

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :
Commission Review of the :
Capacity Charges of Ohio : Case No. 10-2929-EL-UNC
Power Company and Columbus:
Southern Power Company. :

- - -

PROCEEDINGS

before Ms. Greta See and Ms. Sarah Parrot, Attorney
Examiners, and Commissioner Andre Porter, at the
Public Utilities Commission of Ohio, 180 East Broad
Street, Room 11-A, Columbus, Ohio, called at 8:30
a.m. on Thursday, April 26, 2012.

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VOLUME VIII

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1 Thursday Morning Session,
2 April 26, 2012.

3 - - -

4 EXAMINER SEE: Let's go on the record.
5 Let's take brief appearances of the parties, name
6 only, starting with the company and going around the
7 room.

8 MR. NOURSE: Thank you, your Honor. On
9 behalf of the Ohio Power Company Stephen T. Nourse,
10 Daniel R. Conway, Matthew J. Satterwhite.

11 MR. PETRICOFF: Thank you, your Honor.
12 On behalf of Exelon Corporation and Constellation
13 NewEnergy, Sandy Grace, David Stahl, Lija
14 Kaleps-Clark and Howard Petricoff; on behalf of
15 Direct Energy and the Retail Energy Supply
16 Association, Lija Kaleps-Clark and Howard Petricoff.

17 MR. HAYDEN: Good morning, your Honor.
18 On behalf of FES, Mark Hayden, David Kutik, and Jim
19 Lang.

20 MS. KINGERY: Good morning, your Honor.
21 On behalf of Duke Energy Retail Sales and Duke Energy
22 Commercial Asset Management, Jeanne W. Kingery and
23 Amy B. Spiller.

24 MR. DARR: On behalf of IEU-Ohio, Frank
25 Darr, Sam Randazzo, and Matt Pritchard.

1 MS. KYLER: Good morning. On behalf of
2 the Ohio Energy Group, Jody Kyler and Michael Kurtz.

3 MS. KERN: Good morning. On behalf of
4 the Ohio Consumers' Counsel, Kyle Kern and Melissa
5 Yost.

6 MR. BEELER: Good morning. On behalf of
7 staff, Steve Beeler and John Jones.

8 EXAMINER SEE: Mr. Nourse, I believe
9 there was an issue you wanted to address on the
10 record.

11 MR. NOURSE: Yes, your Honor, thank you.
12 The company had requested of staff the production
13 costs breakdown for Mr. Harter's testimony. We
14 wanted to have a basic understanding of what the
15 production costs used in his analysis were. It's in
16 the nature of workpapers and supporting data and
17 would obviously facilitate proficient
18 cross-examination and understanding a basic level
19 what Mr. Harter did.

20 So I requested that information on behalf
21 of the company and I'll let staff speak to what their
22 response was, but we were told we could not get the
23 information.

24 EXAMINER SEE: When did you request the
25 information, Mr. Nourse?

1 MR. NOURSE: I believe it was Tuesday.

2 EXAMINER SEE: This past Tuesday?

3 MR. NOURSE: This past Tuesday.

4 EXAMINER SEE: Mr. Beeler or Mr. Jones?

5 MR. JONES: Yes, your Honor. As counsel
6 stated, there were questions, follow-up questions, on
7 the worksheets that staff provided to the company.
8 We answered the first set of questions to those
9 worksheets and then there was a subsequent follow-up
10 with other questions. And at that time we decided
11 that we felt like we were being served discovery for
12 these questions so we had to put a stop to that line.
13 We thought it was more appropriate those questions be
14 asked on cross.

15 MR. NOURSE: Well, again, your Honor,
16 this is not a discovery question relative to trying
17 to admit something or ask about arguments or getting
18 into, you know, what's happened in the past in other
19 cases or any of that sort of thing. It was this
20 directly relates to his testimony, simple question of
21 what the -- what the breakdown was for the production
22 cost, what the data -- you know, where it came from,
23 what was used to develop production costs.

24 And I would just add, I mean, we are
25 dealing with an outside consultant here so whatever

1 policies support the notion of staff not being
2 subject to discovery I don't think would even apply
3 to an outside consultant.

4 EXAMINER SEE: Well, although they are
5 outside consultants they are submitting testimony on
6 behalf of staff and will be treated as if they are a
7 staff -- an agent of the staff. Is the company going
8 to be able to go forward with the witness tomorrow?

9 MR. NOURSE: Well, it's either tomorrow
10 or some other day. If we are not going to have the
11 information, then we are not going to have the
12 information. You know, it will be a handicap we will
13 have to deal with.

14 EXAMINER SEE: We'll take this issue up
15 again with the staff and the company during the
16 break.

17 MR. NOURSE: Thank you, your Honor.

18 EXAMINER SEE: Let's proceed with the
19 first witness for today.

20 MR. STAHL: Good morning, your Honor.
21 David Stahl on behalf of the Exelon Companies. At
22 this time Exelon will call to the stand David Fein.

23 (Witness sworn.)

24 EXAMINER SEE: Have a seat.

25 Proceed, Mr. Stahl.

1 MR. STAHL: Thank you, your Honors.

2 - - -

3 DAVID I. FEIN

4 being first duly sworn, as prescribed by law, was
5 examined and testified as follows:

6 DIRECT EXAMINATION

7 By Mr. Stahl:

8 Q. Good morning, Mr. Fein.

9 A. Good morning.

10 Q. Could you please state your name for the
11 record.

12 A. Yes. David Fein, it's F-E-I-N.

13 Q. By whom are you employed, Mr. Fein?

14 A. Exelon Corporation.

15 Q. What capacity do you hold with Exelon
16 Corporation?

17 A. Vice President, State Government Affairs
18 in the East Region.

19 Q. Mr. Fein, do you have a copy of your
20 direct testimony with you?

21 A. Yes, I do.

22 Q. All right.

23 MR. STAHL: We have marked that, your
24 Honors, or asked that the reporter mark that as
25 Exelon Exhibit 101.

1 EXAMINER SEE: The exhibit is so marked.

2 (EXHIBIT MARKED FOR IDENTIFICATION.)

3 MR. STAHL: Thank you.

4 Q. Mr. Fein, can you identify for the record
5 what Exelon Exhibit 101 is, please.

6 A. Yes. Exelon Exhibit 101 is my direct
7 testimony submitted on April 4 consisting of 16 pages
8 of questions and answers.

9 Q. Was this testimony prepared by you or
10 under your supervision and direction?

11 A. Yes, it was.

12 Q. Do you have any changes or corrections
13 that you would like to make to this testimony at this
14 time?

15 A. I do not.

16 Q. Mr. Fein, if I were to ask you the
17 questions set forth in this testimony today, would
18 your answers be the same as reflected in the exhibit?

19 A. Yes, they would.

20 MR. STAHL: Thank you.

21 Your Honor, at this time I have no
22 further questions of Mr. Fein, and Mr. Fein is
23 available for cross-examination.

24 EXAMINER SEE: Thank you. Ms. Kern?

25 MS. KERN: Thank you. No questions, your

1 Honor.

2 EXAMINER SEE: Ms. Kyler?

3 MS. KERN: No questions.

4 EXAMINER SEE: Mr. Darr?

5 MR. DARR: No questions.

6 EXAMINER SEE: Ms. Kingery?

7 MS. KINGERY: No questions, your Honor.

8 EXAMINER SEE: Mr. Kutik or Mr. Hayden?

9 MR. HAYDEN: No questions.

10 EXAMINER SEE: Mr. Nourse or Mr. Conway?

11 MR. NOURSE: Thank you, your Honor.

12 - - -

13 CROSS-EXAMINATION

14 By Mr. Nourse:

15 Q. Good morning, Mr. Fein.

16 A. Good morning, Mr. Nourse.

17 Q. Let me start with a few questions about
18 the RAA, reliability assurance agreement. You know
19 what I am talking about when I refer to the RAA,
20 correct?

21 A. Yes.

22 Q. And can you describe your understanding
23 what the -- what the fixed resource requirement
24 option under the RAA means? And I'll refer to that
25 as the FRR.

1 A. Generally speaking, it's an agreement
2 that the PJM has to determine the manner in which a
3 load-serving entity can meet its capacity
4 obligations. The fixed resource requirement option
5 is one of those options available. It is the option
6 that the AEP company is currently operating under.
7 That option requires or allows the company to meet
8 its capacity obligations in a variety of manners but
9 it is -- it is the I guess op -- it is the option --
10 one of two options available to them for meeting
11 their capacity obligations.

12 Q. Okay. And under the FRR option, is it
13 fair to say that the FRR entity avoids the RPM
14 capacity market, provides its own -- self-supplies
15 its own capacity either that it owns or that it has
16 contractual entitlements to and avoids purchasing or
17 paying for capacity through the RPM market?

18 A. Yes.

19 Q. Okay. Now, when did you first become
20 aware of an FRR option in the RAA?

21 A. I'm sorry. When did I first?

22 Q. When did you first become aware of the
23 FRR option under the RAA?

24 A. Probably earlier in my career when I
25 started learning about PJM.

1 Q. Okay. So you have known about it for a
2 while.

3 A. When you say learned about it, yes.

4 Q. I said you've known about it.

5 A. Known about it, yes.

6 Q. Okay. That's fair. Now, what's your
7 understanding of the pricing options for an FRR
8 entity under the RAA?

9 A. When you say pricing options, I assume
10 you mean how can the entity establish a price for
11 capacity?

12 Q. Yeah. I didn't state that very well.

13 Let me ask this way, it's your
14 understanding that the FRR entity provides capacity
15 to support the load in its entire service area so
16 that would include shopping load in a retail state,
17 retail shopping state?

18 A. Yes, unless the load-serving entity
19 avails itself of that option of self-supplying.

20 Q. Okay. So you are saying unless a CRES
21 provider in the case of Ohio terminology undertakes a
22 self-supply option itself, then the FRR entity such
23 as AEP Ohio would cover and support the capacity
24 supporting retail shopping load, correct?

25 A. That's correct.

1 Q. Okay. And so in that context what are
2 the pricing options under the FRR entity?

3 A. You are referring to AEP's price now?

4 Q. Yes, yes.

5 A. As I understand it, AEP has a number of
6 different options to set that price. They could seek
7 to obtain capacity in the marketplace from another
8 party. They could utilize their own resources for
9 that and establish a price that they wish to charge
10 for that. I think there's market purchases. There's
11 trying to establish what they believe are their costs
12 associated with that. There's just some degree of
13 flexibility to the company to establish whatever
14 that -- that price under that option that they seek
15 to charge.

16 Q. Okay. Just to be clear, again, we are
17 focusing on in this case AEP Ohio is an FRR entity
18 and selling capacity to a CRES provider in Ohio to
19 support retail shopping load, and in that context you
20 would agree that one of the options is to establish a
21 cost-based charge, correct?

22 A. That's one of the options. The only
23 thing I would add in the question you said to support
24 retail shopping. I don't know that I would agree
25 with that classification to basically satisfy the

1 capacity obligation.

2 Q. Okay. So you are taking issue with the
3 term "support."

4 A. Yes.

5 Q. Okay. And all I meant by that is that it
6 used as an input to the service provided by a CRES
7 provider. With that clarification, we agree?

8 A. We agree.

9 Q. Now, you mentioned, I believe, earlier in
10 one of your answers that implied this already, but
11 let's be clear, it's your understanding that a CRES
12 supplier in Ohio does have the option of self -- to
13 self-supply under the -- under the RAA even if AEP
14 Ohio is a FRR entity, correct?

15 A. Yes. There is a certain notice
16 requirement where they have to invoke that. I can't
17 remember the timing, but if I'm not mistaken, it's
18 some years in advance where they would have to notify
19 the company that they will take care of that
20 obligation.

21 Q. So they would -- they would participate
22 in the auction for the RPM capacity auction that's
23 three years in advance; is that your recollection?

24 A. Well, they could or use their own
25 resources to meet -- meet that obligation.

1 Q. Okay. I'm sorry. That's what I meant.
2 They would actually opt out of the auction that's
3 three years in advance; is that accurate?

4 A. Correct.

5 Q. Okay. And did -- are you aware of any
6 CRES provider that did opt out of the RPM auction
7 that was conducted in the spring of 2011?

8 A. I am not aware of anyone who availed
9 themselves of that option.

10 Q. And let me ask you with regard to the --
11 excuse me ,the auction that's occurring this spring,
12 has not occurred yet, by this point in time is it
13 your understanding that someone -- a CRES provider
14 that wanted to opt out of the auction would have
15 already had to do so?

16 A. Yeah. As I understand it, they would
17 have had to do that, and in order to do that, they
18 would have obviously had to know what sort of load
19 obligation they were going to have, you know, three
20 years forward in order to make such an election.

21 Q. Right. And did any Ohio CRES provider
22 opt out of the auction that's being conducted this
23 spring?

24 A. To the best of my knowledge, no. And I
25 don't believe that information necessarily is -- is

1 publicly available information.

2 Q. Well, that's fine. To the best of your
3 knowledge, nobody -- no CRES provider has opted out.

4 A. To the best of my knowledge, yes.

5 Q. All right. Now, you mentioned knowing
6 your load three years in advance. Is that also
7 something that applies to the FRR entities, any FRR
8 entity including AEP Ohio?

9 A. It -- it applies but in a much different
10 manner because the nature of the retail supply
11 business there's a much greater uncertainty. And
12 certainly in this service territory I think we can
13 all agree there has been a fair degree of uncertainty
14 in the last year or so about how the market would
15 operate. So it would have been virtually impossible
16 for a CRES provider to provide that type of notice
17 that far in advance not knowing what the company was
18 going to utilize as the capacity mechanism in this
19 service territory.

20 Q. What are the typical terms for CRES
21 retail contracts to your understanding in Ohio?

22 A. Again, I -- I would assume they would be
23 similar to what you see in other competitive retail
24 markets. Contracts are varying lengths ranging from
25 month-to-month contracts to multi-year contracts. My

1 experience is you probably see a greater amount of
2 contracts in the shorter term than longer term
3 because the 12- to 18-month timeframe, but I don't --
4 I don't have, you know, knowledge of what's typical.
5 I think that's -- that's industry typical and I don't
6 think Ohio's market is -- well, Ohio market is very
7 different from other competitive retail markets but
8 contract length is something that a supplier, of
9 course, does not have control over entirely. It's
10 two parties trying to determine what makes the most
11 sense for their business, for their home. So I think
12 they range but many times you see a one-year contract
13 as an average term in the industry.

14 Q. Let me ask you this way, is it fair to
15 say that most, if not all, contracts that are out
16 there, retail contracts, with CRES providers have
17 been entered into since November of 2010?

18 A. I'm sorry. I missed the first part,
19 since November, 2010?

20 Q. Yeah. Most, if not all, retail contracts
21 that are out there with CRES providers have been
22 entered into since November, 2010?

23 A. You know, I'm not able to answer that
24 sort of as a standard industry. I just don't have a
25 basis of knowledge to know what terms my competitors

1 would be contracting at. I think it's been extremely
2 difficult to enter into a longer-term contract with
3 the huge degree of uncertainty of what the rules are
4 going to be in Ohio, and obviously the capacity
5 component is a major part of that but, you know, the
6 entire ESP structure and what that will look like in
7 the AEP service territory certainly can have a
8 challenging negotiation and explanation with a
9 customer.

10 Q. Yeah. And the longest term that you
11 mentioned in your prior answer was 12 to 18 months.
12 That would put it about the end '11, the farthest
13 back at the end of 2011, would it not?

14 A. It would. And if I could further explain
15 that answer, you know, obviously the market structure
16 looked very differently at the end of 2010 than it
17 does today where maybe there was a higher degree of
18 some certainty, at least on the capacity component
19 obviously that changed with the company's filings at
20 the FERC and the ongoing litigation here before the
21 Commission.

22 Q. Let me ask you about a statement in your
23 testimony. It's at the bottom of page 4, carries
24 over to the top of page 5 about your position that
25 the proposed capacity charge will postpone the

1 development of competitive retail markets and deprive
2 customers opportunities to buy capacity needs from a
3 competitive market. Do you see that?

4 A. Yes.

5 Q. Okay. And to be clear here -- well, let
6 me ask you what do you mean by "postpone
7 development?" What are you specifically saying
8 there?

9 A. What I'm saying there is that the
10 company's proposal in this case to set a capacity
11 rate at \$355 per megawatt day will have a negative
12 effect on the continuing development of competition
13 and will be -- not lead to continuing development of
14 competition in the AEP service territory as I believe
15 the statute directs.

16 Q. Okay. Well, we will get into that, but I
17 wanted to focus in on the last part of our statement
18 here that's at the top of page 5 about obtaining
19 capacity needs from a competitive market.

20 A. Uh-huh.

21 Q. Would you agree our discussion we just
22 had a few minutes ago about the FRR, that under the
23 FRR construct retail shopping customers don't obtain
24 capacity and CRES providers don't obtain capacity
25 from a competitive market under the FRR?

1 A. Yes. But based upon the way the -- based
2 upon the way the company has chosen to meet its
3 obligations, yes.

4 Q. So what you are really saying here with
5 respect to capacity needs, from getting capacity
6 needs from a competitive market, is that you would
7 like to see the FRR end earlier and be what AEP will
8 do starting in mid 2015 to become the RPM entity, you
9 would like to see that happen earlier?

10 A. Yes. What this statement refers to is
11 our belief and design and recommendation that the
12 applicable state compensation mechanism or the manner
13 in which AEP procures its capacity be done through a
14 competitive process, an open and competitive
15 transparent process that's being used throughout the
16 PJM footprint to meet the capacity needs and that
17 would be participating through the RPM process or
18 utilizing the results of that process to establish
19 the appropriate capacity charge.

20 Q. Okay. Now, further down the page, page
21 5, you state that Exelon's position is that the state
22 compensation mechanism for AEP Ohio remain at the RPM
23 price, right?

24 A. Yes.

25 Q. Okay. Now, what's your understanding of

1 the current -- the current state compensation
2 mechanism that's in effect in Ohio?

3 A. I believe the current -- when you say
4 current, are you talking about today or are you --

5 Q. What's being charged today.

6 A. Okay. What's being charged today under
7 the Commission's entry is a two-tiered system of
8 capacity pricing that the Commission has put into
9 place as an interim mechanism from the beginning of
10 this year through May 31 of this year. And it's my
11 understanding of the Commission's entry that as of
12 June 1, that state compensation mechanism reverts to
13 where it had been through the Commission's prior
14 entry of the RPM price.

15 Q. So follow up on the last part, your
16 understanding is that the Commission's already
17 decided what's happening starting on June 1?

18 A. The way I understand the Commission's
19 interim entry in this case is, yes, that after
20 May 31, the applicable state compensation mechanism
21 is RPM pending resolution of this proceeding.

22 Q. Okay. All right. Let's turn to page 6.
23 In lines 17 through 19, you say that Exelon applauds
24 AEP Ohio's decision to become an RPM entity, right?

25 A. Yes.

1 Q. So we appreciate that and maybe we can
2 pause and enjoy that.

3 MR. NOURSE: Thank you.

4 Q. So, Mr. Fein, but this is -- this is a
5 big deal, right? This is what Exelon has been
6 pushing AEP Ohio to do, correct, is to become an RPM?

7 A. Our testimony in this proceeding -- prior
8 incarnation of this proceeding we certainly among
9 other things recommended that the -- that the company
10 participate in the RPM auctions. For a variety of
11 reasons that we have articulated both from a
12 consistency standpoint with the way other Ohio
13 utilities are participating and the way that other
14 service territories throughout the PJM footprint that
15 have competitive markets have embraced that concept
16 of a better and more transparent manner in which to
17 meet capacity obligations, so yes.

18 Q. Okay. And let me just ask you a few
19 questions about the prior iteration of the
20 proceedings as you put it and I want to make clear,
21 first of all, that I want to talk about the
22 stipulation a little bit, but I'm not doing it in
23 such a way in any way I would suggest Exelon is still
24 bound by the stipulation at all, okay?

25 But having said that, in that prior

1 iteration of the proceeding, is it fair to say that
2 Exelon recognized that in order to get from point A
3 to point B there were some important steps that
4 needed to occur and should occur in order for AEP
5 Ohio to restructure its business, terminate the pool
6 agreement, and become a full-fledged RPM entity and
7 implement a competitive SSO all wrapped up together,
8 correct?

9 MR. KUTIK: Your Honor, at this time I
10 object on the grounds of relevance. What Exelon or
11 Constellation's prior opinion was with respect to the
12 stipulation is not relevant to any issue in this
13 case.

14 MR. NOURSE: Well, your Honor, I stated
15 very clearly that we're not talking about having the
16 stipulation effective in any way, but I want to
17 understand what's changed, what the current position
18 is. He's talked about the stipulation in his
19 testimony. He's talked about the prior iteration of
20 this proceeding in his answers so I think I'm
21 entitled to explore that.

22 MR. KUTIK: Parties take a number of
23 positions with respect to settling a matter. So what
24 positions they took in that doesn't necessarily bear
25 on the merits of this case. If he wants to know

1 about whether they feel that there should be other
2 steps taken now, let them ask that directly.

3 MR. NOURSE: Your Honor, I am entitled to
4 ask the questions. I want to ask and I think that
5 this is clearly something the witness can address and
6 I've already made clear we're not trying to talk
7 about the stipulation as any kind of a binding
8 principle or document.

9 MR. KUTIK: Well, he is.

10 EXAMINER SEE: The objection is
11 overruled.

12 You can answer the question, Mr. Fein.
13 Do you need it to be read back?

14 THE WITNESS: Please. Thank you, your
15 Honor.

16 (Record read.)

17 A. As our testimony that was filed in
18 support of that stipulation indicated, we recognize
19 that there are a number of issues that were being
20 resolved in the form of a comprehensive settlement of
21 which you identified in your question. There were
22 many others. And that certainly played a role in --
23 in our position that we took in that proceeding.

24 There were other factors including the
25 uncertainty of litigation and we recognize that --

1 and continue to believe that, you know, a workable
2 transition to competition is in the best interest of
3 Ohio consumers. It's in the best interest of AEP
4 Ohio. And we certainly embraced that stipulation as
5 a way to get there.

6 Q. Now, as we sit here today, and before we
7 get to, you know, what's changed and what's different
8 now, there's another step and that's the ESP --
9 modified ESP proposal that's been filed by AEP Ohio.
10 Are you familiar with this?

11 A. Yes, I am.

12 Q. And among other things let me ask about a
13 couple of features to make sure you are familiar with
14 them. One feature is that whole legal corporate
15 separation would be achieved as a -- as a, you know,
16 condition of going forward with the ESP; is that your
17 understanding?

18 MR. DARR: Objection.

19 MR. STAHL: Your Honor, at this point I
20 am going to have to join Mr. Kutik's objection. I
21 think this is getting a little far afield off course.
22 I think Mr. Fein's testimony does address the
23 possible resolution of the capacity charge issue in
24 the broader sense of a case like the pending ESP
25 proceeding, but I don't think that that allows AEP to

1 go into cross-examination about our understanding of
2 the case as it's been proposed by AEP or what the
3 issues might be in that case, and I think that's
4 where this cross-examination is going and that's
5 better suited for the hearings beginning on May 14.

6 EXAMINER SEE: Did I hear --

7 MR. NOURSE: I'm sorry.

8 EXAMINER SEE: Did you want to respond to
9 them individually or respond to them all at one time?

10 MR. NOURSE: I didn't hear another
11 objection. Go ahead.

12 EXAMINER SEE: Did I hear another
13 objection? I thought so.

14 Mr. Darr.

15 MR. DARR: Same question -- same basis as
16 to relevance. The company's case as presented today
17 is about a \$355 supposedly cost-based charge. The
18 investigation that Mr. Nourse is attempting here is
19 to justify apparently his ESP proposal or at least to
20 lay out for the record his ESP proposal. It's not
21 relevant and I object.

22 MR. KUTIK: And I would join in the
23 objection, your Honor.

24 EXAMINER SEE: Okay. Would you like to
25 respond, Mr. Nourse?

1 MR. NOURSE: Thank you, your Honor.
2 First of all, Mr. Stahl just stated that this witness
3 does talk about resolving the capacity charge issue
4 in a broader proceeding like the ESP and so I want to
5 explore that a little bit and it is certainly a door
6 he has opened.

7 And, No. 2, this, you know, he stated
8 that he is familiar with the ESP proposal, and I
9 think some of the speculation down the road here
10 about where I am headed with this is a little bit
11 premature at this point. You know, it is relevant in
12 the sense trying to understand his recommendation
13 here and how it may relate to the other -- the ESP
14 case which, again, he has mentioned, he said he is
15 familiar with, and so I think it is perfectly
16 appropriate to explore his understanding and his
17 position.

18 MR. STAHL: Your Honor, if I may just
19 very briefly in reply, Mr. Fein addresses this
20 particular question at page 12, lines 16 through 19
21 of Exelon Exhibit 101, and he quite clearly states
22 there "We believe that the structure of the
23 stipulation rejected by the Commission represented a
24 fair balance of many diverse interests. Many of the
25 stipulations' tenets therefore still provide a viable

1 framework for a new ESP and any changes to the state
2 compensation mechanism." We are here today in this
3 case to talk about the state compensation mechanism.
4 I think it's perfectly fair for Mr. Nourse to examine
5 Mr. Fein about the relationship between the ESP and
6 changes in the state compensation mechanism as
7 Mr. Fein has raised it on this page 12, but I don't
8 think it gives him a broad license to go in and talk
9 about the relationship between corporate separation
10 and the stipulation and everything else so that's --

11 MR. NOURSE: Well, your Honor, I think
12 Mr. Stahl is making my point for me. Again, this
13 witness talks about all these things, and I'm simply
14 trying to understand how he's putting it together,
15 his position, so. He's allowed to talk about it, but
16 I am not allowed to ask questions about it? I don't
17 think that's correct.

18 MR. STAHL: That's not what the
19 question --

20 EXAMINER SEE: Thank you, gentlemen. The
21 objections are overruled.

22 Mr. Nourse, you can continue but let's
23 keep it tight.

24 Q. (By Mr. Nourse) Mr. Fein, you've stated,
25 have you not, there are other platforms or other

1 things that were in the stipulation that were
2 important to -- to Exelon's -- I'm sorry,
3 Constellation or Exelon? You're representing --

4 A. Both.

5 Q. I apologize. Okay. Thank you.

6 A. We are all one now.

7 Q. All right. That's right. Okay. So you
8 stated, have you not, that the -- these other
9 platforms or major issues that were addressed in the
10 stipulation continue to be pertinent to the context
11 of resolving the capacity charges issue and address
12 the state compensation mechanism on an ongoing basis,
13 correct?

14 A. Yes. I mean, the testimony and our
15 belief is that a number of those issues that were
16 addressed in the prior stipulation represented key
17 issues that were being resolved, and like all
18 settlements Exelon compromised its position in
19 exchange for agreeing to a settlement, so it was a
20 fair and reasonable resolution of a number of
21 difficult and challenging issues. And included in
22 that stipulation, of course, was a resolution of the
23 appropriate capacity -- pricing capacity mechanism.

24 Q. Okay. When you talk about these other
25 issues, what were the major issues in your mind with

1 that?

2 MR. KUTIK: Objection, your Honor.

3 Again, what position they took with respect to the
4 stipulation other than with respect to the capacity
5 charge is not relevant to issues in this case.

6 MR. DARR: IEU joins in the objection.

7 MR. NOURSE: Your Honor, you know, again,
8 he is talking about ESP. He is talking about the
9 stipulation. I am trying to clarify what his
10 position is today and the starting point is the
11 things he's talking about, the stipulation and the
12 ESP, that he said he is aware of so I'm trying to
13 understand his position today in this case.

14 EXAMINER SEE: The objection is
15 overruled.

16 A. You know, as I reference in my testimony
17 here, you know, on page 13 also I talk about a
18 number -- and I talk about it as an integrated
19 package that had a key of pro competitive aspects so
20 if your question is what were some of those,
21 obviously one was, you know, setting a glide path
22 where the company was going to move into the RPM
23 construct for meeting their capacity obligations.

24 Another was moving to a competitive
25 wholesale procurement process for establishing the

1 SSO position, we had advocated going back to the
2 first ESP case for the companies after the enactment
3 of Senate Bill 221. There were certain enhancements
4 to the competitive retail market that were in our
5 view positive aspects that would help on that glide
6 path towards competition.

7 Those were important issues to us as well
8 as ensuring full corporate separation of the
9 company's generating assets from its natural monopoly
10 assets in order to lead to a more well functioning,
11 competitive retail market. Those were just some of
12 the items that I was referencing here in my testimony
13 as key positive attributes of the stipulation.

14 Q. Thank you, Mr. Fein. Let's go back to
15 page 7 of your testimony. I believe starting on page
16 7 and I guess following over to page 9, you have
17 six -- I guess six separate reasons or bases for
18 supporting your recommendation that we go to RPM
19 pricing, correct?

20 A. That we continue to rely upon RPM pricing
21 as the state compensation mechanism, yes.

22 Q. Okay. But that we -- that we go to
23 100 percent RPM pricing as the outcome in this case
24 to be clear, right?

25 A. That's correct.

1 Q. Okay. So let's talk about reason No. 1
2 which is line 7 through 10 on page 7. Now, your
3 position, as I understand it, and you state here is
4 nothing in Ohio law requires a cost-based state
5 compensation mechanism in this context, right?

6 A. Yes.

7 Q. Okay. And is the requirement that
8 capacity charges be set based on RPM in state law?

9 A. No.

10 Q. Okay. No. 2 starts on line 11 and goes
11 through line 18 and I believe to summarize you're --
12 you're saying it should be done -- RPM pricing should
13 be done to develop in competitive markets, correct?

14 A. That's a short summation of those five or
15 six lines but that's -- yes, that's ultimately what
16 we're recommending is that it's now and it's
17 obviously a much lower number than the number that
18 the company's proposed in this case.

19 Q. Okay. And my question is in a fully
20 competitive and functional market, do competitors
21 typically rely on their competitors' network?

22 A. When you refer to network, you mean their
23 wires and poles, and if so, I would say they
24 certainly rely upon them but, of course, the
25 distribution utility should not be viewed as a

1 competitor. They should be viewed as indifferent to
2 the power that flows on their lines. That attribute
3 is a key attribute to a well functioning, competitive
4 market.

5 Q. Okay. Well, let's -- I am not talking
6 about wires and poles. I am just asking you a
7 general question, and perhaps your statement about
8 neutrality is -- is true where all the appropriate
9 prices are set and all the appropriate rules are in
10 place. But I am just asking you, as a general
11 matter, do competitors typically rely on their
12 competitor's facilities as a critical input to
13 providing service?

14 MR. KUTIK: Your Honor, asked and
15 answered. I object.

16 MR. NOURSE: Do you want me to respond,
17 your Honor?

18 EXAMINER SEE: Sure.

19 MR. NOURSE: I'm not sure why Mr. Kutik
20 is defending that witness but --

21 MR. KUTIK: I'm defending the record. Go
22 ahead.

23 MR. NOURSE: I would say I was trying to
24 get a clearer answer which certainly is something
25 Mr. Kutik does very, very regularly in his

1 cross-examination. And I don't think his answer was
2 clear.

3 EXAMINER SEE: Today in particular,
4 Mr. Nourse, I am going to need you to speak up and
5 use a mic.

6 MR. NOURSE: Okay.

7 EXAMINER SEE: The objection is
8 overruled. You can answer the question, Mr. Fein.

9 A. I -- I can't answer your question with a
10 generality because I fundamentally disagree with sort
11 of the generic premise that I think you are operating
12 under and that is, you know, you used the phrase in
13 the prior question "network" and this recent question
14 you used the word "facilities." Again, in a
15 functioning, competitive marketplace AEP Ohio and
16 say, for example, Exelon Energy or Constellation
17 NewEnergy would not be viewed as a competitor. We
18 would be viewed as a competitive supplier utilizing
19 your facilities and network as the distribution
20 utility to provide service to end use customers and
21 that is an attribute that is in all of the well
22 functioning markets.

23 And frankly that's one of the reasons why
24 competition never really developed here in the AEP
25 Ohio service territory because that separation never

1 really occurred and that's ancient history somewhat.
2 But, yes, that's -- that's -- I am just having
3 difficulty agreeing with your question in the manner
4 in which you phrased it because that is not an
5 accurate reflection of how a competitive market
6 operates.

7 Q. Okay. Well, you are getting ahead of my
8 question. You are presuming where I'm going, and I
9 don't want to do that. I want to focus and ask you a
10 very general question and let's not get into the --
11 your specific arguments about the current situation.

12 And you have a specific example in mind,
13 you know, please feel free to mention it to -- in
14 support of your answer. But all I'm asking you is in
15 a general sense in competitive markets do competitors
16 typically rely on each other to provide critical
17 inputs to their service they are competing with?

18 MR. STAHL: Your Honor, I will object at
19 this point.

20 MR. DARR: Object.

21 MR. STAHL: I do think Mr. Fein has
22 answered that question. I also object to
23 Mr. Nourse's characterization of Mr. Fein's response
24 as presenting argument. I don't think he was
25 presenting an argument. I think he was attempting to

1 answer, and I do think to some degree this is a
2 question of argument because I think it's fair to say
3 that the Annals of American Business and Law are
4 replete of examples in which courts have upset the
5 rights of one competitor to use the network of
6 another competitor so I don't know what the point of
7 continuing to ask Mr. Fein this question is. I think
8 it's been answered to the best of his ability.

9 EXAMINER SEE: Was there another
10 objection?

11 MR. DARR: It was me again. Asked and
12 answered.

13 EXAMINER SEE: Mr. Nourse, did you wish
14 to respond?

15 MR. NOURSE: Yeah, your Honor. I
16 specifically directed him to his -- his reasons
17 supporting his recommendation. Whether you want to
18 call it "an argument" or "a reason," I don't see the
19 difference. But he's saying that RPM pricing
20 promotes the development of competitive markets so I
21 think I am entitled to probe his understanding of
22 what competitive market is, and I am asking him a
23 feature -- whether that's a feature of a competitive
24 market or not.

25 EXAMINER SEE: The objection is

1 overruled. You can answer the question, Mr. Fein.

2 THE WITNESS: I guess I am having trouble
3 understanding what the question is. Your Honor, what
4 I just heard from counsel was a very different
5 question than what he asked.

6 EXAMINER SEE: Do you want to have the
7 question read back to you, Mr. Fein?

8 THE WITNESS: Sure.

9 MR. NOURSE: Let me just try again, your
10 Honor.

11 EXAMINER SEE: Rephrase, Mr. Nourse.

12 Q. Is it a feature of competitive markets
13 for one competitor to rely on another to -- to have a
14 critical input for service that's being competed?

15 A. My answer would be the same to what I
16 answered before and that is depending on how you are
17 defining competitor, if that means that one market
18 participant has to rely upon a service provided by
19 what I believe you are defining as a competitor,
20 then, yes, that is an attribute that we see in
21 competitive markets or markets that are moving to a
22 competitive model.

23 Throughout this industry and others the
24 way in which I am understanding the way you are
25 asking this question is, yes, they -- there can be

1 situations where one competitor could rely upon the
2 services in order to ultimately provide a good end
3 service to its customer.

4 Q. And are there examples like the telecom
5 industry or something you have in mind when you say
6 that that happens?

7 A. The history of the introduction of
8 competition and the restructuring of the telecom
9 industry is replete with examples of where that
10 happened, sure.

11 Q. Where that happened in the telecom
12 industry, is it -- was it the case that the
13 facilities being used were what we call monopoly
14 facilities, or did they relate to competitive
15 facilities that could be provided by anyone?

16 A. Initially like the electric industry
17 these were as -- you know, generically defining them
18 facilities or networks that were previously paid for
19 by consumers under a monopoly model and that as there
20 was a movement to competition, those same facilities
21 or networks were made available to competitors to
22 utilize those facilities on a competitive basis,
23 nondiscriminatory, as part of a movement and a change
24 to the market structure that had been in effect for a
25 long number of years.

1 Q. And in those cases we're talking about
2 wires and central office locations that are connected
3 to wires; is that correct?

4 A. Yes.

5 MR. STAHL: Your Honor.

6 MR. NOURSE: He mentioned this example,
7 your Honor. I just want to tie it off and move on.

8 MR. STAHL: I don't think there is a
9 question pending. There was an answer to your
10 question before I could object, so.

11 Q. So, Mr. Fein, in this case, this is the
12 first time I have asked you about this case in this
13 whole line of questioning, we're not talking about
14 wires or monopoly facilities, are we?

15 MR. STAHL: I'll object. To some extent
16 it calls for a legal conclusion.

17 Q. Mr. Fein, I know you are an attorney, but
18 I am not asking you for a legal opinion.

19 A. This case we're talking about the
20 appropriate state compensation mechanism for
21 establishing the capacity charge applicable to CRES
22 providers and ultimately with regard to shopping
23 customers; that's what this case is about. It's not
24 about setting the rates for the wires and the poles.

25 Q. And is the generation service a

1 competitive service in your opinion in Ohio?

2 A. It -- it's supposed to be.

3 Q. Okay. And let me ask you a similar line
4 of questions about cross-subsidies. Do competitive
5 markets function well when there is cost subsidies?

6 MR. STAHL: Object, your Honor. That's
7 an awfully broad and hypothetical question, I think.

8 MR. NOURSE: I think Mr. Fein is -- talks
9 about cross-subsidies in his testimony, and I'm
10 asking to tie it in about this point, about
11 competitive markets.

12 MR. STAHL: That's not really what
13 Mr. Fein talks about. He takes an example of a
14 subsidy that was given by an AEP witness, and he
15 provides the other side to that specific example. He
16 did opine generally about the effect of so-called
17 cross-subsidies and their influence on whether a
18 market operates competitively well or whatever the
19 phrase was in that Mr. Nourse used. That's a very
20 different question.

21 MR. NOURSE: Your Honor, what I asked
22 about was cross-subsidies.

23 EXAMINER SEE: Thank you very much,
24 gentlemen.

25 To the best of your ability, answer the

1 question, Mr. Fein.

2 The objection is overruled, Mr. Stahl.

3 A. The allowance of cross-subsidies as that
4 term is used in talking about market structures is
5 not a positive attribute of a well functioning,
6 competitive market.

7 Q. Okay. To clarify your answer when we
8 talk about a subsidy and use that term in particular
9 in the regulatory context and in the context of your
10 testimony, would you agree that a subsidy means that
11 someone is paying a charge or rate that's below cost?

12 A. That could be one example of that, yes.

13 Q. Are there other examples of what that
14 definition "cross-subsidy" means?

15 A. Yes. Another example or definition would
16 be utilizing what are monopoly or regulated assets to
17 provide a competitive advantage to a competitive
18 affiliate to the detriment of other competitive
19 suppliers who would not have the same -- would not be
20 conferred the same benefit. And that's another
21 example widely used in the industry that is
22 prohibited, again, in your more well functioning
23 markets' explicit rules that would -- would prohibit
24 that type of inappropriate subsidy being provided to,
25 say, for example, a generating affiliate.

1 Q. Thank you. So we agree that competitive
2 markets work best without subsidies, correct?

3 A. We would agree with that, yes.

4 Q. Thank you. Your third answer starting on
5 line 19, page 7, in particular I want to clarify your
6 statement here about the RPM being advantageous I
7 think is the term you use on line 19 to AEP Ohio. Do
8 you see that?

9 A. Yes.

10 Q. Well, let me just ask what do you mean by
11 that?

12 A. What I mean by that was and is when the
13 applicable RPM pricing was at a level higher than
14 where it is today and where it's set to move as of
15 June 1.

16 Q. Okay. So, now, but your -- appear to be
17 saying, correct me if I am wrong, that AEP gained an
18 advantage or it was advantageous to AEP Ohio when it
19 was collecting RPM prior to the time which we pursued
20 getting a cost-based rate; is that what you are
21 saying?

22 A. Yeah. What I'm saying is that presumably
23 the company was enjoying the revenues generated when
24 that applicable capacity rate was at a higher value.
25 That was advantageous to the company.

1 Q. So do you know how much retail
2 competition was occurring in AEP Ohio's service
3 territory prior to November, 2010? This is the time
4 when the filing was made to pursue a cost-based
5 charge.

6 A. I don't have the applicable shopping
7 statistics in front of me or in front of mind. What
8 I do recall is that as we moved into the latter half
9 of 2010, we started seeing the development of
10 shopping in the AEP Ohio service territory.
11 Obviously a positive showing of signs that we hadn't
12 seen in the past but I don't have the specifics in
13 mind.

14 Q. So is it fair to say in your
15 understanding that the capacity pricing was not an
16 issue for AEP Ohio prior to November, 2010?

17 A. When you say not an issue, only AEP Ohio
18 can really answer that. I guess my point here that
19 I'm making in the testimony is since that was the
20 applicable mechanism during that period of time and
21 since the last ESP case, we assume that it was not an
22 issue for AEP Ohio and only became an issue when they
23 went forward at the end of 2010 seeking to alter the
24 capacity mechanism.

25 Q. Okay. What I mean is not a material

1 financial issue but, Mr. Fein, but what I'm asking
2 you is it fair to say that prior to the time retail
3 competition really occurred in any significant
4 fashion in AEP Ohio's service territory, would you
5 expect whatever the capacity pricing was it would not
6 be a material financial issue for AEP Ohio at that
7 time?

8 A. Again, I can't really speak for how the
9 company viewed that or what their thoughts were on
10 that about whether it was a material issue or not.
11 Again, only -- I don't know what the company's
12 motivations were or what their thoughts were on it
13 and why it remained constant from the time of the
14 original ESP until November of 2010.

15 Q. Okay. And your fourth basis starts on
16 line 3 about the self-supply. I think we've already
17 talked about that quite a bit so let's move to your
18 fifth -- fifth reason here starting on line 4 is, and
19 I believe, is it fair to say, that you're arguing
20 that you are submitting in your opinion that the
21 reason -- another reason supporting RPM pricing is
22 comparable, nondiscriminatory access to CRES service,
23 correct?

24 A. Correct.

25 Q. And in support of that contention you are

1 pointing to Duke, Duke Energy Ohio, and you reference
2 FirstEnergy in this answer too, I think, indirectly?

3 What you're saying uniformity across the
4 state is the reason?

5 A. I think this -- the reason here certainly
6 talks about aspects of uniformity across the state.
7 In creating uniformity in a capacity pricing will
8 certainly promote retail competition and, you know,
9 this answer talks about that and gives examples of
10 how in Duke Energy's situation, similarly situated as
11 an FRR entity, they are, you know, making capacity
12 available at the applicable RPM pricing today and
13 that just because you are an FRR entity does not mean
14 that you cannot provide capacity at the RPM rates.

15 Q. Okay. Well, you mentioned Duke Energy,
16 and just like we talked about before with the
17 stipulations would you agree that the Duke Energy
18 agreement to do -- to do RPM pricing was based on a
19 package of terms and conditions and that -- in that
20 deal, correct?

21 A. Again, Duke Energy could probably speak
22 better to that than I can, but the Commission's order
23 in that proceeding addressed a large number of issues
24 and one of which, of course, was the appropriate
25 capacity construct and it was again a stipulated

1 agreement that was adopted by the Commission that, if
2 my memory serves me, all parties supported and had a
3 number of aspects to that. Again, I don't know that
4 Duke Energy identified one item as a reason why they
5 could offer RPM pricing, but it was a comprehensive
6 package of issues.

7 Q. Yeah. Thank you. Now, is it your
8 contention -- are we on the fifth point, I think?

9 A. Yes.

10 Q. Fifth point, that throughout the state of
11 Ohio retail SSO rates and wholesale charges that may
12 relate to competition for CRES providers must all be
13 uniform?

14 A. Certainly not prices but the mechanisms
15 by which competition will exist, yes, we believe
16 there should be uniformity in the manner in which
17 standard service offer is set. And by that we mean
18 use of a competitive wholesale procurement process to
19 establish the SSO, the rules regarding competitive
20 retail electric service. All of those -- those two
21 key items, and obviously the capacity mechanism is a
22 subpart of that, that type of uniformity will and has
23 led to a more robust development of a competitive
24 marketplace and that's certainly something that
25 Exelon strongly supports.

1 Q. Well, are we talking in this regard,
2 Mr. Fein, about a policy debate, or are you
3 suggesting that your understanding of Ohio law would
4 require that result based on a concern about
5 comparable, nondiscriminatory access?

6 A. Well, I think it clearly is a, like many
7 things before a regulatory agency, a combination of
8 law and policy. The law has certain pronouncements
9 and requirements, and the Commission has given great
10 deference to develop policies that comport with that
11 law. And our recommendation in this proceeding is in
12 order to achieve that nondiscriminatory and
13 comparable access, that we recommend that the
14 Commission rely upon the RPM pricing to be the
15 applicable state compensation mechanism as it has in
16 the past to govern the capacity pricing in the AEP
17 service territory.

18 Q. So if one EDU agrees to do something,
19 it's not required by law, does that mean the other
20 EDUs then have to do it in order to avoid your
21 concern about discrimination?

22 A. I don't know if I would agree with that
23 characterization, but we would support and encourage
24 and believe it's good public policy to attempt to
25 achieve as great an amount of uniformity in market

1 structures, in market rules; that if the State is
2 interested in creating that sort of level playing
3 field and sending a good signal to would-be
4 investors, customers, and suppliers, that, yes, that
5 is a -- that is an appropriate and a welcome policy
6 directive that the Commission should -- should
7 implement as it's moving Ohio to a more competitive
8 marketplace for electricity.

9 Q. Okay. In your last answer before that
10 one you said it was a combination of policy. Now,
11 this answer you mentioned "policy" a couple of times.
12 Is your point about No. 5 here, is it a policy
13 argument?

14 A. The fifth reason cited here in my
15 testimony, we believe that adopting such a policy
16 would be consistent with and comport with and follow
17 the directives of the law here where consumers are
18 supposed to have comparable and nondiscriminatory
19 access to competitive retail electric service.

20 Q. But if one EDU agrees to do something in
21 a stipulation that is not necessarily required by law
22 to do, is it your contention under this point No. 5
23 that other EDUs, therefore, have to do it in order to
24 maintain uniformity throughout the state of Ohio?

25 MR. STAHL: Your Honor, I object. That

1 specific question has been asked and answered two
2 questions ago, I believe.

3 MR. NOURSE: I don't think so, your
4 Honor. He is just giving policy reasons, and he
5 stated he is making a point that is based on law and
6 policy.

7 MR. STAHL: Yeah. That wasn't the
8 question. The question was if one EDU does it, do
9 all of the EDUs have to do it and that was the
10 question that was answered two questions ago.

11 MR. NOURSE: I think it's a simple yes or
12 no answer, your Honor.

13 MR. STAHL: Well, it wasn't --

14 EXAMINER SEE: Thank you. Thank you --

15 MR. STAHL: Sorry, your Honor.

16 EXAMINER SEE: -- both.

17 MR. NOURSE: Your Honor, why don't we
18 move on.

19 Q. (By Mr. Nourse) Mr. Fein, let's talk
20 about your sixth reason, the final, on page 9,
21 line 5, okay? As I understand it, you are
22 maintaining that Senate Bill 3 and Senate Bill 221
23 have eliminated the -- as you call it, the arcane,
24 arbitrary method of charging cost for service,
25 correct?

1 A. Yes.

2 Q. Now, did -- to your understanding in Ohio
3 did market rates materialize as envisioned under
4 Senate Bill 3 after the market development period?

5 A. Did market rates develop after the end of
6 the market development period?

7 Q. Yeah. Do you understand under Senate
8 Bill 3 that market rates were supposed to be charged
9 after the market development period?

10 A. I understand what Senate Bill 3 intended
11 to achieve. I think we probably would spend a lot of
12 time here if we went through what happened or didn't
13 happen with market rates being implemented as
14 originally contemplated. But what I would agree with
15 is that due to the actions of the Commission I don't
16 believe that market rates were allowed to go into
17 effect as originally contemplated under Senate Bill
18 3.

19 MR. NOURSE: Okay. I don't know if there
20 is a better mic, your Honor, that's available. This
21 one has gone dead. Can we go off the record for just
22 a minute?

23 EXAMINER SEE: Let's go off the record
24 for just a minute.

25 (Discussion off the record.)

1 EXAMINER SEE: Let's go back on the
2 record. Go ahead.

3 Q. (By Mr. Nourse) Mr. Fein, would you
4 agree, since you mentioned Senate Bill 221 on line 5
5 there, that 221 contains many cost-based rate
6 adjustments as part of the electric security plan
7 option?

8 A. Senate Bill 221 provides the electric
9 distribution utilities with what I will describe is a
10 hybrid method of recovering costs or setting rates
11 unlike what existed prior to that.

12 Q. Okay. Turn to page 10, okay, in line 9,
13 you're referring to the December, 2010, entry in this
14 case, correct?

15 A. Yes.

16 Q. And you are stating on line 10 that entry
17 required AEP Ohio to use RPM-based pricing.

18 A. Correct.

19 Q. And are you -- are you using the December
20 entry as a basis for supporting the permanent outcome
21 of this case of RPM pricing?

22 A. When you use the phrase "permanent," I
23 guess what we believe is that the Commission's entry
24 in December was a correct one then and continues to
25 be today that the appropriate state compensation

1 mechanism should be the RPM pricing.

2 Q. Okay. Thank you for that clarification.
3 On line 16 and following, you maintain that AEP Ohio
4 should have switched to procuring capacity for the
5 RPM market earlier essentially, right?

6 A. Yes. In my testimony there I reference
7 the company could have elected as early as March of
8 2009 to participate in the RPM auction for the 2012
9 and '13 planning year.

10 Q. I believe we agreed on this earlier, but
11 CRES providers could also exercise the same option on
12 that same date, correct?

13 A. CRES providers could elect to opt out or
14 could elect to self-supply capacity and meet their
15 load obligations yes.

16 Q. Okay. Now, are you aware, though you are
17 an attorney, I don't think you are offering legal
18 opinions in your testimony, so I'll say as a nonlegal
19 opinion, your understanding of whether there is any
20 legal or regulatory requirements applicable to AEP
21 Ohio that would force them to make the choice that
22 you are referencing here?

23 A. No. Well, as I understand your question,
24 and I don't say here that this was a legal
25 requirement that they be forced to do that. As my

1 testimony outlines, they had the option to do that
2 and could have done that but chose not to do that.

3 Q. Okay. Let's turn to page 13, Mr. Fein.
4 Actually I'm going -- I think we already covered
5 this. Okay.

6 Let me actually move to a different
7 topic. Mr. Fein, I think you've already indicated
8 that there are a number of potential outcomes in this
9 case for the -- the capacity charge that the
10 Commission may adopt, and I referred to it as the
11 permanent charge a minute ago. What I meant by that
12 simply so far we have had interim charges, correct?

13 A. Correct.

14 Q. And the issue in this case is what the
15 pricing will be up through the middle of 2015,
16 correct?

17 A. The issue in this case is what the
18 capacity mechanism will be after June 1 of this year.

19 Q. And after -- after May 31, 2015, given
20 the current election to become an RPM entity, this --
21 this issue dealing with this case will not be -- not
22 be pertinent or applicable, will it?

23 A. That's correct. The issue has to do with
24 what the applicable capacity charge will be for that
25 three-year period prior to June 1, 2015.

1 Q. Okay. So, now, with respect to these
2 various alternative outcomes in this case, I just
3 want to discuss a couple of them with you. And the
4 three rate levels I want to discuss essentially to be
5 illustrative here to talk about some competitive
6 issues are the \$146 per megawatt day charge that's
7 essentially the current RPM rate and the \$255 per
8 megawatt day rate that is currently the second tier
9 of the interim approach, correct?

10 A. Correct.

11 Q. And the third level rate is the \$355
12 proposal that the company is making based on its
13 analysis of cost, correct?

14 A. Correct.

15 Q. Okay. And so if we were to assume
16 today's market conditions, today's AEP Ohio's SSO
17 rate as the price to compare, does Exelon -- does
18 Exelon believe for most commercial/industrial
19 customers it could make offers that would be
20 attractive to retail customers if it was charged the
21 \$146 capacity fee?

22 A. Yes, because that is a capacity mechanism
23 that is -- is and was in place as the appropriate
24 mechanism, being the RPM pricing, and that based on
25 current market conditions which can change, that

1 there is the opportunity to make offers that, of
2 course, we believe would be attractive to customers.

3 Q. Now, the reason I ask you about
4 commercial/industrial, Exelon doesn't currently serve
5 residential customers in Ohio, does it?

6 A. Unfortunately not.

7 Q. Okay.

8 A. We had been looking at it and with the
9 flurry of filings that began at the end of 2010, we
10 stopped looking at getting into that market sector
11 because of the uncertainty.

12 Q. Okay. Now, given the same assumptions
13 about today's market conditions and today's SSO
14 rates, does Exelon believe it can make offers to
15 commercial/industrial cus -- to most or some but not
16 all commercial/industrial customers using a \$255 per
17 megawatt day charge?

18 A. Well, first of all, you can always make
19 offers to customers at a variety of different levels.
20 Whether the customer views that as a good offer, a
21 positive offer, you know, is really in the eyes of
22 the customer. But the higher capacity rate of \$255
23 per megawatt day makes it more challenging for both
24 the customer and the supplier to provide a large
25 enough potential savings opportunity for a number of

1 customers. And as you know, whether that is a type
2 of savings opportunity for a customer, there are many
3 factors that go into that including how they utilize
4 power and length and term of a contract. And with
5 the way in which currently the tiers are set up it
6 may not be advantageous for either the supplier or
7 the customer to offer service with a capacity rate
8 like that for any extended period of time.

9 Q. Okay. But using the assumptions we
10 talked about and using a \$255 per megawatt day
11 capacity charge, can Exelon make attractive offers to
12 some commercial/industrial customers on that basis?

13 A. I think it's difficult. Is it possible?
14 Is it possible with all and have we had the
15 opportunity to offer such a proposition to a lot of
16 customers? No, we haven't. I think customers have
17 learned that customers now seeking competitive
18 options are going to pay a different capacity rate
19 than other customers who may have moved more quickly
20 because of the two-tiered system.

21 So it certainly frustrates our ability to
22 do that on a broad basis and there are limited
23 possibilities but certainly as you can appreciate not
24 as -- we are not able to do it in the same mechanism
25 as we would if we were relying upon the tier 1

1 pricing that you outlined earlier.

2 Q. Okay. Are you making some attractive
3 offers today to commercial/industrial customers based
4 on \$255 capacity charge?

5 A. Have we made some? I think we are
6 getting into an area obviously of some competitive
7 sensitivity with some of my competitors I see in the
8 room and will see the record. We've had some ability
9 but certainly customers haven't been as interested as
10 they were with utilizing the RPM construct for
11 capacity or utilizing the tier 1 or being able to
12 have been in that first tier that are being charged
13 the tier 1, so it's certainly frustrated our ability
14 to offer service at that level.

15 Q. Okay. And the same questions, same
16 assumption for the \$355 capacity charge level?

17 A. At that level I do not believe we would
18 be able to make offers that would be viewed as
19 attractive by customers.

20 Q. For any customers?

21 A. That's correct.

22 Q. Okay. Now, you mentioned earlier the --
23 there was a number of factors that could be -- your
24 ability to make attractive offers may be dependent
25 upon. Let me list some and see if you agree that

1 they apply, talk about each briefly. No. 1 is the
2 term of the proposed agreement?

3 A. Yes.

4 Q. Okay. And with a new offer, we are
5 talking about new offers, not an existing customer,
6 right, how does the term in the proposed agreement
7 relate to your ability to make an attractive offer?

8 MR. STAHL: Your Honor, before we start
9 down this road, I will pick up on a point Mr. Fein
10 noted in one of his previous answers and that is that
11 these are very competitive commercial terms that we
12 are now discussing in public which as Mr. Fein noted
13 with a number of other competitors present.

14 These were also the subject of discovery
15 requests that AEP served on us. After a series of
16 objections, the objections were overruled, we did
17 respond to the discovery in a way that I thought was
18 mutually agreeable between Exelon and AEP but, now,
19 we are going beyond our responses and I think we are
20 ultimately going to get into some very sensitive
21 competitive issues and I just don't think are proper
22 for being aired in this public forum with all of
23 these parties present. So, you know, this particular
24 question I guess is one that I don't have a real
25 strong objection to, but if we are going to go down

1 and talk about all of these other six factors that
2 might affect the attractiveness and offers at various
3 price levels, I think we are going to have to
4 seriously consider about going into a closed session
5 of some kind with only certain people present. And I
6 didn't think this was going to be an issue here
7 today.

8 MR. NOURSE: Well, let me address that
9 briefly, your Honor. You know, I certainly can -- we
10 can ask Mr. Fein to refrain from mentioning matters
11 that are competitively sensitive. He can indicate if
12 that's the case hopefully. You know, whether or not
13 there is any satisfactory response in the public
14 portion, I suppose, could determine whether we need
15 to go into a sealed record. I know the discovery
16 responses that Mr. Stahl mentioned were certainly
17 provided to all parties and none of them were marked
18 confidential and so I'm reading out of the same
19 responses and asking him simple questions about that.

20 So having said all that we're open to
21 suggestion on how we proceed relative to the prospect
22 of a closed record.

23 EXAMINER SEE: I think we are okay with
24 the question that was just posed to the witness. We
25 are venturing into an area that could be very

1 sensitive to Exelon as a competitor. And I would ask
2 that you proceed carefully, and if we need to close
3 the proceedings so that Mr. Fein can respond to a
4 question, we will. I would ask that we hold those to
5 the end if we get to that point but let's proceed
6 cautiously.

7 MR. KUTIK: Your Honor, if Mr. Fein
8 believes the answers would provide propriety
9 information, he should feel free to say that,
10 correct?

11 MR. NOURSE: He should indicate.

12 EXAMINER SEE: He needs to indicate he
13 can't answer the question.

14 MR. KUTIK: That's my point, yes. In
15 other words, I don't want him to be compelled.

16 EXAMINER SEE: Without saying something,
17 divulging trade secrets or confidential proprietary
18 information.

19 MR. KUTIK: Right, thank you.

20 EXAMINER SEE: Given Mr. Fein is an
21 attorney, I assumed he understood where we were going
22 with that conversation.

23 THE WITNESS: Recovering attorney.

24 EXAMINER SEE: I'm sorry? Recovering
25 attorney?

1 THE WITNESS: And I apologize. I don't
2 remember the question now.

3 MR. NOURSE: That's fine.

4 EXAMINER SEE: We can certainly reread.

5 MR. NOURSE: We can start over because I
6 do want to make clear.

7 Q. (By Mr. Nourse) Mr. Fein, what I'm trying
8 to get at is a very general -- I think a very general
9 explanation of these items will probably be
10 sufficient, but I think we need to hear what you need
11 to say about it. If you are able to respond without
12 getting into, you know, Exelon's proprietary or
13 confidential information, I think we would all prefer
14 that, but if you're not, then we can certainly go
15 back and answer it later in a sealed record.

16 A. Sure.

17 Q. With that understanding, so I think we've
18 established that the term of the proposed agreement
19 relative to a new offer and to the attractiveness of
20 the new offer is a factor? And, again, with these
21 questions I don't -- I am not getting into the levels
22 of 146, 255, 355. I'm asking as essentially a
23 generic or general matter for you to help me
24 understand for the record the -- each of these
25 factors, how they relate to the ability to make an

1 attractive offer in this context.

2 A. Sure. And I mean so on the term of the
3 agreement, that's a factor that comes into play
4 because we do not know what the capacity mechanism
5 will be going forward between now and June 1, 2015.
6 We certainly don't know what the effective price to
7 compare would be because we do not know what the
8 standard service offer price will be and we --
9 obviously we don't know where market prices will go
10 in the future so that's why the -- the term of the
11 agreement is a significant risk and a significant
12 unknown that factors into our ability to know today
13 what might be viewed to a customer as an attractive
14 offer.

15 Q. So you would like to get the capacity
16 charge case resolved and the ESP case resolved and
17 the ESP case might actually resolve the capacity case
18 as well; is that -- is that -- that would help
19 establish a term going into the future for CRES
20 providers to make offers, correct?

21 A. As a participant in competitive market,
22 uncertainty is not a good thing for us and not a good
23 thing for consumers so, yes, we would favor a higher
24 degree of certainty of what the rules of the game
25 will be so that we and customers in the marketplace

1 can better understand what that future might be
2 knowing you can't erase all of the uncertainty but
3 there are some significant ones that are uncertain as
4 we sit here today.

5 Q. Okay. And, Mr. Fein, I think we've
6 identified another area upon which we agree so thank
7 you.

8 Let me move to the next factor, I think,
9 and that is the load factor of the retail customer.
10 We agree that's another pertinent factor in making
11 attractive offers?

12 A. Yes. The way in which a customer
13 utilizes electricity over what hours of the day and
14 what they alter during seasons, that's a factor that
15 has an impact on the costs of serving that customer.

16 Q. Okay. And then another factor is the
17 number of facilities under contract or available for
18 contract?

19 A. Yes.

20 Q. Okay. And can you help us with that?

21 A. Sure. If you are serving a customer that
22 has multiple accounts or facilities or locations,
23 many of those accounts or locations might utilize
24 electricity differently. And, therefore, the pricing
25 that might be viewed as attractive could be different

1 based upon sort of that portfolio of accounts and
2 different usage characteristics. So depending on how
3 a customer views that and depending on how we would
4 address that, that can have an impact on the
5 attractiveness of a competitive option in the eyes of
6 that customer and in our eyes of our ability to offer
7 an attractive option to that customer.

8 Q. So with respect to the last two factors
9 we've discussed, you're saying that both parties
10 under the proposed offer or contract want to know the
11 load to be served including the load factor?

12 A. That's correct. And under the construct
13 we have now, it's entirely possible that a customer
14 could be obtaining service or would effectively be
15 paying different capacity charges embedded in their
16 service depending upon whether they, you know, are a
17 tier 1 or tier 2 customer under the current
18 construct, for example, and what that might be going
19 forward, that would be another factor that may affect
20 the attractiveness of an offer.

21 Q. Okay. And as another factor, whether the
22 pricing is fixed or available?

23 MR. STAHL: Can I just ask for a
24 clarification? I think we are going down the road
25 here and we are kind of losing the context of why

1 these questions are being asked. When Mr. Nourse
2 says would another factor be whether the pricing is
3 fixed or variable, I guess I would like a little more
4 specificity. Another factor in what? In determining
5 whether an offer will be made or whether an offer
6 will be made at a certain capacity price? Because
7 that's the context in which the interrogatory was
8 first asked. And I just ask Mr. Nourse to specify
9 what he means by other factor, for what purpose.

10 MR. NOURSE: Thank you. I wasn't done
11 with my question, but I believe with all these
12 questions we set it up very clearly that we're
13 talking about factors that you mentioned in your
14 earlier answers as affecting the ability to make
15 attractive offers to customers.

16 Q. Did you understand that, Mr. Fein?

17 A. Yes.

18 Q. Okay. As another factor, whether the
19 pricing is fixed or variable?

20 A. Yes. That can affect the attractiveness,
21 of course, of an offer but the entirety of the
22 contract is fixed. Whether certain components are
23 fixed or variable, yes, those are things that can
24 affect the attractiveness of an offer.

25 Q. Okay. And that's something that a CRES

1 provider can decide what kind of offers it wants to
2 make, whether fixed or variable, correct?

3 A. A CRES provider can certainly decide what
4 types of offers it wishes to make. The contract
5 takes two parties to agree on what that structure
6 might be. And different customers are concerned or
7 interested in different types of products. And it
8 just varies with the type of customer and what their
9 concerns are with respect to their electricity
10 purchasing.

11 Q. And maybe this is a subcategory of this
12 one but is it accurate that a CRES provider can offer
13 a fixed price but then also provide for a passthrough
14 capacity charge? Is that something you've seen?

15 A. Certainly addressing -- capacity could be
16 addressed in a fixed or passthrough variety. Again,
17 the CRES provider can decide what they want to offer.
18 Whether that would be acceptable to a customer,
19 again, is something the two parties would have to
20 work out but that's certainly an option to handle the
21 capacity component as a passthrough charge.

22 Q. Okay. And if -- why does the passthrough
23 of capacity charge -- by the way that's a separate
24 factor actually in your list in your response, right?
25 So we are going right into that one but why -- why is

1 that factor an issue with a new offer, or is it only
2 if you do it today versus after the Commission
3 decides this case?

4 A. Well, in -- it's a factor because neither
5 us as a supplier or a customer really knows what that
6 construct is going to be, you know, the -- the reason
7 why in a number of the other well functioning markets
8 where capacity really isn't an issue within PJM is
9 utilizing that three-year forward known price for
10 capacity that the RPM construct that has really
11 removed that component of pricing as an issue because
12 you have a fixed known charge that will apply for a
13 three-year period.

14 That leads to greater ability of both
15 suppliers and customers to enter into longer term
16 fixed-type contracts where you wouldn't need to
17 address a passthrough, and a customer would have that
18 certainty of his -- his or her price and not have an
19 unknown like capacity being addressed in a nonfixed
20 basis. I mean, customers who like budget certainty
21 or fixed price certainty, if you can remove that
22 potential variable cost from their equation, that is
23 a very attractive feature. And one of those things
24 that is a hallmark of a -- of a competitive market is
25 that ability to offer that fixed price certainty and

1 the capacity component being an important subpart of
2 that.

3 Q. Okay. I think we agree on this, I just
4 want to clarify, so if -- if the Commission decides
5 this case and adopts a charge as we discussed
6 earlier, that would apply during this period leading
7 up to June, 2015, then not only the company but all
8 customers as well as all CRES providers would --
9 would have that rate in hand and be able to make
10 offers to the extent that they can without this
11 passthrough issue being a big issue, correct?

12 A. If the Commission establishes a set price
13 or set mechanism to establish capacity pricing for
14 this three-year period, that would be an extremely
15 positive market development provided, of course, that
16 that mechanism or that rate be set at a level that
17 allows the competitive market to continue to develop
18 setting it. Of course, I know you are not asking
19 about the price but setting it at the proposed rate,
20 I believe, would be -- while it would be fixed and
21 known I think it would -- it would stop the progress
22 that's been made on developing competition.

23 Q. Okay. But and that part we don't agree
24 on but that's a separate issue, right? You're
25 talking about transparency here, are you not?

1 A. I'm talking about transparency and the
2 ability to manage risk, and I'm talking about fixed
3 price certainty.

4 Q. Okay. Now, another factor in making an
5 attractive offer, I believe you consider, is payment
6 terms, correct?

7 A. Yes.

8 Q. Okay. Can you briefly address that one?

9 A. Payment terms is a frequent issue that is
10 negotiated between suppliers and their customers.
11 Much like any commercial transaction, the -- the
12 payment terms can have an effect on what pricing you
13 can offer because it has to do with the amount of
14 risk that a supplier would take in providing service
15 before they receive payment. No different in
16 electricity than many other commercial areas where
17 you as the supplier are providing a service before
18 getting payment, and you have to balance that --
19 those payment terms whether they are, you know, one
20 week, 14 days, a month, whatever they may be, into
21 your ability to offer pricing.

22 Q. Okay. So that really just says you're
23 screening customers for either security or credit
24 capabilities relative to the load being served; is
25 that fair?

1 A. I don't know if I would agree that it's
2 like credit screening as you explain it. There are
3 some that really may not have to do with credit. It
4 might have to do with the ability of that end use
5 customer to process invoices in a timeframe.

6 An example I would give you is doing
7 business with municipal entities. Government
8 generally pays a little slower than, you know,
9 for-profit commercial entities because of the way in
10 which the government operates. Those are factors you
11 take into account in offering service and they have
12 an impact on your ability to offer attractive
13 pricing.

14 Q. Okay. And I think the last factor that
15 you listed in your discovery response was forward
16 power prices which I believe is the same as forward
17 energy prices, correct?

18 A. Yes.

19 Q. And if you can just briefly address that
20 as it relates to making an attractive offer.

21 A. Sure. Electricity markets move up and
22 move down, and your ability to offer pricing that
23 would be deemed attractive to a customer is going to
24 be dependent today on what your view is of where
25 market prices might go over the term of the agreement

1 so that is obviously a variable that a supplier needs
2 to use their expertise in anticipating where that
3 might go over the term of the agreement in order to
4 make what might be deemed an attractive offer to a
5 customer.

6 Q. Okay. Good. I was hoping we could get
7 through this on the public record, and I think we've
8 completed what I want to ask about that. So thank
9 you.

10 A. You're welcome.

11 Q. Let me go back to your testimony then.
12 Page 13, Q and A starting on line 12, there you are
13 referring to the modified ESP filing that was made
14 recently by AEP Ohio?

15 A. Yes.

16 Q. I guess the point of this answer is the
17 last sentence where you say that this filing
18 demonstrates that AEP is willing to accept something
19 other than cost-based price, right?

20 A. Yes.

21 Q. Okay. Now, is it your understanding that
22 the -- the two-tiered pricing that you reference here
23 in this answer that's reflected in the modified ESP
24 plan is a proposal that stands on its own?

25 A. I view it as a proposal that is part of

1 the modified ESP filing that's pending before the
2 Commission. So if what you mean by that is it's --
3 it's something that's being proposed in the context
4 in a much broader proceeding, I would agree with you.

5 Q. Yeah. And to clarify that, is it your
6 understanding that the -- that feature of the
7 modified ESP, like all the other features, is
8 premised on acceptance of the entirety of the package
9 reflected in the modified ESP as a whole?

10 A. I believe the company's filing in that
11 case is deposited as this is a package offer, if you
12 will, and that I believe as is allowed under Ohio law
13 if the Commission alters that package, the electric
14 distribution utility has some discretion to revoke,
15 if you will, the package that was put forward in the
16 form of the ESP.

17 Q. Okay. Is the two-tiered capacity pricing
18 you reference here, is it fair to say that's a
19 compromise of AEP Ohio's litigation position as you
20 understand it?

21 A. I can't recall how the company
22 characterized it in the modified ESP, but I would
23 look at it as some form of compromise considering the
24 capacity charge being proposed in this proceeding.

25 Q. Okay. But just to be fair about your

1 statement on lines 16 through 18, this inclusion of
2 this two-tiered capacity pricing as part of the
3 modified ESP demonstrates that AEP's willing to
4 accept that two-tiered pricing if the entire package
5 of the modified ESP package; is that your
6 understanding?

7 A. Yes. It's my understanding that what the
8 company's proposing in that modified ESP proceeding
9 is that they are willing to accept this two-tiered
10 capacity pricing as part of the integrated package
11 that they've proposed in that other proceeding to use
12 something other than the \$355 per megawatt day
13 proposal in this proceeding.

14 Q. Okay. And, Mr. Fein, let me ask you to
15 turn to page 15. And you make a statement on line 17
16 that Exelon is not unsympathetic to AEP's Ohio
17 financial concerns. Do you see that?

18 A. Yes, I do.

19 Q. Okay. And I appreciate that statement.
20 I'm left-handed so sometimes I take left-handed
21 compliments just as well as anything else. But when
22 you say you are not unsympathetic, can you explain
23 what you meant there?

24 A. Well, what I mean here is that we
25 understand that the company is -- is -- is in a bit

1 of transition to restructuring itself and understands
2 what the company has proposed in this modified ESP
3 and what they had proposed under the prior
4 stipulation. We certainly understand that issue and
5 this testimony here in this passage that you are
6 citing. We understand the company has some concerns
7 with respect to that transition and how they believe
8 they need to be compensated or need to set up that
9 transition. And we, you know, look forward to how
10 that matter is resolved in the other proceeding and
11 simply here to just sort of recognize that fact and
12 how that issue or that concern could be addressed in
13 some form or fashion.

14 MR. NOURSE: Thank you, Mr. Fein. That's
15 all the questions I have, your Honor.

16 EXAMINER SEE: Mr. Beeler?

17 MR. BEELEER: No questions, your Honor.

18 EXAMINER SEE: Any redirect, Mr. Stahl?

19 MR. STAHL: Your Honor, may we take a
20 short recess to discuss that?

21 EXAMINER SEE: Yes.

22 MR. STAHL: Thank you.

23 EXAMINER SEE: We'll take about 5
24 minutes. Let me know if that's not enough.

25 And we are off the record.

1 (Recess taken.)

2 EXAMINER SEE: Mr. Stahl.

3 MR. STAHL: Thank you, your Honor. Very
4 brief redirect.

5 - - -

6 REDIRECT EXAMINATION

7 By Mr. Stahl:

8 Q. Mr. Fein, Mr. Nourse was asking you
9 toward the end of his cross-examination of you a
10 series of questions involving various factors that
11 Exelon might take into account to determine whether
12 or to what extent to make an offer to a customer. Do
13 you recall that?

14 A. Yes, I do.

15 Q. Those factors were originally listed in a
16 response to interrogatory filed by Exelon in response
17 to AEP discovery; is that correct?

18 A. Yes, it is.

19 Q. Do you have that response in front of
20 you?

21 A. I do.

22 Q. I'd like you to turn to that answer,
23 which is answer to Interrogatory 2-4, and there are
24 two sentences, one of which all of those factors are
25 set forth, and then a preceding sentence. Can you,

1 for purposes of the completeness of the record,
2 Mr. Fein, read those two sentences into the record?

3 A. Yes. Beginning with the sentence "To
4 determine"?

5 Q. Yes.

6 A. "To determine whether a value proposition
7 could be made to retail customers at a certain
8 capacity cost, other costs benefit and risk variables
9 must be considered. Those major variables, in
10 addition to the cost of capacity, include, but are
11 not limited to the following: One, the term of the
12 proposed agreement; two, the load factor of the
13 retail customer; three, the number of facilities
14 under contract or available for contract; four,
15 whether the pricing is fixed or variable; five,
16 whether the capacity costs are passed through; six,
17 payment terms; and, seven, forward power prices."

18 MR. STAHL: Thank you, Mr. Fein.

19 I have nothing further.

20 EXAMINER SEE: Any recross, Ms. Kern?

21 MS. KERN: No questions, your Honor.

22 EXAMINER SEE: Ms. Kyler?

23 MS. KYLER: No questions, your Honor.

24 EXAMINER SEE: Mr. Darr?

25 MR. DARR: No questions.

1 EXAMINER SEE: Ms. Kingery?

2 MS. KINGERY: No questions, your Honor.

3 EXAMINER SEE: Mr. Hayden?

4 MR. HAYDEN: No questions.

5 EXAMINER SEE: Mr. Nourse?

6 MR. NOURSE: No questions, your Honor.

7 EXAMINER SEE: Mr. Beeler?

8 MR. BEELEER: No questions, your Honor.

9 EXAMINER SEE: The Bench has one
10 question.

11 - - -

12 EXAMINATION

13 By Examiner See:

14 Q. Mr. Fein, have you read the other
15 testimony submitted in this case?

16 A. I've read most, but not all of the
17 testimony filed in this case.

18 Q. Have you read the testimony of OEG
19 witness Kollen?

20 A. I did. It was a little while ago, so my
21 memory might be a little foggy of what Mr. Kollen had
22 in his testimony.

23 Q. Do you recall that Mr. Kollen had an ESM
24 provision?

25 A. Yes.

1 Q. Equity stabilization mechanism he
2 advocated as part of his testimony.

3 A. Yes, I remember that testimony.

4 Q. Do you agree with or endorse the
5 implementation of the ESM?

6 A. We have not developed a position
7 regarding Mr. Kollen's recommendation.

8 EXAMINER SEE: Thank you.

9 Thank you, Mr. Fein.

10 THE WITNESS: Thank you, your Honor.

11 MR. STAHL: Thank you.

12 EXAMINER SEE: Mr. Stahl, I cannot recall
13 whether or not you moved for admission of Exelon
14 Exhibit 101.

15 MR. STAHL: I did not, but at this time I
16 move for the admission of Exelon Exhibit 101.

17 EXAMINER SEE: Are there any objections
18 to the admission of Exelon Exhibit 101?

19 MR. CONWAY: No, your Honor.

20 EXAMINER SEE: Accordingly, Exelon
21 Exhibit 101 is admitted into the record.

22 (EXHIBIT ADMITTED INTO EVIDENCE.)

23 EXAMINER PARROT: I believe FES has our
24 next witness.

25 MR. KUTIK: Yes, your Honor. FirstEnergy

1 Solutions Corporation for its first witness calls
2 Robert Stoddard.

3 Your Honor, we have provided to the court
4 reporter and we have asked to have marked as FES
5 Exhibit 101, a document entitled "Direct Testimony of
6 Robert B. Stoddard on Behalf of FirstEnergy Solutions
7 Corp."

8 EXAMINER PARROT: So marked.

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 - - -

11 ROBERT B. STODDARD

12 being first duly sworn, as prescribed by law, was
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 By Mr. Kutik:

16 Q. Please introduce yourself.

17 A. I'm Robert Stoddard. I'm the Vice
18 President of Charles Rivers Associates, where I lead
19 the firm's Energy & Environment practice.

20 Q. Do you have before you what has been
21 marked FES Exhibit 101?

22 A. I do.

23 Q. And what is that?

24 A. This is the direct testimony prepared on
25 behalf of the FirstEnergy Solutions Corp.

1 Q. Do you have any additions or corrections
2 to make to this?

3 A. Yes, I do have several minor corrections
4 to make.

5 Q. What is the first correction you'd like
6 to make?

7 A. The first correction is on page 5 at
8 line 17, after the term "CRES providers" --

9 Q. Just wait until we all get there.

10 A. Sorry.

11 Q. Go ahead.

12 A. After the term "CRES providers," there
13 should be a period. Later in that sentence after the
14 term "in this section" there should be a comma.

15 Q. What is your next correction?

16 A. My next correction is on page 31,
17 line 11.

18 Q. What change do you wish to make there?

19 A. The third word of the defined term
20 "Capital Recovery Cost" should read "Capital Recovery
21 Factor."

22 Q. What is your next correction?

23 A. On the following page, page 32, at
24 line 5, the question should read "...to determine the
25 E&AS offset...."

1 Q. What is your next correction?

2 A. On the following page, 33, at lines 18
3 and 19, before the term "E&AS" the word "net" should
4 be added.

5 Q. In line 18, it should be "appropriate
6 E&AS offset."

7 And line 19, "an average of net E&AS
8 revenues."

9 A. That's correct.

10 Q. What is your next correction?

11 A. On page 43 at line 3.

12 Q. What would you like to correct there?

13 A. The opening of that sentence should read
14 "The first window was in December 2006 to
15 March 2007."

16 Q. So we're striking "2006" and adding
17 "December 2006 to March 2007"?

18 A. Yes, sir.

19 Q. Are there any other corrections on that
20 page?

21 A. On that page, at line 18, a similar
22 correction, strike "2011," and replace it with "from
23 November 2010 to March 2011."

24 Q. And we're striking the word "in" as well.

25 A. Yes, sir.

1 Q. Do you have any other corrections or
2 additions?

3 A. Yes. On my Exhibit RBS-2.

4 Q. And what is the correction you wish to
5 make there?

6 A. We move down the timeline. There's an
7 entry for "December 2010." That should be set
8 against the term "PUCO introduces state compensation
9 mechanism." And against the prior entry, "AEP files
10 Section 205," that should be designated as a
11 "November 2010" event.

12 Q. Are those all the additions and
13 corrections that you wish to make?

14 A. Yes, they are.

15 Q. If I asked you the questions that appear
16 in FES Exhibit 101, as you've modified them, would
17 your answers be the same as appear in 101 as you've
18 modified them today?

19 A. Yes, sir.

20 MR. KUTIK: I have no further questions.

21 EXAMINER PARROT: Thank you.

22 Ms. Kern?

23 MS. KERN: No questions, your Honor.

24 EXAMINER PARROT: Ms. Kyler?

25 MS. KYLER: No questions.

1 EXAMINER PARROT: Mr. Darr?

2 MR. DARR: No questions, your Honor.

3 EXAMINER PARROT: Ms. Kingery?

4 MS. KINGERY: No questions.

5 EXAMINER PARROT: Mr. Conway?

6 - - -

7 CROSS-EXAMINATION

8 By Mr. Conway:

9 Q. Good morning, Mr. Stoddard.

10 A. Good morning.

11 Q. Please let me know if you can't hear me.

12 A. I will.

13 Q. Early on in your testimony, Mr. Stoddard,
14 you have a discussion where you describe the PJM RTO
15 referencing really pages 6 and 7 and thereabouts. I
16 have a few questions to ask you, which is designed,
17 actually, to track with that part of your discussion.

18 The first question in the series, as I
19 understand it, PJM operates the bulk power system in
20 a large area of the eastern United States, right?

21 A. Yes, sir.

22 Q. And it also operates financial markets
23 for the purchase and sale of energy capacity,
24 ancillary services, and transmission rights, correct?

25 A. That's correct.

1 Q. And PJM implemented the Reliability
2 Pricing Model construct or "RPM" to incent capacity
3 suppliers to make available sufficient resources to
4 meet forecasted reliability requirements for the RTO,
5 correct?

6 A. Yes; for the RTO and for each location's
7 deliverability area within the RTO.

8 Q. And so the incentive mechanisms might
9 vary depending on that refinement that you just
10 provided?

11 A. The mechanism is common across the
12 footprint. The resulting prices might differ.

13 Q. And RPM is governed by rules set forth in
14 PJM tariff and in the PJM reliability assurance
15 agreement.

16 A. That's correct.

17 Q. Can you recall specifically which
18 provisions of the tariff in the RAA govern the RPM
19 construct?

20 A. Yes. The RPM -- the rules that govern
21 RPM are set forth principally in attachment DD to the
22 PJM tariff and in section 8 of the PJM reliability
23 assurance agreement.

24 Q. And through the RPM rules, PJM determines
25 whether generation resources qualify as potential

1 capacity suppliers; is that right?

2 A. Yes, sir.

3 Q. And it's done in accordance -- this
4 qualification process is done in accordance with
5 PJM's rules, right?

6 A. Yes, sir.

7 Q. And PJM also determines minimums or
8 floors, and maximums or caps, for each qualified
9 generation resource's offer prices, right?

10 A. No, that's incorrect. The PJM -- the
11 market design includes mitigations, so that if a
12 supplier has the potential to exercise market power
13 as determined by the internal market monitor, then in
14 that case there can be maximums or floors placed
15 underneath.

16 But that's how you would expect any
17 well-regulated market to operate that people can't
18 exercise market power. Resources that don't have
19 market price, however, are free to offer any price
20 they'd like on the market.

21 Q. Okay. So, when appropriate, the PJM
22 market monitor determines what caps or floors should
23 apply to each resource's offer pricing; is that
24 correct?

25 A. Yes, when appropriate.

1 Q. And the capacity rates in the PJM RTO,
2 under the RPM's construct, normally are set through
3 the auction process that constitutes the PJM capacity
4 market; is that correct?

5 A. Yes. For those entities that are meeting
6 their RPM obligations through the auction.
7 Obviously, the Ohio utilities that are currently all
8 FRR entities have an internal mechanism.

9 Q. Understood. But with regard to the RPM
10 construct, the principal auction that occurs is the
11 base residual auction, correct?

12 A. That's correct. Although, I do want to
13 differ with you slightly. The RPM design is
14 comprehensive. All load-serving entities in the PJM
15 footprint are part of the RPM design. There are two
16 different ways that such an entity will meet those
17 obligations, either through the auction or through
18 the FRR alternative.

19 Q. With regard to the RPM side of the
20 mechanism, putting FRR aside for just a moment, the
21 capacity prices are set through the auction process,
22 the principal of which is the base residual auction,
23 correct?

24 A. That's correct. The price paid to
25 resources are set through the auctions.

1 Q. And the base residual auction is
2 conducted annually.

3 A. Yes.

4 Q. And as I understand it, there may be
5 incremental auctions to that base residual auction
6 that are also undertaken subsequently.

7 A. That's correct. There are three
8 incremental auctions that PJM conducts for each
9 planning year after the base residual auction has
10 occurred.

11 Q. Okay. So the incremental auctions take
12 place after the base residual auction. The three
13 incremental auctions take place after the base
14 residual auction but before the delivery year the
15 base residual auction supports.

16 A. Yes.

17 Q. Okay. So the PJM RTO price for capacity
18 in the RPM setting is set by the supply of capacity
19 resources offering into the base residual auction and
20 also based on the demand for resources as determined
21 by PJM; is that right?

22 A. Yes. The demand side is set according to
23 the tariffs variable resource requirement and the
24 supply curve is whatever is bid in by potential
25 suppliers.

1 Q. With regard to the RPM construct, on the
2 demand side, PJM buys capacity as determined by the
3 variable resource requirement mechanism; is that
4 right?

5 A. No. PJM secures capacity obligations,
6 and the quantity of supply obligations that they
7 secure is determined based on the variable resource
8 requirement. PJM is not buying or selling anything.

9 Q. But the amount -- I'll put it in the past
10 tense. The amount of capacity setting the amount of
11 capacity bought in the RPM construct, in aggregate,
12 is determined by the variable resource requirement
13 mechanism; is that right?

14 A. I'll still quibble even with the
15 "bought." The capacity services of resources are
16 secured for future year, and the quantity of the
17 resources that have that obligation is determined
18 through the variable resource requirement.

19 Q. So with the substitution of the word
20 "secured" then, my question -- the answer to my
21 question is "yes" then?

22 A. Could you read back the question then?

23 (Record read.)

24 A. Yes. With the substitution of the word
25 "secured" for "bought."

1 Q. And how that amount of capacity to be
2 secured is actually determined, is specified in the
3 tariff, PJM tariff?

4 A. That's correct.

5 Q. And which portion of the tariff, if you
6 recall, governs that determination?

7 A. That's attachment DD, section 5.

8 Q. So, in the end, the amount of capacity
9 secured through an RPM auction is determined in
10 accordance with that rule that PJM administers,
11 right?

12 A. Yes.

13 Q. Now, turn to the supply side, or at least
14 what I would refer to as "the supply side." I
15 believe you pointed out that the PJM independent
16 market monitor has determined that the base residual
17 auction capacity markets are structurally
18 concentrated. Did I get that right?

19 A. I didn't say that, but that is his
20 determination for all of the base residual auctions
21 that have occurred so far.

22 Q. Okay. Could you just explain to me in
23 what I posed that you took exception to in your
24 answer?

25 A. I heard you say that I already offered

1 that as a fact. What I said earlier was that the
2 mechanism exists whereby he could trigger that, and
3 now I'm also admitting that he has in fact triggered
4 that for all the base residual auctions but not all
5 the incremental auctions.

6 Q. I think he was referring to a portion of
7 your testimony as a predicate to my question.

8 Okay. As a result that structural
9 concentration, is it the indication that all supply
10 offers into the base residual auction from existing
11 resources are subject to offer caps for their prices?

12 A. From existing resources, that's true.
13 But there have always been offers from new resources
14 from uprates and from imports that provide a range of
15 nonmitigated offers into each of the base residual
16 auctions.

17 Q. And would your answer be the same with
18 that qualification in the case of -- if I asked you
19 the same question, but instead of referring to "base
20 residual auctions," you substituted the "incremental
21 auctions"?

22 A. No. The incremental auctions, from time
23 to time, have been determined not to be structurally
24 concentrated, and therefore, the market monitor has
25 indicated he has not mitigated offers into all of the

1 incremental auctions.

2 Q. So, in any event, with regard to base
3 residual auctions, PJM does establish offer caps on
4 the pricing for existing generation that bids into
5 the auctions, right?

6 A. Yes.

7 Q. And when that happens, when there are
8 offer caps for prices established, that's done in
9 accordance with a PJM rule; is that right?

10 A. Yes. That's in accordance with
11 attachment DD, section 6 of the tariff.

12 Q. Okay. And it's done on an avoidable cost
13 rate basis; is that right?

14 A. That's one of the factors in the formula.

15 Q. When you say it's one of the factors, are
16 you referring to the offset? There's also an offset
17 for the energy and ancillary services.

18 A. Yes, that's correct. The complete
19 formula, for the record, is that we start with the
20 market monitor's estimate of the avoidable cost rate
21 from which we subtract the market monitor's estimate
22 of the energy and ancillary services earnings from
23 that resource and multiply the entire product -- the
24 difference of those two -- by 1.1.

25 Q. Okay. Okay. And sometimes there's --

1 I'm getting it wrong -- but is there an APIR which
2 stands for some kind of incremental environmental
3 factor that gets factored in?

4 A. Part of the avoidable cost rate is a
5 factor called "avoidable project investment
6 recovery." This is a factor that allows a resource
7 that is facing a major capital expenditure, for
8 instance an environmental retrofit, to include a full
9 cost recovery; that is to say, a levelized cost
10 recovery of the capital and operating costs of that
11 incremental addition on top of the avoidable
12 operating costs of the balance of the facility.

13 Q. Thank you. So, at the end of the day,
14 with regard to these existing generation resources
15 being bid into the RPM base residual auction that
16 have been qualified by PJM, there's an offer cap that
17 takes into account a formulation of avoidable costs
18 for the resource, a formulation that takes into
19 account the earnings from energy and ancillary
20 services that's taken into account, and sometimes
21 this additional factor that results from the APIR,
22 and the whole thing is multiplied by 1.1 according to
23 the rule, right?

24 A. That's correct. But I want to stress
25 again this rule is only used when the market monitor

1 has determined that resource owner has structural
2 market power.

3 Q. And that has been the case with regard to
4 existing generation resources during each of the base
5 residual auctions so far; is that right?

6 A. That's true.

7 Q. So with regard to the demand side of the
8 auctions, those are subject to the regulation by PJM
9 as far as what amounts are being secured through the
10 auctions, right?

11 A. That's correct. As it must be, because,
12 after all, capacity itself is a regulatory construct.
13 And we wouldn't ever normally want capacity of the
14 product up front, except for the fact we need to
15 secure reliability, and that reliability is a
16 determination made by the market operator and this is
17 the mechanism by which that information is put into
18 the market.

19 Q. And then by "the mechanism," were you
20 referring to the entire RPM construct, or were you
21 just referring to the demand side of the construct,
22 how the resources are supplied?

23 A. I'm thinking here of the entire RPM
24 construct, both the auction side and the FRR side.
25 FRR entities are also told by PJM what quantity they

1 have to buy, just as the variable resource
2 requirements tells the auction-based side of the RPM
3 shop what quantity of resources they need to supply
4 So the whole demand-structure capacity is, itself,
5 intrinsically a regulatory construct.

6 Q. Okay. Thank you. Then on the supply
7 side of the RPM auctions there's also substantial
8 regulation of how resources are qualified and then
9 bid into the auction, particularly in connection with
10 offer caps that apply to existing generation; is that
11 accurate?

12 A. As a general summary, while I will accept
13 there are a lot of regulations that govern how this
14 market operates, all important markets, for instance
15 the stock market, has a big pile of regulations about
16 how it operates. Any important market needs to have
17 those regulations in hand, and there is an important
18 part of the market which remains unregulated. These
19 offers from new supply, offers from imports, offers
20 from demand side resources that keep the market in
21 touch with the actual supply conditions and demand
22 conditions of the market.

23 Q. But you would agree that these RPM
24 auctions and the market that has been constructed to
25 secure supplies to meet the requisite or the

1 determined demands, it is subject to significant
2 regulation. Would you agree with that?

3 A. I would. But many, many markets, in
4 fact, arguably, all important markets, are subject to
5 important regulation. It doesn't change the fact
6 that effective markets, and FERC has, in approving
7 these regulations, have determined these are the just
8 and reasonable way for setting a reasonable price for
9 capacity.

10 Q. At the end of the day, I think you
11 mentioned in your testimony that RPM auction price is
12 an approximation price of the market value of
13 capacity; is that correct? Did you say that in your
14 testimony?

15 A. I did. But I also made the point it is
16 the best proxy we have for what a true competitive
17 price would be. And any time you put in some
18 regulation around the market, you will end up with a
19 potentially different outcome than if you had amidst
20 competition and many small buyers and sellers.

21 The point of the RPM design and all the
22 regulations around it is to replicate, as closely as
23 a regulated market can, to recognize there are very
24 large players, such as AEP and Dominion, that own
25 thousands or tens of thousands of megawatts of

1 generation, you can't have this exact
2 microcompetitive outcome, but we are trying to
3 replicate through market design that outcome as
4 closely as we can.

5 Q. Mr. Stoddard, that market design that you
6 just referred to is intended to replicate that market
7 results, it is composed of, would you agree, a fairly
8 comprehensive set of regulatory mechanisms?

9 A. It includes many regulatory checks and
10 balances, but, at the core of it, it is a market of
11 willing sellers offering resources into a market set
12 where the quantity is set to meet the reliability
13 needs of the region.

14 Q. Now, you mentioned the stock market as
15 also being a regulated market, nevertheless,
16 competitive, right?

17 A. Yes.

18 Q. Okay. There's nothing like the variable
19 resource requirement that's applied to the stock
20 market which determines what quantity of a security
21 is to be secured in the market; is there?

22 A. No, but there's an important difference
23 in that. The stock certificate is, itself, something
24 with intrinsic value. The only reason why a capacity
25 obligation has value is because, as a regulatory

1 construct, we need to have that assurance of future
2 performance from resources to keep the lights on
3 reliably. So the capacity construct itself is not --
4 capacity is not valuable on its own; it's only
5 valuable in the context of the regulatory construct.

6 Q. And on the offer side of the stock
7 market, there's not a mechanism to establish price
8 caps or price floors on prices that people who are
9 willing sellers might offer, is there?

10 A. Well, there are numerous -- I'm -- as an
11 officer of my corporation, we're a publicly-traded
12 company. I can't trade during certain windows
13 because I have nonpublic information. People that
14 have the ability to unfairly move the price in the
15 market do face regulation in something like the stock
16 market.

17 Q. But there is no -- there's no rule that
18 governs the stock market which, based on a decision
19 about or a finding of structural concentration, has
20 limited the amount of a particular security that an
21 otherwise willing seller might -- the price for a
22 particular security that a willing seller might
23 otherwise be inclined to require.

24 A. I'm not an expert in securities law to be
25 able to answer that question whether, if someone has

1 50 percent of the stock, they can do whatever they
2 like with it. So I'll defer the answer.

3 Q. All right. Let me turn to the fixed
4 resource requirement topic. AEP Ohio is a fixed
5 resource requirement or FRR entity is PJM.

6 A. Yes. They made that voluntary election
7 in 2006.

8 Q. And they have been an FRR entity since
9 then and they will be an FRR entity until, according
10 to the current plan, until June of 2015; is that
11 right?

12 A. Till May 31st of 2015. They made the
13 nonrevocable decision to switch to RPM as of June 1,
14 2015.

15 Q. I'm somewhat loathe to do this, but I
16 will. Can you describe generally what being an FRR
17 entity means for AEP Ohio? And if you could give me
18 the nutshell, that would be sufficient for me, but
19 you can do what you want.

20 A. I'll try to be brief. So back in 2007,
21 AEP signed up to be a fixed resource requirement
22 entity. This meant they took on the obligation to
23 develop a plan for each planning year, as it came
24 through, for how the entire footprint of AEP East
25 would have enough resources to meet the PJM

1 reliability requirements set forth.

2 Once it put forward that plan, that
3 designated certain resources. Those resources now
4 face the same sort of capacity obligation that they
5 would have had had they been cleared through the base
6 residual auction.

7 So they're now put in a very similar
8 position with one minor difference, which is if PJM
9 were to restate the forecast reliability requirement
10 for the AEP East zone, AEP East would be required to
11 modify its plan to either increase or decrease the
12 resources available to PJM to meet that reliability
13 requirement.

14 Q. Okay. And, again, if you can do this in
15 a concise manner, how does the FRR status and its
16 requirements, obligations, compare or contrast with
17 an LSE, a load-serving entity, or generation resource
18 that participates in the RPM construct?

19 A. As an FRR entity, it's really better to
20 think about AEP East as the generation provider.
21 Load-serving entities in PJM pay a price. That's all
22 their obligations. They serve their load and they
23 pay a price.

24 It's the generators of PJM who have the
25 obligations, detailed obligations, set forth in

1 sections 7 through 12 of the Attachment DD to the PJM
2 tariff to perform to meet standards. So once AEP as
3 an FRR entity, that is, filed a valid capacity plan,
4 it's now really in the role of a capacity supplier,
5 and its obligations are exactly the same as they
6 would be under section 7 through 12 of Attachment DD;
7 that is to say, they have to be available.

8 They've got testing requirements. They've
9 got certain penalties they face. But these are
10 exactly the same penalties that they would face if
11 they were a BRA resource. The one difference is that
12 if PJM restates the capacity requirement, if you were
13 a BRA entity who had cleared your power plants, that
14 change in the load forecast going forward would have
15 had no effect on what your obligations were.

16 You said here's 1,200 megawatts of my
17 resources; 1,200 megawatts is what you deliver. If
18 the load forecast is increased by 2 percent, AEP Ohio
19 needs to find an incremental 2 percent of resources
20 available. Conversely, if the load forecast goes
21 down by 2 percent, AEP Ohio now has 2 percent of its
22 resources available for it to use for other purposes.

23 So it's a symmetric risk to AEP Ohio as an
24 FRR entity; but, otherwise, all of the risks are the
25 same as if they were a capacity supplier that secured

1 through the base residual auction or one of the
2 incremental auctions subsequent to that.

3 Q. Thank you.

4 Going back to the reliability assurance
5 agreement, that's the document that establishes the
6 FRR alternative to participating in RPM; is that
7 right?

8 A. Yes.

9 Q. Okay. And is there a provision of the
10 reliability assurance agreement within that FRR
11 alternative that controls the pricing of capacity by
12 an FRR entity, like AEP Ohio?

13 A. Yes, there is. That is under Schedule
14 8.1, Section D-8, of the reliability assurance
15 agreement.

16 Q. And so, is one possibility pricing
17 capacity supply to CRES providers under that
18 provision the prevailing RPM price?

19 A. Yes; if a state compensation mechanism
20 doesn't exist.

21 Q. Okay. And if it does, then it might be
22 something other than RPM; is that right?

23 A. If there's a state compensation
24 mechanism, that pricing prevails.

25 Q. Which might be different than RPM.

1 A. It could be, but my recommendation would
2 be that it should not differ.

3 Q. And then another alternative in that
4 provision of the reliability assurance agreement that
5 governs pricing for an FRR entity is a rate based
6 upon cost.

7 A. Yes; if there's no state compensation
8 mechanism. The state compensation mechanism always
9 prevails if it exists.

10 Q. That's a --

11 MR. KUTIK: Excuse me, your Honor, I
12 don't think the witness finished his answer.

13 MR. CONWAY: Excuse me.

14 A. But absent such a mechanism, if the
15 utility made a filing under Section 205, under the
16 Federal Power Act, proposing a change in
17 compensation, then the FERC can find that a cost or
18 other basis could be just and reasonable.

19 Q. Are you aware whether or not there's a
20 debate or dispute over whether a state mechanism
21 would trump or override the cost-based alternative to
22 pricing? Are you aware whether there's a dispute
23 over that issue?

24 A. I am aware that FERC has actually ruled
25 on that issue, and that AEP is now challenging

1 through a 206 whether the wording of the RAA is
2 accurate.

3 Q. Okay. So the answer is, it is your
4 understanding there is a continuing dispute over that
5 issue.

6 MR. KUTIK: Objection, asked and
7 answered.

8 MR. CONWAY: I'm just looking for a yes
9 or no answer.

10 MR. KUTIK: He gave you the answer, so I
11 object.

12 EXAMINER PARROT: Overruled.

13 A. My understanding is the Commission's
14 determination on that is final and that you are now
15 seeking to change the text of the RAA itself. So I
16 don't think there's any dispute about the
17 interpretation of this passage of the RAA as it
18 stands today.

19 Q. Okay. In any event, is it your
20 understanding that AEP Ohio believes that the
21 cost-based alternative includes a basis of embedded
22 costs for determining the capacity price?

23 A. That's my understanding of your
24 litigation position. I disagree with it, obviously.

25 Q. And others, including you, don't agree

1 with that, right?

2 A. That's correct.

3 Q. And your position, which I gather from
4 reviewing your testimony, correct me if I am wrong,
5 roughly at page 28 and thereabouts in your testimony,
6 your position is that the cost-based alternative
7 means an avoided cost rate, net of the energy and
8 ancillary services offset that we discussed
9 previously, right?

10 A. Yes.

11 Q. It might include, in your view of what
12 "cost-based" means, it may also include the available
13 project investment recovery rate?

14 A. It might. I think at this point as soon
15 as you've gone to FERC with this concept, they would
16 have the opportunity to review costs and review the
17 amortizations schedules and make reasonable
18 adjustments that they have in their sole discretion.

19 Q. But your position is that basically that
20 cost-based rate, under that alternative, means the
21 avoidable cost rate minus the entity and ancillary
22 services offset.

23 A. As a general matter. I mean, I think
24 there are some important points around this, as a
25 general matter.

1 Let me give an example, where if you were
2 a utility serving the state of Maryland -- now,
3 Maryland has had a capacity shortfall. The market
4 price of capacity in Maryland is much higher than it
5 is in Ohio. So, in that case, I think there could be
6 a reasonable claim that a fixed resource requirement
7 entity serving Maryland consumers would reasonably
8 seek a rate under this provision of the 205 filing
9 that is hinged to the market price in the state of
10 Maryland, rather than the market price in the rest of
11 the pool as we have here in Ohio.

12 Such an option, of course, isn't really
13 open to AEP Ohio because if they have expensive
14 resources in their portfolio they're trying to price
15 in, they always have the option of buying
16 lower-priced market resources to provide least-cost
17 service to their customers.

18 Q. My question is, with regard to the
19 cost-based alternative in Schedule 8.1, Section D-8,
20 your position is that -- your basic position is that
21 that cost-based alternative means a rate that's
22 calculated by using the avoided cost rate and netting
23 it against the energy and ancillary services; is that
24 right?

25 A. Well, as a general matter, I think that's

1 right. But, here again, FERC has to make a decision
2 to make sure that rate is just and reasonable.

3 Q. And that's --

4 MR. KUTIK: Excuse me. Did you finish
5 your answer?

6 THE WITNESS: No, thank you.

7 A. And that may require that the default
8 values that the market monitor uses for particular
9 resources, or the default amortization schedules that
10 the market monitor uses, would need to be adjusted,
11 possibly in ways that would result in a lower cost
12 than the formulas specified in the tariff would
13 result.

14 Q. And a lower cost than the formulas that
15 you specified in your testimony?

16 A. That would certainly be a possible
17 outcome of FERC.

18 Q. I wanted to talk to you about your
19 cost-based method that you outlined or described in
20 your testimony. I think I provide a summary of it
21 around page 34 and 35; is that right? The question
22 is, is that where you provide a summary of your first
23 approach and your second approach for making the
24 cost-based calculation?

25 A. I would have pointed to pages 32 and

1 33 for a general description of the approach, and
2 34 and 35 are where I summarize my findings.

3 Q. And although you describe two approaches,
4 is it -- you list one of them first so I assume
5 that's your -- if you have a preferred approach, that
6 that's the preferred approach; is that right?

7 A. Yes. And on page 39 I state, "Yes. I
8 believe the first approach, which applies
9 over-earnings on one asset to offset under-earnings
10 on other assets, is most consistent with a
11 cost-of-service approach, which is the approach that
12 AEP Ohio adopted in this case."

13 MR. CONWAY: Can I have the answer
14 reread.

15 (Record read.)

16 Q. So is -- the answer to my question, I
17 think, was yes, and then you provided some
18 explanation which references AEP Ohio's embedded-cost
19 approach. Is that what you just did?

20 A. My answer to the question is yes, I
21 believe the first approach is the appropriate
22 approach.

23 Q. Thank you. And your first approach
24 concludes that a fleet approach concludes or finds
25 that AEP Ohio's generation assets have an overall

1 negative net capacity cost of \$51.05 per
2 megawatt-day; is that correct?

3 A. Yes, that's correct.

4 Q. And there's also a negative \$148.14 per
5 megawatt-day that you reference, but, again, it
6 seemed to me that you focused on the \$51.05 result.

7 A. That's fair. If the negative \$148.14
8 rate does not include project investment, either the
9 project investment that AEP Ohio's actually made on
10 existing resources or that I forecast AEP Ohio is
11 likely to make on existing resources going forward.

12 Q. Are you finished?

13 A. I am finished.

14 Q. So the difference between the \$148.14 and
15 the \$51.05, both of which are negative, is that you
16 applied that APIR factor to get it up to negative
17 \$51.05?

18 A. That's correct.

19 Q. Now, the negative \$51.05 per megawatt-day
20 net cost value that your findings confirmed for AEP
21 Ohio, that's less than the RPM price for the next
22 delivery year starting in June of this year and then
23 it's also less than the RPM price for the subsequent
24 two delivery years, correct?

25 A. This is an aggregate price, so I compare

1 it to the aggregate of going forward. It is lower
2 than the aggregate going forward. If you look at my
3 calculation year by year, in each year AEP's net
4 capacity rate is lower than the PJM clearing price.

5 Q. That was my point. It ends up being less
6 than the RPM price in every period; is that right?

7 A. That's right. So AEP Ohio being paid the
8 RPM price, as I suggest, results in substantial
9 earnings to AEP Ohio upon its assets above what they
10 strictly would be required to earn.

11 Q. Okay. And the minus \$51.05 value, that
12 would also be less than the RPM price, than any RPM
13 price that has been in effect since 2007 when the RPM
14 construct began and through May of this year, right?

15 A. Sure. Absolutely. AEP Ohio would have
16 been earning positive returns from sales into base
17 residual auctions, given its net capacity costs.

18 Q. So under your interpretation of the
19 cost-based alternative, AEP Ohio would have been, for
20 use of a better phrase, they would have been worse
21 off with a cost-based alternative from the beginning
22 of the RPM construct through to date, and then they'd
23 also be worse off in the future until they exit the
24 FRR status at the end of May 2015, right?

25 A. Could you clarify what rate you imagine I

1 would be charging, if I were the benevolent dictator,
2 would I require AEP Ohio to charge under this rule?

3 Q. My question is, is it true that AEP Ohio
4 would have been disadvantaged from a pricing
5 standpoint and a revenue collection standpoint, it
6 would have been disadvantageous for AEP Ohio to
7 charge your cost-based rate at all times from 2007
8 all the way through 2015?

9 A. I think you misunderstand. I never
10 proposed that AEP Ohio be required to charge
11 \$51.05 negative.

12 Q. I do understand that.

13 A. So I think that was the premise of your
14 question, so I need to correct the premise of the
15 question. If they were required to hand money to
16 CRES providers for taking capacity, I agree that
17 would be a strange outcome and it would be
18 financially disadvantageous.

19 But that's not what I'm proposing. I'm
20 proposing that they charge the RPM, just as they have
21 been charging the RPM, and my demonstration here is
22 to prove the costs are well above the RPM rate and,
23 therefore, the higher rate is required.

24 Q. Let me try this a little bit differently.
25 Assume that the cost-based rate based on your

1 approach is negative \$51.05 per megawatt-day. Would
2 you agree that AEP Ohio would be unwise to choose
3 the -- to have chosen or to choose in the future a
4 cost-based alternative to RPM?

5 A. If they had been required by some
6 unspecified mechanism to charge a negative rate for
7 capacity, then that would have been a poor decision
8 for AEP to have pursued, yes. I can't imagine any
9 ratemaking mechanism that ends up with that result.
10 But that hypothetical is that somehow you had that
11 negative rate, then, yes, that would be less
12 advantageous than having taken the base residual
13 auction price in that period.

14 Q. Maybe I don't understand your position.
15 Is your position that that cost-based rate would
16 produce -- the way you would implement it, would
17 produce a price of minus \$51.05 per megawatt-day?

18 MR. KUTIK: May I have the question read,
19 please.

20 (Record read.)

21 A. No, I don't believe that would be an
22 outcome of any proceeding. If this were to have gone
23 to FERC and they had found that \$51.05 negative was
24 the correct cost-based rate, then your ratemaking
25 department would have wisely pointed out that there

1 was an alternative that they could always have sold
2 the capacity into the market at market prices. So
3 there was an opportunity that they had that bounds
4 the rate at the market price.

5 Q. And that market rate is the RPM price,
6 correct?

7 A. That's correct.

8 Q. Okay. Changing to a different topic,
9 which is the energy and ancillary service offset
10 value. In your testimony, you have calculated E&AS
11 offset values for AEP Ohio's generation fleet,
12 correct?

13 A. Yes, I have.

14 Q. And you followed the PJM approach for
15 calculating the E&AS offset, did you not?

16 A. It's actually the approach of the
17 independent market monitor.

18 Q. Okay. Thank you for that correction.
19 And in the context in which the independent market
20 monitor performs that calculation is the maximum
21 offer price determination for the RPM auctions; is
22 that right?

23 A. Yes.

24 Q. And in order to replicate that
25 independent market monitoring principle -- let me

1 back up a little bit.

2 The independent market monitor is the one
3 that actually makes the calculation; is that right?

4 A. That's correct.

5 Q. Okay. But the independent market
6 monitor's calculation is in accordance with a rule
7 that PJM has established; is that right?

8 A. Yes. And let me clarify it. There is a
9 rule in the tariff, section 6 of Attachment DD, that
10 outlines how that calculation would be done. The
11 market monitor has developed the specific operational
12 rules to implement that tariff provision, so there's
13 more detail underneath the tariff that the market
14 monitor has published in the state of the market
15 report.

16 Q. If you haven't already gone over this, in
17 order to replicate the independent market monitor's
18 approach, you used a three-year historical moving
19 average of annual net energy and ancillary service
20 revenues to determine the offset to be used for each
21 delivery year, right?

22 A. That's correct. The market monitor was
23 very adamant in the development of his tariff that he
24 use the most current actual data as the basis for
25 market monitoring, rather than some speculative

1 forecast about how units might form or what market
2 prices might be.

3 Q. Let me follow up on that a little bit.
4 Let's focus on the 2014-2015 delivery year, okay?

5 A. I'm with you.

6 Q. Three years of energy and ancillary
7 services earnings data that you would use to develop
8 an offset for that delivery year would be the 2008,
9 2009 and 2010 periods?

10 A. Yes. One piece of your timetable that I
11 think is important to put on the record. The base
12 residual auction for that delivery year was in May of
13 2011. So sitting there in May of 2011 or preparing
14 for that auction, the three most current years would
15 be 2008, '9 and '10, so that current data is what is
16 used to monitor the outcome of the auction that's
17 held in May 2011.

18 Q. And then could you just describe for me,
19 for the 2013-2014 delivery year, the three years that
20 you would look to to develop the E&AS offset would be
21 what?

22 A. Well, again, the auction was held in
23 May 2010, so now you're using the years '9, '8, and
24 '7 as the three most current years.

25 Q. And then for the 2012-2013 delivery

1 years, on a rolling basis would be the --

2 A. '8, '7, and '6 if the BRA was held in May
3 2009 for that year.

4 Q. By "'8, '7, and '6," you mean 2008, 2007,
5 2006?

6 A. Right.

7 Q. The E&AS offset values that you would use
8 in this cost-based capacity price calculation that
9 you developed, they are then based on earnings data
10 from a period that is between three-and-a-half and
11 five-and-a-half years prior to the year when the
12 related cost-based rate would be in effect, right?

13 A. That's true. I prefer to think of that
14 as they are the current three years when the auction
15 is held.

16 Q. But would you agree -- I'm sorry.

17 A. I accept the truth of your assessment,
18 but it's still the most current data when the auction
19 is held.

20 Q. Would you agree that there's -- that
21 that's a lag, though, between the year when the
22 prices are in effect and the year from which the data
23 is extracted -- the years from which the data is
24 extracted?

25 A. While I accept there is a lag, I think it

1 is important to keep in mind, because these are from
2 long-lived assets, they are in the market repeatedly
3 that lag trues up over time. So if we have earnings
4 in 2009 that were higher than expected at the time,
5 then in the years later on, that results in a lower
6 capacity price. That's effectively a way of shifting
7 that over-earning in the energy market, the
8 unexpectedly higher energy earnings in energy market
9 from the earlier period in to a reduction in capacity
10 rate later.

11 Likewise, if there is low energy earnings,
12 such as we had last year, that would result in a high
13 capacity price coming forward in 2015-2016, from
14 which, as a BAR entity in those years, AEP Ohio will
15 benefit from.

16 Q. Mr. Stoddard, the lag, I take it, you
17 would not regard that lag as being a significant lag,
18 as not an adverse impact on the results that end up
19 being applied in real time in the delivery year for
20 using data that is that aged?

21 A. There was a lot of discussion about this
22 in developing the rule, and this has been litigated
23 as a separate item before FERC. And FERC, in the
24 end, decided that in the balance there can be some
25 negative effects from using the lag data. There's

1 also negative data if you use forecast data. And
2 FERC's decision explicitly on this point, it was
3 better to maintain this lagging structure because it
4 could then rely on real data rather than on some
5 forecasted or predicted data going forward.

6 Q. Do you have any understanding of,
7 relatively speaking, the trend in the E&AS offset
8 value for the 2006, 2007, 2008, 2009, 2010 period?

9 A. Yes. Generally speaking, I think it's a
10 well-known fact to everyone in the room that the
11 price of natural gas fell off the ledge in 2008.
12 With that, came down energy prices. With that, there
13 was substantially reduced energy margins from those
14 resources. So the trend was that we had increasing
15 energy and ancillary services for 2006 and 2007. '8
16 was a mixed year, and then the margins, since then,
17 have been somewhat lower, though, because I saw the
18 data to suggest there's actually been some pickup
19 from the bottom of the market.

20 Q. Would you agree that the more recent
21 period for your E&AS offset would reduce the lag
22 between the period when the cost-based rates that you
23 would recommend would be effective and the period
24 when the debt revenue used to develop that offset
25 would be derived?

1 A. While I would agree it would reduce the
2 lag, I think there's a large number of other
3 implications that trying to use a current year
4 approach would create. You would have much more
5 uncertainty about what future prices were going to
6 be. You would have difficulties writing contracts
7 around that. You would unlink the price from the
8 market price for capacity, which means all the
9 financial hedging tools that exist now to manage the
10 price uncertainty, both for CRES providers and for
11 the utility itself, would be completely undermined.

12 So, yes, you would gain the benefit of a
13 tighter lag, but there's a host of negatives that
14 come with that that I just don't believe make that
15 worthwhile.

16 Q. There wasn't anything that precluded you
17 from using a more recent period than what the market
18 monitor would have required for purposes of the price
19 cap calculation when you did your calculations for
20 your cost-based alternative, is there?

21 A. Microsoft Excel lets you make all sorts
22 of crazy calculations you want to, but that doesn't
23 mean that's a calculation I would ever sponsor in
24 testimony.

25 Q. Let me ask you about the self-supply

1 options for CRES providers that are possible in the
2 context of an FRR entity like AEP Ohio. Now, CRES
3 providers, they do have the option, in the case of an
4 FRR entity such as AEP Ohio, they have the option of
5 submitting their own FRR capacity, using their
6 self-supplying capacity, right?

7 A. They technically have that option, that's
8 correct.

9 Q. And your Exhibit 2, to the testimony you
10 provided -- described at least two of the windows in
11 which CRES providers had an opportunity to notify AEP
12 Ohio and then pursue self-supply, right?

13 A. Yes. As I discussed in the body of my
14 testimony, there were two such windows. As on
15 page 43 of my testimony, there were two such windows,
16 one immediately after the settlement agreement had
17 been approved by FERC, and the second, which arguably
18 opened immediately after AEP filed its Section 205 to
19 seek a higher capacity rate in November of 2010.

20 Q. So the two windows you describe are the
21 window -- the December 2006 to March 2007 window and
22 then the November 2010 to March 2011 window.

23 A. That's right. I discuss them. I also
24 discuss why I don't think it was reasonable for a
25 CRES provider to use either of those windows.

1 Q. Now, there are also -- there were windows
2 in 2009 and 2010, were there not, prior to base
3 residual auctions for the 2012, '13, and the
4 2013-2014 years?

5 A. Yes. Once again, there are windows. My
6 view, although there's a technical opportunity to do
7 so, given the public stance of AEP Ohio on pricing,
8 there was absolutely no reason to incur the
9 administrative expense and risk of entering into such
10 a self-supply arrangement.

11 Q. And, in any event, you're not saying that
12 CRES providers were somehow precluded from submitting
13 FRR capacity plans and electing FRR status in 2009
14 and 2010, right?

15 A. No, they weren't precluded, but, you
16 know, this all has to be put into context. They
17 wouldn't have been put into this whole position but
18 for AEP Ohio's election of the FRR alternative.
19 Every other CRES provider outside of this footprint
20 automatically enjoys the benefit of having the RPM
21 price as their rate without having to worry about
22 hedging that through some expensive alternative.

23 Q. Now, you indicate in your testimony, I
24 believe it's at page 42, around line 21, you indicate
25 a CRES provider would face "volume management issues"

1 if it elected to become an FRR entity. Do you see
2 that?

3 A. I do.

4 Q. And by "volume management issues," do you
5 mean that the CRES provider would have to commit
6 capacity resources to PJM, in advance of the period
7 when it would have to deliver that capacity, to serve
8 its customers' loads, right?

9 A. I do. And, consequently, they have a
10 substantial shopping risk. They can't know with any
11 accuracy, as we heard Mr. Fein mention earlier this
12 morning, the quantity they're going to be able to
13 secure under these arrangements. This contrasts
14 sharply with the quantity risks that AEP Ohio faces.

15 They face no shopping risk as an FRR
16 entity. They simply have to serve all the load,
17 regardless of who the retail supplier is, whether
18 they're an SSO customer or they become a shopping
19 customer. So the quantity risks we are talking here
20 is asymmetric. There's a strong cost to the CRES
21 provider. No such comparable cost exists for AEP
22 Ohio.

23 Q. Okay. Now, it is true, wouldn't you
24 agree, is it not -- you would agree that AEP Ohio
25 does not know in advance, when it makes its

1 commitment under the FRR process, how much load it
2 actually will be serving in the future period,
3 delivery year?

4 A. Could you clarify? Do you mean serve as
5 an SSO customer or serve in its footprint?

6 Q. In its footprint.

7 A. They don't precisely, but they don't have
8 to hit it precisely. The FRR capacity plan doesn't
9 require they actually track actual metered load. PJM
10 sets forward a standard that you need to hit this
11 many megawatts. You hit that many megawatts and
12 you're done, unless there's a significant change, so
13 significant a change that the PJM revises their
14 reliability requirement.

15 That is a discrete event. It happens
16 once. You have to refile the FRR capacity plan, but
17 that's necessary. So it's a very discrete,
18 manageable risk that happens before the capacity
19 risk. The capacity risk I'm talking about on
20 page 42 is volume management in realization of load
21 in the course of a year. That is a very different
22 management issue than the one we are describing with
23 AEP Ohio's one-time reset by PJM of the
24 administrative requirement.

25 Q. If a CRES provider were to make this FRR

1 election, it would then secure capacity through the
2 RPM base residual auction; is that right or not
3 right?

4 A. No, no. Prior to -- let's back up a
5 timetable. So the BRA happens in May. Two months
6 before the base residual auction, AEP Ohio has to
7 file its fixed resource plan. Prior to AEP's filing
8 of that plan, the CRES providers either have to
9 indicate to AEP Ohio they want to put in resources on
10 their behalf into the plan or they have to have a
11 separate capacity plan filed to PJM.

12 So in those -- by definition, those
13 resources in any capacity plan have to be resources
14 that have not been committed into the base residual
15 auction and are precluded from being part of the BRA
16 structure thereafter for that delivery year.

17 Q. Turning to a different topic,
18 Mr. Stoddard, it's a discussion, I believe, that
19 begins and ends on page 27 of your testimony. I
20 believe you state at lines 1 to 2, it's "not
21 surprising to see that many different technologies
22 have been installed in PJM over the past decade." Do
23 you see that?

24 A. I do.

25 Q. And "different technologies," that refers

1 to different types of generators, right?

2 A. It's all a manner of capacity resources.

3 Q. And it includes a reference to different
4 types of generation.

5 A. That's a subset of those technologies,
6 yes.

7 Q. They also -- I'm sorry.

8 MR. KUTIK: Please finish your answer.

9 A. We have generation technologies. We have
10 demand-side technologies and --

11 Q. All those together are what you are
12 referring to in your testimony?

13 A. That's correct.

14 Q. So would it be appropriate to call them
15 "different resource technologies" then?

16 A. Yes.

17 Q. And one type of resource technology
18 that's included in your reference would be in the
19 generation component gas combustion turbines?

20 A. Yes.

21 Q. And gas combined cycle?

22 A. Yes.

23 Q. And then also renewables on the less
24 conventional side of it?

25 A. There are many forms of renewables, yes.

1 Q. Wind and solar.

2 A. Wind and solar, small hydro.

3 Q. Biomass?

4 A. Biomass, yes.

5 Q. And with regard to the generation
6 resource technologies, about how much has been
7 installed in PJM over the last ten years from a
8 megawatt standpoint?

9 A. As I recall, the Brattle report found
10 since RPM has been implemented, which is the last
11 eight years, that figure, as I recall, is
12 8,400 megawatts. I'm doing that one from memory.
13 I'm sorry, let me give it exactly.

14 So this section of the Brattle Group
15 report, cited on pages 50 to 51 of my testimony, and
16 they note there has been 4,800 megawatts of new
17 generation, 4,100 megawatts of plant upgrades, and
18 various other additions for a total addition of
19 13,100 megawatts of increased committed capacity
20 since RPM was implemented.

21 Q. Thank you. So the upgrades are 4,100,
22 did you say?

23 A. Yes, that is correct, sir. That's
24 4,100 megawatts of plant upgrades.

25 Q. And then 4,800 of --

1 A. New generation.

2 Q. Of new generation. And what else?

3 A. 800 megawatts of plant reactivations,
4 6,900 megawatts of increased net imports, and
5 11,800 megawatts of demand-side resources.

6 Q. With regard to the new generation that
7 you mentioned, the 4,800, how much of that is gas
8 combustion turbine or gas combined cycle?

9 A. Gas is a little less than
10 4,000 megawatts -- no, I'm sorry, that's not true.
11 Gas is roughly half of that total. It's about
12 800 megawatts of coal, and then the remainder is
13 renewables.

14 Q. So 800 megawatts of coal, 2,400 megawatts
15 of gas, and the remainder is?

16 A. Renewables.

17 Q. Renewables?

18 A. Those are round numbers. The
19 800 megawatts of coal is right. The others are my
20 recollection.

21 Q. The 800 megawatts of coal, is that the
22 Longview plant?

23 A. That's correct.

24 Q. And where is that located?

25 A. I believe that is in Pennsylvania.

1 Q. And when was its construction commenced?

2 A. I don't recall the date. I believe its
3 commercial on line date was in about 2009.

4 Q. So as far as you know was construction
5 commenced prior to the beginning of the RPM
6 construct?

7 A. Yes. Let me give some color around that.
8 I was at a conference where one of the senior
9 executives responsible for building the Longview
10 plant was discussing why they were building the
11 plant. He was saying we don't need contracts to move
12 forward because he had every confidence the market
13 prices that he will get for the plant for energy and
14 capacity will be sufficient to meet the needs of our
15 plant.

16 Q. And that is the only coal-fired capacity
17 which has come on line in the last seven or eight
18 years in the PJM footprint?

19 A. That's the only new facility, yes.

20 Q. Do you have any idea of how much
21 coal-fired capacity has been retired or announced for
22 retirement in the time period that RPM has been in
23 effect?

24 A. Not a small number is the short answer.
25 I believe it's on the order of 10,000 megawatts, but

1 the exact number I don't have with me. And that, of
2 course, is due in large part to the substantial
3 changes in environmental regulations that have
4 occurred since this time and the very high cost of
5 meeting those. There are simply lower cost resources
6 available, typically on the demand side, to meet this
7 same reliability requirement at the much lower cost
8 than retrofitting coal.

9 MR. CONWAY: Your Honor, that's all I
10 have.

11 EXAMINER PARROT: Thank you, Mr. Conway.
12 Mr. Jones?

13 MR. JONES: No questions, your Honor.

14 EXAMINER PARROT: Mr. Kutik, any
15 redirect?

16 MR. KUTIK: May I have a moment, your
17 Honor?

18 EXAMINER PARROT: You may.

19 (Recess taken.)

20 EXAMINER PARROT: Let's go back on the
21 record.

22 Any redirect?

23 MR. KUTIK: Yes, your Honor, just a few
24 questions.

25 - - -

REDIRECT EXAMINATION

By Mr. Kutik:

Q. Mr. Stoddard, you had a conversation with Mr. Conway about this negative cost figure that you came up with. Why is that in your testimony?

A. I had wanted to ensure that if AEP Ohio were charging the RPM rate to CRES providers, that that would not be a rate that was below their cost.

So my proposal is that the correct rate to charge is the RPM price, and we know that at that rate, based on the analysis that I did, that AEP Ohio would have substantial difference, I mean, if they were charging 75, but their cost of providing is actually negative 50. That means that every megawatt they're selling, they are still earning a \$225 megawatt-day contribution margin -- actually, \$125 a day contribution margin to the bottom line.

Q. How does negative cost make any sense?

A. Negative cost means that within the framework of a capacity market, that this resource would be doing fine even if the capacity price were zero. The negative price merely means that they are cash positive from the energy markets. The cost of operating the plant, keeping the plant functional, plus buying fuel is more than offset by the revenues

1 they receive from selling energy and ancillary
2 services. It's cash positive. It's actually a
3 normal situation for a profitable power plant to be
4 in.

5 Q. You also had a conversation with
6 Mr. Conway about the FRR entity and the change that
7 might have to occur if the load forecast from PJM
8 changed, and you used the word that it would only
9 happen if there was, in your words, "a significant
10 change." Can you quantify that for us, please?

11 MR. CONWAY: Could I have that question
12 reread?

13 (Record read.)

14 A. PJM is only going to change the reserve
15 margin if they have some concerns that there is --
16 that the existing resource base may not be sufficient
17 to meet the reliability requirement. There's a dead
18 band where they won't move anything.

19 On the other hand, we have to ask the
20 realistic question how large can these deviations be.
21 Historically, PJM forecast's accuracy has been quite
22 good. From one year to the next, which is the window
23 they have to rechange that forecast, we're only
24 talking probably 2 to 3 percent as a likely variation
25 in the total load forecast for the AEP East zone.

1 Q. So with that difference in the FRR
2 obligation -- and by "FRR" I mean from the RPM
3 participant -- justify compensating an FRR entity on
4 an embedded cost basis?

5 A. No; certainly not at the levels AEP is
6 seeking here. To be seeking a rate that is multiples
7 of the RPM price because there is a risk of a 2 or
8 3 percent variation in the loads they have to serve
9 strikes me as an unreasonably high risk premium to
10 place on the service they're providing.

11 MR. KUTIK: No further questions.

12 EXAMINER PARROT: Ms. Kern?

13 MS. KERN: No questions.

14 EXAMINER PARROT: Mr. Yurick?

15 MR. YURIK: No, thank you.

16 EXAMINER PARROT: Mr. Darr?

17 MR. DARR: No questions.

18 EXAMINER PARROT: Ms. Kingery?

19 MS. KINGERY: No questions.

20 EXAMINER PARROT: Mr. Petricoff?

21 MR. PETRICOFF: No questions, your Honor.

22 EXAMINER PARROT: Mr. Conway?

23 MR. CONWAY: Just a couple, your Honor.

24 - - -

25 RECROSS-EXAMINATION

1 By Mr. Conway:

2 Q. Mr. Stoddard, in response to a question
3 from Mr. Kutik, I believe you provided an estimate
4 that the RPM price for -- well, the purpose of your
5 cost analysis is to show that at an RPM price for
6 capacity, AEP Ohio would obtain a \$125 per
7 megawatt-day contribution. Do you recall that?

8 A. I do.

9 Q. And I think you also said that AEP would
10 do fine at a zero price; is that right?

11 A. What I said is that the resource
12 earning a -- that had a negative capacity price would
13 not need a capacity payment in order to cover its
14 incremental costs.

15 Q. And you said that they would do fine then
16 at a zero price; is that right?

17 A. They certainly would be willing to sell
18 their capacity at that price. What their overall
19 balance sheet would look like, I can't define.

20 Q. So your point is that at a zero price or
21 at a RPM price, in your view, they're covering
22 incremental costs; is that right?

23 A. Yes, they're covering the costs that are
24 anticipated that the RPM market will cover.

25 Q. That doesn't mean, does it, that they

1 would be making a profit on or covering all of their
2 fixed and variable costs, does it?

3 A. No. That's the wonderful thing about
4 competitive markets, there's no guarantee about
5 earning one rate of return or another. So if
6 capacity is intended to be at a market rate in a
7 competitive market, then you can be earning a lot of
8 money or very little money.

9 Q. And if they don't earn their fixed and
10 variable costs over the long run, then they exit the
11 market, right?

12 A. No. Let's be clear about that.

13 Q. The generation --

14 MR. KUTIK: Let him finish and answer,
15 please.

16 EXAMINER PARROT: Mr. Conway, allow the
17 witness to finish, please.

18 A. If, in my hypothesis, their actual need
19 for revenue is negative, they're actually earning
20 nothing, they have no incentive to retire that plant.
21 They do have a disincentive potentially to make a
22 massive capital contribution to, say, upgrade that
23 plant. They have to figure out whether they can
24 afford it.

25 But the plant itself would be profitable

1 to operate. It would be earning a contribution
2 margin, but it may not be covering its full cost, but
3 those costs can't be avoided by shutting down the
4 plant. Those costs have been sunk into the capital
5 rate. They're effectively the stranded costs of the
6 utility, and the capacity markets aren't intended to
7 cover your stranded costs.

8 Q. And, in the long run, if they don't cover
9 their fixed and variable costs, the result will be
10 that the units will not be -- will not be kept in
11 service and replacement units will not, at the same
12 time, be brought into service, right?

13 A. No, I don't think I would agree with
14 that. They're covering more than the costs they
15 require to keep them in service. What they aren't
16 doing, necessarily, is providing the owner of those
17 plants a rate of return that the owner would like to
18 get from it.

19 But competitive markets are not designed
20 to ensure anyone a particular rate of return. You
21 have to have a competitively priced asset that's
22 sufficient in the market that can compete on its own
23 basis.

24 MR. CONWAY: Thank you very much. No
25 further questions.

1 EXAMINER PARROT: Mr. Jones?

2 MR. JONES: No questions, your Honor.

3 EXAMINER PARROT: Commissioner Porter.

4 - - -

5 EXAMINATION

6 By Commissioner Porter:

7 Q. Mr. Stoddard, I wanted to better
8 understand "to go" cost and how it represents
9 embedded costs.

10 A. Sure.

11 Q. You just had an exchange with Mr. Conway
12 about that, and it's mentioned throughout your
13 testimony. This "to go" terminology is a
14 generally-accepted term. It's an accounting term or
15 Commission term. It's sort of a "Commission sitting
16 around the lounge" kind of term. It more formally
17 would be known on going-forward cost. "To go" is a
18 handy moniker for that.

19 Okay. And a "to go" cost is a cost that
20 is a subset or a component of what we have been
21 referring to as "embedded costs"?

22 A. Yes. That's correct.

23 Q. So the overall cost of an AEP generating
24 unit would be -- the total cost would be described as
25 the embedded costs?

1 A. Certainly the way they're calculating it,
2 that's how my interpretation is.

3 Q. But "to go" cost -- help me to
4 understand. "To go" costs are the types of costs
5 that could be avoided if a unit were to retire --
6 were to shut down temporarily or to retire, sort of
7 in the mothballing sense, in the long run?

8 A. Either of those scenarios, and I've made
9 the particular assumption in my testimony, that the
10 coal plant, given its technology, it's very hard to
11 mothball for a few years. You have a lot of staff.
12 You have a lot of inventory costs. If you want to
13 shut down a coal plant, you want to retire it.

14 Gas units and diesel units and other
15 smaller flexible units, those are easier to mothball
16 for a few years. Take them out and put them on
17 reserve and bring them back when they are economic.

18 Q. So the "to go" cost between the coal unit
19 and gas cost is basically the same thing. There's no
20 difference in a "to go" cost in a gas unit versus a
21 coal unit? Is it cost that's determined on a
22 day-by-day basis or, in order for it to become a "to
23 go" cost, must a unit be shut down for a certain
24 period of time?

25 A. No. You're looking at sort of a hard

1 shutdown where you would be releasing some staff.
2 You'd be cutting inventory. You could move spare
3 parts to other resources, so it's taking a fairly
4 significant chunk out of what you are doing. It's
5 not just a one-day shutdown. It's a multiyear
6 shutdown where you're taking out the whole kit and
7 caboodle for a while.

8 Q. Okay.

9 A. But, otherwise, Commissioner, the general
10 cost items between the two, the line items to
11 consider are the same with regards to technology.
12 The particular values you would put on that are
13 different, and the monitor has gone through and
14 calculated what those would all be on a very specific
15 basis.

16 Q. Thank you. So in calculating the return
17 on equity, either in an aggregate basis or for a
18 per-unit basis, you take the total of the "to go"
19 costs -- I'm sorry. You take the total embedded
20 cost, which would include the "to go" costs, in order
21 to determine the net revenue, or would you simply
22 include only "to go" costs to get that return?

23 A. Frankly, I wouldn't calculate the return
24 on equity amount. I'm thinking about this from a
25 very operational perspective, the decision of the

1 plant owner. Do I want to continue to offer this
2 plant as a resource into the market or not? So it's
3 a go/no-go decision you got to make. And in order to
4 go, then you have to get at least those dollars,
5 which is why it's called a "to go" cost, a to
6 go/no-go basis. That's what you need to go.

7 It can still result actually in a negative
8 earnings because you're not recovering from an
9 accounting perspective. You're not recovering
10 certain costs you attribute to it, such as the cost
11 of debt service or the cost of capital. But from a
12 cash perspective, which is how markets operate, it's
13 more profitable to keep the plant in service and
14 accept whatever capacity benefit you can receive,
15 rather than to shut it down because you still have
16 those debt costs. You still have that sunk capital.

17 Q. I get that part of it. I think you refer
18 to the fact -- I think you refer to a return on
19 equity and how it would be impacted by the costs at a
20 unit.

21 A. Right.

22 Q. What I'm trying to understand is if it is
23 the total -- what I'm trying to understand is what
24 number is included when you calculate -- I understand
25 you have -- you haven't calculated these, but you

1 refer to the impact on the RLE, which would include
2 the total, all the costs which would be the embedded
3 costs, or would it just be the "to go" costs. What
4 you just told me is you would operate or not operate
5 based upon your "to go" costs.

6 A. I think from an accounting perspective,
7 Commissioner, it is what you do with the stranded
8 costs. Implicitly what we are hearing is the total
9 embedded costs of these units is above what the
10 market will pay for them. That sounds like we're in
11 a stranded costs situation, and on a regulatory
12 accounting basis, you may decide the way you have to
13 do it is to move those stranded costs into some sort
14 of regulatory account or take them off the books,
15 effectively, before you recalculate the RLE.

16 I'm not sure how you want to look at it
17 from a perspective -- if you have an independent
18 power producer who didn't have the luxury of taking a
19 stranded cost or line item, whatever, then you just
20 take a look at the total revenues you're getting out
21 of energy capacity and ancillary services and the
22 cost you got, including the debt service cost and
23 everything else, and you might find the net operating
24 income is negative, even if your contribution margin
25 off the plant is positive because of the various

1 capital line items in between them.

2 Q. Right. So you're familiar with the RAA.
3 In fact, you were a participant. On whose behalf did
4 you participate?

5 A. I was in the settlement process on behalf
6 of GenOn, and in settlement, the judge then asked I
7 join one of the small committees that actually
8 drafted this section of the RAA.

9 Q. Okay. So your understanding of this RAA
10 is that it does not permit, or does it simply not
11 mention the ability of an FRR entity to seek a
12 capacity cost for its embedded costs?

13 A. My view on that is that this was filed --
14 this RAA was filed as part of a larger settlement
15 agreement. If you go through and look, every time
16 the word "cost" is mentioned in that whole settlement
17 agreement, it's always in the context of an avoidable
18 cost. Even when we're looking at new project
19 investment in the APIR term we talked about, it's the
20 avoidable project investment.

21 So the view in -- my view of it as we
22 wrote this, we were talking about just avoidable
23 costs. We are trying to set up a market structure
24 that didn't turn the FRR into some way that a regular
25 entity could get a really big number, whereas if they

1 were going to be in the RPM, they would do poorly.

2 What we would have done then is create an
3 exception that swallowed the rule. Everyone that
4 could have taken that option would have chosen to get
5 some high value. The point of this market was to be
6 comprehensive. The point of the FRR was to allow
7 very limited carve-out for firms that had regulatory
8 reasons and state reasons to seek a different
9 structure.

10 Q. Okay. So the cost calculation of an FRR
11 entity would make -- would be no different -- at
12 least as it relates to the costs being avoidable
13 costs, would be no different in an entity
14 participating in the RPM versus an entity who is an
15 FRR.

16 A. That it is my view of how the RAA should
17 be read.

18 Q. Let me take a step back. Are you aware
19 that AEP has agreed to participate in the base
20 residual auction in 2015-2016 delivery period?

21 A. Yes.

22 Q. Fast-forwarding through that time frame,
23 is it your opinion or your view that the costs that
24 AEP would be permitted to use and when it makes
25 offers into that BRA, that those would also be the

1 avoidable costs?

2 A. I'm quite sure the market monitor used
3 the same general methodology that I used in my
4 finding that avoidable costs, you would never look at
5 embedded costs.

6 Q. So if the Commission approved a number
7 prior to that, prior to 2015, that somehow allocated
8 for embedded costs, it would be inconsistent with
9 what the company would be permitted to do in the
10 future period 2015-2016.

11 A. Yes.

12 Q. It's presumably more attractive to the
13 company, or the company would be better off in this
14 interim period, by having the ability to get an
15 embedded cost approved by this application now, and
16 it won't have that ability in the future to do that.

17 A. Yes, sir.

18 COMMISSIONER PORTER: Thank you. That's
19 all I have.

20 EXAMINER PARROT: Thank you,
21 Mr. Stoddard.

22 MR. KUTIK: Your Honor, at this time we
23 move for the admission of FES Exhibit 101.

24 EXAMINER PARROT: Any objections to
25 admission of FES Exhibit 1?

1 Hearing none, FES Exhibit 101 is
2 admitted.

3 (EXHIBIT ADMITTED INTO EVIDENCE.)

4 EXAMINER PARROT: Let's take a break for
5 lunch. We will reconvene at 1:45. Thank you.

6 (At 12:38 p.m. a lunch recess was taken
7 until 1:50 p.m.)

8 - - -

9 EXAMINER SEE: Let's go on the record.
10 Mr. Kutik, your next witness.

11 MR. KUTIK: Your Honor, FirstEnergy
12 Solutions calls, as its next witness, Tony Banks.

13 (Witness sworn.)

14 EXAMINER SEE: Proceed.

15 MR. KUTIK: Your Honor, we have provided
16 to the court reporter and asked to be marked as FES
17 Exhibit 102 a document entitled "Testimony of Tony C.
18 Banks on behalf of FirstEnergy Solutions Corp."

19 EXAMINER SEE: The exhibit is so marked.

20 (EXHIBIT MARKED FOR IDENTIFICATION.)

21 - - -

22 TONY C. BANKS

23 being first duly sworn, as prescribed by law, was
24 examined and testified as follows:

25 DIRECT EXAMINATION

1 By Mr. Kutik:

2 Q. Please introduce yourself.

3 A. I'm Tony Banks. I'm Vice President of
4 Competitive Market Policies for FirstEnergy
5 Solutions.

6 Q. Mr. Banks, do you have in front of you
7 what has been marked for identification as FES
8 Exhibit 102?

9 A. Yes, I do.

10 Q. And what is that?

11 A. That is my testimony in this 10-2929 case
12 for AEP capacity costs.

13 Q. Do you have any additions or corrections
14 to make to that testimony?

15 A. I do not.

16 Q. If I ask you the questions that appear in
17 that exhibit, would your answers be as they appear in
18 that exhibit?

19 A. Yes, they would.

20 MR. KUTIK: Your Honor, may I approach?

21 EXAMINER SEE: Yes.

22 MR. KUTIK: Your Honor, I'd like to hand
23 the witness, as well as the Bench and opposing
24 counsel, three documents that have been previously
25 marked in this case, two of which are admitted, FES

1 Exhibit 113, FES Exhibit 116, and FES Exhibit 117.

2 Q. Mr. Banks, directing your attention to
3 FES Exhibit 113, can you tell us what that is,
4 please?

5 A. Yes. It's a report that is titled
6 Summary of Switch Rates from EDUs to CRES Providers
7 in Terms of Sales for the Month Ending December 31,
8 2011, and it also provides the same material for each
9 quarter going back to June 30, 2008.

10 Q. And who was this prepared by?

11 A. It's noted as being prepared by the
12 Public Utilities Commission of Ohio, Division of
13 Market Monitoring and Assessment.

14 Q. Is this information available on the
15 PUCO's website?

16 A. Yes, it is.

17 Q. Does that division that you mentioned, to
18 the best of your knowledge, have the duty or
19 responsibility to report the statistics of this type?

20 A. To the best of my knowledge, yes.

21 Q. Let me now direct your attention to
22 Exhibit 116. What is that?

23 A. Exhibit 116 is titled "Aggregation
24 Activity in Ohio," with the first year dating back to
25 2007 through September of 2011.

1 Q. And who compiled these statistics?

2 A. I believe the same, the Public Utilities
3 Commission, Division of Market Monitoring and
4 Assessment.

5 Q. These statistics are also available on
6 the PUCO's website?

7 A. Yes, sir, that's correct.

8 Q. Now, these statistics that we are looking
9 at on Exhibit 116, these show, among other things,
10 the percent of customers that have switched that
11 represent aggregation customers. Is that a fair way
12 to read this?

13 A. Yes, it is.

14 Q. Looking at the first box on the top of
15 the first page, which bear the dates September 2010
16 to September 2011, do the statistics look accurate to
17 you?

18 A. Well, they look generally accurate,
19 except that in September of 2011 it shows 100 percent
20 switching as a result of aggregation, and I do
21 believe there are customers who have switched, for
22 example, in the residential class that are not
23 aggregated.

24 Q. With respect to the other three data
25 points in that first box at the top of the page,

1 showing over 90 percent of customers, residential
2 customers who have switched, as aggregation
3 customers, does that sound accurate to you in your
4 experience?

5 A. Yes, they look to be reasonably accurate.

6 Q. Now, let me refer you to FES Exhibit 117.
7 Are you there, sir?

8 A. Yes, I am.

9 Q. Now, with respect to that exhibit, do you
10 recognize that as a summary of certain data taken
11 from Exhibit 113, the PUCO's switching statistics?

12 A. Yes, it is a summary of that.

13 Q. I want to direct you to the time periods
14 under the columns CEI, Ohio Edison, and Toledo
15 Edison, which show you the quarters ending March 2009
16 and June 2009 of basically zero switching. Do you
17 see that?

18 A. Yes, I do.

19 Q. Is that accurate?

20 A. Well, again, it looks to be reasonably
21 accurate and the main reason is that that was the
22 period of time when FirstEnergy utilities were
23 going -- or had filed an ESP, and there was a lot of
24 uncertainty in the market as to whether and where
25 price to compare might end up and other factors, and

1 as a result of that, FirstEnergy Solutions returned
2 all of its customers back to the utility, so I
3 believe that 0 percent or near 0 percent would be
4 accurate, yes.

5 Q. Now, it also shows, for example, CEI and
6 Ohio Edison, a jump of around 30 percent from the
7 quarter ending June '09 to the quarter ending
8 September of '09. Do you see that?

9 A. Yes, I do.

10 Q. For both CEI and Ohio Edison.

11 A. Yes.

12 Q. Was there a particular event that caused
13 that increase to occur?

14 A. Well, in both cases that is when
15 FirstEnergy Solutions signed a contract with NOPEC,
16 which is a group that aggregates approximately 130
17 communities and buys power on their behalf, all the
18 residential and small commercial customers in those
19 communities. And the original contract with NOPEC,
20 if I remember correctly, is about 500,000 customers,
21 so that could account for the increase from almost 0
22 up to the 30 percent range.

23 Q. Let me direct your attention to the
24 Toledo Edison column, and you see a jump around the
25 same time frame from 0 to 189 percent and then from

1 19 percent to about 55 percent. Was there something
2 that occurred in Toledo Edison's territory that would
3 account for that increase?

4 A. Yes. Very similar to CEI and Ohio
5 Edison, Toledo Edison's service territory had a
6 contract executed by a group called NOAC, which again
7 represented multiple communities as well as the city
8 of Toledo, and those communities aggregated and that
9 would account for the large increase for aggregation
10 percentages at that time.

11 Q. Are you aware of an organization similar
12 to NOPEC or NOAC that currently has similar type of
13 contracts with municipalities in AEP Ohio's
14 territory?

15 A. I'm not aware of any group or
16 organization that has aggregated communities and
17 represent them to create an opportunity to have those
18 kind of increases in AEP Ohio's service territory.

19 Q. And if there was such an organization
20 that actively had such contracts, because of your
21 responsibilities, would you be aware of that?

22 A. In all likelihood, yes.

23 Q. I want to ask you about some comments
24 that have been made during the course of this
25 proceeding during cross-examination.

1 MR. SATTERWHITE: Your Honor, at this
2 point I'm going to object. The timeline for filing
3 prefiled direct is passed. If you want to put some
4 documents in to substantiate some points, but, you
5 know, when I said I thought we'd be out this
6 afternoon, I thought I'd be the one cross-examining
7 the witness, not a whole new version testimony
8 submitted on behalf of FirstEnergy.

9 I think it's inappropriate to give all new
10 testimony today, the day of the hearing, and not to
11 provide anything to the company in advance and just
12 do it directly on the stand.

13 MR. KUTIK: Your Honor, we are responding
14 to questions and answers on cross-examination by
15 AEP's witnesses. I think we are allowed to provide a
16 brief direct, and it will be brief, to respond to
17 comments that have been made on cross-examination by
18 their witnesses. We couldn't obviously file prefiled
19 testimony in response to cross-examination.

20 MR. SATTERWHITE: Your Honor, if I may,
21 FES did not ask leave to file any supplemental
22 testimony. They have put a witness on, and after --
23 I don't know if they had this plan all day but, after
24 lunch, suddenly they put a bunch of documents in
25 front of the stand and all the other parties and are

1 going in depth on a number of issues. It's improper
2 supplemental testimony that they didn't ask leave
3 for.

4 MR. KUTIK: Your Honor, I was in the
5 middle of the question. May I finish the question?

6 EXAMINER SEE: I understand that. Let me
7 hear the rest of question. That doesn't mean I want
8 the witness to answer, I just want to hear the rest
9 of your question.

10 MR. KUTIK: Yes, so we can have the
11 record properly established.

12 Q. (By Mr. Kutik) In their testimony on the
13 stand, Mr. Munczinski and Mr. Allen, referring to a
14 statistic that refers to page 5 of your testimony
15 specifically your statement, quote, In FirstEnergy
16 Ohio utility's service territory alone, shopping
17 customers have saved over \$100 million annually based
18 on a conservative estimate of a 4-percent-average
19 discount provided by CRES providers.

20 Mr. Munczinski claimed that you were
21 saying that FES has only provided a 4 percent
22 discount, and Mr. Allen claimed that you were saying
23 that FES had averaged a 4 percent discount. Is that
24 what you were saying in your testimony?

25 EXAMINER SEE: That is not for you to

1 answer at this point. Hold on just a second.

2 MR. SATTERWHITE: Objection; see earlier
3 comments.

4 EXAMINER SEE: The objection is
5 overruled.

6 And you may answer the question,
7 Mr. Banks.

8 A. As relates to the 4 percent discount, as
9 it states in my testimony, it's a conservative
10 estimate based on what we know the marketplace to be
11 above. So if we use actual estimates of savings that
12 the customer had, it would be above 4 percent.

13 And it's also important to note that this
14 is in the FirstEnergy utility service territories
15 where the SSO service was bid in the competitive
16 market. So the downward pressure on price was
17 already established through the SSO service, so the
18 discount in that service territory would not be as
19 high as perhaps other service territories.

20 We have seen discounts as high as
21 22 percent in other service territories, so this
22 discount is not representative of the savings
23 available to customers.

24 Q. It has also been suggested that assuming
25 that CRES providers would be getting some type of,

1 quote, discount, end quote, off of AEP Ohio's cost of
2 capacity, CRES providers, according to Messers. Allen
3 and Munczinski, would not provide corresponding
4 savings to customers. Is that an accurate assessment
5 of what could happen?

6 MR. SATTERWHITE: Same objection, your
7 Honor.

8 EXAMINER SEE: The objection is
9 overruled.

10 You can answer the question, Mr. Banks.

11 A. If the question was relating to discounts
12 that CRES providers might receive and the suggestion
13 was that CRES providers would keep that discount, and
14 if you really have been in the competitive markets,
15 you learn to understand that any price that a CRES
16 provider offers, to the extent there's competition,
17 it's subject to competition from other suppliers.

18 So if a CRES provider got a discount on
19 anything that was readily available in the
20 marketplace, the CRES provider is going to have to
21 pass those savings on to customers; otherwise, they
22 risk losing those customers. The other CRES
23 providers know if that CRES provider is able to
24 internally reduce its costs, then you can maybe make
25 an argument that that CRES provider can earn a little

1 bit more margin than another CRES provider.

2 But as relates to discounts that are
3 readily available in the marketplace, that CRES
4 provider is subject to the competition, and that
5 competition will force that CRES provider to pass the
6 savings on to customers.

7 Q. Is that behavior you just described
8 consistent with behaviors engaged in by AEP Ohio's
9 retail affiliate?

10 MR. SATTERWHITE: May I have the question
11 reread, please?

12 (Record read.)

13 MR. SATTERWHITE: I object. We are
14 definitely going well beyond explaining a term in his
15 testimony now or explaining something that was
16 described earlier. Now we seem to be on the attack
17 of another party in the case.

18 MR. KUTIK: The claim by the witnesses
19 was that discounts would be kept by CRES providers,
20 and so we are now trying to establish that AEP's
21 retail affiliate does engage in retail competition to
22 undercut competitors' prices, just like the rest of
23 the competitors do. That's the way the market works.

24 MR. SATTERWHITE: Again, your Honor, we
25 are down the same path of providing all new testimony

1 that should have been prefiled. The company would
2 have had the chance to do discovery. It's unfair to
3 the company to do this on the stand right now without
4 prefiling it or seeking leave for supplemental
5 testimony.

6 EXAMINER SEE: If the company chooses to,
7 they can offer rebuttal testimony. As far as the
8 objection, I'm going to overrule the objection and
9 allow the witness to answer the question.

10 THE WITNESS: Could you repeat the
11 question, please?

12 (Record read.)

13 A. Yes, it is. I'm aware of a recent offer
14 by AEP Ohio that is 24 percent off the price to
15 compare in FE utility service territory, and the
16 reason that is, in my view, is because AEP Ohio has
17 access to market-based capacity and because
18 market-based capacity is so low, it is able to offer
19 that rate.

20 Q. What is the rate it was offering?

21 A. I think it was 5.96 cents per
22 kilowatt-hour.

23 MR. KUTIK: Your Honor, may I approach?

24 EXAMINER SEE: Yes.

25 MR. KUTIK: We would like to have a

1 document from AEP Retail Energy marked as FES 121.

2 Your Honor, I stand corrected, we would
3 like to have it marked as FES Exhibit 120.

4 EXAMINER SEE: The exhibit is so marked.

5 (EXHIBIT MARKED FOR IDENTIFICATION.)

6 Q. Mr. Banks, I hand you what has been
7 marked as FES Exhibit 120. What's that?

8 A. This is an offer by AEP Retail Energy to
9 customers in the Ohio Edison, The Illuminating
10 Company, and Toledo Edison service territories, and
11 that offer is for 5.96 cents per kilowatt-hour, and
12 it identifies savings in each one of those utility
13 service territories.

14 MR. KUTIK: Thank you, Mr. Banks.

15 Your Honor, I have no further questions.

16 EXAMINER SEE: Ms. Kern?

17 MS. KERN: No questions.

18 EXAMINER SEE: Ms. Kyler?

19 MS. KYLER: No questions, your Honor.

20 EXAMINER SEE: Mr. Randazzo?

21 - - -

22 CROSS-EXAMINATION

23 By Mr. Randazzo:

24 Q. Mr. Banks, you talk about the benefits of
25 competitive markets in your testimony. Would, at

1 least directionally, some of the benefits you
2 identify in your testimony be provided to customers
3 in AEP Ohio service territory through the use of a
4 competitive bidding process, much like the one you
5 described being used in FirstEnergy's service
6 territory?

7 MR. SATTERWHITE: Objection, your Honor.
8 It seems everyone is trying to get on the train now
9 of putting more testimony in. I believe that's
10 friendly cross. The positions of IEU are not opposed
11 at all in this case, and this is not consistent with
12 the positions they have taken. The questions are
13 simply friendly cross and shouldn't be allowed.

14 MR. RANDAZZO: If I may, your Honor,
15 Kevin Murray's testimony recommends that the
16 Commission use a competitive bidding process.

17 EXAMINER SEE: The Bench does consider
18 that a friendly cross, Mr. Randazzo. Do you have
19 anything else?

20 Q. Mr. Banks, in your testimony are you
21 recommending the Commission use a competitive bidding
22 process?

23 A. Could you refer me to the page, please?

24 Q. Anywhere in your testimony, do you
25 discuss the use of a competitive bidding process to

1 provide the benefits of competition to both shopping
2 and nonshopping customers?

3 MR. KUTIK: For clarification, in this
4 case?

5 MR. RANDAZZO: In this case, yes, that's
6 correct.

7 A. I'd have to look. I've had comments in
8 several cases. I'd have to look.

9 MR. SATTERWHITE: I take the opportunity
10 in the lull to object again. They are trying to get
11 around the Bench's ruling. This is friendly cross
12 and trying to establish something so friendly cross
13 can continue. I think we're in a capacity case here,
14 and we are dealing with the number that the company
15 put out there and whether that number is appropriate
16 or not, and I think we are heading down friendly
17 cross again, so I will object again.

18 EXAMINER SEE: Do you want to respond,
19 Mr. Randazzo?

20 MR. RANDAZZO: Your Honor, this witness
21 is addressing problems with the capacity price
22 proposal. We have suggested recommending
23 Mr. Murray's testimony, that you can avoid all this
24 foo-foo, if I can use that technical legal term, over
25 the appropriate methodology to set a capacity price

1 by using a competitive bidding process like the one
2 used in Duke, like the one that is used in
3 FirstEnergy service, that will provide benefits to
4 both shopping and nonshopping customers. It will
5 also reduce the cost associated with the support that
6 is necessary for customers that are eligible for
7 universal service funds assistance.

8 We have a different idea about serving the
9 public interest that is more comprehensive, and the
10 fact that we may be on the same page as FirstEnergy
11 Solutions on many of the issues in the case, doesn't
12 mean that our particular approach is not adverse to
13 their position, and I think my cross should be
14 allowed.

15 MR. SATTERWHITE: If I may, your Honor?

16 EXAMINER SEE: Briefly.

17 MR. SATTERWHITE: I'll be quick. That's
18 fine.

19 You know, IEU presented a witness on this.
20 They're both attacking the position the company has
21 taken, and I take a bit of umbrage that the company
22 being able to recover its costs that it has is just a
23 hoo-hoo position in this record, and I think both IEU
24 and FES are both trying to seek to have the
25 Commission not adopt the position that the company

1 has taken to base things upon cost, and, again, it's
2 just friendly cross to get to the same result to take
3 down the company's number.

4 EXAMINER SEE: The objection is
5 sustained.

6 Ms. Kingery?

7 MS. KINGERY: No questions, your Honor.

8 EXAMINER SEE: Ms. Kaleps-Clark?

9 MS. KALEPS-CLARK: No questions, your
10 Honor.

11 EXAMINER SEE: Mr. Satterwhite, are you
12 doing the cross-examination?

13 - - -

14 CROSS-EXAMINATION

15 By Mr. Satterwhite:

16 Q. Mr. Banks, how you doing?

17 A. Not too bad.

18 Q. Good to see you again.

19 A. Same here.

20 Q. As the vice president of regulatory
21 policy, you're aware that the structure for CRES
22 operations across the state of Ohio is not -- it's
23 not a uniform state system, correct?

24 A. I have to correct you on my title, vice
25 president of Competitive Market Policies. Based on

1 that, could you repeat?

2 Q. You deal with the policies and interact
3 with the policies of Ohio and are familiar with the
4 rules and regulations, correct?

5 A. Generally, yes.

6 Q. And you're aware to become certified in
7 the state of Ohio as a CRES provider, not all CRES
8 providers are created equal, correct?

9 A. I'm not sure I know what you mean by
10 that.

11 Q. Have you been involved in the
12 certification process? Are you familiar with the
13 renewals the CRES provider has to go through before
14 the Commission?

15 A. I don't know the details, no.

16 Q. Are those people, under your direction,
17 filing those renewals and certifications to provide
18 business as a business opportunity in Ohio as a CRES
19 provider?

20 A. Yes. I have people that work with me
21 that would know those answers, yes.

22 MR. SATTERWHITE: Your Honor, may I
23 approach?

24 EXAMINER SEE: Yes.

25 MR. SATTERWHITE: I will go ahead and

1 mark AEP Exhibit 112, which is the "Filing
2 Instructions for Retail Electric Generation Providers
3 and Power Marketers."

4 EXAMINER SEE: The exhibit is so marked.

5 (EXHIBIT MARKED FOR IDENTIFICATION.)

6 Q. Take a look at the document I put before
7 you, sir.

8 A. I have it.

9 Q. And are you familiar with these types of
10 documents where the Commission provides templates for
11 CRES providers for their certifications and renewals?

12 A. I am generally familiar that the
13 Commission has these type of documents. I don't know
14 the specifics of this particular document.

15 Q. Do you ever review the work filed by your
16 department with the Public Utilities Commission of
17 Ohio?

18 A. I do review some work filed by my
19 department.

20 Q. And you would agree that certification
21 and renewal of that certification is an important
22 function for a CRES provider in Ohio, would you not?

23 A. I would suggest that's pretty routine for
24 FirstEnergy Solutions and that's the only CRES
25 provider I'm responsible for their certification.

1 Q. And, really, I think -- I don't know if
2 we need the documents, but it might be easier to get
3 to the point I'm trying to ask you about. If you
4 look on A-10 of the document --

5 MR. KUTIK: Your Honor, I'll object at
6 this point to questions on this document. The
7 witness said he's not familiar with it. No
8 foundation with respect to this document.

9 MR. SATTERWHITE: Your Honor, I'm trying
10 to finish. This is a document from the Commission's
11 website on filing instructions. I really want to ask
12 the witness, since he's the only company witness
13 representing FirstEnergy Solutions in this case and
14 is responsible for that company, and really establish
15 his understanding of when a company files for
16 certification and when they act in Ohio, what are the
17 parameters of that action. I can ask him without the
18 document. I thought this would be a lot quicker and
19 more efficient to put this in front of him.

20 EXAMINER SEE: I believe Mr. Banks has
21 indicated he's not familiar with what you had marked
22 as AEP 112.

23 Is that correct, Mr. Banks?

24 THE WITNESS: I'm familiar with the
25 details of this document. I am familiar with the

1 fact you have to be certified in order to be a CRES
2 provider in Ohio.

3 EXAMINER SEE: The objection is
4 overruled.

5 Q. Mr. Banks, can you look at A-10 again?

6 A. I'm there.

7 Q. Is it your understanding that when a CRES
8 provider applies for certification in the state of
9 Ohio, that they need to indicate in which certified
10 territories in Ohio they intend to operate?

11 A. That is my understanding, yes.

12 Q. And, in fact, depending on the different
13 certified territories a CRES provider may provide
14 services in Ohio, there are different interactions
15 with the electric distribution utility in each of
16 those territories, correct?

17 A. I'm really not sure what you mean by
18 "different interactions." The interactions I'm
19 familiar with are around the same issues generally,
20 but there are interactions with all of the utilities
21 in those service territories.

22 Q. There are different processes, different
23 requirements based on each of the certified
24 territories and the distinctions between those EDUs;
25 correct?

1 A. Again, I'm not the one that deals with
2 processes on a day-to-day basis. The issues, general
3 issues are the same, and our department works to deal
4 with the general issues, but as far as -- I don't
5 know what they say when they call or who they're
6 talking to.

7 Q. But you are familiar, it would be someone
8 underneath you that would interact with them?

9 A. That's correct.

10 Q. Let's move to your testimony marked FES
11 102, I believe. Here on the bottom of page 4, you
12 discuss the benefits of competition on lines 21 to
13 22, correct? Or that whole page, it looks like.

14 A. Yes, that's correct.

15 Q. And then you go on to talk a little bit
16 about what the live direct was this morning, talking
17 about the number of customers that have shopped, to
18 the top of page 5 where you talk about the average
19 savings, right? I want to talk a little bit about
20 this 4 percent average discount. I believe, correct
21 me if I am wrong, what you added to today was that
22 was just a conservative average, correct?

23 A. That's what I said, yes, as is stated in
24 my testimony.

25 Q. Is it your assertion that 4 percent is

1 not an accurate number?

2 A. I think 4 percent is a conservative
3 estimate of the average discount, as I stated in my
4 testimony.

5 Q. Are you saying it swings depending on the
6 individual customer?

7 A. No, I'm not saying that. I'm saying if
8 you use 4 percent to calculate the savings in
9 FirstEnergy Ohio utility service territories,
10 customers would have saved about \$100 million. That
11 4 percent is conservative. I believe they're saving
12 more is the point of that.

13 Q. Right. And what is the saving you
14 believe they're making?

15 A. Well, I think the average is above 4
16 percent, so, for example I think a lot of the
17 FirstEnergy Solutions contracts, and they're mostly
18 government aggregation contracts so they're publicly
19 available, and 6 percent for residential customers,
20 and residential customers make up the bulk of those
21 savings.

22 Q. Did you do a review of all the contracts
23 to determine what the savings would be, or is this
24 just a ballpark?

25 A. Is what a ballpark?

1 Q. The 4 percent, maybe 6 percent, somewhere
2 between those two is what the savings are.

3 A. Well, I know that our standard offer was
4 around 6 percent, so the savings would higher than
5 the 4 percent as stated here, and that's why I listed
6 it as conservative.

7 Q. And when you said 6 percent, that's the
8 standard offer to residential customers, is that what
9 you said?

10 A. Yes.

11 Q. This quote doesn't relate solely to
12 residential customers, does it?

13 A. No, it does not.

14 Q. So my original question was, did you do
15 any studies to figure this number, or is this just a
16 ballpark number to figure what the savings were?

17 A. The savings in this testimony are based
18 on a conservative estimate. I know the actual
19 savings to be more than 4 percent because government
20 aggregation contracts, for the most part, are 6
21 percent for the bulk of the load that are in
22 government aggregation contracts, and government
23 aggregation shopping in FE utilities at that point
24 was the predominant shopping in those service
25 territories for residential customers.

1 Q. So that is the analysis you would do to
2 support that is larger than 4 percent, what you just
3 provided? You didn't do any studies or any further
4 review.

5 A. That's correct. I didn't have to do any
6 study to come up with that answer.

7 Q. And you stated also this is focused on
8 the FirstEnergy certified territory; is that correct?

9 A. Yes, it is.

10 Q. Does FirstEnergy provide capacity on an
11 FRR basis?

12 A. First Energy provides RPM price capacity,
13 to my knowledge.

14 Q. And FirstEnergy doesn't own any of its
15 own generation that it supplies to customers,
16 correct?

17 MR. KUTIK: And when you say
18 "FirstEnergy," are you talking the utility?

19 MR. SATTERWHITE: Yes.

20 Q. The EDU, I'm trying to use your term.

21 A. So when CRES providers have customers in
22 the FirstEnergy utility service territory, they get
23 the capacity at RPM from PJM.

24 Q. Right. So FirstEnergy, the three
25 companies that make up the EDU, do not own any

1 capacity, correct?

2 A. That's correct. There may be some
3 exceptions somewhere. I'm not sure.

4 Q. I noticed you were in the room when
5 Mr. Fein was testifying; is that correct?

6 A. I believe I heard part of his testimony.

7 Q. Do you agree with Mr. Fein's statement
8 earlier that competitive markets work better without
9 subsidies?

10 A. I would say, yes, I absolutely agree with
11 Mr. Fein that competitive markets work without
12 subsidies, and I'd like to explain what I think
13 subsidies are in this case.

14 Q. Fine.

15 A. So if you have a company, who by virtue
16 of its own decisions determines it wants to be a
17 monopoly, which AEP through the election of FRR had
18 decided it wants to be a monopoly in its service
19 territory, so that monopoly now has market power over
20 all the customers in its service territory.

21 So I believe that when you have market
22 power, the best indication of the appropriate price
23 that a monopoly that has market power should charge
24 is a market-based price; otherwise, monopolies would
25 be able to charge anything they want.

1 So I believe the subsidy is actually -- if
2 AEP is allowed to charge 355 per megawatt-day for
3 capacity, the subsidy is actually from the CRES
4 providers to AEP because AEP is the only company that
5 would be able to get that above-market capacity value
6 in a market that's readily able and willing to offer
7 capacity at RPM prices.

8 Q. And is that the only subsidy that would
9 be in existence?

10 A. That is the only subsidy I think is in
11 existence relating to CRES providers.

12 Q. Let's take a step back from just the
13 statement of competitive matters and subsidies in
14 general. Is the subsidy that you explained the only
15 subsidy that can exist in a competitive market
16 dealing with capacity?

17 A. Are you asking me if it's the only that
18 can exist?

19 Q. Correct.

20 A. I guess any subsidy can exist, but it
21 wouldn't be good for competitive markets.

22 Q. Okay. Thank you. There were also some
23 questions about the past level of shopping in AEP
24 Ohio's territory, and haven't you previously stated
25 that that as of June 2011 AEP comprised only

1 1 percent of the shopping in the state of Ohio?

2 A. Can you refer me to the page, please?

3 Q. I'm just asking you in general. It's not
4 in your testimony here.

5 A. I'm not sure where I may have said that.

6 Q. Well, have you said that? We'll start
7 there.

8 A. At 1 percent, I don't recall.

9 Q. Do you recall testifying in the ESP
10 Stipulation case?

11 A. Yes, I do.

12 Q. Would it help if I showed you that
13 testimony to refresh your recollection what you said
14 there?

15 A. It could help, yes.

16 MR. SATTERWHITE: Your Honor, just a
17 moment if I can look at my notes to make sure I'm in
18 the right place.

19 EXAMINER SEE: Okay.

20 MR. KUTIK: Page 3 to 4.

21 MR. SATTERWHITE: Thank you.

22 Q. If I could just have you read just to
23 yourself starting at line 20 and over to page 4.

24 EXAMINER SEE: Do you have a transcript
25 reference?

1 MR. SATTERWHITE: Absolutely. I'm sorry,
2 your Honor. What I provided to the witness to
3 refresh his recollection is testimony filed in the
4 stipulation case by Mr. Tony Banks on pages 3. The
5 bottom of page 3 and to the top of page 4, is what I
6 showed him to refresh his recollection.

7 EXAMINER SEE: This is his testimony in
8 that case?

9 MR. SATTERWHITE: Correct.

10 EXAMINER SEE: Okay.

11 Q. Did you review that?

12 A. Yes, I did.

13 Q. Do you want me to reask the question now?

14 A. Yes, please.

15 Q. As of June 2011, what percent of the
16 customers shopping for retail electric service in
17 Ohio were in AEP Ohio service territory?

18 A. As stated in my prior testimony,
19 approximately 1 percent of shoppers are located in
20 AEP Ohio's service territory.

21 MR. SATTERWHITE: Let me check the
22 exhibits we got today and see if it answers my next
23 question or not here.

24 MR. KUTIK: You didn't just get them
25 today. They have been previously marked.

1 Q. Mr. Banks, you state, again, on this
2 4 percent average discount, that was just the
3 FirstEnergy territory. What is the conservative
4 average of savings over that same time period in the
5 AEP Ohio territory?

6 A. I have no idea.

7 Q. What about the Duke territory?

8 A. I don't know.

9 Q. Would you say that most of the contracts
10 that FES provides could be categorized as either a
11 fixed price or fixed percentage off the price to
12 compare?

13 A. Can you repeat that, please?

14 Q. Sure. I'm trying to understand the
15 contracts provided by FES Solutions, would you say
16 that the categories that they fit in in the offers
17 you make to that customer is either a fixed price or
18 a fixed percentage off the price to compare?

19 A. Do we offer both of those? Yes.

20 Q. Do you offer any other kinds of
21 contracts? I'm just trying to get the parameters of
22 what you offer.

23 A. I don't know that I want to tell you
24 everything we offer, unless that's public knowledge.

25 Q. I'm just talking really broadly here, how

1 they're structured. Is it fair to say they're
2 basically based on a fixed price or a fixed
3 percentage off?

4 A. That's the bulk of our contracts.

5 MR. SATTERWHITE: Your Honor, I'm trying
6 to avoid getting into confidential information, so I
7 will try to do as much as I can with the public
8 documents I could find.

9 So I'd like to mark now AEP Retail Energy
10 Exhibit 113, which is a document filed by FirstEnergy
11 Solutions in Case 10-2366-EL-GAG that deals with the
12 Reynoldsburg aggregation program in a contract.

13 EXAMINER SEE: The exhibit is so marked.

14 (EXHIBIT MARKED FOR IDENTIFICATION.)

15 Q. Mr. Banks, do you recognize this
16 document?

17 A. It looks like the terms and conditions
18 and environmental disclosure and frequently asked
19 questions for the Reynoldsburg governmental
20 aggregation program.

21 Q. Is this the typical example of the type
22 of contract that would be provided by FirstEnergy
23 Solutions for an aggregation program?

24 A. This is not the aggregation contract.

25 Q. Okay. What is this?

1 A. As I indicate, it's the terms and
2 conditions, the environmental disclosure, and
3 frequently asked questions for the Reynoldsburg
4 agreement.

5 Q. Okay. Is this something that typically
6 would be provided, this type of document, to
7 communities being served by FirstEnergy Solutions in
8 government aggregation?

9 A. Yes. This is one of the documents that's
10 provided.

11 Q. Like I said, I'm trying to avoid getting
12 to a number of documents identified as confidential.
13 If this isn't representative of other areas, please
14 let me know. But are the terms and conditions sheets
15 provided, typical terms and conditions that are
16 provided by FES?

17 A. Of course, I'm not reading the whole
18 thing here, but generally we always provide terms and
19 conditions, environmental disclosure, and frequently
20 asked questions, and for the most part, they're very
21 similar. Now, whether or not this is exactly the
22 same as another one, I couldn't tell you.

23 Q. Let's start with page 1 of the exhibit,
24 and in the third paragraph it starts off, "As a
25 member of this aggregation, you are guaranteed to

1 save 5 percent off your Price to Compare." Do you
2 see that?

3 A. Yes, I do.

4 Q. Is that FES's representation, that
5 customers are guaranteed to save 5 percent?

6 A. That is telling the customer they are
7 going to save 5 percent off the price to compare,
8 yes.

9 Q. And in the frequently asked questions on
10 page 2 -- I apologize, it isn't numbered -- the
11 third question is, "How will I know if I can save
12 money under the Reynoldsburg electric governmental
13 aggregation program?" Do you see that?

14 A. Yes.

15 Q. Under that, again, the guarantee of a
16 5 percent discount is also provided, correct?

17 A. Okay. My sheet is different than that.

18 Q. Does it say, "Under this governmental
19 aggregation program, the price you pay for electric
20 generation supply is guaranteed to be 5 percent
21 lower"?

22 A. Not on the question I thought you were
23 directing me to.

24 Q. I was on the third question.

25 A. Yes.

1 Q. What does your answer read?

2 A. So the question is, "How will I know if I
3 can save money under the Reynoldsburg electric
4 governmental aggregation program?"

5 Q. Correct.

6 A. "The price you pay for electric
7 generation supply is guaranteed to be 15 percent
8 lower."

9 Q. I think you are starting on the back of
10 it. I guess maybe it's easier to identify what we
11 have here. There's two sets of frequently asked
12 questions, correct? The first one behind the cover
13 page deals with, I believe, residential. The
14 second part that has the 15 percent would deal with
15 commercial, correct?

16 A. Okay, yes.

17 Q. So on both those instances, it's the same
18 question; it just has a different percentage of
19 savings, 5 or 15 percent.

20 A. Yes, that's correct.

21 Q. And, again, it guarantees those savings;
22 is that correct?

23 A. Yes. That's what it says.

24 Q. I ask you to turn to the terms and
25 conditions. You discuss in your testimony -- strike

1 that.

2 Is it your understanding that if a
3 capacity price is changed, that FirstEnergy Solutions
4 will be able to pass that change in capacity price on
5 to customers?

6 MR. KUTIK: You're asking under this
7 contract?

8 MR. SATTERWHITE: In general, first.

9 MR. KUTIK: Well, then I'll object to
10 that as proprietary, your Honor, and I would move we
11 go into a sealed record on that point.

12 MR. SATTERWHITE: If it makes it easier,
13 your Honor, I will start with this contract and see
14 where we can, or I can ask other questions later.

15 EXAMINER SEE: Okay. If we need to move
16 into a sealed portion of the transcript, I'd like to
17 put it altogether and do it at one time.

18 MR. SATTERWHITE: I most likely will have
19 some questions and I'll put it all at the end.

20 EXAMINER SEE: All right.

21 Q. Mr. Banks, if you can look at the terms
22 and conditions, and under the terms and conditions of
23 service, No. 2, basic service prices, I'd like you to
24 review that for me real quick, please.

25 A. Okay, I've read it.

1 Q. And do the terms and conditions here
2 allow FES to pass through the additional costs to FES
3 that might come from an increased capacity charge?

4 A. It says, "Changes may include, without
5 limitation, transmission or capacity requirements,"
6 so capacity, I would say yes.

7 Q. And these are what is referred to in
8 parenthesis as a passthrough event, correct?

9 A. Yes.

10 Q. So the company -- I'm trying to
11 understand. The company is allowed to pass through
12 these costs, but the customer is still guaranteed to
13 get the 5 percent or 15 percent savings --

14 A. Yes.

15 Q. -- indicated?

16 A. Yes; because you have to understand that
17 the passthrough event that is contemplated here is an
18 event that would result in additional capacity
19 charges or transmission charges that FES may incur,
20 but that may also incur on the side of the utility.
21 So the impact on the PTC or the savings from the PTC
22 don't change.

23 Q. If FES is charged more for capacity, that
24 won't change, in your opinion, the price that is
25 charged to customers. The 5 percent or 15 percent

1 will still stay the same.

2 A. Up until this filing, that was our
3 belief, yes.

4 Q. And that's what this contract would
5 control. I believe it was filed with this docket on
6 March 30, 2012, correct?

7 A. I don't know.

8 Q. The last page has the electronic service,
9 if you want to refer to that.

10 A. Yes. This is the opt-out notice relating
11 to supplemental enrollments. The original contract
12 was well before this period of time.

13 Q. Yes. But this is the contract that
14 customers will be served under -- strike that.

15 These are the terms and conditions that
16 customers received that they would be served under,
17 correct?

18 A. Yes. Those supplemental customers, yes.

19 Q. So is it your belief that the capacity
20 price that FirstEnergy Solutions would pay as a
21 result of this proceeding increases, that that also
22 changes the SSO for the company, the SSO price?

23 A. This proceeding?

24 Q. I'm just asking you general your
25 understanding how the application of a change in the

1 proceeding would affect the SSO price.

2 A. My understanding, this proceeding is AEP
3 is asking for 355 a megawatt-day for capacity charges
4 to CRESSs. I don't know what they intend to do on the
5 other side if they get this.

6 Q. All right. My question was more revolved
7 around we discussed there is a guarantee of 5 and
8 15 percent savings for customers, and you had
9 indicated if the price for capacity that FES must pay
10 increases, that customers still would be guaranteed
11 to get that savings because the capacity price
12 increase that FES would pay would also show up
13 somewhere else. Is my understanding correct?

14 A. I did not say that relative to this
15 proceeding. In this proceeding if we were required
16 to pay a capacity charge, then FES would always honor
17 its contracts, but in this case we would lose money.
18 That's why later on we decided to try to cover
19 ourselves for those circumstances where we could get
20 absent increased capacity charge, and that's why we
21 started developing language around both parties being
22 able to get out of the contract.

23 Q. And "later on" meaning what?

24 A. In '12 at some point in time. You have
25 to remember, this is a contract relating to the

1 original Reynoldsburg aggregation agreement dating
2 back to '10 or some period before. So these terms
3 and conditions, to my belief and knowledge, are
4 similar to what they were when we signed the original
5 agreement.

6 Q. So there is nothing in this contract or
7 terms and conditions that would allow FES to stop
8 serving the customer, correct?

9 A. There is nothing. But you have to
10 remember, when AEP established its stip, it allowed
11 for 21 percent RPM base capacity. All these
12 agreements that were signed at that point in time
13 would get RPM based capacity. So there was really no
14 risk that the capacity costs under this agreement
15 would go up to 255, or whatever else AEP is
16 considering for capacity, so there was no risk that
17 this capacity cost would go up in the Reynoldsburg
18 agreement.

19 MR. SATTERWHITE: Your Honor, I move to
20 strike. All I asked was what was contained in the
21 body of these terms and conditions, not his
22 explanation of his belief what that may mean or not
23 mean.

24 MR. KUTIK: Your Honor, he was asked
25 about the circumstances that would apply to this

1 contract. He explained with respect to the
2 circumstances as he understood it with respect to the
3 Stipulation whatever risks the company was looking
4 at. The foundation for the question was incorrect
5 and that's what Mr. Banks was explaining.

6 MR. SATTERWHITE: Not at all, your Honor.
7 I was asking him in the four corners of this
8 document, what was contained in that.

9 EXAMINER SEE: Thank you both. The
10 witness's answer stands.

11 MR. SATTERWHITE: Thank you.

12 Q. Look at page 5 of your testimony again.
13 On line 16 to 17 you refer to "above market price for
14 capacity." Do you see that?

15 A. Yes, I do.

16 Q. And just so I make sure I understand, you
17 use that term a number of times in your testimony.
18 Is it safe to assume when you refer to a market price
19 for capacity, you're referring to the PJM RPM?

20 A. I am referring to the PJM RPM capacity
21 price, yes.

22 Q. And there are other markets that
23 determine capacity prices, correct, not just the one
24 used here?

25 A. In the PJM region, I don't know of other

1 markets that determine capacity prices.

2 Q. That's not the only price for capacity;
3 that's one price for capacity, and that's focused on
4 the PJM RPM price, correct?

5 A. Outside of this case, that's the only
6 capacity price that I know of.

7 Q. But the PJM RPM capacity price is set
8 through a specific process, correct?

9 A. That's correct.

10 Q. And you don't know of any other market
11 prices for capacity outside of the PJM RPM price?

12 A. I don't know of any other market-based
13 price for capacity outside of the capacity prices
14 that are established in the PJM, either base residual
15 auction or supplemental auctions that might be
16 conducted.

17 Q. But you do understand that the FRR is not
18 synonymous with the PJM RPM, correct?

19 A. I do understand that FRR is not PJM RPM.
20 FRR is a designation that a utility can elect to take
21 responsibility for serving its load so it doesn't bid
22 its load into PJM, and then that utility is required
23 to provide capacity plus reserve to serve that load.

24 Q. Further down on line 17 through 23, on
25 page 5, you discuss the increase in component costs,

1 how that impacts customer savings in Ohio, correct?

2 A. Yes. On lines 20 and 21 I talk about
3 increases in component costs, yes.

4 Q. But the customers don't pay directly for
5 something like capacity to whoever provides it. What
6 the customer pays on the retail side is controlled by
7 what the CRES provider is going to charge them; is
8 that correct?

9 A. What the customer pays on the retail side
10 is what the customer is willing to pay.

11 Q. As long as someone is willing to sell it
12 to them, correct?

13 A. Correct. But they won't pay what they're
14 not willing to pay.

15 Q. Correct. But what FES charges its
16 customers is established by FES and what they're
17 willing to offer it at, correct?

18 A. What FES offers its customers is based on
19 what FES views as component costs at any point in
20 time when it is negotiating a deal with a customer.

21 Q. I'm asking, because you mentioned "An
22 inappropriate increase in component cost affects the
23 savings for retail customers." That's your
24 testimony, right?

25 A. That's correct.

1 Q. But isn't there a middle part to that
2 equation, where it's the CRES provider, such as FES,
3 that is deciding what they're going to charge as to
4 the retail rate, not the individual component costs
5 at the front end?

6 A. FES can make offers, and there are
7 various component costs that goes into a price that
8 FES might offer a customer. You have to pay for your
9 energy costs. You have to pay for a swing in a
10 customer load, basically your load profile. You have
11 to pay for capacity. You have to pay for any risk
12 adders you think are appropriate in the deal, and you
13 also have to pay for your administrative costs of
14 being a retail company. On top of that you may add a
15 margin, and that's what retailers do in the market.
16 They offer costs plus whatever is their margin, so
17 capacity is a cost that indirectly the customer ends
18 up paying the CRES provider for.

19 Q. Okay. That's my point. So an increase
20 in a component cost doesn't necessarily,
21 automatically mean an increase to a retail customer
22 for what they will pay someone like FES, correct?

23 A. I can't answer in that context. I mean,
24 when you strike a deal with the customer, you look at
25 your component costs at the time you do the deal. So

1 if capacity is valued at, let's say, \$16 a
2 megawatt-day, that's the cost that you base your
3 price to customers on.

4 In your mind, you struck a deal with the
5 markets that you're going to pay \$16 for capacity.
6 You've also struck the deal with the market you're
7 going to pay, let's say, \$30 for energy. And once
8 you do the deal with that customer, your profit is
9 locked in at that time. So if you have an increase
10 in capacity costs after you have locked in your deal
11 with the customer, you either have to pass those
12 costs on to the customer, or you can get out of the
13 deal. But you can't have an increase in costs after
14 you've entered into a deal with the customer and not
15 have that increase in cost impact your profitability
16 in that deal. That's just the way the market works.

17 Q. And is that why on page 6 of your
18 testimony, line 4 to 7, you talk about FirstEnergy
19 Solutions will only enter into contracts with clauses
20 allowing termination if the contract becomes
21 uneconomical?

22 A. I thought I heard you say "only," and I
23 don't see that in here. It says these "contracts
24 will likely contain terms and conditions...."

25 Q. Well, do you think FES should enter into

1 contracts that would require it to be uneconomical?

2 A. I don't understand that question.

3 Q. Well, what does your testimony state in
4 here, that FES will enter into contracts with clauses
5 that do not allow it to get out if the contract
6 becomes uneconomical?

7 A. What this says is that any competitor in
8 the marketplace will either decide to enter into a
9 contract that will pass those costs on, or get out of
10 the contract, or not get in the market in the first
11 place. But to the extent there will be unknown costs
12 down the road that could potentially affect the deal,
13 a competitor is only wise to protect itself from the
14 increases in costs, and this is one of the ways you
15 can do it. You can have terms and conditions in your
16 contract that will allow you to get out of that
17 contract to the extent you have an increase in costs
18 that wasn't anticipated.

19 Q. Is the premise of that condition that the
20 CRES provider should not be required to stay in a
21 contract that would be uneconomical to the CRES
22 provider?

23 A. The CRES provider should enter into a
24 contract with a willing buyer. If the buyer is
25 willing to sign that contract, both parties have to

1 live up to the terms and conditions of that contract.

2 I'm not sure what you're asking beyond that.

3 Q. Well, you talked about before in your
4 testimony, and in your written testimony, what you
5 term as inappropriate increases in component costs
6 affect the price that go to retail customers. And
7 then later in your testimony you talk about how
8 contracts in the future will likely contain terms and
9 conditions that allow suppliers to terminate the
10 contracts in the event that regulatory changes make
11 the contracts uneconomical, right?

12 A. I did indicate that if changes in
13 component costs make a contract uneconomical and the
14 supplier was astute enough to include that language
15 in the contract, that's the right thing to do.

16 Q. Because from a basic economic point of
17 view, you don't think you should be stuck in a
18 contract that is uneconomical if you planned ahead
19 and had the contract terms; is that correct?

20 A. What I said is, we go into the contract
21 thinking the contract is going to be economical, and
22 based on everything we understood about what's
23 happening in Ohio, we saw the stip, and so when we
24 saw the stip, we made our best guess who was going to
25 get RPM capacity and who wasn't, and we signed a

1 contract based on that best guess.

2 And we had an open and honest discussion
3 with the customer about it, so basically what the
4 customer gets is the least cost of either a deal with
5 us or SSO service if the costs come in at higher than
6 were anticipated. Because we are going to charge
7 them a cost that's below -- a price that's below the
8 SSO service, so if we get capacity costs that would
9 cause us to increase the customer price, we would let
10 the customer return to SSO service. So basically the
11 customer gets a free option to either have the lower
12 of our deal or the SSO service.

13 We saw it as a benefit to the market by
14 having customers shop and a benefit to the customer
15 realize savings in the event this case ended the way
16 we thought it would end. And anybody who would
17 accept the cost that is not managed from a risk
18 perspective is probably not going to last in the
19 business very long.

20 MR. SATTERWHITE: Your Honor, I ask to
21 strike everything but the last sentence. I wasn't
22 asking about interaction with customers at this
23 point. I was asking from an economic point of view
24 if FES should be required to stay in an uneconomical
25 contract. It was that simple.

1 MR. KUTIK: He was asked about
2 essentially how you deal with those risks, and he
3 answered that question.

4 MR. SATTERWHITE: I never asked how he
5 would deal with those risks. I asked from an
6 economic point of view, should he be required to stay
7 in a contract that is uneconomical.

8 MR. KUTIK: Same difference.

9 EXAMINER SEE: Motion to strike
10 everything but the last sentence of the witness's
11 answer is granted.

12 MR. SATTERWHITE: Thank you.

13 Q. Let me ask, what if FES had an economical
14 contract that insured a diversity of competitive
15 suppliers that insured competition, should FES be
16 required to stay in that contract?

17 MR. KUTIK: Your Honor, there is no
18 evidence in all of this record, that the assumption
19 in that question is at all fact. Therefore, it's an
20 improper question. It assumes facts not in evidence.

21 MR. SATTERWHITE: Your Honor, I wasn't
22 considering it as fact. I was testing the witness's
23 belief about competition, and we talked about
24 uneconomic contracts, and I wanted to test his theory
25 against his belief in competition. It is a

1 hypothetical.

2 EXAMINER SEE: Mr. Satterwhite, I will
3 ask you to rephrase the question.

4 MR. SATTERWHITE: Sure.

5 Q. See if I can do it to clear it up.
6 Mr. Banks, you stated in your testimony -- I'm trying
7 to lead up to it to make it easier -- the importance
8 of competition in the state of Ohio, correct?

9 A. Can you point me to the page and line
10 number?

11 Q. Sure. We talked about it earlier. It
12 was page 4 you talked about the benefits of
13 competition and how it was important to Ohio,
14 correct?

15 A. I say benefits for customer and the
16 economy, and I stated that Ohio has taken advantage
17 of those opportunities.

18 Q. And you would agree that that diversity
19 of suppliers is important for competition, correct?

20 A. I think a competitive marketplace will
21 have multiple suppliers.

22 Q. So if FES is offering a contract to a
23 customer that ultimately ends up being uneconomical,
24 would it be appropriate for the Commission to not
25 allow FES out of that contract if it supported

1 competition in Ohio?

2 MR. KUTIK: Objection, your Honor.

3 There's no basis to believe that the Commission could
4 compel FES to be in or out of any contract.

5 MR. SATTERWHITE: Your Honor, I'm asking
6 a hypothetical to test the theory how important
7 competition is. This witness talks about how
8 important it is. I'm simply trying to determine
9 whether what they're asking to apply to AEP Ohio
10 would also apply to FirstEnergy Solutions, and if
11 something was uneconomical, if they should be forced
12 to stay in that contract for the benefit of
13 competition.

14 EXAMINER SEE: The objection is
15 sustained.

16 Q. Still on page 6, line 17, you start to
17 talk about capacity being a moving target. Do you
18 see that?

19 A. Yes, I do.

20 Q. Is it your testimony that capacity
21 charges should stay fixed to avoid customer
22 confusion?

23 A. Absolutely not.

24 Q. What is the point there of the moving
25 target causing confusion in the market?

1 A. The point is that at any point in time,
2 every supplier in the state of Ohio had the
3 expectation that cost of capacity was going to be
4 RPM-based capacity through May of 2015. The moving
5 target indicates with the stip, now CRES suppliers
6 are faced with a moving target of what the capacity
7 through 2015 was going to be.

8 Then with this filing, CRES providers are
9 faced with another different moving target what the
10 capacity is going to be through 2015. So it's not
11 that the capacity value should be fixed; it's just
12 the capacity value at any given point in time
13 shouldn't change on a whim.

14 Q. Right. You state on line 18 this created
15 uncertainty for suppliers so you'd rather see a more
16 stable capacity price, correct?

17 MR. KUTIK: Objection, mischaracterizes
18 his testimony.

19 MR. SATTERWHITE: I'm trying to figure
20 out, your Honor. I'm asking the question.

21 EXAMINER SEE: The objection is
22 overruled.

23 THE WITNESS: Can you repeat it for me,
24 please?

25 (Record read.)

1 A. I think the first time you asked, I said
2 absolutely not. What I'd like to see is certainty,
3 so to the extent capacity values are known through
4 the 2015 time frame, which they were until AEP filed
5 its first stip, those capacity prices shouldn't
6 change. And then AEP filed this capacity price case
7 at 355, which changed it again.

8 So I think from a supplier and customer
9 perspective, it causes a lot of confusion, and as a
10 result, acts as a damper on competitive markets.

11 Q. On line 19 to 20 you talk about the
12 uncertainty, you're not talking about AEP
13 specifically and the stuff you just gave in your
14 answer. You say a party will be "less likely to
15 engage in any new transaction because they don't know
16 'the rules of the road' and whether a proposed new
17 transaction is in their best interest...."

18 So that's not stating that you'd rather
19 see a more consistent capacity charge; is that your
20 testimony?

21 A. What I'm saying, I'm not looking to say a
22 fixed capacity charge. I'm looking for suppliers and
23 customers to know what that capacity charge is and
24 not have that known capacity charge change mid stream
25 in contract.

1 Q. Maybe we're saying the same thing. What
2 you don't want to see are swings in the capacity
3 charge, correct?

4 A. That's not what I said. The capacity
5 could swing. For example, the current capacity
6 charge is about \$145 a megawatt day. On June 1 it
7 goes to about \$16 a megawatt-day. That's a swing.
8 On June 1st of the following year it goes to about
9 \$27 a megawatt-day. That's a swing.

10 Those things are okay because those things
11 were known. It was known by the entire market that
12 the capacity cost of a shopping customer that would
13 be charged to a CRES provider was going to be those
14 numbers, absent the adjustment to get to AEP's zone,
15 but everyone knew that.

16 All of a sudden now the capacity charge is
17 asked to be different midstream based on the stip
18 that was filed in September, and then asked to be
19 different again in this capacity case, then asked to
20 be different again in the modified ESP. So that's
21 the problem. Nobody knows what is going to happen.
22 There's too much uncertainty.

23 Q. So you just want it to be known.

24 A. To be known, yes, absolutely.

25 Q. I'd like to draw your attention to the

1 bottom of page 8, top of page 9 of your testimony.
2 Are you testifying that FES will terminate all
3 contracts above the RPM if something is set above RPM
4 in this case?

5 A. What I'm suggesting is that when we look
6 at the capacity prices that have been proposed over
7 the last several months, those capacity prices that
8 have been proposed by AEP, those capacity prices are
9 higher than the prices that were baked into the
10 contracts that we have with customers. So to the
11 extent that those capacity prices are increased at a
12 level that absorbs all of our margin, then, yes, we
13 would think that would not be the right thing to do.

14 Q. Right. And you state here on line 22,
15 "allow FES to terminate the contract if the customer
16 does not later receive RPM-based capacity pricing,
17 FES would terminate such contracts...."

18 I'm just trying to understand your
19 position. Are you saying if there's not RPM-based
20 pricing approved in this case, FES intends to
21 terminate the contract?

22 A. Our contracts allow us to terminate the
23 contract if RPM capacity, as we understand it, is not
24 approved, and that's a mutual right by both FES and
25 the customer, for the most part.

1 Q. So when you state on line 23, "FES would
2 terminate such contracts," that's not a declaration
3 you're going to terminate the contracts at this
4 point, correct?

5 A. I don't know what we would end up doing,
6 but based on the prices that are being considered, I
7 could pretty certainly say with the increases in the
8 capacity costs that have been proposed, that FES
9 would definitely terminate those contracts because
10 they would become uneconomical, because we have the
11 right under the contract to terminate. The customer
12 knows that, and we went into the contract with that
13 understanding with the customer.

14 Q. So you are just saying that you could.

15 A. I'm saying with the prices proposed in
16 this contract, we would.

17 MR. KUTIK: Could I have the question
18 read back.

19 (Record read.)

20 MR. KUTIK: Thank you, your Honor. The
21 record appears to be correct.

22 Q. I understand that, but I'm trying to look
23 at the words, not the overall outside testimony, but
24 the words inside your testimony.

25 Starting on line 21 down to 23, over to

1 the top of 8, you talk about the terms and conditions
2 that allow you to terminate, and you say, "FES would
3 terminate such contracts...."

4 What your testimony is today is that's
5 tied to an increased capacity charge at the level AEP
6 has proposed; is that correct?

7 A. Yes.

8 Q. It is your opinion, is it not, that it
9 does not matter what the costs of the utility are,
10 that the Commission should ensure competitive
11 suppliers access to RPM pricing for capacity,
12 correct?

13 A. It is my belief that -- I think I said
14 this in the last ESP, if I recall. It sounds like
15 it. But it is my belief that market-based capacity
16 should be the price that's put into effect, and the
17 reason is, again, as a monopoly, AEP could define
18 costs as anything. I mean, we don't know what that
19 is, and they're held to no accountability for
20 responding in the markets, like every other generator
21 and every other competitor in Ohio has to respond.

22 So I think AEP just needs to be held
23 accountable for reducing its costs so it can be more
24 competitive in the marketplace and not just assume
25 its costs should be recovered in full.

1 Q. My question is, it is your opinion that
2 it does not matter what the costs of the utility are,
3 correct?

4 A. Yes, that's what I said. That is
5 correct.

6 Q. So in your position with FES, have you
7 been involved in rule-making before the Commission?

8 A. Before what Commission?

9 Q. I'm sorry. Have you participated in your
10 role with FES in the rule-making proceedings with the
11 Commission, in front of the Commission, reviewing
12 rules?

13 MR. KUTIK: You mean this Commission?

14 Q. Correct, the PUCO.

15 A. Reviewing rules?

16 Q. Are you aware that the Commission has
17 rule-making proceedings when they pass Administrative
18 Code rules?

19 A. I'm aware they have proceedings, yes.

20 Q. Are you ever involved in those
21 proceedings and review any of the work in your
22 capacity with your company?

23 A. Yes.

24 Q. So you are familiar when I talk about the
25 "rule-making proceedings before the PUCO" what I'm

1 talking about?

2 A. Like this one here?

3 Q. That's a good question. Is this a
4 rule-making proceeding?

5 A. It seems to be.

6 Q. Are you familiar with JCARR, the Joint
7 Committee on Agency Rule Review?

8 A. I am not.

9 Q. So it is your understanding what we're
10 participating in today is a rule-making proceeding by
11 the Public Utilities Commission of Ohio?

12 A. It's my understanding that there's going
13 to be a rule-making on this case for 355 capacity.
14 That is my understanding of what we're doing today.

15 Q. Could you draw that distinction, or are
16 you aware of what an adjudicatory or evidentiary
17 hearing would be before the Commission as opposed to
18 a rule-making proceeding?

19 MR. KUTIK: Your Honor, at this point I
20 object, relevance. What is the relevance of this
21 witness's view of this particular procedure as
22 opposed to a rule-making or adjudicatory one? He's
23 not a lawyer. It doesn't matter.

24 MR. SATTERWHITE: If I may, your Honor.

25 EXAMINER SEE: Yes.

1 MR. SATTERWHITE: On page 9 he cites to
2 the Ohio Revised Code that deals with the adoption of
3 rules and bases his testimony on the duty of the
4 Commission in rule-making. I want to review what his
5 understanding of what we are in today versus a
6 rule-making procedure. I think it's appropriate.

7 EXAMINER SEE: The objection is
8 overruled.

9 MR. SATTERWHITE: Could you reread the
10 question, please.

11 (Record read.)

12 A. I'm not aware of all of those nuances.
13 What I am aware of is that the Commission has the
14 authority and responsibility as regards to this case.

15 Q. Thank you. Looking at page 9 of your
16 testimony, you refer to what you describe as the
17 impact on governmental aggregation in the state in
18 relation to this case, correct?

19 A. I think the question talks about the
20 status of governmental aggregation.

21 Q. On the top of page 9, correct. And it is
22 your testimony that the Commission must ensure
23 there's no discouragement of governmental
24 aggregation?

25 A. I don't know that I say that. I say that

1 the capacity pricing -- the question is about whether
2 or not the capacity pricing encourages and promotes
3 governmental aggregation.

4 Q. You state at line 3, "Pursuant to Revised
5 Code Section 4928.20(K) the Commission is charged to
6 'adopt rules that encourage and promote...aggregation
7 in the state.'" It goes on to say, "Does the proposed
8 capacity pricing encourage and promote governmental
9 aggregation?" Right?

10 A. That's what the question is, yes.

11 Q. And then you answer "No" to that,
12 correct?

13 A. "Does the proposed capacity pricing
14 encourage..." My answer is no, right.

15 Q. My question, do you believe the
16 Commission should not adjust the capacity price
17 because it could discourage governmental aggregation?

18 A. I think that if the outcome is to
19 discourage governmental aggregation, that the
20 Commission should not adjust the capacity pricing in
21 a way that would discourage governmental aggregation.

22 Q. You cite the Revised Code as the
23 authority to say that the Commission has a duty to
24 make sure it does not discourage governmental
25 aggregation, correct?

1 MR. KUTIK: Well, technically, it's not
2 testimony; it's a question. Since it's in the
3 question, not the answer, I'll object to
4 mischaracterization of the witness's testimony.

5 MR. SATTERWHITE: Your Honor, I'm asking
6 him his understanding of the question and answer in
7 his testimony so I understand the basis of his
8 testimony. The question incorporated the statute, so
9 I'm trying to see if that's the duty he's talking
10 about.

11 MR. KUTIK: That wasn't his question.

12 EXAMINER SEE: The witness may answer the
13 question.

14 THE WITNESS: I need the question reread,
15 please.

16 A. I agree with my lawyer, I didn't -- that
17 wasn't my answer. The question was whether the
18 Commission is charged with the responsibility to
19 adopt rules to encourage and promote large-scale
20 government aggregation in the state. That's part of
21 the question.

22 And the question is actually, "Does the
23 proposed capacity pricing encourage and promote
24 governmental aggregation?" And my answer is "No" to
25 that question. I'm not sure beyond that what I'm

1 being asked.

2 Q. I appreciate you agreeing with your
3 attorney, but I'm asking your testimony here today.
4 You discuss the role of governmental aggregation and
5 that shopping could be limited if the capacity price
6 were to increase, correct?

7 A. That's right. I did say shopping would
8 be limited for government aggregation if the capacity
9 price was increased.

10 Q. Is it your understanding that the
11 Commission should try to prevent that because it has
12 a duty to support governmental aggregation and not
13 discourage governmental aggregation?

14 A. I do believe the Commission should
15 prevent that because its role -- it has a role to
16 encourage and promote governmental aggregation.

17 Q. Okay. On page 14 of your testimony the
18 question asked of you refers to 4928.02(I). Do you
19 see that?

20 A. Yes, I see the question.

21 Q. And on line 7 to 8 you assert that AEP
22 Ohio has not...accomplished structural corporate
23 separation, as required by...law." Do you see your
24 statement there?

25 A. I do see my statement.

1 Q. Are you testifying that AEP Ohio is
2 operating in violation of the law?

3 MR. KUTIK: I'll note he's not a lawyer,
4 your Honor, so I object, this calls for a legal
5 conclusion, but I assume that's not the point of the
6 question.

7 MR. SATTERWHITE: My question, he says
8 it's required by law. I'm trying to see his
9 understanding.

10 A. Well, the point of this answer was the
11 sales practices and market power as a result of not
12 achieving corporate separation. So when you put
13 those two things together, I would question whether
14 or not AEP is in compliance with law, when you put
15 those two things together.

16 Q. Are you asserting that AEP Ohio is not
17 operating in compliance with the law?

18 A. My layman's interpretation is that AEP,
19 in aggregate, with all the things that it's doing in
20 the marketplace, is not operating in accordance with
21 what I would perceive to be the law in Ohio, more
22 specifically state policy.

23 Q. And here you talk about "has not yet
24 accomplished structural corporate separation...." So
25 are you expanding what you're saying to be the

1 aggregate of all actions that AEP Ohio does, or are
2 you limiting it to the structural corporate
3 separation in your testimony?

4 A. Well, if we can go back to the question,
5 it says, "Pursuant to Revised Code...state policy
6 seeks to 'ensure retail electric service consumers
7 protection against unreasonable sales practices,
8 market deficiencies, and market power.'"

9 And my point in my answer here is that
10 when you think about all those things, I would
11 suggest to you that AEP acts contrary to all of those
12 things, and when you combine that with the fact that
13 they have not achieved structural corporate
14 separation, it, for me, questions whether they are
15 operating in compliance with the law.

16 Q. Now, your attorney has established the
17 question is not your testimony; the answer is.

18 A. Yes. And the answer is related to the
19 question.

20 Q. I'm glad we agree on that. But my
21 question, the sentence I'm talking about is, "To the
22 contrary, the Proposed Capacity Pricing reflects an
23 abuse of market power by an EDU that has not yet
24 accomplished structural corporate separation, as
25 required by...law."

1 I'm not a grammarian. My wife is the
2 English teacher. But it looks like the "as required
3 by Ohio law" is modifying the "has not yet
4 accomplished structural corporate separation." Is my
5 attempt at being a grammarian correct?

6 A. I'm not seeing the distinction. What it
7 says is that the entity, the proposed capacity price,
8 is a reflection of "an abuse of market power by an
9 EDU that has not yet accomplished structural
10 corporate separation."

11 Q. You're saying "required by Ohio law,"
12 modifies both "proposed capacity pricing reflects an
13 abuse of market power" and the second part that says
14 "by an EDU that has not yet accomplished structural
15 corporate separation."

16 A. Yes. I think both those things indicate
17 that AEP Ohio is not acting in accordance with state
18 policy.

19 MR. SATTERWHITE: Your Honor, at this
20 point I have a couple more questions, but I think it
21 involves some of the material provided to the company
22 in discovery that we agreed to keep competitively
23 sensitive. I want to respect the company's wishes
24 and move to close the record.

25 EXAMINER SEE: Okay. I need to know who

1 has entered into a protective agreement in the room
2 and who would need to leave.

3 MR. HAYDEN: Your Honor, I don't know the
4 company has entered into a protective agreement with
5 anyone but AEP.

6 EXAMINER SEE: Then I'd like for you to
7 hold those questions. Let me shift to staff.

8 Do you have any cross-examination for
9 this witness?

10 MR. BEELEER: No questions, your Honor.

11 EXAMINER SEE: Is it possible for us to
12 take the entire portion of the cross-examination
13 questions and any redirect you might have on those in
14 a closed piece and continue with any redirect that
15 doesn't need to be closed and any recross you would
16 not have till the close of the proceeding?

17 MR. KUTIK: I'm not sure I understand,
18 your Honor.

19 EXAMINER SEE: Let's go off the record
20 for a minute.

21 (Discussion off record.)

22 (Confidential portion.)

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(Public record.)

EXAMINER SEE: Back on the record.

MR. KUTIK: No questions.

MR. SATTERWHITE: At this time the
company would move -- or do you want to move first?

EXAMINER SEE: Go ahead, Mr. Satterwhite.

MR. SATTERWHITE: Do you want to finish
questions from the Bench?

EXAMINER SEE: No, no. Go ahead.

MR. KUTIK: Since it is my witness, let
me move forward.

MR. SATTERWHITE: Go ahead.

MR. KUTIK: At this time FES moves for
admission of FES Exhibit 102, FES exhibits previously
offered and now offered again, FES 116 and FES
Exhibit 120.

EXAMINER SEE: Are there any objections
to the admission of FES 102, FES 116, and FES 120?

MR. SATTERWHITE: No objection to 102,
your Honor, to 116. I believe this is something that
was previously not put into the record because the
witness couldn't validate it, Witness Allen, and I
believe Mr. Banks indicated that he knew there

1 definitely was an error on this exhibit, particularly
2 the 100 percent on the first page, so I don't think
3 this is a valid -- I don't think we should be
4 admitting data we know is invalid.

5 MR. KUTIK: What the witness said, your
6 Honor, this was from the PUCO, that this was from the
7 PUCO's website, and he was also commenting that that
8 particular data had a particular problem, but that
9 doesn't invalidate the document or make it
10 unauthentic. It also doesn't make it hearsay, given
11 the public duty that the PUCO has to collect and
12 disseminate that document. It's a public document.

13 MR. SATTERWHITE: I believe, counsel,
14 correct me if I'm wrong, this is not a screen print
15 from PUCO. This is an aggregation of data put
16 together. It's not the actual document from the
17 Commission, and the witness has indicated the data is
18 not correct, and so on the off chance if I were to go
19 through and check every other number in here, it is
20 improper.

21 MR. KUTIK: Your Honor, the numbers have
22 been authenticated.

23 EXAMINER SEE: The Bench will take
24 consideration of FES Exhibit 116 first thing
25 tomorrow.

1 As to the other exhibits?

2 MR. SATTERWHITE: The other exhibit was
3 FES 120.

4 EXAMINER SEE: Exhibit 102, the direct
5 testimony of Mr. Banks.

6 MR. SATTERWHITE: Right.

7 EXAMINER SEE: It is admitted.

8 (EXHIBIT ADMITTED INTO EVIDENCE.)

9 EXAMINER SEE: The other is FES Exhibit
10 120.

11 MR. SATTERWHITE: We would oppose this as
12 that is a case about AEP's certified territory, the
13 interaction of the CRES providers with AEP Ohio and
14 the capacity charge here, and I believe this was
15 already stated this was something from the Toledo
16 Edison territory and wouldn't really apply to this
17 case and doesn't belong. It's not relevant.

18 MR. KUTIK: Your Honor, what it shows is
19 that AEP Ohio's affiliate engages in highly
20 competitive activities, which is something that bears
21 on the veracity of the statements made by AEP Ohio's
22 witnesses about CRES behavior and competition and
23 what would and wouldn't happen in AEP Ohio; that is,
24 that CRES providers in AEP's Ohio territories
25 wouldn't act competitively and would keep profits

1 that AEP believes belong to them.

2 MR. SATTERWHITE: Again, your Honor, I
3 think Mr. Kutik did point out this is about what
4 happens in AEP Ohio, but what offered here is
5 something that happens outside of AEP Ohio's
6 territory, so it shouldn't be in the record. It's
7 not relevant to business interactions in AEP Ohio's
8 territory.

9 MR. KUTIK: What is relative is how
10 competitors act, regardless of where they are in
11 Ohio.

12 EXAMINER SEE: The Bench will take up the
13 admission of that exhibit tomorrow morning first
14 thing also.

15 What about the other two exhibits?

16 MR. SATTERWHITE: Thank you. AEP Ohio
17 would move for the admission of AEP Ohio 112 and 113.

18 MR. KUTIK: We object to Exhibit 112.
19 There is no foundation laid for that.

20 We have no objection to 113.

21 MR. SATTERWHITE: Exhibit 112, your
22 Honor, is straight from the Commission's website. It
23 is simply filing instructions that Mr. Banks is in
24 charge of complying with.

25 MR. KUTIK: No authentication from this

1 witness.

2 MR. SATTERWHITE: Self-authenticating,
3 your Honor, comes from the Commission's website.

4 MR. KUTIK: Apparently not, given AEP
5 attitude about that website.

6 EXAMINER SEE: Thank you, both. With
7 that, we will take up the admission of AEP
8 Exhibit 113, AEP Exhibit 116, and FES 120 tomorrow
9 morning.

10 MR. KUTIK: Your Honor, we have no
11 objection to 113.

12 EXAMINER SEE: I'm sorry, 112.

13 MR. CONWAY: Your Honor, could we address
14 a scheduling matter?

15 EXAMINER SEE: Wait just a moment,
16 Mr. Nourse. Let me finish this.

17 MR. CONWAY: Certainly. I thought you
18 were going off the record.

19 EXAMINER SEE: With that, 113, to which
20 there was no objection, is admitted into the record.

21 MR. SATTERWHITE: Thank you.

22 (EXHIBIT ADMITTED INTO EVIDENCE.)

23 EXAMINER SEE: Let's go off the record.

24 (Discussion off record.)

25 EXAMINER SEE: Back on the record.

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1 The parties have raised -- the company
2 has indicated it will -- it plans to file rebuttal
3 testimony. We will take the issue up of filing
4 rebuttal testimony, the due date for rebuttal, and
5 the date to reconvene the hearing in the morning, and
6 we'll start this process all over again at
7 8:00 o'clock tomorrow.

8 We're adjourned until then.

9 (The hearing adjourned at 4:19 p.m.)

10 - - -

1 CERTIFICATE

2 I do hereby certify that the foregoing is a
3 true and correct transcript of the proceedings taken
4 by me in this matter on Thursday, April 26, 2012, and
5 carefully compared with my original stenographic
6 notes.

7
8 Karen Sue Gibson, Registered
9 Merit Reporter

10 Rosemary Anderson, Registered
11 Professional Reporter

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Case No(s). 10-2929-EL-UNC

Summary: Transcript of Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company hearing held on 04/26/12 - Volume VIII electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.