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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING OF THE MARCH 7, 2012 ENTRY AND MEMORANDUM IN SUPPORT

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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

March 27, 2012 **Attorneys for Industrial Energy Users-Ohio**

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Entry issued by the Public Utilities Commission of Ohio ("Commission") on March 7, 2012 authorizing Ohio Power Company ("OP") to implement a two-tiered generation capacity service pricing scheme ("Pricing Scheme") until May 31, 2012 ("March 7, 2012 Entry"). The Commission's March 7, 2012 Entry is unlawful and unreasonable in the following respects:

1. The Commission's order authorizing OP to implement the Pricing Scheme is unlawful because the Commission is without subject matter jurisdiction to establish a formula or cost based capacity charge in this proceeding.

2. The Commission's order authorizing the Pricing Scheme is unlawful because the resulting rates are unduly discriminatory and not comparable.

3. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because it permits OP to recover transition costs in violation of state law.

4. The Commission's order authorizing implementation of the Pricing Scheme is unlawful and unreasonable because there is no record to support the Commission's finding that "the state compensation mechanism could risk an unjust and unreasonable result."

5. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the rate increase is not based on any economic justification as required by Commission precedent.

6. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the Commission failed to comply with Section 4909.16, Revised Code.

7. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because OP did not file an application for rehearing as provided by Section 4903.10, Revised Code, and the Commission abrogated its prior order without making the findings required by that Section.

Additionally, IEU-Ohio joins in the Application for Rehearing by FirstEnergy Solutions Corporation ("FES") filed on March 21, 2012 and incorporates the assignments of error and supporting memorandum as if fully stated herein.

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing and deny OP's Motion to implement the Pricing Scheme.

Respectfully submitted,

Samuel C. Randazzo
Frank P. Darr
Joseph E. 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

Attorneys for Industrial Energy Users-Ohio

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's March 7, 2012 Entry permitted OP to replace the legal capacity pricing mechanism on which retail customers and Competitive Retail Electric Service ("CRES") providers have relied with an illegal Pricing Scheme designed to shut down customer choice. That Entry is unlawful and unreasonable for several reasons. First, the Commission's attempt to authorize the Pricing Scheme exceeded the Commission's statutory authority governing electric service regulation. Second, even if the Commission had some authority to set a capacity rate, the Pricing Scheme approved in the March 7, 2012 Entry violates state law because it results in unduly discriminatory and non-comparable rates and the collection of illegal transition costs. Third, the Commission approved a rate increase without a proper record and in violation of the statutory procedures for seeking emergency relief or reversal of a Commission order. Additionally, IEU-Ohio joins in the Application for Rehearing filed by FES and adopts the assignments of error and supporting memorandum as if fully stated herein.

Because the Commission's order is unlawful and unreasonable, the Commission should grant rehearing and reverse its March 7, 2012 Entry authorizing the Pricing Scheme. By granting rehearing and reversing its prior decision permitting OP to stifle customer choice, it will return the parties to the status quo the law required when the Commission rejected the Stipulation and Recommendation ("Stipulation") on February 23, 2012.

II. BACKGROUND

Capacity transactions between OP and a CRES provider are sales for resale.[1] As a result, capacity charges that OP seeks to impose through the Pricing Scheme are governed by the rules of PJM Interconnection, LLC ("PJM") under the federally approved Reliability Assurance Agreement ("RAA"). The rules create an organized capacity market generally referred to as the Reliability Pricing Model ("RPM") and are embodied in PJM's open access transmission tariff. The RPM rules require a load-serving entity ("LSE") to obtain or arrange for adequate capacity (in the form of qualifying generation or demand response resources) to meet PJM's forecasted peak demand, including a reserve margin. To price capacity resources, the RPM also features a centralized capacity auction in which generation and demand response resources are cleared or matched to forecasted load based upon prices offered by qualifying resources three years prior to a June to May delivery year.

An LSE that is a Fixed Resource Requirement Entity ("FRR Entity") may satisfy its capacity or resource adequacy obligation through a second method known as the Fixed Resource Requirement Alternative ("FRR Alternative"). An FRR Entity may be an investor owned utility, such as OP, that has the ability to satisfy the unforced capacity obligation for all load in its service territory. For an FRR Entity, the FRR Alternative allows it to submit an FRR capacity plan with a fixed capacity resource requirement in lieu of satisfying the capacity resource obligation through PJM's RPM capacity auction process. To establish the compensation paid by CRES providers to the FRR Entity, Section D.8 of Schedule 8.1 of the RAA provides, in relevant part:

[1] Tr. Vol. XII at 2184 (Cross-examination of Philip Nelson).

> In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.[2]

OP and Columbus Southern Power Company ("CSP")[3] elected to operate as FRR Entities for the 2007-2008 delivery year and thereafter. As FRR Entities, they charged CRES providers the RPM auction price.[4] In late 2010, however, American Electric Power Service Corp. ("AEPSC"), on behalf of OP, requested that the Federal Energy Regulatory Commission ("FERC") approve formula rates as the basis for establishing the capacity charges that would be levied upon CRES providers in Ohio. The proposed move to a formula rate approach from an auction-based clearing price approach would have significantly increased capacity charges to CRES providers.[5]

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[2] PJM Open Access Transmission Tariff, Attachment D, Schedule 8.1 ("Fixed Resource Requirement Alternative") (emphasis added).

[3] Since the initiation of this proceeding, OP and CSP have merged. For purposes of this pleading, references are to the surviving legal entity, OP.

[4] Prefiled Testimony of Richard Munczinski at 5 (Aug.31, 2011).

[5] Comments of Industrial Energy Users-Ohio at 4 (Jan. 7, 2011).

In response to AEPSC's FERC filing, the Commission initiated this proceeding in December 2010.[6] In the initiating Entry, the Commission noted that it had approved retail rates including the recovery of capacity costs in the first electric security plan[7] based on the continuation of capacity charges established by the three-year capacity auction conducted by PJM ("RPM-priced capacity") under the current FRR mechanism.[8] The Commission then "expressly adopt[ed] as the state compensation mechanism for the Companies the current capacity charges established by the three-year capacity auction conducted by PJM, Inc. during the pendency of this review."[9]

As a result of the Commission's adoption of the PJM pricing mechanism for capacity as the state compensation mechanism, the FERC dismissed the case filed by AEPSC. In dismissing the case, the FERC determined that the Commission's adoption of the RPM auction as the state compensation mechanism precluded OP's right to proceed under Section 205 of the Federal Power Act because OP had contracted away that right when it signed the RAA.[10]

Thus, since the RPM auction was implemented, CRES providers serving customers in OP's service territory were charged for capacity based upon the prevailing RPM auction price for capacity in the unconstrained portion of the PJM region.[11] That

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[6] Entry at 1 (Dec. 8, 2010).

[7] *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*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order (Mar. 18, 2009) ("*ESP I*").

[8] Entry at 1-2 (Dec. 8, 2010).

[9] *Id.* at 2.

[10] *American Electric Power Service Corporation*, 134 FERC ¶ 61,039 at 5 (Jan. 20, 2011).

[11] Entry at 2 (Dec. 8, 2010).

approach remained in effect until the Commission approved a Stipulation[12] filed on September 7, 2011 in this case and related cases that sought to establish a new electric security plan ("ESP") and implement the Pricing Scheme.[13]

As part of the Stipulation, OP proposed to replace the RPM pricing mechanism with the Pricing Scheme. As proposed, OP would have been permitted to charge CRES providers $255/megawatt-day ("MW-day") for all capacity provided for shopping customers that were outside pre-determined shopping caps.[14] CRES providers serving customers within the shopping caps would be charged the RPM price for capacity.[15] The $255/MW-day price was a negotiated rate; it had no relation to either a market-determined price or a cost or formula-based price.[16] Following an extended hearing, the Commission initially approved the Pricing Scheme with two modifications.[17] First, the Commission determined that governmental aggregation programs should have access to RPM-priced capacity outside the shopping caps.[18] Second, the Commission rejected

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[12] Stipulation (Sept. 7, 2011).

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

[14] Stipulation at 20-22 (Sept. 7, 2011).

[15] *Id.* at 21.

[16] Tr. Vol. II at 191 (Cross-examination of Kelly Pearce); Tr. Vol. V at 737 (Cross-examination of Philip Nelson); Tr. Vol. V at 810, 845 (Cross-examination of Joseph Hamrock).

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

[18] *Id.* at 54.

a provision of the Stipulation that permitted a reallocation of a customer class's unused allotments to other customer classes.[19]

On February 23, 2012, however, the Commission rejected the Stipulation, finding in an Entry on Rehearing that the Stipulation did not benefit ratepayers and the public interest.[20] As a result of its decision to reject the Stipulation, the Commission ordered OP "to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan ... and an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case."[21]

OP, however, failed to bring its treatment of capacity pricing into compliance with the Entry on Rehearing. In response to the Commission's rejection of the Stipulation in the Entry on Rehearing, OP filed a Motion seeking Commission approval to continue the Pricing Scheme as implemented under the December 29, 2011 version of the DIP or some modification of it.[22] While the Motion was pending, moreover, OP stated that it would continue to operate as if the Commission had not rejected OP's attempts to restrict customer choice on several occasions.[23]

[19] *Id.* at 55. The Stipulation established a priority list, or queue, that was based on when the customer shopped. Stipulation, Appendix C. The shopping caps limited access to RPM priced capacity based on a percentage of total megawatt hours sold. *Id.* Appendix C was further "operationalized" through a document filed with the Commission called the Detailed Implementation Plan ("DIP") which OP filed on October 5, 2011, one day after hearings on the Stipulation commenced.

[20] Entry on Rehearing at 12 (Feb. 23, 2012).

[21] *Id.*

[22] Motion for Relief and Request for Expedited Ruling (Feb. 27, 2012) ("OP Motion").

[23] In its cover letter accompanying the tariffs filed on February 28, 2012, OP continued to maintain that it needed "clarification" of the Commission's Entry on Rehearing and would "await further direction based

Concluding that a return to the RPM pricing mechanism for all capacity sold to CRES "could risk an unjust and unreasonable result," the Commission granted OP's Motion in the March 7, 2012 Entry and authorized OP to continue the Pricing Scheme subject to the clarifications in a January 23, 2012 Entry.[24] In support of its decision to permit OP to continue the Pricing Scheme, the Commission noted that OP was not receiving Provider of Last Resort ("POLR") Charges revenue as a result of the Commission's decision in the remand of the *ESP I* case. It also cited the conflicting evidence regarding the cost of capacity that parties had presented in the hearing on the Stipulation.[25] The Commission further stated that OP may have to share with affiliates any revenue it received as a result of off-system sales ("OSS") that would be available as a result of customer migration.[26] The Commission's approval of the Pricing Scheme is effective until May 31, 2012 "at which point the rate for capacity under the state compensation mechanism shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year."[27]

III. ARGUMENT

By permitting OP to charge CRES providers a capacity charge exceeding the RPM price, the Commission has exceeded its statutory authority. Even if the Commission had the legal authority to set a capacity charge, the Pricing Scheme

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on disposition of its Motion for Relief filed yesterday (February 27, 2012) in Case No. 10-2929-EL-UNC." Letter from Steven T. Nourse to Betty McCauley (Feb. 28, 2012).

[24] Entry at 16 (Mar. 7, 2012).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 17.

adopted by the Commission results in unduly discriminatory and non-comparable rates and permits OP to recover transition costs in violation of state law. Further, the process used by the Commission to approve the Pricing Scheme was legally defective. For these reasons, the Commission should grant rehearing and deny OP's motion requesting permission to implement the Pricing Scheme.

1. The Commission's order authorizing OP to implement the Pricing Scheme is unlawful because the Commission is without subject matter jurisdiction to establish a formula or cost based capacity charge in this proceeding.

The Commission's rate setting authority is governed by statute.[28] Although the Commission has recently asserted that it has authority to set capacity rates,[29] state law authorizes the Commission to set rates for two types of retail electric services: non-competitive ones and the standard service offer ("SSO"). Under the applicable law, this case is not properly before the Commission whether the capacity charge is treated as a noncompetitive or competitive service.

Chapter 4928, Revised Code, establishes that the provision of retail electric service is comprised of non-competitive and competitive services.[30] If the retail electric service is non-competitive, the Commission's authority is defined by Chapters 4901,

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[28] *Lucas County Commissioners v. Pub. Util. Comm'n of Ohio*, 80 Ohio St.3d 344, 347 (1997) ("The commission may exercise only that jurisdiction conferred by statute.").

[29] *American Electric Power Service Corporation*, Case No. ER11-2183-000, Motion for Leave to Answer and Limited Answer Submitted on Behalf of the Public Utilities Commission of Ohio to PJM Interconnection, L.L.C. Response to AEP Motion for Expedited Ruling at 3 (Mar. 22, 2012). A separate issue is raised regarding whether the Commission is preempted from setting a capacity rate. The Commission, however, need not address that issue if it determines that state law does not provide the necessary rate making authority to set the rate under the current legal and factual posture of this case.

[30] Section 4928.05(A), Revised Code.

4909, 4933, 4935, and 4963, Revised Code.[31] In addition, an electric distribution utility ("EDU") must provide non-competitive retail electric service on a comparable and non-discriminatory basis.[32]

Further, rate setting for noncompetitive services under Sections 4909.18 and 4909.19, Revised Code, entails extensive mandatory procedural requirements (*e.g.*, pre-filing notice, application, and staff report) and a Commission determination that the resulting rates are just and reasonable. Rates for any particular service would need to be addressed in the context of a total revenue requirement for non-competitive services that remain subject to the Commission's rate setting authority.

Other retail electric services are defined as competitive. Under Section 4928.03, Revised Code,[33] retail electric generation,[34] aggregation, power marketing, and power

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[31] Section 4928.05(A)(2), Revised Code. Under Chapter 4909, Revised Code, a utility can make a "first filing" for a new service to establish a rate and the Commission may approve the application without a hearing. Section 4909.18, Revised Code. If the PUCO determines that the application is an application to increase rates, the PUCO must follow the rate base rate of return method to evaluate the utility's revenue requirement (in total) and determine if additional compensation is warranted. Traditional ratemaking does not allow the PUCO to adopt transition-to-market or glide path pricing.

[32] Section 4928.03, Revised Code. To avoid the possibility that the ratemaking process will trap federally approved transmission rates, Section 4928.05(A)(2), Revised Code, further provides: "Notwithstanding Chapters 4905 and 4909 of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission."

[33] This section also requires that consumers and suppliers to consumers be provided comparable and non-discriminatory access to non-competitive services. So even if generation capacity service was a non-competitive service, it would have to be available on a comparable and non-discriminatory basis to all consumers and suppliers to such consumers.

[34] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16 (Jan. 11, 2012).

brokering are "competitive services."[35] For competitive services, the Commission is without authority to set the prices for these services by traditional economic regulation, and supervision of competitive retail electric services are not within the Commission's jurisdiction under Chapter 4909, Revised Code[36] and other specified Chapters except as specifically identified in Section 4928.05, Revised Code.

With regard to the provision of a generation service, the only exception that authorizes the Commission to set rates for a competitive service concerns the SSO. The only time an EDU can directly supply retail generation service is when it is the default supplier (the customer is not served by a CRES provider including a governmental aggregator).[37] The only source of the Commission's authority to price default generation supply is provided by Sections 4928.141, 4928.142, and 4928.143, Revised Code. Based on Section 4928.141 Revised Code, the SSO is defined to include "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service" and it must

[35] The PUCO has authority to declare more services, including ancillary services, competitive under Sections 4928.04 and 4928.06, Revised Code, and gives the Commission authority to make sure the services that it declares to be competitive are provided at just and reasonable rates once it determines that there has been a decline or loss of competition with regard to such services declared to be competitive by the Commission. The Commission has no such authority with regard to retail generation service, aggregation, power marketing or power brokering since these services are declared competitive by statute.

[36] Since the PUCO has no jurisdiction under Chapter 4909, Revised Code, it is logical to argue that it has no authority to entertain a "cost-based" rate. AEP has previously argued and the PUCO has previously held that Ohio's restructuring legislation made cost-based analysis irrelevant.

[37] Section 4928.05(A)(1), Revised Code, provides an exception to the finding that retail electric generation service is fully competitive.

be offered on a comparable and nondiscriminatory basis. Further, an EDU must comply with various procedural requirements for approval of an SSO.[38]

The division of competitive and non-competitive services under state law also dictates how and when an EDU can offer to provide a competitive service. Section 4928.17, Revised Code, states that:

> [N]o electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service *and supplying a competitive retail electric service*, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
> (1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.
>
> (Emphasis added.)

The statutory scheme provided by Ohio law leads to two possible treatments of capacity sold to CRES providers if the Commission is not preempted from setting capacity rates. If capacity service is a non-competitive service, then OP must initiate a rate case under Section 4909.18, Revised Code, and comply with the applicable filing requirements. The Commission, furthermore, cannot approve a rate increase for the service unless it finds that the rates are just and reasonable in relation to a total revenue

[38] Sections 4928.142 and 4928.143, Revised Code.

requirement. OP, however, has satisfied none of the substantive or administrative requirements of Chapter 4909, Revised Code, to initiate a ratemaking process, and the Commission has not proceeded on the application to increase the rate in the manner required by law (*e.g.*, issuance of a staff report, an opportunity to file objections, hearing). Thus, the March 7, 2012 Entry is unlawful if capacity service sold to CRES providers is a noncompetitive retail electric service.

If capacity service is competitive, it must be provided by an appropriate affiliate under a corporate separation plan, and market pricing must prevail unless such service qualifies as an SSO. Although capacity service is a component of retail generation service that may be a part of the SSO, it is not by definition the default service.[39] Moreover, if capacity service could be sold as an SSO, various procedural requirements would have to be satisfied before the Commission could approve the SSO, but OP and the Commission have not attempted to satisfy those requirements. Alternatively, if capacity service is not a default service subject to the provisions governing the SSO, then the March 7, 2012 Entry violates applicable law by setting the price for the second tier of capacity service at $255/MW-day and failing to require its sale through a separate subsidiary. Thus, the Entry is unlawful under state law, regardless of the starting point.

The Commission lacked subject matter jurisdiction to authorize the Pricing Scheme if it is characterized as either competitive or non-competitive electric service. Because the Commission's March 7, 2012 Entry is not authorized by state law, the

[39] The SSO is defined as "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Section 4928.141(A), Revised Code.

Commission should grant rehearing and reverse its decision granting OP authority to implement the Pricing Scheme.

2. The Commission's order authorizing the Pricing Scheme is unlawful because the resulting rates are unduly discriminatory and not comparable.

Even if the Commission had some authority to set a capacity charge, the Pricing Scheme authorized in this matter violates state legal provisions on price discrimination and comparability. Because the resulting rates of the Pricing Scheme are illegal, the Commission should grant rehearing and revoke its authorization permitting OP to price capacity at $255/MW-day.

Section 4928.02, Revised Code, various other sections in Chapter 4928, Revised Code, and Commission rules require the Commission to ensure that rates, services, and practices associated with competitive and non-competitive retail electric service rates are comparable and non-discriminatory. For example, Section 4928.02(A), Revised Code, provides that it is the State's policy to "[e]nsure the availability to consumers of ... nondiscriminatory ... retail electric service." Similarly, Section 4928.40(D), Revised Code, provides that "no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service." Likewise, the definition of "standard service offer" in Rule 4901:1-35-01(L), Ohio Administrative Code ("OAC"), highlights the importance of the role of the nondiscriminatory and comparable requirements that are imposed by Chapter 4928, Revised Code: "'Standard service offer' means an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." These statutory and administrative requirements for nondiscriminatory and comparable rates extend to both customers and suppliers.[40]

Differences in treatment of customers can be justified only "where such differential is based upon some actual and measurable differences in the furnishing of services to them."[41] Absent a finding that demonstrates that rate differences are reasonable, those rates violate the statutory requirements that prohibit undue discrimination and non-comparability.[42]

As approved by the Commission in the March 7, 2012 Entry, the Pricing Scheme permits OP to sell capacity to similarly situated customers, CRES providers, at two different prices, the price resulting from the RPM-pricing mechanism for retail customers representing 21% of OP's annual load and $255/MW-day for the balance of the load seeking service through a CRES provider.[43] There has never been a demonstration that the cost to serve those customers justifies any difference in the rates. Further, the Commission has not made any finding that would support the conclusion that the Pricing Scheme satisfies the requirement that rates be comparable to the cost of capacity used to serve OP's SSO load.

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[40] For example, Sections 4928.15 and 4928.35(C), Revised Code, require electric distribution service to be available to all consumers and suppliers on a non-discriminatory and comparable basis.

[41] *Townships of Mahoning County v. Pub. Util. Comm'n of Ohio*, 58 Ohio St. 2d 40, 44 (1979).

[42] *In the Matter of the Complaint of Westside Cellular, Inc. dba Cellnet*, Case No. 93-1758-RC-CSS, Opinion and Order at 50-51 (Jan. 18, 2001) (Section 4905.33, Revised Code, violated when Ameritech Mobile charged a non-affiliate more than it charged its own retail service provider for the same services).

[43] Entry at 17 (Mar. 7, 2012).

OP's only justification for the Pricing Scheme was that OP was facing a financial shortfall if it was required to continue to price all capacity through the RPM pricing mechanism.[44] In response to this "justification," the Commission concluded that the use of RPM pricing "could risk an unjust and unreasonable result" because OP is no longer receiving provider of last resort ("POLR") charges[45] and shares revenues associated with released capacity due to customer switching with other affiliates.[46] This justification, however, does not address any difference in the furnishing of the service to customers that would permit discrimination among customers.

In fact, the discrimination has only to do with maintaining OP's hold on customers by blocking the ability of CRES providers to offer alternatives to default service. As the Commission is well aware, the Companies pursued the Pricing Scheme as a means of preventing customers from shopping,[47] and the Commission in its December 14, 2011 Opinion and Order concluded that the Pricing Scheme would have that effect.[48] Blocking customer choice certainly cannot be a legal basis for the discrimination contained in the Pricing Scheme.[49] Because there is no legal basis for the Pricing Scheme under the applicable law regarding nondiscrimination and comparability, the

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[44] As noted in IEU-Ohio's memorandum contra the motion, the Companies have not provided any factual record that supports this claim. Industrial Energy User-Ohio's Memorandum Contra Ohio Power Company's February 27, 2012 Motion for Relief and Request for Expedited Ruling at 14 (Mar. 2, 2012).

[45] The reference to POLR charges is suspect in itself because OP failed to demonstrate that it had any cost basis associated with providing POLR service. See below.

[46] Entry at 16 (Mar. 7, 2012).

[47] FES Ex. 1, TCB ex. 7, 8, & 9.

[48] Opinion and Order at 54 (governmental aggregation programs would be foreclosed from accessing competitive retail generation services).

[49] Section 4928.02 (B), Revised Code, provides that it is state policy to provide customers with "options they elect to meet their respective needs."

Commission should grant rehearing and reverse its decision to allow OP to impose the Pricing Scheme.

3. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because it permits OP to recover transition costs in violation of state law.

Senate Bill 3 provided a statutory structure for the recovery of transition costs. These costs were defined in Section 4928.39, Revised Code. Generally the total allowable transition costs for which an electric utility could seek transition revenue were the prudently incurred and legitimate, net, verifiable generation costs that were not recoverable in a competitive market that the utility would otherwise have the opportunity to recover.[50] The electric utility was then offered a limited time period for the recovery of those generation-related transition costs. Transition costs recovery was to end by December 31, 2005.[51]

Through its higher capacity charge, OP is seeking to recover capacity charges in excess of the revenue available at market rates. The second tier rate is well above the RPM price for capacity. The difference between the current RPM capacity price of approximately $110/MW-day and the second tier price represents a potential recovery of transition costs if the other criteria were satisfied.[52]

OP itself has stated that the purpose of the higher capacity charge contained in the second tier is recovery of transition costs. As OP explained, it believed it relied

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[50] Section 4928.39, Revised Code.

[51] Section 4928.40, Revised Code.

[52] Transition cost recovery was limited to net, verifiable, and directly assignable costs of retail electric generation service that were prudently incurred and otherwise recoverable. For purposes of this proceeding those issues have not been addressed at this point.

upon its "expected ability to establish costs-based rates," but complained that it will be forced to move to RPM-priced capacity "without a reasonable transition mechanism" for "a transition period."[53] OP's claim that it has some expectation to additional transition revenues, however, flies in the face of Ohio's controlling statutory provisions governing the opportunity for a utility to seek and obtain transition revenue recovery.

OP's opportunity to recover transition costs has ended. As provided by Section 4928.38, Revised Code, "[t]he utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code." Section 4928.141, Revised Code, further prohibits the continued receipt of transition revenues: "A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan." In short, OP bases its "expectation" that it should receive a cost-based rate for capacity on an assumption

[53] OP Motion at 5. (Feb. 27, 2012). Throughout these proceedings, OP has argued that it has some entitlement to transition costs to support its move to an SSO based on a competitive bidding process ("CBP"). In a press release issued on February 27, 2012, the parent company of OP once again indicated that the purpose of OP's request for an arbitrarily priced capacity charge was to provide recovery of generation-related assets. "'AEP Ohio has committed significant capital investment in its Ohio generation fleet under what was a regulated environment to serve our customers' generation needs,' said Nicholas K. Akins, AEP president and chief executive officer. "'The settlement agreement allowed AEP Ohio a reasonable transition to market over a period of time. Without that transition, we will basically be giving the capacity we built to competitive suppliers for the taking.'" Press Release (Feb. 27, 2012) (viewed at https://www.aepohio.com/info/news/viewRelease.aspx?releaseID=1203).

that it is entitled to another opportunity to recover transition costs.[54] It is not. The March 7, 2012 Entry permitting recovery of transition revenues, therefore, is illegal and unreasonable and should be reversed.

4. The Commission's order authorizing implementation of the Pricing Scheme is unlawful and unreasonable because there is no record to support the Commission's finding that "the state compensation mechanism could risk an unjust and unreasonable result."

In support of its conclusion that continued use of the RPM pricing mechanism as the state compensation mechanism could result in an unjust and unreasonable result, the Commission noted that OP was no longer collecting POLR charges as a result of the *ESP I* remand and may have to share OSS revenues. Further, the Commission cited evidence from the Stipulation hearing that RPM prices did not permit OP to recover its capacity costs.[55] The Commission's reasoning and reliance on this "record" was unreasonable and unlawful.

The first factor noted by the Commission to support its Entry is that OP is no longer authorized to collect POLR charges. The Commission, however, previously determined that OP was not entitled to POLR charges because it had failed to demonstrate that it had any POLR-related costs.[56] The Commission's suggestion that OP should be permitted to raise its capacity rate to make up for a cost the Commission previously found had not been proven defies reason.

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[54] *See Dayton Power and Light Co. v. Pub. Util. Comm'n of Ohio*, 4 Ohio St. 3d 91 (1983).

[55] Entry at 16 (Mar. 7, 2012).

[56] *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 Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 33 (Oct. 3, 2011).

The Commission also relies improperly on testimony from the Stipulation hearing concerning capacity costs. When the Commission rejected the Stipulation on February 23, 2012, it further decided to restart proceedings in this case.[57] If this proceeding is truly "reset" to the point in time when the Stipulation was filed, then the evidence supporting the Stipulation on which the Commission relied[58] cannot justify continuing the Pricing Scheme.[59]

The Commission's reliance on the hearing record also violates the Signatory Parties' understanding of the use of that record in subsequent proceedings if the Stipulation was rejected. Although a provision of the Stipulation concerning the withdrawal of a party did not contemplate the exact circumstances that have occurred here, *i.e.*, the Commission's rejection of the Stipulation through an Entry on Rehearing, the Signatory Parties, including OP, agreed that "this proceeding shall go forward at the procedural point at which the Stipulation was filed, and the parties will be afforded the opportunity to present evidence through witnesses, to cross-examine all witnesses, to present rebuttal testimony, and to brief all issues which shall be decided based upon the record and briefs, as if the Stipulation had never been executed." The use of the this record is particularly unwarranted when the parties supporting the Stipulation did not challenge OP's evidence because they were trading other benefits of the Stipulation for the Pricing Scheme and other provisions that OP sought.[60]

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[57] Entry on Rehearing at 13.

[58] March 7, 2012 Entry at 15-16.

[59] Stipulation at 30.

[60] Entry at 15 (Mar. 7, 2012).

Moreover, the use of the Stipulation hearing evidence is prejudicial. Without this reference to the record of the Stipulation hearing, the Commission had no basis to suggest that RPM rates are below OP's cost to provide capacity or the Commission's conclusion that RPM prices could lead to an unjust and unreasonable result.[61]

Finally, there is no evidence to address what shortfall might occur because of OP's decision to agree to share OSS revenue with other affiliates.

Because the reasoning on which the Commission authorizes OP to implement the Pricing Scheme is nonsensical (loss of POLR charges), and "evidence" it relies upon violates the terms of the Stipulation hearing (capacity costs) or is nonexistent (OSS shortfall), the Commission's March 7, 2012 Entry is unlawful and unreasonable.

5. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the rate increase is not based on any economic justification as required by Commission precedent.

With the current RPM price at approximately $110/MW-day, the Commission's approval of the second-tier rate of $255/MW-day is more than double the level set by the RPM pricing mechanism. The only justification offered for the rate increase is that based on the improper reasoning and record discussed in the prior assignment of error.[62] Wholly absent from the Commission's decision is any finding that OP will actually suffer a shortfall that requires rate relief.

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[61] *Id.* at 16. As discussed below, the Commission's determination that OP was receiving capacity revenue under the POLR, likewise, is indefensible.

[62] March 7, 2012 Entry at 16.

In the *ESP I* case, the Commission stated that the Companies must demonstrate the economic basis for a rate increase in the context of a full review.[63] On the record before it, the Commission, however, did not and could not make any finding that OP was suffering an economic shortfall. In fact, the *ESP I* rates have become notorious because they have resulted in significantly excessive earnings.[64] Moreover, OP's own motion demonstrated that its "worst case" scenario still generated positive returns.[65] Because the Commission authorized a rate increase without a demonstration that there was an economic basis for it, the Commission violated its own precedent, and the decision should be reversed on rehearing.

6. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because the Commission failed to comply with Section 4909.16, Revised Code.

The Commission has concluded that OP is entitled to some expedited rate relief by raising the capacity charge to $255/MW-day on the basis that OP could face an unjust and unreasonable result if the Commission did not act. If the Commission intended to provide some emergency relief, it did not comply with Section 4909.16, Revised Code.

If there were a real emergency, OP could seek relief under Section 4909.16, Revised Code. That Section provides the Commission with authority to address, on an

[63] *ESP I*, Opinion and Order at 34 (Mar. 18, 2009).

[64] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code,* Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011); *In the Matter of the 2010 Annual Filing of Columbus Southern Power Company and Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code,* Case Nos. 11-4571-EL-UNC, *et al.*, Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Jan. 31, 2012).

[65] OP Motion at 5 (Feb. 27, 2012).

interim basis and subject to refund, financial emergencies. In addressing such emergencies, however, the Commission has long-standing precedent and criteria that must be applied, after a hearing, to determine if emergency relief is appropriate and, if so, to what extent.[66] OP, however, has not invoked that authority, and thus it has no basis for claiming any interim relief based on its alleged financial distress.

Even if the Commission could properly consider OP's concern that it may incur harm if the Commission does not provide interim financial relief, OP's claim that it will suffer confiscation also is without merit. To support a claim of confiscation, OP must demonstrate that the rate is "so 'unjust' as to be confiscatory,"[67] but a review of a rate, standing alone, is not a basis for determining if a confiscation has occurred. Before the Commission may find that rates are confiscatory, it must assess "all relevant costs and expenditures made by [the electric distribution utility]."[68] "It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end."[69] Relying on this well-understood test for determining if rates are confiscatory, the Commission has held that it must "consider the total effect of the [EDU's] rates."[70] Applying this comprehensive review standard, the Commission has found that an 8% return based on net operating income

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[66] *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM, Opinion and Order at 3 (Jan. 25, 2001).

[67] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

[68] *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 924 (S.D. Ohio 2004).

[69] *Id.* at 921.

[70] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for Monongahela Power Company*, Case No. 04-880-EL-UNC, Opinion and Order at 16 (Dec. 8, 2004).

(along with other factors) was sufficient to support a determination that rates were not confiscatory.[71]

In light of this high hurdle to establish a constitutional claim, OP's assertion that requiring it to provide RPM-priced capacity for all customer load migrating to CRES providers will result in confiscation is unsupported. OP rests its argument on a lower return on equity that has no basis in the current record and would still return, by OP's own analysis, a positive return in both 2012 and 2013.[72] Its additional claim that the stock value has declined likewise is outside the record available to the Commission and does not demonstrate anything other than that OP's value was overstated on the assumption that it could continue to extract excessive returns from customers.[73] Moreover, OP ignores recent Commission and Staff findings that its first ESP is producing significantly excessive returns. The Commission determined that the CSP ESP resulted in significantly excessive earnings in 2009,[74] and the Staff of the Commission has raised a similar concern with CSP's total-EDU earned return on common equity for 2010.[75] Given that their returns occurred while OP was charging the

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[71] *Id.* at 20.

[72] OP Motion at 5.

[73] The current price of AEP's stock is well within the twelve-month range of prices. *See* http://finance.yahoo.com/echarts?s=AEP+Interactive#chart1:symbol=aep;range=20070305,20120229;indicator=volume;charttype=line;crosshair=on;ohlcvalues=0;logscale=on.

[74] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011).

[75] *In the matter of the 2010 Annual Filing of Columbus Southern Power Company and Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code*, Case Nos. 11-4571-EL-UNC, *et al.*, Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Jan. 31, 2012).

same SSO rates and under the same capacity mechanism the Commission required OP to implement on February 23, 2012, OP has failed to demonstrate any basis to believe the Commission's Entry on Rehearing will result in confiscation.

Having failed to properly invoke the Commission's emergency authority or to present a case supporting such relief, OP's motion should have been denied. The Commission should correct its March 7, 2012 Entry by granting rehearing.

7. The Commission's order authorizing the Pricing Scheme is unlawful and unreasonable because OP did not file an application for rehearing as provided by Section 4903.10, Revised Code, and the Commission abrogated its prior order without making the findings required by that Section.

Because emergency relief was not available, the only other alternative for seeking a change to a Commission order is an application for rehearing. An application for rehearing is available "[a]fter any order has been made by the public utilities commission."[76] Only after granting rehearing may the Commission "abrogate or modify" its order and only if it finds that the original order is "unjust or unwarranted, or should be changed."[77]

OP, however, sought and received a reversal of the Commission's Entry on Rehearing without complying with the rehearing process. Instead of applying for rehearing, OP filed the February 27, 2012 Motion requesting that the Commission abrogate its prior order in the Entry on Rehearing directing OP to return capacity rates to the terms provided by the December 8, 2010 Entry. In the March 7, 2012 Entry, the Commission granted that request, but the Commission did not grant rehearing prior to

[76] Section 4903.10, Revised Code.

[77] *Id.*

changing its order and did not determine that its prior order was unjust or unwarranted. Absent a showing that there is an emergency, the Commission did not have the legal authority to reverse its prior order outside the rehearing process. Therefore, the Commission's March 7, 2012 Entry was illegal and should be reversed.

IV. CONCLUSION

As a result of the Commission's decision, customer choice will be frustrated, and customers will lose an effective means of reducing their electric bills. The Commission, however, can serve customer interests by reversing its unfortunate decision to authorize the Pricing Scheme. The Commission should do so because the March 7, 2012 Entry is both unlawful and unreasonable.

Respectfully submitted,

Samuel C. Randazzo
Frank P. Darr
Joseph Oliker
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
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 Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support* was served upon the following parties of record this 27th day of March 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

Frank P. Darr

Steve Nourse
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com

COUNSEL FOR COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

COUNSEL FOR THE OHIO ENERGY GROUP

Jeffrey L. Small
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
small@occ.state.oh.us

COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Lisa McAlister
Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
lmcalister@bricker.com
tobrien@bricker.com

COUNSEL FOR THE OHIO MANUFACTURERS' ASSOCIATION

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 E. 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
tobrien@bricker.com

COUNSEL FOR OHIO HOSPITAL ASSOCIATION

M. Howard Petricoff
Stephen M. Howard
Lija Kaleps-Clark
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com
lkalepsclark@vorys.com

COUNSEL FOR DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC AND CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC., RETAIL ENERGY SUPPLY ASSOCIATION

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

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

COUNSEL FOR FIRSTENERGY SOLUTIONS CORP.

Dorothy Kim Corbett
Associate General Counsel
Duke Energy Business Services LLC
139 East Fourth Street
Cincinnati, OH 45202
Dorothy.Corbett@duke-energy.com

Jeanne W. Kingery
Associated General Counsel
155 East Broad Street, 21st Floor
Columbus, OH 43215
Jeanne.Kingery@duke-energy.com

COUNSEL FOR DUKE ENERGY RETAIL SERVICES, LLC

Thomas Lindgren
Public Utilities Section
Ohio Attorney General's Office
180 East Broad Street, 6th Floor
Columbus, OH 43215
thomas.lindgren@puc.state.oh.us

ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Jeff Jones
Sarah Parrot
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215
Greta.See@puc.state.oh.us
Jeff.jones@puc.state.oh.us

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

COUNSEL FOR EXELON GENERATION COMPANY, LLC

Mark A. Whitt
Melissa L. Thompson
Whitt Sturtevant LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, OH 43215
whit@whitt-sturtevant.com
thompson@whitt-sturtevant.com

Vincent Parisi
Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

ON BEHALF OF INTERSTATE GAS SUPPLY, INC.

Dane Stinson
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215
dane.stinson@baileycavalieri.com

ON BEHALF OF THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE OHIO SCHOOL BOARDS ASSOCIATION, THE OHIO SCHOOLS COUNCIL AND THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS