the Commission correctly ordered OP to revise and refile the revised DIP, the Commission should deny OP's Application for Rehearing.

---

[7] *Id., passim.*

[8] *Id.* at 8-9.

[9] Ohio Power Company's Motion and Request for Expedited Ruling (Jan. 25, 2012).

[10] Entry (Feb. 3, 2012).

[11] Ohio Power Company's Application for Rehearing (Feb. 10, 2012) ("OP App. for Rehearing").

II. ARGUMENT

A. OP Seeks to Restrict Customer Choice Through the Revised DIP

In the first assignment of error, OP argues that it should be granted rehearing because the Commission's January 23, 2012 Entry expanded OP's obligation to provide RPM-priced capacity and that OP will suffer financial consequences if it does so.[12] In support of its first assignment of error, OP states that the Commission's resolution of five issues in the January 23, 2012 Entry illegally altered the terms of the Opinion and Order while those issues were the subject of OP's Application for Rehearing filed on January 13, 2012.[13] Thus, OP's argument is rooted in two claims: (1) that the Commission revised its Opinion and Order when it ordered OP to file a revised DIP in the January 23, 2011 Entry;[14] and (2) that the rehearing process precluded the Commission from ordering OP to bring the revised DIP into compliance with the Opinion and Order.[15] Because neither argument is correct, the Commission should deny the first assignment of error.

1. OP's December 29, 2011 Filing Improperly Treated Customers Served by Governmental Aggregation Programs as Part of the Shopping Cap Allocation

As noted above, OP's first assignment of error is based on several examples OP asserts expanded the obligation to provide RPM-priced capacity beyond the modifications to the Stipulation ordered in the Opinion and Order. In its first example,

---

[12] This memorandum contra does not address OP's claims of financial hardship. The claims are based on workpapers which are incomplete and unexplained. As such, they cannot be relied upon by the Commission in its review of the Application for Rehearing.

[13] OP App. for Rehearing at 21.

[14] *Id.* at 5-21.

[15] *Id.* at 21-23.

OP argues that the Opinion and Order permits OP to treat customers that have access to RPM-priced governmental programs as part of the shopping cap allocations rather than as outside the shopping caps.[16] Based on this misreading of the Opinion and Order, OP concludes that the Commission expanded its obligation to provide RPM-priced capacity when the Commission ordered OP to revise the DIP so as to include governmental aggregation customers as an additional and separate allotment.[17] OP alternatively claims that the Commission should limit the modification to allow only non-mercantile customers access to RPM-priced capacity through governmental aggregation programs.[18]

OP's argument that the Commission exposed OP to some new requirement in the January 23, 2012 Entry is not supported by the Commission's Opinion and Order. The Opinion and Order states that the shopping caps must be modified "to adjust the RPM set aside levels" as necessary to accommodate governmental aggregation load.[19] The same requirement applies in 2013 and 2014.[20] According to the Commission, the modification was required "to ensure that any customer located in a governmental aggregation community will qualify for the RPM set aside."[21]

Despite the direction of the Commission that the shopping caps do not apply to governmental aggregation customers, OP sought to constrain the modification the

---

[16] *Id.* at 6.

[17] *Id.*

[18] *Id.* at 6-7. OP's attempt to further restrict access to RPM-priced capacity through the exclusion of mercantile customer participation in governmental aggregation programs is discussed separately below.

[19] Opinion and Order at 54 (Dec. 14, 2011).

[20] *Id.* at 54.

[21] *Id.*

Commission ordered. In its December 29, 2011 filing, OP treated the governmental aggregation load (limited to only governmental aggregation programs approved in the November 2011 elections) as part of the first 21% of load in the queue. Under OP's revision, "[a]ll allotments awarded to customers under these governmental aggregation programs shall be included in the calculation of awarded allotments for purposes of determining whether additional allotments are available under the Cap."[22] By reordering the queue, customers in the identified governmental aggregation communities effectively moved to the front, thereby pushing others further to the back and excluding some customers not in governmental aggregation programs that otherwise would be eligible for RPM-priced capacity.[23] Thus, OP's interpretation effectively limited the availability of RPM-priced capacity, in violation of the December 14, 2011 Opinion and Order, for customers not in governmental aggregation programs.

Because the December 29, 2011 filing did not segregate governmental aggregation programs from the shopping caps load, the Commission correctly directed OP to revise its December 29, 2011 filing in the January 23, 2012 Entry. As the Commission explained, "[i]n modifying [the shopping caps in the Opinion and Order], the Commission established an additional separate allotment of RPM-priced capacity set asides, over and above the pro rata allocation provided to customers in the Stipulation for 2012 to ensure that any customer located in a governmental aggregation community receives a set- aside."[24] The Commission provided no indication that this approach was intended to displace the existing set asides. Rather, the Commission's Opinion and

---

[22] Revised DIP at 8 (Dec. 29, 2012).

[23] *Id.* at 5 (Section 4a) & 7-8 (Section 4g).

[24] January 23, 2012 Entry at 5.

Order and the January 23, 2012 Entry make clear that governmental aggregation programs operate outside the shopping caps. Thus, the first example offered by OP to support its claim that the Commission expanded the scope of the modification is baseless.

2. *All Governmental Aggregation Communities Have Access to RPM-Priced Capacity Under the Commission's Opinion and Order*

In its second example of alleged problems with the January 23, 2012 Entry, OP argues that the Commission should have limited the communities eligible under the Commission's modification for RPM-priced capacity to only those that approved programs in the November 2011 elections.[25] In support of its position that would narrow the scope of the modification, OP argues that communities that had previously approved aggregation "had years to implement aggregation programs and switch customers,"[26] and then misstates the testimony of an FES witness[27] (for the second time in this proceeding[28]) to suggest that these communities could have taken advantage of their existing status in sufficient time to avoid being excluded from access to RPM-priced capacity.[29]

Once again, OP has attempted to recast the Commission's Opinion and Order into something more to its liking. In the Opinion and Order, the Commission held that it

[25] OP App. for Rehearing at 7-11

[26] *Id.* at 9.

[27] FES Ex. 1 at 33. The testimony states that it takes "three to four months at best" to complete the process of providing service.

[28] Ohio Power Company's Application for Rehearing at 35 (Jan. 13, 2012).

[29] OP App. for Rehearing at 10 ("The pre-November communities had ample time to complete aggregation after September and prior to January—if they had desired to do so.").

was modifying the shopping caps to ensure that "any customer located in a governmental aggregation community will qualify for the RPM set aside."[30] Furthermore, the Commission ordered the modification to "ensure the availability of unbundled and comparable retail electric service to all customer classes."[31] "Any customer" and "all customer classes" do not refer to only those in communities that had a November 2011 election.

Despite the Commission's direction to modify the shopping caps to accommodate all customers in governmental aggregation programs, OP's December 29, 2011 filing limited the access to RPM-priced capacity to those customers "in a community that approved a governmental aggregation program in the November 8, 2011 election."[32] In the January 23, 2012 Entry, therefore, the Commission properly rejected OP's attempt to limit the Commission's modification, concluding "the modification to the Stipulation is meant to include all communities' that have established governmental aggregation programs."[33]

3. *The Commission Properly Permitted the Participation of Mercantile Customers in Governmental Aggregation Programs.*

In the third example OP uses to support its first assignment of error, OP argues that the Opinion and Order permitted it to limit access to RPM-priced capacity through governmental aggregation programs by denying access to an RPM-priced allotment of

[30] Opinion and Order at 54 (Dec. 14, 2011).

[31] *Id.*

[32] Revised DIP at 8 (Section 4(i)(3)) (Dec. 29, 2011).

[33] January 23, 2012 Entry at 4.

capacity to mercantile customers.[34] In support of this exclusion, OP asserts the denial is appropriate because "[l]arge 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."[35] OP then presents several unsupported policy arguments to suggest that it would be unfair to allow mercantile customers to receive access to RPM-priced capacity through governmental aggregation programs.[36] Again, OP has ignored Ohio law and the express terms of the Opinion and Order.

First, the Opinion and Order does not support the limitation on mercantile customer access to RPM-priced capacity that OP inserted into the December 29, 2011 filing. While the Commission noted that governmental aggregation programs have assisted residential customers in becoming customers of CRES providers,[37] the Commission stated that it intended to ensure the availability of comparable and unbundled retail electric service "to all customer classes"[38] and "that any customer located in a governmental aggregation community will qualify for the RPM set aside."[39] Thus, the Commission correctly rejected OP's attempt to limit mercantile customer

---

[34] OP App. for Rehearing at 11-16.

[35] *Id.* at 12.

[36] *Id.* at 13.

[37] *Id.*

[38] Opinion and Order at 54 (Dec. 14, 2011).

[39] Opinion and Order at 54.

choice by excluding them from accessing RPM-priced capacity through governmental aggregation programs.[40]

Second, OP's attempt to justify the exclusion by arguing that mercantile participation is not part of the statutory "design" also is incorrect. As the Commission noted in the Opinion and Order, it is the state policy to ensure the availability of unbundled and comparable retail electric service that provides consumers with the options they elect to meet their respective needs.[41] To create additional options for customers, *communities are authorized to aggregate customers through either opt-in or* opt-out governmental aggregation programs. In opt-in programs, customers must choose to participate. In opt-out programs, customers (other than mercantile customers) may choose to not participate.[42] Regardless of the form of the program, mercantile customers may choose to participate in a governmental aggregation program.[43] Additionally, residential and smaller business customers may also choose to place themselves on a "do not aggregate" list.[44] Thus, the "design" of governmental *aggregation programs is to create options that support customer choice whether a* community adopts an opt-in or opt-out governmental aggregation program.

Despite the statutory policy to ensure customer choice through governmental aggregation programs, OP has attempted to exclude mercantile customer participation by restricting their access to RPM-priced capacity (or as discussed below, limiting the

---

[40] January 23, 2012 Entry at 6.

[41] *Id.* Section 4928.02(A), Revised Code, states this policy statement.

[42] Section 4928.20, Revised Code.

[43] Section 4928.20(A), Revised Code.

[44] Section 4928.21, Revised Code.

portability of that capacity). These attempts would reduce mercantile customers' options. Because state policy is to ensure customer choice and Section 4928.20(A), Revised Code, recognizes that mercantile customers may participate in a governmental aggregation program, the Commission's decision to order OP to eliminate the restriction on mercantile customer access to RPM-priced capacity furthered the legislative "design."[45] In contrast, OP's attempt to justify the restriction on mercantile customer participation because participation is not part of the legislative "design" is baseless.

The balance of OP's argument rests on the suggestion that mercantile customers have "bargaining power" and received other "benefits" of the Stipulation, making their participation in governmental aggregation programs unnecessary and unfair.[46] This argument ignores the fact that mercantile customers come in a variety of sizes (and can include smaller commercial users that are parts of national accounts).[47] It ignores the fact that the capacity price for those not receiving RPM-priced capacity makes shopping largely uneconomic;[48] thus, "bargaining power" is meaningless. Most importantly, it ignores the law. OP would have the Commission reverse the legislative determination

---

[45] January 23, 2012 Entry at 6.

[46] OP App. for Rehearing at 13.

[47] OP admits that the problems caused by the exclusion of mercantile customers would affect GS-2 customers. *Id.* at 14. Its solution for GS-2 mercantile customers is not to make another option available, but to shift the revenue responsibility that is driving the numerous complaints the Commission recently noted, *see* PUCO Press Release, Feb. 10, 2012 (viewed at http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/puco-to-resolve-aep-small-business-customer-rate-issues/) to other customers. OP App. for Rehearing at 14-15 (OP is not opposed to modifying various rates as long as the changes are revenue neutral). Shifting the damage caused by the changes in revenue responsibility and rate design does nothing to advance customer interests in securing economical electricity that is currently available to customers of some of the other Ohio electric distribution utilities ("EDU"), but effectively precluded to OP customers by the shopping caps the Commission approved.

[48] FES Ex. 3 at 37.

that mercantile customers are authorized to participate in governmental aggregation programs.[49]

Not satisfied that it has created sufficient constraints on customer choice through the shopping caps, OP also argues that the Commission should impose a new restriction on the portability of RPM-priced capacity a mercantile customer might secure through participation in a governmental aggregation program. According to OP, the Commission "should ensure that mercantile customers cannot join an aggregation in order to secure [an] RPM-priced capacity allotment and then leave the aggregation in order to shop with another CRES provider."[50] While OP argues that such an action would add insult to injury,[51] it is far from clear what the alleged insult is. A mercantile customer participating in a governmental aggregation program would be receiving service from a CRES provider serving the governmental aggregation program. If the mercantile customer subsequently left the governmental aggregation program with its RPM-priced capacity, that customer would purchase generation from a CRES provider if it chose not to return to the standard service offer ("SSO"). Whether the mercantile customer stayed with the aggregation program or left and contracted with a CRES provider, the effects on OP would be the same; it would recover its capacity charges from the CRES provider, but would not recover SSO revenue from the customer. If, instead, OP expects that the mercantile customer will not be able to shop if it leaves the governmental aggregation program because the customer will be subject to $255/megawatt-day capacity price, then it is apparent that OP is proposing another way

[49] Section 4928.20(A), Revised Code.

[50] OP App. for Rehearing at 15.

[51] *Id.*

to manipulate the Stipulation to prevent customer choice. Because OP has offered no reasonable basis to impose this new restriction, the Commission must reject it.

4. OP's Claim that the Commission May Not Assert Continuing Jurisdiction over the Shopping Caps Is Legally Incorrect

In its fourth example supporting the first assignment of error, OP argues that the Commission improperly asserted continuing jurisdiction to review the shopping caps in 2013 and 2014.[52] It essentially repeats this argument in its third assignment of error.[53] In the interest of brevity, the related arguments are addressed below.

OP asserts that the Commission should not have claimed continuing jurisdiction to monitor the implementation of the shopping caps because it "injects substantial financial uncertainly to future implementation of the modified Stipulation."[54] OP, however, also notes that the Commission ordered that future shopping caps be adjusted to accommodate the changes in the shopping caps in 2013 and 2014.[55] In an attempt to resolve the inconsistency between its suggestion that the Commission cannot continue to monitor the shopping caps and also order the 2013 and 2014 modifications to shopping caps, OP suggests that the 2013 and 2014 modifications to the shopping caps was a "limited provision for adjustment."[56] As discussed below, the attempt to reconcile its legal positions regarding the Opinion and Order suffers from much more serious legal problems than just logical inconsistency.

---

[52] OP App. for Rehearing at 16-19.

[53] *Id.* 28-30.

[54] *Id.* at 16.

[55] *Id.* (*citing* Opinion and Order at 54 (Dec. 14, 2011)).

[56] *Id.* at 17.

Initially, OP's attempt to avoid ongoing supervision of the shopping caps should be rejected because OP ignores the applicable law concerning the Commission's jurisdiction and authority.[57] Under its general authority, the Commission is charged with monitoring the activities of a public utility such as OP.[58] As a result, the Commission will be involved in all aspects of OP's implementation of the Stipulation, including the shopping caps, for years to come.

Reference to the Commission's legal authority to supervise utilities also addresses OP's suggestion that its "bargain" prevents on-going Commission involvement with the shopping caps. As OP explains, the Commission's assertion of continuing jurisdiction threatens the transition period bargained for to induce it to enter the Stipulation's other terms.[59] The agreement the Signatory Parties entered, however, is subject to Ohio law.[60] The Signatory Parties could not bargain away the Commission's legal jurisdiction and authority.

This argument, moreover, reopens the question of whether the Stipulation is nothing more than a bargain to allow OP to secure transition costs illegally. If OP's argument is a concession that OP is recovering transition revenue, then there is no

[57] IEU-Ohio has questioned the Commission's legal authority to set a wholesale capacity rate. IEU-Ohio Application for Rehearing at 26 (Jan. 13, 2012). For purposes of the first assignment of error, however, the only issue is the allocation of capacity at the RPM price.

[58] Section 4905.05 & 4905.06, Revised Code (Commission has supervisory jurisdiction over public utilities); Section 4928.01(A)(6), (7), & (11), Revised Code (electric distribution utility defined as a public utility under Section 4905.03, Revised Code).

[59] OP App. for Rehearing at 17. Once again, OP impliedly threatens to withdraw from the Stipulation. *Id.* at 16 ("this continuing jurisdiction language should be clarified and narrowly interpreted in order to avoid unraveling the entire agreement.").

[60] *Monongahela Power Co. v. Pub. Util. Comm. of Ohio*, 104 Ohio St. 3d 571 (2004).

legal basis for the two-tiered generation capacity pricing scheme,[61] and the Commission should grant rehearing and reverse its approval of the modified shopping caps and two-tiered capacity pricing based on IEU-Ohio's January 13, 2012 Application for Rehearing.[62]

In support of its claim that the Commission should not assert continuing jurisdiction to modify the shopping caps, OP asserts that expanding the availability of RPM-priced capacity would require it to subsidize artificial and uneconomic shopping.[63] Because OP urged that all Ohio EDUs should be charging PJM's pre-RPM or RPM price just a few years ago, this assertion should be rejected for the self-serving rhetoric that it is.[64] Moreover, the record in this case demonstrates that the RPM-capacity charges rather than the arbitrary price set by the Stipulation is the proper economic price for capacity.[65]

In short, OP has not provided any legal or other basis to justify rehearing in the fourth example used to support its first assignment of error. The Commission had the authority to exercise jurisdiction over the shopping caps and every other aspect of OP's utility operations as a matter of law. The bargain OP entered with the Signatory Parties does not, indeed cannot, alter the applicable law. The "economic" arguments are incorrect.

---

[61] See Section 4928.38, Revised Code (EDU prohibited from recovering transition revenue after market development period).

[62] IEU-Ohio's Application for Rehearing at 36-39 (Jan. 13, 2012).

[63] OP App. for Rehearing at 18.

[64] Tr. Vol. V at 796-97.

[65] FES Ex. 2 at 7-9.

In its related third assignment of error, OP presents the legal basis for its claim that the Commission cannot assert continuing jurisdiction over the shopping caps. According to OP, the Commission loses jurisdiction to modify a final order.[66] It further alleges that its right to due process will be violated in that it has been induced 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 individual shopping is not 'unintentionally displaced.'"[67] It also asserts that the Commission's decision creates a "moving target" that gives the wrong signal to investors and customers, but then concedes that changes may be necessary.[68] None of the arguments warrants rehearing.

First, it is clearly inaccurate to assert that the Commission loses jurisdiction to supervise OP's implementation of the shopping caps. As previously discussed, Ohio law extends to the Commission the jurisdiction and authority to supervise OP.

Second, OP has not made any commitment to long-term changes in the Stipulation that it cannot retract. As the Commission was well aware, the Stipulation was a proposal. After it was filed, the Commission was required to decide if the Stipulation comported with statutory requirements and public policy, and the Commission was expected to modify or reject the Stipulation or provisions of it if the

---

[66] In the only legal citation to support this assignment of error, OP cites *Discount Cellular, Inc. v. Pub. Util. Comm'n of Ohio*, 112 Ohio St. 3d 360, 375 (2007), for the proposition that the Commission loses jurisdiction to modify a final order when a case is on appeal to the Supreme Court. OP's legal statement is irrelevant since the Commission has not addressed the applications for rehearing from the December 14, 2011 Opinion and Order.

[67] OP App. for Rehearing at 28-29.

[68] *Id.* at 29.

Commission found, as was the case with regard to the shopping caps, that the Stipulation did not comport with Ohio law or regulatory policy.[69] The expectation that the Commission might modify the Stipulation was so clear that OP retained a unilateral right to withdraw from the Stipulation that was not available to other Signatory Parties.[70] Based on that unilateral right to withdraw, OP has threatened to terminate the Stipulation on at least two occasions if not allowed to have its way.[71] Thus, OP has not shown any commitment to long-term and lasting changes as asserted as a basis for the alleged assignment of error.

Third, the Stipulation itself contains several provisions that necessitate the exercise of continuing jurisdiction by the Commission, a condition that is inconsistent with OP's suggestion that the Commission would somehow bow out of its supervisory role[72] once it issued its Opinion and Order. Under the Stipulation's terms, the Commission will supervise the fuel adjustment clause,[73] the alternative energy rider,[74] the generation resource rider,[75] the pool modification rider,[76] the gridSMART rider,[77] and

---

[69] *Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 64 Ohio St. 3d 123 (1992) (stipulation must satisfy a three prong test that includes a showing that the stipulation as a whole advances the public interest).

[70] Stipulation at 29 (while withdrawal by a party other than AEP triggered a negotiation process, "AEP may withdraw if the proposed Stipulation is modified, pursuant to RC 4928.143(C)(2)(a) and without regard to the additional process set forth in this provision; upon such withdrawal, the Stipulation will be null and void").

[71] *See* Ohio Power Company's Application for Rehearing and Memorandum in Support at 38 (Jan. 13, 2012); Ohio Power Company's Memorandum in Opposition at 55 (Jan. 23, 2012).

[72] Section 4905.05 & 4905.06, Revised Code; Section 4928.01(A)(6), (7), & (11), Revised Code.

[73] Stipulation at 8.

[74] *Id.*

[75] *Id.* at 6.

[76] *Id.* at 25.

[77] *Id.* at 7.

the phase-in recovery rider.[78] The Commission also will supervise the competitive bidding process ("CBP"), and the Stipulation specifically provides additional Commission authority to force a CBP if the Commission determines that OP is failing to meet its obligations to complete the dissolution of the Interconnection Agreement and the transfer of generation assets.[79] The Commission has also asserted responsibility for monitoring the implementation of the generation divestiture and other elements of corporate separation.[80] Thus, OP's suggestion that the Commission cannot exercise continuing jurisdiction to supervise the terms of the shopping caps when the Commission will monitor and has authority to address every other significant aspect of the Stipulation is nonsensical and inconsistent with the Commission's general supervisory powers.

Fourth, OP's claim that it made several long-term commitments in the Stipulation, giving rise to some sort of expectation of certainty, is based on a list of items that does not support its argument. The so-called "long-term and permanent obligations imposed on AEP Ohio"[81] include proceeding with corporate separation, dissolving the Interconnection Agreement, and foregoing recovery of provider of last resort ("POLR") charges during the years preceding an auction-based SSO.[82] Corporate separation,

---

[78] *Id.* at 25-27.

[79] *Id.* at 15-17.

[80] *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 18-19 (Jan. 23, 2012).

[81] OP App. for Rehearing at 29.

[82] *Id.*

however, was required by law.[83] OP filed notice of its intent to terminate or modify the Interconnection Agreement in 2010.[84] Recovery of POLR charges based on the Black-Scholes approach contained in the ESP Application had been thoroughly discredited by the Ohio Supreme Court at the time OP entered the Stipulation.[85] These commitments and the remainder[86] of the "obligations" concern matters in the Stipulation which OP retained the right to suspend by withdrawing from the Stipulation.[87]

Fifth, OP's allegation of a due process violation has no legal basis because OP has not provided a demonstration of any constitutionally protected interest. While OP has claimed it will suffer some poorly defined cost,[88] OP's constitutional interest is more narrow because it operates in a highly regulated industrial sector: "All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level."[89] OP's workpapers, however, do not demonstrate that the Commission's ongoing supervision would result in rates that would be confiscatory,[90] and OP provides no fact, argument, or citation to suggest otherwise.

---

[83] Section 4928.17, Revised Code.

[84] Cos. Ex. 7 at 19.

[85] *In re Columbus S. Power Co.*, 123 Ohio St. 3d 512 (2011). The Commission rejected the Companies' methodology on October 3, 2011 in the Order on Remand from the Court's decision. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Order on Remand (Oct. 3, 2011).

[86] OP App. for Rehearing at 29 (notification to PJM Interconnection, rates subject to the proposed ESP, agreement to a purchased power contract, collection of deferrals at less than the weighted average cost of capital, foregoing recovery of environmental compliance costs).

[87] Stipulation at 29.

[88] OP. App. for Rehearing at 3.

[89] *Federal Power Commission v. Texaco,* 417 U.S. 380, 391-92 (1974).

[90] While OP has provided workpapers that it claims demonstrate that OP will suffer some "cost", OP has not suggested that a confiscation would result.

In summary, OP has not provided in the third assignment of error any legal basis for the Commission to retreat from exercising its authority to monitor the shopping caps. The Commission has asserted no authority it did not already have to monitor and supervise utility operations. Moreover, the various "commitments" OP claims it made are contingent and do not rise to a constitutionally protected interest. As with the fourth example supporting the first assignment of error, the third assignment of error is baseless.

5. The Commission Revised the Allocation of Capacity to Protect Residential Shopping in its December 14, 2011 Opinion and Order

In the fifth example used to support its first assignment of error, OP argues that the Commission's January 23, 2012 Entry misinterprets the Opinion and Order by directing OP to assign the original 21% allocation provided to residential customers to, not surprisingly, residential customers.[91] Arguing incorrectly that the Commission modified a particular provision of the Stipulation (Paragraph IV.2.b.3), OP argues that the modification "does not go back to the initial allocation among the classes based on September 7, 2011 data."[92]

The Opinion and Order, however, was not constrained as OP argues. Because the Commission was concerned that residential customers would be foreclosed from securing RPM-priced capacity, the Commission modified the Stipulation to allow some additional residential customers to retain their existing option to shop.[93] The

---

[91] OP App. for Rehearing at 19-21.

[92] *Id.* at 20.

[93] Opinion and Order at 55 (Dec. 14, 2011).

modification was not limited to removing the January 2012 reallocation of unallocated capacity provided by the Stipulation. Instead, the Commission modified "the Stipulation such that RPM-priced capacity allocation determined for each customer class is only available for customers in the particular customer class, no RPM-priced capacity can be allocated to a customer in another customer class."[94] Because the Commission's modification does not contain any reference to the January 2012 reallocation, OP's assertion that the January 23, 2012 Entry expanded access to RPM-priced capacity beyond the modification in the Opinion and Order is not correct.[95]

6. *The Commission Legally and Reasonably Ordered OP to Bring the Revised DIP into Compliance with the December 14, 2011 Opinion and Order*

OP concludes its first assignment of error with a legal argument that the Commission improperly expanded the modifications to the Stipulation outside the rehearing process. OP's conclusion, however, is not supported by the facts or the law.

Initially, there is no factual support for OP's argument that the Commission expanded the modifications. As demonstrated above, the Commission took no action in the January 23, 2012 Entry that was inconsistent with either the Opinion and Order or the applicable law. Government aggregation programs were to be accommodated outside the shopping caps.[96] All communities with approved governmental aggregation programs would be permitted access to RPM-priced capacity.[97] Mercantile customers were not excluded from access to RPM-priced capacity secured through governmental

---

[94] *Id.*

[95] January 23, 2012 Entry at 3-4.

[96] Opinion and Order at 54 (Dec. 14, 2011).

[97] *Id.*

aggregation programs.[98] The residential allocation of RPM-priced capacity was protected.[99] The Commission would monitor the EDU as required by Ohio law.[100] Thus, the factual claims that OP rests its first assignment of error are incorrect.

OP's legal argument to support the first assignment of error is no better than its factual claims. While OP extensively discusses the Supreme Court's decision in *Discount Cellular, Inc. v. Public Utilities Commission of Ohio*[101] for the proposition that the Commission must follow the rehearing process to modify its Opinion and Order, the decision does not stand for that proposition. Discount Cellular, the appellant, claimed that the Commission added in the entry on rehearing a ground for dismissal of Discount Cellular's complaint that had not been the basis for the original dismissal order.[102] The Court rejected the alleged error because the appellant had failed to properly assign error for the inclusion of the additional reason.[103] In a statement not necessary for the outcome of the decision (*dictum*), the Court stated that the Commission acted outside its authority on rehearing when it cited in its rehearing order an additional reason for denying the appellant's complaint.[104] Relying on the *dictum* in the *Discount Cellular* case, OP argues that the Commission cannot change its rationale for decision "without a pending rehearing request and after granting rehearing."

---

[98] Section 4928.20(A), Revised Code.

[99] Opinion and Order at 55 (Dec. 14, 2011).

[100] Section 4905.05 & 4905.06, Revised Code (Commission has supervisory jurisdiction over public utilities); Section 4928.01(A)(6), (7), & (11), Revised Code (electric distribution utility defined as a public utility under Section 4905.03, Revised Code).

[101] 112 Ohio St. 3d 360 (2007).

[102] *Id.* at ¶ 61.

[103] *Id.* at ¶ 66.

[104] *Id.* at ¶ 65.

The *dictum* from *Discount Cellular,* however, does not provide support for the first assignment of error. First, it is not a holding of the case; thus it is not legal authority on which the Commission should act. Second, the Commission has not committed any of the transgressions that OP alleges violate the *dictum* of *Discount Cellular.* As noted above, the Commission found that OP had failed to file a revised DIP in compliance with the *Commission's Opinion and Order and directed OP to take corrective action.* The Commission did not take any action to change or alter what it had previously ordered. Thus, nothing in *Discount Cellular* requires the Commission to grant rehearing.

Moreover, granting rehearing on the first assignment of error would be inconsistent with the current status of the revised DIP. As noted previously, the Commission stayed its January 23, 2012 Entry until it rules on the January 13, 2012 Applications for Rehearing. As a result of the stay, OP is currently under no duty to do anything to bring its December 29, 2011 filing into compliance with the Opinion and Order.[105] While the unfortunate result of the Commission's stay is that the development of governmental aggregation programs will be delayed until the Commission acts on the Applications for Rehearing, the stay also demonstrates that the Commission has not revised the Opinion and Order outside the rehearing process. Because OP is claiming error based on the assertion that the Commission unlawfully revised the Opinion and Order outside the rehearing process, the Commission's stay renders the first assignment of error meaningless.

B. The Commission Lawfully Directed OP to Comply with Modifications Supported by the Record

[105] Entry at 3-4 (Feb. 3, 2012).

In OP's second assignment of error, OP argues that the Commission did not have a basis in the record to support its decision to require OP to comply with the Opinion and Order and, thus, violated Section 4903.09, Revised Code.[106] Once again, OP premises its argument on the incorrect assumption that the January 23, 2012 Entry expanded OP's obligation to provide RPM-priced capacity.[107] Working from that assumption, OP asserts that the Commission's modifications were limited to assisting residential customers[108] and concludes that the January 23, 2012 Entry is unlawful and unreasonable because the Commission went beyond OP's narrow interpretation of the Commission's Opinion and Order.[109] As discussed above, however, the Commission did not limit its decision to only residential customer participation. While the Commission expressed special concern for the impact of the Stipulation on residential customer's ability to shop, the Commission concluded that state policy required it to order modifications to encourage choice for all customers in all customer classes.[110] Because OP's assumption is faulty, the rest of the argument is not correct.

Moreover, OP misreads the one case it relies upon to support its assignment of error, *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*.[111] In that case, the Court reversed a Commission decision modifying a stipulation. The Court found that the Commission during rehearing had "made several modifications ... without any

---

[106] OP App. for Rehearing at 23-27.

[107] *Id.* at 23.

[108] *Id.* at 26.

[109] *Id.* at 26-27.

[110] Opinion and Order at 54-55.

[111] 111 Ohio St. 3d 300 (2006).

reference to the record evidence and without thoroughly explaining its reasons."[112] In contrast, the Commission here detailed in the Opinion and Order the evidence it was relying upon, the state energy policy it was attempting to effect, and the reasons it was using governmental aggregation programs and revising the shopping caps back to the September 7, 2011 levels to effect state policy.[113] While IEU-Ohio continues to disagree with the Commission's decision to impose any shopping limits because they violate state law and policy, there is no basis to conclude that the Commission failed to comply with Section 4903.09, Revised Code, in justifying the modifications that allowed some customers to retain their right to shop for alternatives to the SSO.

C. OP's Fourth Assignment of Error Rests on Faulty Factual Claims and Provides No Legal Basis for Additional Customer Charges

In its fourth assignment of error, OP argues that the expansion of the availability of RPM-priced capacity is unlawful because it imposes costs on OP and will result in a below-cost subsidy supporting a competitive offering.[114] The first part of the claim essentially is a reiteration of OP's complaint that it will lose customers and be hurt financially. As noted previously, the record was more than sufficient to demonstrate the need to revise the shopping caps to accommodate governmental aggregation programs outside the shopping caps. Similarly, there is no basis to find that OP will be unlawfully or unreasonably required to subsidize uneconomic competitive entry, as discussed above. This assignment of error, therefore, should be rejected because OP has offered no basis in its Application for Rehearing for the Commission to grant rehearing.

---

[112] *Id.* at ¶ 35.

[113] Opinion and Order at 54-55 (Dec. 14, 2011).

[114] OP App. for Rehearing at 30-32.

In this assignment of error, however, OP also attempts to claim that the Commission's January 23, 2012 Entry requires some sort of new revenue recovery mechanism. According to OP, the Commission should approve a new retail charge, an upward adjustment in the generation rates, or a deferral based on Section 4928.143(B)(2)(d) or (e), Revised Code, because the RPM-priced capacity obligation "falls well short of being compensatory based on actual cost."[115]

Of course, OP's working assumption is that there is some "shortfall." As noted previously, the workpapers supporting the alleged "shortfall" provided by OP are unexplained. Thus, OP has failed to indicate on what basis it believes the Commission's January 23, 2012 Entry would result in a "shortfall."

Moreover, the Commission has no authority to approve recovery of this alleged "shortfall" through the ESP based on either of the cited provisions. Section 4928.143(B)(2)(d), Revised Code, requires a demonstration that the charge would have the effect of stabilizing or providing certainty regarding retail electric service." Yet, OP does not suggest in any way that a new charge would satisfy this statutory requirement. Thus, the Commission has no basis to grant rehearing to set a charge based on this section.

Reliance on Section 4928.143(B)(2)(e), Revised Code, likewise is misplaced. That section authorizes automatic increases or decreases in a component of the SSO price. As the Commission is aware, however, the state compensation mechanism addresses the wholesale rate for capacity,[116] while the ESP sets the retail SSO.[117]

---

[115] OP App. for Rehearing at 31-32.

[116] Tr. Vol. XII at 2184-85 (cross-examination of Philip Nelson).

[117] Sections 4928.141 & 4928.143, Revised Code.

Reflecting this distinction, the proceedings to set the state compensation mechanism were separate from the application to approve a new ESP. The Stipulation maintained that distinction.[118] As a result, if this proposed charge is designed to make up the alleged "shortfall" that results from not charging CRES providers the arbitrary $255/MW-day capacity rate as OP states, then the charge does not adjust a component of the SSO price. Authorization for such a retail charge under the ESP, therefore, would be illegal.[119]

Even if one of these statutory provisions permitted a new charge or deferral to address the alleged "shortfall," which they do not, OP cannot demonstrate that the Commission could increase rates. Under Section 4928.143(C)(1), Revised Code, the ESP must be more favorable in the aggregate than the alternative Market Rate Offer ("MRO") provided by Section 4928.142, Revised Code. Yet, OP's ESP currently is more favorable by $42 million based on the Commission's estimate[120] or less favorable by more than $300 million when the total ESP term is included in the ESP versus MRO test.[121] Regardless of the Commission's starting point, adding $437 million[122] of undefined "shortfalls" on top of current rates would guarantee that the ESP fails the requirements of Section 4928.143(C)(1), Revised Code.

---

[118] Compare Stipulation, Para. IV.1 with *id.*, Para. IV.2.

[119] The Supreme Court has held that the items that the Commission may include in an SSO are strictly limited by Section 4928.143, Revised Code. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512 (2011).

[120] Opinion and Order at 32. IEU-Ohio has asked the Commission to reverse that finding in its Application for Rehearing, as noted below.

[121] IEU-Ohio App. for Rehearing at 14-15 (Jan. 13, 2012).

[122] OP App. for Rehearing at 3. As noted previously, there is no basis for the Commission to accept OP's estimate of its alleged shortfall because OP fails to provide any explanation of the basis on which its estimate or the attached workpapers reach these results.

Thus, the Commission should deny the fourth assignment of error. As previously noted, OP does not provide a legal or factual basis for its assertion that the Commission's modification of the shopping caps to accommodate governmental aggregation is unlawful or results in improper subsidies. Moreover, the suggestion that OP has some claim to increased rates or a deferral to recover "shortfalls" through the ESP is not demonstrated.

D. The Commission Correctly Directed OP to File a Revised DIP as Required by Ohio Law

In its fifth assignment of error, OP incorrectly argues that the Commission departed from its own precedent without explanation when it ordered OP to file a revised DIP.[123] In support of its assignment of error, OP provides an extended discussion, not supported by any citation to the record in this case,[124] to the FirstEnergy rate stabilization plan ("RSP") and electric transition plan ("ETP") cases.[125] How this discussion addresses the Commission's modifications to the shopping caps is never made clear; OP merely concludes that the January 23, 2012 Entry's "apparent

---

[123] OP App. for Rehearing at 32-35.

[124] Each of these cases was resolved by a Stipulation which contained a provision that it and the Commission's decision could not be cited as precedent. *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of their Transition Plans and for Authorization to Collect Transition Revenues,* 99-1212-EL-ETP, Stipulation and Recommendation at 17-18 (April 17, 2000); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to continue and Modify certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Following the Market Development Period,* Case No. 03-2144-EL-ATA, Stipulation and Recommendation at 7-8 (Feb. 11, 2004). While OP disclaims that it is relying on the stipulations as precedent, it then argues in the same sentence that the Commission's approval of the stipulation in the ETP case "demonstrates that the result was not unlawful." OP App. for Rehearing at 34. This misuse of stipulations has become part of a pattern with OP. *See 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 15-16 (Jan. 23, 2012).

[125] OP App. for Rehearing at 33-35.

reluctance to uphold the RPM set-aside limits represents an unjustified departure from precedent."[126]

Because the fifth assignment of error fails to present any identifiable basis for the Commission to grant rehearing, it should be denied. As provided by Section 4903.10, Revised Code, "[an] application [for rehearing]... shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In the fifth assignment of error, however, OP states that the Commission has not followed its own precedents regarding capacity pricing, but has not indicated how the Commission has failed to do so. Instead of detailing the nature of the error, OP offers its version of the holdings and testimony in two FirstEnergy cases decided before the adoption of Amended Substitute Senate Bill 221 and then concludes that the Commission did not follow these "precedents."[127] Because OP only offers an unexplained conclusion to support its assignment of error, it has failed to comply with the statutory requirement to set forth specifically the ground or grounds on which the fifth assignment of error is based, and the Commission should deny this assignment of error as a result.[128]

Moreover, it is clear that OP's December 29, 2011 filing which failed to properly implement the Opinion and Order compelled the Commission to direct OP to revise and refile the revised DIP. When the Commission issued the Opinion and Order, OP was

---

[126] *Id.* at 35.

[127] *Id.* at 33-35.

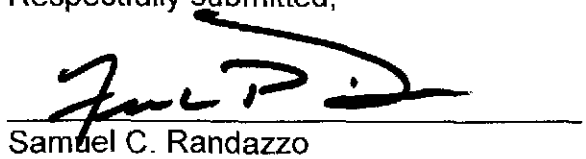
[128] *Consumers' Counsel v. Public Util. Comm'n of Ohio*, 70 Ohio St. 3d 244, 248 (1994).

obligated to comply with Commission orders.[129] As part of that compliance, OP was required to revise and refile its terms and conditions of service including the revised DIP.[130] OP, however, used its filing as an opportunity to try to limit the scope of the Commission's modifications to the shopping caps. When the Commission determined that OP's December 29, 2011 filing did not comply with the Opinion and Order, the Commission properly responded in the January 23, 2012 Entry directing OP to revise and refile the DIP. Nothing in the Commission's actions can be construed as anything more than its attempt to hold OP to its obligations to comply with the Commission's Opinion and Order. No violation of some unarticulated precedent occurred.

III. CONCLUSION

For the reasons stated above, OP's February 10, 2012 Application for Rehearing should be denied. OP has not provided any legal or factual basis for the Commission to extend shopping caps to governmental aggregation programs, to exclude mercantile customers from accessing RPM-priced capacity through those programs, or for increasing SSO rates. Indeed, Commission action supporting any of these actions would harm customers that are already voicing serious concerns about the effects of the Commission's approval of the Stipulation.

Respectfully submitted,



Samuel C. Randazzo
Frank P. Darr
Joseph Oliker

[129] Section 4903.15, Revised Code ("Unless a different time is specified therein or by law, every order made by the public utilities commission [is] effective immediately upon entry thereof upon the journal of the public utilities commission.").

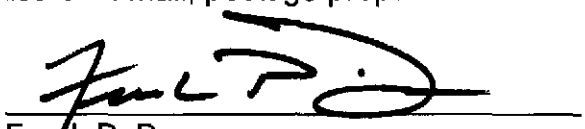
[130] Section 4905.30, Revised Code.

McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's Application for Rehearing-Revised* was served upon the following parties of record this 21st day of February 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



Frank P. Darr

Matthew J. Satterwhite
Steven T. Nourse
Anne M. Vogel
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street
Columbus, OH 43215
dconway@porterwright.com

ON BEHALF OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

Dorothy K. Corbett
Amy Spiller
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Dorothy.Corbett@duke-energy.com
Amy.spiller@duke-energy.com

Philip B. Sineneng
Terrance A. Mebane
THOMPSON HINE LLP
41 S. High St., Suite 1700
Columbus, OH 43215
Philip.Sineneng@ThompsonHine.com
Terrance.Mebane@ThompsonHine.com

ON BEHALF OF DUKE ENERGY RETAIL SALES, LLC

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

ON BEHALF OF THE OHIO ENERGY GROUP

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

ON BEHALF OF ENERNOC, INC.

Terry L. Etter
Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215-3485
etter@occ.state.oh.us
grady@occ.state.oh.us
small@occ.state.oh.us

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

OH BEHALF OF OHIO HOSPITAL ASSOCIATION

John W. Bentine
Mark S. Yurick
Zachary D. Kravitz
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, OH 43215
jbentine@cwslaw.com
myurick@cwslaw.com
zkravitz@cwslaw.com

ON BEHALF OF THE KROGER CO.

Terrence O'Donnell
Christopher Montgomery
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com

ON BEHALF OF PAULDING WIND FARM II LLC

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F Lang
Laura C. McBride
N. Trevor Alexander
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
aehaedt@jonesday.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org

ON BEHALF OF THE APPALACHIAN PEACE AND JUSTICE NETWORK

Lisa G. McAlister
Matthew W. Warnock
Thomas O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
lmcalister@bricker.com
mwarnock@bricker.com
tobrien@bricker.com

ON BEHALF OF OMA ENERGY GROUP

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
jejadwin@aep.com

ON BEHALF OF AEP RETAIL ENERGY PARTNERS LLC

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
smhoward@vorys.com

ON BEHALF OF PJM POWER PROVIDERS GROUP AND THE RETAIL ENERGY SUPPLY ASSOCIATION

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, PA 19406
gthomas@gtpowergroup.com

Laura Chappelle
4218 Jacob Meadows
Okemos, MI 48864
laurac@chappelleconsulting.net

ON BEHALF OF PJM POWER PROVIDERS GROUP

M. Howard Petricoff
Michael Settineri
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com

Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

ON BEHALF OF THE COMPETE COALITION

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
callwein@williamsandmoser.com

ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL AND THE SIERRA CLUB

M. Howard Petricoff
Michael J. Settineri
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
smhoward@vorys.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC., DIRECT ENERGY SERVICES, LLC

David I. Fein
Vice President, Energy Policy – Midwest
Constellation Energy Group, Inc.
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
david.fein@constellation.com
cynthia.brady@constellation.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC.

Pamela A. Fox
C. Todd Jones,
Christopher L. Miller,
Gregory H. Dunn
Asim Z. Haque
Schottenstein Zox and Dunn Co., LPA
250 West Street
Columbus, OH 43215
pfox@hillardohio.gov
cmiller@szd.com
gdunn@szd.com
ahaque@szd.com

ON BEHALF OF THE CITY OF HILLIARD, OHIO, THE CITY OF GROVE CITY, OHIO AND THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO

Sandy I-ru Grace
Assistant General Counsel
Exelon Business Services Company
101 Constitution Ave., NW
Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com

David M. Stahl
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com

ON BEHALF OF EXELON GENERATION COMPANY, LLC

Gary A Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@aol.com

ON BEHALF OF DOMINION RETAIL, INC.

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
kpkreider@kmklaw.com
dmeyer@kmklaw.com

Holly Rachel Smith
Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, VA 20115
holly@raysmithlaw.com

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
Bentonville, AR 72716-0550
Stephen.Chriss@wal-mart.com

ON BEHALF OF WAL-MART STORES EAST, LP AND SAM'S EAST, INC.

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, OH 43212
tsantarelli@elpc.org

ON BEHALF OF THE ENVIRONMENTAL LAW & POLICY CENTER

Nolan Moser
Trent A. Dougherty
Camille Yancy
Cathryn Loucas
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
nolan@theoec.org
trent@theoec.org
camille@theoec.org
cathy@theoec.org.

ON BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL

Douglas G. Bonner
Emma F. Hand
Keith C. Nusbaum
Clinton A. Vince
Daniel D. Barnowski
SNR Denton US LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
doug.bonner@snrdenton.com
emma.hand@snrdenton.com
keith.nusbaum@snrdenton.com
clinton.vince@snrdenton.com
daniel.barnowski@snrdenton.con

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

ON BEHALF OF HESS CORPORATION

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Jacqueline Lake Roberts,
Counsel of Record
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

ON BEHALF OF CPOWER, INC., VIRIDITY ENERGY, INC., ENERGYCONNECT INC., COMVERGE INC., ENERWISE GLOBAL TECHNOLOGIES, INC., AND ENERGY CURTAILMENT SPECIALISTS, INC.

Robert Korandovich
KOREnergy
P.O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

ON BEHALF OF KORENERGY

Benita Kahn
Lija Kaleps-Clark
Vorys Sater, Seymour and Pease LLC
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
bakahn@vorys.com
lkalepsclark@vorys.com

William Wright
Werner Margard
Thomas Lindgren
John H. Jones
Assistant Attorneys' General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
william.wright@puc.state.oh.us

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Jon Tauber
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINERS