

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

INDUSTRIAL ENERGY USERS-OHIO'S POST-HEARING BRIEF

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{C37700:6 }

("RAA").² While there are many contested propositions of law and statements of fact in this proceeding, this view of the role of the RAA and RPM-Based Pricing are not contested.

Article 2 of the RAA contains a purpose clause that states the intention and objective of the RAA (emphasis added):

This Agreement is intended to ensure that adequate Capacity Resources, including planned and Existing Generation Capacity Resources, planned and existing Demand Resources, Energy Efficiency Resources, and ILR will be planned and made available to provide reliable service to loads within the PJM Region, to assist other Parties during Emergencies and to coordinate planning of such resources consistent with the Reliability Principles and Standards. **Further, it is the intention and objective of the Parties to implement this Agreement in a manner consistent with the development of a robust competitive marketplace.** To accomplish these objectives, this Agreement is among all of the Load Serving Entities within the PJM Region. Unless this Agreement is terminated as provided in Section 3.3, every entity which is or will become a Load Serving Entity within the PJM Region is to become and remain a Party to this Agreement or to an agreement (such as a requirements supply agreement) with a Party pursuant to which that Party has agreed to act as the agent for the Load Serving Entity for purposes of satisfying the obligations under this Agreement related to the load within the PJM Region of that Load Serving Entity. Nothing herein is intended to abridge, alter or otherwise affect the emergency powers the Office of the Interconnection may exercise under the Operating Agreement and PJM Tariff.

² FirstEnergy Solutions Corp. ("FES") Ex. 110A at 111. While AEP-Ohio has claimed that it is entitled to receive cost-based compensation from CRES suppliers based on the RAA, it did not submit the RAA to support its claim or explain its failure to do so.

Ohio Civil Rule 10(D) states:

When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

As explained herein, AEP-Ohio's claim that it is entitled to cost-based compensation from CRES suppliers must be dismissed for a variety of reasons, including its failure to follow the Ohio Civil Rules which apply here pursuant to Section 4903.22, Revised Code. It is also important to note that the RAA is governed by the laws of Delaware pursuant to Section 16.2 of the RAA. Thus, AEP-Ohio is effectively asking the Commission to make judgments about any rights AEP-Ohio may have under the RAA based on the laws of Delaware.

AEP-Ohio is not a signatory party to the RAA. As discussed herein, American Electric Power Service Corporation (“AEPSC”) signed the RAA as agent for AEP-Ohio’s affiliated operating companies in the area known as AEP East. As shown on Schedule 17 of the RAA, AEPSC is one of the parties to the RAA “...on behalf of its affiliates:

Appalachian Power Company
Columbus Southern Power Company
Indiana Michigan Power Company
Kentucky Power Company
Kingsport Power Company
Ohio Power Company
Wheeling Power Company.”

Generation service is a competitive service by operation of Ohio law.³ While there are many contested claims in this proceeding, this legal reality is not contested.

AEP-Ohio has also continuously supported the use of RPM-Based Pricing for ratemaking purposes in Ohio. Indeed, AEP-Ohio relied upon RPM-Based Pricing to develop the capacity component of the competitive benchmark prices that AEP-Ohio used to compare the results under Section 4928.142, Revised Code (the market rate offer or “MRO” option), and Section 4928.143, Revised Code (the electric security plan or “ESP” option), in the ESP proceeding that produced the standard service offer (“SSO”) that is presently in effect.⁴

The RPM-Based Pricing capacity compensation method remained in effect until the Public Utilities Commission of Ohio (“Commission”) approved, over objections, a

³ Section 4928.03, Revised Code.

⁴ IEU-Ohio Ex. 103 at 11, 13-14.

Stipulation and Recommendation (“Stipulation”)⁵ in this case and related cases in which AEP-Ohio sought approval of a new ESP as discussed below.⁶

RPM-Based Pricing also controls for purposes of establishing compensation available to electric distribution utilities (“EDU”) in other areas of Ohio, including areas where AEP-Ohio’s affiliated CRES supplier is actively seeking and presently serving retail customers.⁷

On November 1, 2010, AEPSC, acting in the agent role it frequently plays within American Electric Power Company (AEP-Ohio’s parent), filed an application with the Federal Energy Regulatory Commission (“FERC”) in Docket No. ER11-1995.⁸ In its application, AEPSC requested authorization to establish a “cost-based” capacity compensation mechanism for OP and CSP relying upon Section D.8 of Schedule 8.1 of PJM’s RAA and to make the compensation mechanism uniquely applicable to CRES suppliers serving retail customers located in AEP-Ohio’s certified electric distribution service area. AEPSC claimed that there was no state compensation mechanism in place and that it was entitled to prosecute its claim based on Section 205 of the Federal Power Act (“FPA”) (hereinafter referred to as “the Section 205 Filing”).⁹

⁵ Stipulation and Recommendation (Sept. 7, 2011) (“Stipulation”).

⁶ See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 54-55 (Dec. 14, 2011) (hereinafter “*Stipulation Order*”).

⁷ IEU-Ohio Ex. 102A at 23-24. Although FirstEnergy Corporation’s (“FirstEnergy”) EDUs (The Cleveland Electric Illuminating Company, the Ohio Edison Company, and The Toledo Edison Company) are not compensated for capacity at RPM-Based Pricing, the FirstEnergy EDUs conducted an auction to procure capacity until it could sync up with PJM’s base residual action (“BRA”). *Id.* at 22-23. The price that resulted from these auctions was very close to the capacity prices that resulted from PJM’s BRA for the same delivery years. *Id.* at 23.

⁸ As a result of a deficient filing and a related directive from FERC, AEPSC refiled its application in FERC Docket No. ER11-2183 on November 24, 2010.

⁹ *American Electric Power Service Corporation*, FERC Docket No. ER-11-2183, Application at 3 (November 24, 2010) (hereinafter “*the Section 205 Filing*”).

In the Section 205 Filing, AEPSC proposed to substitute a pricing formula with computations tied to unaudited and AEP-Ohio-controlled data reported in its FERC Form 1. Neither AEPSC, OP nor CSP notified parties affected by the Section 205 Filing prior to making the Section 205 Filing at FERC.¹⁰

In recognition of the clear and present danger presented by the Section 205 Filing, the Commission issued an Entry in this proceeding on December 8, 2010. Among other things and in case the Commission's prior determinations had left any doubt, the December 8, 2010 Entry adopted, pursuant to Schedule 8.1 of the RAA, RPM-Based Pricing as the state compensation mechanism for AEP-Ohio. The December 8, 2010 Entry also opened this proceeding and solicited comments from interested parties.

Subsequent to the December 8, 2010 Entry, the Commission notified FERC of its action and urged FERC to dismiss the Section 205 Filing, a position supported by numerous parties. In response to the Commission's reliance upon the December 8, 2010 Entry in support of the Commission request that FERC dismiss the Section 205 Filing, AEPSC again argued that the Commission did not have subject matter jurisdiction to establish a capacity price for generation capacity service provided to a CRES supplier for resale to retail electric consumers in Ohio.

On January 20, 2011, FERC issued an order rejecting the Section 205 Filing finding that the Commission had adopted a state compensation mechanism pursuant to Schedule 8.1 of the RAA. More specifically, FERC found that AEPSC had waived any right to make a Section 205 Filing to establish a price for generation capacity service

¹⁰ Tr. Vol. II at 233-236, 404-405.

and did so as part of the settlement agreement which was associated with FERC's approval of the RAA.¹¹

AEPSC sought rehearing of FERC's January 20, 2011 order, again asserting that the Commission lacked subject matter jurisdiction to establish the method of compensation for capacity available to a CRES supplier.¹² Thereafter, AEPSC also filed a complaint¹³ at FERC pursuant to Section 206 of the FPA generally seeking to amend Section 8.1 of the RAA to displace and subordinate the role of any state compensation mechanism and RPM-Based Pricing.¹⁴ In its complaint AEPSC alleged, among other things, that the state compensation mechanism contained in Section 8.1 of the RAA was not just and reasonable because it would allow the Commission to establish a wholesale rate for capacity and circumvent AEPSC's ability to secure the specific type of cost-based compensation for such capacity that AEPSC favored.¹⁵ FERC has not addressed AEPSC's Section 206 Filing.

On February 29, 2012, AEPSC, acting in its capacity as agent for Indiana Michigan Power ("I&M") and relative to I&M's Michigan service area, filed an application with FERC in Docket No. ER12-1173-000.¹⁶ In its application, AEPSC requested authorization to establish a "cost-based" capacity compensation mechanism pursuant to Section D.8 of Schedule 8.1 of PJM's RAA. As in the Section 205 Filing related to Ohio,

¹¹ *The Section 205 Filing*, FERC Order at 4-5 (January 20, 2011).

¹² AEPSC's request for rehearing is still pending. On March 24, 2011, FERC tolled AEPSC's request for rehearing to allow itself additional time to consider the merits of AEPSC's rehearing request.

¹³ *American Electric Power Service Corporation v. PJM Interconnection, L.L.C.*, FERC Docket No. EL11-32-000, Complaint (April 4, 2011) (hereinafter "*the Section 206 Filing*").

¹⁴ Section 16.4 of the RAA states that only the PJM Board may amend the RAA. Thus, AEPSC's effort to amend the RAA through its Section 206 Filing is barred by the RAA.

¹⁵ *The Section 206 Filing* at 2-4.

¹⁶ *American Electric Power Service Corporation*, FERC Docket No. ER12-1173-000, Application (Feb. 29, 2012) (hereinafter "*I&M Case*").

AEPSC claimed that there was no “state compensation mechanism” in place in Michigan and that AEPSC was entitled to prosecute its claim based on Section 205 of the FPA (hereinafter referred to as the “Michigan Filing”). On April 30, 2012, FERC suspended the Michigan Filing for the maximum period allowed under the FPA, finding that the Michigan Filing may be unjust and unlawful and indicated that the process established by FERC would consider the following questions or subjects:

Whether the inclusion of CWIP in rate base is consistent with the Commission’s regulations and accounting procedures;

Whether proper procedures are in place to ensure there is no double recovery of capitalized AFUDC and corresponding amounts of CWIP included in rate base;

Whether the costs included in the formula rate have already been paid for by other customers through other rate schedules;

The extent to which alternative suppliers have relied on RPM clearing prices through June 2015;

The inclusion of derivative hedges in the calculation of the overall rate-of-return;

Customer review procedures;

The proper level of the ROE; and

The resulting rate.¹⁷

On January 27, 2011, AEP-Ohio filed an application to establish a new ESP.¹⁸

On August 11, 2011, the Commission issued an entry establishing a procedural schedule to conduct an evidentiary hearing in this proceeding. Shortly thereafter on September 7, 2011, AEP-Ohio, along with number of other parties, submitted the

¹⁷ *I&M Case*, FERC Order at 7-8 (April 30, 2012).

¹⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Application (January 27, 2011).

Stipulation to resolve AEP-Ohio's pending ESP proceeding and several other pending cases, including this proceeding.

Relevant to this proceeding, the Stipulation recommended that the Commission approve a two-tiered pricing scheme for generation capacity service available to CRES suppliers to be adopted prospectively as the state compensation mechanism. In other words, the Stipulation recommended that the Commission approve a wholesale capacity price, even though AEPSC was (and is) claiming the Commission is powerless to approve because the Commission lacks subject matter jurisdiction.

The first tier of the Stipulation's recommended CRES capacity price was tied to RPM-Based Pricing. The second tier, applicable to all capacity available to CRES suppliers not subject to RPM-Based Pricing, was set at \$255/megawatt-day ("MW-day"), a substantial increase to the otherwise applicable RPM-Based Price. The \$255/MW-day price was arbitrary and based neither on a market-based pricing method nor a cost-based pricing method.

During a September 7, 2011 conference call with the investment community held shortly after the Stipulation was filed with the Commission, AEP-Ohio acknowledged that the Stipulation was designed to block the ability of retail customers to enjoy the full benefits of the "customer choice" rights provided by Ohio law.¹⁹ Based on AEP-Ohio's own public representations of the purpose of the Stipulation's recommended two-tiered capacity pricing scheme, it was thus beyond doubt as of September 7, 2011 that the Stipulation was fundamentally and purposefully dedicated to a mission in conflict with Ohio law and the policy set forth in Section 4928.02, Revised Code.

¹⁹ FES Ex. 102 at Exhibit TCB-4.

After hearings on the Stipulation, on December 14, 2011, the Commission issued the Stipulation Order approving the Stipulation with modifications including modifications to expand the availability of the tier-one RPM-Based Pricing.²⁰

Following the Stipulation Order, applications for rehearing were submitted on January 13, 2012 by various parties including IEU-Ohio. Among other things, the applications for rehearing claimed that the Commission had erred in concluding that the package presented by the Stipulation was just and reasonable and in the public interest. By entry dated February 1, 2012, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing of the Stipulation Order.

By the time the applications for rehearing were submitted to the Commission, the rate shock and shopping-blocking consequences of the Stipulation (which AEP-Ohio had masked in its on-average mumbo jumbo and untimely reporting of shopping data) began to arrive in relentless proportions. As AEP-Ohio's customers opened the electric bills that arrived after the Stipulation Order, customers' outrage overtook AEP-Ohio's managed message. Also, the results of the bill-reducing competitive bidding process ("CBP") used to set the generation supply price for SSO customers of Duke Energy

²⁰ On January 23, 2012, the Commission issued an entry ("Clarification Entry") that provided a number of clarifications regarding its Stipulation Order. On February 10, 2012, AEP-Ohio filed an application for rehearing of the Commission's Clarification Entry arguing among other things that the Clarification Entry exceeds the Commission's jurisdiction and violates the statutory rehearing process by expanding the Opinion and Order outside the statutory rehearing process. Further, AEP-Ohio argued that the Clarification Entry was not supported by the record, forced AEP-Ohio to *involuntarily* provide a below-cost subsidy, and unreasonably retreated from the RPM-priced capacity set-aside limitations without an explanation. In addition, AEP-Ohio asserted that the Clarification Entry unreasonably imposed long-term obligations on AEP-Ohio while preserving the option to further modify the RPM set-aside levels in the future. On February 17, 2012, IEU-Ohio filed an application for rehearing of the Clarification Entry, arguing the entry was unreasonable because it did not allow all governmental aggregation programs that complete the necessary process by December 31, 2012, to have access to RPM-priced capacity. IEU-Ohio also asserted that the December 31, 2012 deadline to complete the governmental aggregation process was unreasonable.

Ohio (“Duke”) sharpened the contrast between the arbitrary and excessive administratively-determined prices authorized by the Stipulation Order and the SSO prices established through a CBP.²¹ Additionally, the Commission had access to filings that AEP-Ohio, or its agent AEPSC, made at FERC to implement the unlawful corporate separation provisions of the Stipulation and the glaring inconsistencies between the content of such filings and the expectations created by the Stipulation.

On February 23, 2012 the Commission granted, in part, IEU-Ohio’s and FES’ applications for rehearing, and rejected the Stipulation ultimately finding, for multiple reasons, that the Stipulation was not in the public interest.

As discussed below, upon review of the applications for rehearing, the Commission has determined that the Stipulation, as a package, does not benefit ratepayers and the public interest and, thus, does not satisfy our three-part test for the consideration of stipulations. Accordingly, the Commission will reject the Stipulation.²²

Because the Commission’s Stipulation Rehearing Entry rejected the proposed ESP contained in the Stipulation and in accordance with the requirements of Section 4928.143(C)(2)(b), Revised Code,²³ the Stipulation Rehearing Entry directed AEP-Ohio to file tariffs to provide SSO pursuant to its previously authorized ESP:

²¹ PUCO Press Release, *Duke Energy auction leads to lower electric prices in 2012* (Dec. 15, 2011) (accessible via the internet at: <http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/duke-energy-auction-leads-to-lower-electric-prices-in-2012/?border=off>; last visited May 22, 2012).

²² Entry on Rehearing at 4 (Feb. 23, 2012) (hereinafter “*Stipulation Rehearing Entry*”).

²³ Section 4928.143(C)(2)(b), Revised Code, states (emphasis added):

If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission **shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility’s most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.**

Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and **an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.**²⁴

The Stipulation Rehearing Entry also directed the Attorney Examiners assigned to this case to establish a new procedural schedule.

In response to FES' rehearing request, the Stipulation Rehearing Entry also focused on the confusion created by the Stipulation's provisions regarding the transfer of generating assets as such transfer was connected to AEP-Ohio's long-delayed compliance with the corporate separation requirements of Section 4928.17, Revised Code. In this regard, the Stipulation Rehearing Entry (at page 8) stated:

The Commission's intent in approving the generation asset divestiture was based on our understanding that AEP-Ohio would place all of its current (as of September 7, 2011) generation assets into the 2015 base residual auction, pursuant to the plain language of the Stipulation. Our intent is supported by not only the language within the Stipulation but also the testimony of two of the Signatory Parties' primary witnesses. However, AEP-Ohio's FERC filing is inconsistent with the intent of the Commission in that it fails to ensure that all generation assets currently owned by AEP-Ohio will be bid into the upcoming base residual auction.

Based upon the contradictory testimony presented by the Signatory Parties' witnesses, AEP-Ohio's witness Nelson's claim that the ultimate disposition of AEP-Ohio's generation assets was an "open question," and the fact that AEP-Ohio's FERC filing regarding divestiture is inconsistent with the Commission's intent in approving the Stipulation, the Commission finds that there are fundamental disagreements regarding important issues allegedly resolved by the Stipulation. The resolution of these issues is critical to the underlying question of whether the Stipulation benefits ratepayers and the public interest; therefore, we find, upon review of the record of this proceeding, that the Signatory Parties have not met their

²⁴ *Stipulation Rehearing Entry* at 12 (emphasis added).

burden of demonstrating that the Stipulation, as a package, benefits ratepayers and the public interest as required by the second prong of our three-part test for the consideration of stipulations. Accordingly, we must reject the Stipulation. Therefore, the Commission's approval of AEP-Ohio's generation asset divestiture pursuant to Section 4928.17(E), Revised Code, is revoked.

During the course of this proceeding, AEP-Ohio refused to or did not identify the Capacity Resources it intended to offer in PJM's BRA for the delivery year 2015/2016 scheduled to occur in the first half of May 2012. AEP-Ohio approached the concerns identified by the Commission in the Stipulation Rehearing Entry with no sensitivity to such concerns.²⁵

On February 27, 2012 and for the benefit of its sole shareholder, AEP, AEP-Ohio filed a motion for relief seeking to reintroduce AEP-Ohio's interpretation of the Stipulation's scheme to block customer choice. In other words, AEP-Ohio once again asked the Commission to approve a capacity price applicable to CRES suppliers while AEP-Ohio was asserting that the Commission does not have subject matter jurisdiction to do so.

While numerous parties (including many that previously supported the Stipulation) opposed AEP-Ohio's unlawful and unjust motion for relief, the Commission granted the requested temporary relief. Thus, what was contrary to the public interest when presented in the Stipulation as a package was extracted from the package and made available to AEP-Ohio so that AEP-Ohio could temporarily continue its shopping-

²⁵ The BRA referred to by the Commission in the above quote has now taken place and capacity resources that AEP-Ohio placed in the auction have been identified by IEU-Ohio as part of the confidential portion of the evidentiary record associated with IEU-Ohio's cross-examination of AEP-Ohio's witness Nelson in Case Nos. 11-346-EL-SSO, *et al.*

blocking scheme. The Commission made the shopping tax temporary and held that it shall terminate on May 31, 2012.²⁶

Various applications for rehearing were filed contesting the Temporary Shopping Tax Order on rather obvious and fundamental procedural and substantive grounds. No application for rehearing was filed by AEP-Ohio. On April 11, 2012, the Commission granted rehearing for the purpose of giving itself more time to consider the rehearing requests.

The evidentiary hearing phase of this proceeding subsequently commenced on April 17, 2012 and concluded on May 15, 2012.

Prior to the commencement of the evidentiary hearing in this proceeding, IEU-Ohio filed a motion to dismiss, asserting that the Commission lacked the statutory authority to authorize a cost-based or formula-based charge applicable to generation capacity service available to CRES suppliers serving retail customers located in AEP-Ohio's certified electric distribution service area. At the beginning of the hearing, the Attorney Examiners deferred ruling on IEU-Ohio's motion to dismiss.²⁷

At the close of AEP-Ohio's case-in-chief, IEU-Ohio again moved to dismiss the proceeding, this time orally. In its oral motion to dismiss, IEU-Ohio asserted that AEP-Ohio had failed to meet its burden of proof necessary for the Commission to authorize the proposed wholesale capacity compensation mechanism. More specifically, IEU-Ohio identified that AEP-Ohio had failed to meet its burden of presenting evidence sufficient to allow the Commission to approve AEP-Ohio's proposed cost-based capacity pricing mechanism under: (1) the Commission's

²⁶ Entry at 17 (March 7, 2012) (hereinafter "*the Temporary Shopping Tax Order*").

²⁷ Tr. Vol. I at 21-22.

authority to set rates for competitive retail electric service; (2) the Commission's authority to set rates for non-competitive retail electric services; or (3) the Commission's authority to set rates pursuant to the Commission's authority under Section 4909.16, Revised Code, and the applicable precedent associated with Section 4909.16, Revised Code.²⁸ The Attorney Examiners deferred ruling on IEU-Ohio's oral motion to dismiss.²⁹

In this proceeding, AEP-Ohio is seeking Commission approval of a so-called cost-based formula rate method to establish a unique price for generation capacity service available to a CRES provider serving retail customers located in AEP-Ohio's certified electric distribution service area. Based on high level summaries of unaudited FERC Form 1 data for the year 2010, AEP-Ohio claims that this pricing proposal would take the CRES capacity price to about \$355/MW-day for all capacity available to CRES suppliers.³⁰ A capacity price of \$355/MW-day would sharply increase capacity prices and is about five times higher than the average fixed, known and measurable RPM-Based Price during the next three years (\$70/MW-day).³¹

For the reasons explained below, IEU-Ohio urges the Commission to reject AEP-Ohio's capacity pricing proposal. Most of the reasons provided below have been previously presented to the Commission. The resource burn that has been imposed by the *Groundhog Day*-like rehashing of issues and positions on stakeholders that have repeatedly stood in opposition to fundamentally defective proposals by AEP-Ohio adds further injury to the injustice that has visited consumers through AEP-Ohio's efforts to bill, collect, and block the exercise of customer choice rights.

²⁸ Tr. Vol. V at 1056-1059.

²⁹ Tr. Vol. V at 1061.

³⁰ AEP-Ohio Ex. 102 at 21.

³¹ See IEU-Ohio Ex. 102A at 23.

AEP-Ohio's laughable capacity price proposal is the focus of the balance of this brief. The Commission's willingness to pull the plug on the Stipulation Order took courage and provides some hope to consumers that the Commission will yet put things right.

In the last few weeks, AEP-Ohio has launched a glossy and high-priced advertising campaign clearly designed to affect the outcome in this proceeding; a move that would have justified a change of venue in a civil proceeding. AEP-Ohio's advertising frames the debate as a contest between FirstEnergy and the "FairEnergy" proponent, AEP-Ohio. Rather than seeking to win on the merits and addressing the legitimate issues and concerns identified by the Commission and stakeholders, AEP-Ohio has launched a campaign to win its case "on the money." In doing so, AEP-Ohio has yet to respond to requests by injured consumers for a refund of the excessive electric bills that arrived on a "bills rendered basis" following the Stipulation Order.

The Commission's records and orders in this and related proceedings show that but for AEP-Ohio's impeded efforts by the Office of the Ohio Consumers' Counsel ("OCC"), the Appalachian Peace and Justice Network ("APJN"), IEU-Ohio and FES, the injury inflicted on thousands of innocent electric consumers in response to AEP-Ohio's insatiable and unfounded demands would have been much worse. How is it then that AEP-Ohio is free to divert dollars that might be used to improve its service or address the needs of its employees to fund an advertising campaign that has no connection to reality or the real issues raised by its persistent efforts to raise rates and block shopping?

The transition is over and so must be AEP-Ohio's anticompetitive and contrary-to-the-public-interest behavior. IEU-Ohio urges the Commission to sustain AEP-Ohio's oft-stated position that the Commission lacks the authority to do what AEP-Ohio demands.

II. BACKGROUND

In 1999, Ohio fundamentally altered its law regarding the structure of the electricity industry in Ohio and the Commission's economic and other regulation of that industry through the passage of Amended Substitute Senate Bill 3 ("SB 3"). SB 3's means of restructuring of the electric industry was organized and systematic. It established a "transition period" beginning on January 1, 2001 and ending on December 31, 2010.³²

Within this transition period, SB 3 created a five-year market development period ("MDP") during which incumbent investor-owned utilities and customers had the opportunity to prepare for and transition to a competitive market.³³ SB 3 directed the Commission to structure transition plans with the objective of obtaining at least 20% customer switching by the mid-point of the MDP which could end no later than December 31, 2005.³⁴

The evolutionary approach to restructuring the retail investor-owned electric industry in Ohio, accompanied by the completion of the transitional tasks, served two important objectives. The first objective was to provide customers with certain price protections from the dysfunction that is often associated with new and immature

³² Section 4928.40, Revised Code.

³³ *Id.*; IEU-Ohio Ex. 102A at 17.

³⁴ Section 4928.40, Revised Code.

markets until such time as the retail market was mature enough to produce “reasonable” prices.³⁵ The General Assembly protected customers by specifying that the total price of electricity in effect in October 1999 would define the total price envelope within which the individual or unbundled generation, transmission and distribution prices would be established through the transition plan process.³⁶ SB 3 also provided residential customers an immediate benefit in the form of a 5% discount on the unbundled generation price.³⁷

The second consequence of the SB 3 restructuring protected incumbent EDUs during the MDP from potential revenue loss that might otherwise be caused by an abrupt exposure to a new and immature market where customers had the ability to obtain generation supply from a CRES supplier.³⁸ In 2001, price offers for competitive retail service were relatively low and the transition structure protected EDUs from revenue and earnings erosion.³⁹

More specifically, SB 3 provided each EDU with the opportunity to protect itself in the event the EDU judged its unbundled generation prices to be in excess or above the generation service prices that would result from the forces of effective competition.⁴⁰ The opportunity to pursue this protection required an EDU to file a claim with the

³⁵ IEU-Ohio Ex. 102A at 17.

³⁶ The total bundled price for each electric rate schedule established the total rate cap, which is then divided between the functional components (generation, transmission, and distribution). Ohio provided, in Section 4928.34(A)(6), Revised Code, that such rate cap was subject to adjustment for changes in taxes, costs related to the establishment of a universal service fund (“USF”), and a temporary rider established by Section 4928.61, Revised Code. Thus, the rate cap was not an absolute cap on the total charges paid by customers during the MDP.

³⁷ Section 4928.40, Revised Code.

³⁸ IEU-Ohio Ex. 102A at 18.

³⁹ *Id.*

⁴⁰ *Id.*

Commission for “transition revenue” (*i.e.*, the positive difference between existing unbundled generation prices and the unbundled prices attributed by the utility to effective competition—sometimes called “stranded costs”) as part of the electric transition plan (“ETP”) filings.⁴¹ All transition revenue was required to be collected by December 31, 2010.⁴² SB 3 contains the criteria⁴³ that the Commission applied to determine how much, if any, of the transition revenue claim was eligible for recovery.

When the Commission approved a transition revenue claim, it also approved transition charges that the EDU could then charge shopping customers for the period specified by the Commission.⁴⁴ For non-shopping customers, the transition charges were embedded in the default generation supply SSO price and were equal to the portion of the applicable default generation supply price that was not avoidable by shopping customers.⁴⁵

These criteria were applied to determine the total amount of transition revenue that was eligible for collection through transition charges *if* an EDU submitted a claim for transition revenue. SB 3 did not require transition revenue to be addressed unless the EDU submitted a claim for transition revenue. A transition revenue claim was eligible for collection through transition charges if the revenue claim was limited to: (1) costs that were prudently incurred; (2) costs that were legitimate, net verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state; (3) costs that were unrecoverable in a competitive market; and

⁴¹ *Id.*

⁴² Section 4928.40, Revised Code.

⁴³ Section 4928.39, Revised Code.

⁴⁴ IEU-Ohio Ex. 101 at 4-5.

⁴⁵ *Id.* at 5.

(4) costs that the utility would otherwise have been entitled an opportunity to recover.⁴⁶

All four of the criteria had to be satisfied for the transition revenue claim to be recoverable from shopping and non-shopping customers.⁴⁷

The total allowable amount of any transition revenue claim was separated if a portion of that total claim involved generation-related regulatory assets.⁴⁸ The total transition charge resulting from any allowable transition revenue claim was also separated to show a separate regulatory asset charge.⁴⁹ SB 3 limited the Commission's ability to make adjustments to the regulatory asset portion of an allowed transition charge and also required the regulatory asset portion of a transition charge to end no later than December 31, 2010. As stated previously, under SB 3 the non-regulatory asset portion of any transition charge which was associated with above-market generating plants had to end by no later than December 31, 2005 or the end of the MDP, whichever occurred first.⁵⁰ Section 4928.141, Revised Code, which was added after SB 3, excluded any previously authorized allowances for transition costs with the exclusion becoming effective on and after the date the allowance was scheduled to end under the prior rate plan.

If an EDU wanted to make a claim for transition revenue, it had to include the claim in its proposed ETP.⁵¹ A proposed ETP had to be filed 90 days after the effective date of SB 3.⁵² The statutory criteria discussed above were then used to determine how

⁴⁶ Section 4928.39, Revised Code.

⁴⁷ *Id.*

⁴⁸ Section 4928.39(D), Revised Code; IEU-Ohio Ex. 101 at 6.

⁴⁹ IEU-Ohio Ex. 101 at 6.

⁵⁰ Section 4928.40, Revised Code.

⁵¹ IEU-Ohio Ex. 101 at 7.

⁵² Section 4928.31(A), Revised Code.

much of the transition revenue claim was eligible for collection through transition charges. For the generation plant-related portion of the transition revenue claim, the net book value of generating assets at December 31, 2000 was used as the baseline to determine how much, if any, of the net, verifiable, prudently incurred book value was not recoverable in the market and, in this context, the market included the entire market, including the wholesale and retail segments.⁵³

Various methods were used by EDUs to forecast how much transition revenue they might experience as a result of customers being able to select their generation service supplier.⁵⁴ The most popular approach was a revenue-based approach.⁵⁵ Generally, the revenue-based approach projected revenue streams for the various generating plants and computed a present value of the future estimated revenue streams.⁵⁶ The present value of the estimated future revenue streams was then compared to the net book value of the generating plants at December 31, 2000.⁵⁷ Generation plant-related transition costs were deemed to be positive (and potentially eligible for recovery through transition charges) if the present value of the projected revenue streams was, in the aggregate, less than the net book value of the generating plants at December 31, 2000.⁵⁸ Again, the generation plant-related transition revenue had to be recovered during the period beginning January 1, 2001 through either the end of the MDP or December 31, 2005, whichever occurred first.⁵⁹

⁵³ IEU-Ohio Ex. 101 at 7.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 7-8.

⁵⁹ *Id.* at 8.

SB 3 also established the obligation for EDUs to provide an SSO. Specifically, SB 3 required:

After its market development period, an electric distribution utility in this state shall provide consumers, on a non-discriminatory and comparable basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.⁶⁰

A. CSP's and OP's ETP Case

CSP and OP filed their proposed ETPs on December 30, 1999.⁶¹ As a part of these proposed ETPs, CSP and OP submitted a claim for transition revenue which included an allowance for both above-market generation plants and generation-related regulatory assets.⁶²

CSP and OP relied upon Dr. John Landon to estimate the extent to which they had a basis for claiming generation plant-related transition revenue.⁶³ Dr. Landon used a revenue-based approach described in IEU-Ohio witness Hess' testimony.⁶⁴ Dr. Landon projected market-based generation revenue, expenses and capital expenditures for the period 2001 through 2030 using multiple scenarios reflecting different assumptions about natural gas prices and environmental regulations.⁶⁵ Dr. Landon discounted these projections to December 31, 2000 to develop his net

⁶⁰ Former Section 4928.14(A), Revised Code (SB 221 repealed and replaced the former Section 4928.14(A), Revised Code, which was enacted by SB 3. A link to SB 3, which contains the former Section 4928.14(A), Revised Code, is available at the following link: http://www.legislature.state.oh.us/BillText123/123_SB_3_10_N.htm).

⁶¹ *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Application (Dec. 30, 1999) (hereinafter "OP ETP Case").

⁶² IEU-Ohio Ex. 101 at 8.

⁶³ See IEU-Ohio Ex. 106 at 12 (Forrester Direct Testimony); Tr. Vol. I at 139-141; 145-147.

⁶⁴ IEU-Ohio Ex. 101 at 8.

⁶⁵ *Id.*

present value revenue stream and then compared this net present value to net generation plant and associated asset book values as of the same date, December 31, 2000.⁶⁶ From this comparison, he rendered an opinion on the amount of generation plant-related transition revenue that the Commission should approve for CSP and OP (the present value revenue delta or difference between a cost-based ratemaking revenue stream and a competitive market revenue stream).⁶⁷

Dr. Landon's methodology included all of the components of cost-based ratemaking including a rate base, return on rate base, operation and maintenance expenses, depreciation expense, taxes other than income taxes, and income taxes associated with the **total** generation service (both wholesale and retail market segments).⁶⁸ The analysis covered the period from 2001 through 2030. Dr. Landon's testimony concluded that AEP-Ohio would be unable to recover a significant amount of generating plant-related investment in the competitive market.

CSP's and OP's ETP cases were ultimately resolved through stipulations (hereinafter referred to as the "ETP Stipulation") approved by the Commission.⁶⁹ In the ETP Stipulation, CSP and OP agreed to forego claims for recovery of above-market generation plants (generation transition costs or "GTC").⁷⁰ Specifically, AEP-Ohio agreed to not "...impose any lost revenue charges (generation transition charges

⁶⁶ *Id.*

⁶⁷ IEU-Ohio Ex. 101 at 9, JEH-1.

⁶⁸ *Id.* at 9.

⁶⁹ *Id.* at 10; FES Ex. 106.

⁷⁰ *OP ETP Case*, Opinion and Order at 16 (Sept. 28, 2000).

(GTC)) on any switching customer,” an outcome that was designed to encourage shopping.⁷¹

The ETP Stipulation was ultimately contested by one party because the party believed that AEP-Ohio had negative transition revenue or “stranded benefits” and argued that the “stranded benefits” (generation plant net book values below market) should have been netted against the regulatory asset transition costs authorized for AEP-Ohio to increase the shopping credits that were used to encourage shopping.⁷²

On November 6, 2000, CSP and OP filed a memorandum contra to the party’s application for rehearing on the settlement’s treatment of transition revenue. In its memorandum contra, CSP and OP stated:

Under the Stipulation, neither Company will impose any generation transition charge on any switching customer. Stipulation, Section IV. The Companies original transition plan filings included GTCs calculated on the basis of a lost revenues approach. The Commission in its Opinion and Order estimated that the claims that the Companies had foregone as a result of their agreement not to impose GTCs amounted to several hundred million dollars. Nonetheless, Shell argues on rehearing that the Commission erred in adopting the Stipulation’s resolution of the Companies’ GTCs.

This argument illustrates perfectly the bankrupt nature of Shell’s advocacy. Shell is relegated to arguing that the Stipulation is unreasonable because it contains a provision that **eliminates all generation transition charges for both Companies**. (emphasis removed and added)⁷³

In the Commission’s November 21, 2000 Entry on Rehearing addressing and rejecting this party’s protest of the Commission-approved ETP settlement, the Commission said:

⁷¹ FES Ex. 106 at 3 (ETP Case Stipulation and Recommendation); see *also* FES Ex. 105 at 9; Tr. Vol. I at 48-51.

⁷² IEU-Ohio Ex. 101 at 14.

⁷³ *Id.* at 14-15.

The primary stipulation also addresses the netting of GTCs since AEP agreed to withdraw its claim for recovery of any GTCs set forth in its transition plans. To the extent that there may be stranded generation plant benefits, the signatory parties to the primary stipulation have agreed that AEP's withdrawal of GTCs reasonably offsets any possible stranded benefits. The Commission finds this compromise to be a reasonable resolution of the netting issue raised by the language in Section 4928.39(B), Revised Code.⁷⁴

The Commission-approved settlement, however, still provided CSP and OP with the opportunity to collect transition charges for several hundred million dollars of regulatory assets with the regulatory asset transition charges ending on December 31, 2007 for OP and December 31, 2008 for CSP.⁷⁵

The FERC Form 1s for CSP and OP for 2001 correctly describe the effect of SB 3 as "...allowing retail customers to select alternative generation suppliers" effective January 1, 2001 and identified the accounting policy changes adopted by AEP-Ohio as a result of the "deregulation" of generation service in Ohio. More specifically and for example, the 2001 FERC Form 1 for CSP states (emphasis added):

Prior to 1999, CSPCo's financial statements reflected the economic effects of regulation under the requirements of SFAS 71. As a result of **deregulation of generation**, the application of SFAS 71 for the generation portion of the business in Ohio was discontinued. **Remaining generation-related regulatory assets will be amortized as they are recovered under terms of transition plans. Management believes that substantially all generation-related regulatory assets and stranded costs will be recovered under terms of the transition plans. If future events were to make their recovery no longer probable, the Company would write-off the portion of such regulatory assets and stranded costs deemed unrecoverable as a non-cash extraordinary charge to earnings. If any write-off of regulatory assets or stranded costs occurred, it could have a material adverse effect on future results of operations, cash flows and possibly financial condition.**⁷⁶

⁷⁴ *Id.* at 15.

⁷⁵ *Id.* at 10.

⁷⁶ IEU-Ohio Ex. 114 at 123.7.

It is important to note that the provisions of the ETP Stipulation were incorporated into the subsequent rate stabilization plan (“RSP”) proposal filed with, modified and approved by the Commission on February 9, 2004 and January 26, 2005 respectively.⁷⁷

B. Amended Substitute Senate Bill 221

In 2008 the General Assembly passed Amended Substitute Senate Bill 221 (“SB 221”), which altered somewhat the structure of Ohio’s electricity regulations. As AEP-Ohio testified in the first ESP proceedings that produced the current SSO rates, SB 221 did not fundamentally alter SB 3:

Despite many changes to Ohio’s customer choice legislation enacted in 1999 ... that were made by S.B. 221. **The fundamental premise of S.B. 3 remains. That is, all customers are free to switch to receive generation service from Competitive Retail Electric Service (CRES) providers. Further, customers can become part of a government aggregation group as another form of switching.**⁷⁸

Although the General Assembly changed the options available to establish pricing for the SSO, SB 221 retained the obligation of EDUs to provide all consumers in their certified service area “a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.”⁷⁹ SB 221 expressly provided that “[a] standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being

⁷⁷ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC.

⁷⁸ IEU-Ohio Ex. 103 at 25 (emphasis added).

⁷⁹ Section 4928.141, Revised Code.

effective on and after the date that the allowance is scheduled to end under the utility's rate plan."⁸⁰

III. ARGUMENT

A. The Commission does not have the statutory authority to authorize a cost-based rate for capacity service available to a CRES supplier serving retail consumers in AEP-Ohio's certified distribution service area.

The Commission may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.⁸¹ Because of this long-standing precedent essential to our system of federalism, the Commission must dismiss AEP-Ohio's request to significantly increase the price of capacity available to CRES suppliers under any set of facts adopted by the Commission to address the contested legal issues. Because AEP-Ohio's proposal to increase rates fails as a matter of law, the remaining portions of IEU-Ohio's Brief identify the multiple layers of legal requirements that are violated by either entertaining or acting upon AEP-Ohio's proposal to increase capacity prices. These violations occur in the Commission Staff's analysis which is tied to the legally defective and so-called cost-based methodology advanced by AEP-Ohio.⁸² In a somewhat different form, these violations also occur in the alternative approach advanced by the witness for the Ohio Energy Group ("OEG"), Mr. Kollen (an arbitrary capacity charge plus a mystical and "black box" mechanism to guarantee a return on common equity).⁸³

For the reasons discussed below, the Commission must find it lacks statutory authority to consider or approve AEP-Ohio's proposed cost-based formula price and

⁸⁰ *Id.*

⁸¹ *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234, 661 N.E. 2d 1097 (1999).

⁸² See Staff Ex. 103; Tr. Vol. IX at 1941-1951.

⁸³ See OEG Ex. 102.

related rate increase for capacity available to a CRES supplier serving retail consumers in AEP-Ohio's certified distribution service area.

Capacity transactions between AEP-Ohio and a CRES supplier are sales for resale and are considered wholesale transactions.⁸⁴ As a result, these capacity transactions are governed by PJM's rules and, among other things, the FERC-approved RAA. These rules govern an organized capacity market operated by PJM which is generally referred to as RPM and rules embodied in PJM's open access transmission tariff ("OATT"). The RPM rules require a load-serving entity ("LSE") to obtain or arrange for adequate capacity (in the form of qualifying generation or demand-side "Capacity Resources"⁸⁵) to meet PJM's forecasted peak demand, including a reserve margin for the entire PJM region.

To value and price capacity resources, RPM also features a centralized capacity auction in which eligible generation and demand-side resources are cleared or matched to forecasted load based upon prices offered by such resources three years prior to each June to May "delivery year".

An LSE may elect to operate outside the RPM auction process through the Fixed Resource Requirement Alternative ("FRR Alternative"). An LSE electing the FRR Alternative is known as a Fixed Resource Requirement Entity ("FRR Entity"). To establish the compensation paid to an FRR Entity by an "alternative LSE" (in Ohio, a CRES supplier) that is providing service to a switching customer, Section D.8 of Schedule 8.1 of the RAA provides, in relevant part:

⁸⁴ AEP-Ohio agrees that the capacity transactions are wholesale transactions subject to the exclusive jurisdiction of FERC. AEP-Ohio Ex. 101 at 3.

⁸⁵ "Capacity Resources" is a defined term under the RAA. FES Ex. 110A at 6.

In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.⁸⁶

AEPSC, acting as agent for all of the AEP operating companies included in the AEP East region (including AEP-Ohio), elected the FRR option beginning with the 2007/2008 delivery year. As explained above, RPM-Based Pricing has been used since 2007 by AEP-Ohio (and other AEP operating companies) to obtain compensation for capacity available to CRES providers serving retail consumers in AEP-Ohio's certified distribution service area.⁸⁷

If the Commission agrees that the capacity charges to CRES suppliers are wholesale transactions subject to the exclusive jurisdiction of FERC (a position advanced by AEP-Ohio), it must conclude that it lacks subject matter jurisdiction to address AEP-Ohio's capacity charge increase request and dismiss this case.

⁸⁶ FES Ex. 110A, Schedule 8.1, Section D.8.

⁸⁷ Tr. Vol. II at 401.

1. **If the Commission concludes that capacity service available to a CRES supplier is subject to the Commission's economic regulation jurisdiction, it must determine whether the service is competitive or non-competitive.**

Chapter 4928, Revised Code, divides previously bundled generation, transmission and distribution services into unbundled non-competitive and competitive services.⁸⁸ Non-competitive services are services such as electric distribution service. Under Section 4928.03, Revised Code,⁸⁹ retail electric generation,⁹⁰ aggregation, power marketing, and power brokering are “competitive services.”⁹¹

For competitive services, the Commission is without authority to set the prices by traditional or cost-based economic regulation. Supervision of competitive retail electric services are not within the Commission's jurisdiction under Chapter 4909, Revised Code⁹² and other specified Chapters except as specifically identified in Section 4928.05, Revised Code.

⁸⁸ Section 4928.05(A), Revised Code.

⁸⁹ This section also requires that consumers and suppliers to consumers be provided comparable and non-discriminatory access to non-competitive services. So even if generation capacity service was a non-competitive service, it would have to be available on a comparable and non-discriminatory basis to all consumers and suppliers to such consumers.

⁹⁰ *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16 (Jan. 11, 2012) (hereinafter “*Sporn Decision*”).

⁹¹ The Commission has authority to declare more services, including ancillary services, competitive under Sections 4928.04 and 4928.06, Revised Code, and Section 4928.06(B), Revised Code, gives the Commission authority to make sure the services that it declares to be competitive are provided at just and reasonable rates once it determines that there has been a decline or loss of competition with regard to such services declared to be competitive by the Commission. The Commission has no such authority with regard to retail generation service, aggregation, power marketing or power brokering since these services are declared competitive by statute.

⁹² Since the Commission has no jurisdiction under Chapter 4909, Revised Code, it is logical to argue that it has no authority to entertain a “cost-based” rate. AEP-Ohio has previously argued and the Commission has previously held that Ohio's restructuring legislation made cost-based analysis irrelevant.

2. If the capacity service available to CRES suppliers is deemed a competitive generation service, the Commission's economic regulation authority is limited to Sections 4928.141, 4928.142 and 4928.143 Revised Code.

The Commission's only authority to authorize an EDU to bill and collect rates and charges for a competitive service is through the Commission's authority related to the establishment of an SSO. An SSO is defined to include "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."⁹³

An EDU can only directly supply retail generation service when it does so as the SSO or default supplier (when customers are not served by a CRES supplier including a governmental aggregator).⁹⁴ The only source of the Commission's authority to price default generation supply is provided by Sections 4928.141, 4928.142, and 4928.143, Revised Code.

With the enactment of SB 3, generation-related retail electric service became, and remains, a competitive service:

[b]eginning on the starting date of competitive retail electric service [January 1, 2001], **retail electric generation**, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility **are competitive retail electric services** that the consumers may obtain subject to this chapter from any supplier or suppliers.⁹⁵

This legal reality is not contested in this proceeding.

⁹³ Section 4928.141, Revised Code.

⁹⁴ Section 4928.05(A)(1), Revised Code, provides an exception to the finding that retail electric generation service is fully competitive.

⁹⁵ Section 4928.03, Revised Code (emphasis added).

It is also important to note that no party has claimed that capacity is not part of generation service.

Section 4928.05(A)(1), Revised Code, further provides:

[o]n and after the starting date of competitive retail electric service, **a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation ... by the public utilities commission under Chapters 4901. to 4909.**, 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. (emphasis added).

Because the Ohio Revised Code classifies generation service as a competitive service, the Commission cannot regulate it under its traditional cost-based ratemaking authority contained in Chapter 4909, Revised Code. As Chapter 4928, Revised Code, sets forth, the Commission is granted very limited powers to regulate competitive services, and those powers are generally limited to the Commission's ability to establish SSO or retail prices for an EDU acting in its capacity as a default provider.

The Commission has recognized the limits on its authority to regulate an EDU in its default supplier role. In its decision regarding the closure of OP's Sporn 5 generating facility, the Commission held:

[p]ursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code. Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service, we find that so too is the closure of an electric generating facility. Additionally, although there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances, the enumerated statutory exceptions do not include Sections 4905.20 and 4905.21, Revised Code, which otherwise govern applications to abandon or close certain facilities.

...

OP also requests approval of a rider to collect the costs associated with the closure of Sporn Unit 5. **As discussed above. Section 4928.05(A)(1), Revised Code, generally prohibits Commission regulation of retail electric generation service. However, that section expressly provides that it does not limit the Commission's authority under Sections 4928.141 to 4928.144, Revised Code.**⁹⁶

Based on the plain meaning of Ohio law and the Commission's application of Ohio law, the Commission does not have authority to apply traditional or cost-based pricing methods to establish prices for competitive services. Any form of economic regulation over such service must conform to Chapter 4928, Revised Code.

As a competitive service, the only opportunity for the Commission to authorize a generation-related rate is pursuant to an application to establish an SSO. The controlling SSO statutes and Commission rules contain various substantive and procedural requirements that must be satisfied prior to the lawful establishment of an SSO.

For instance, if an EDU has made a filing under either the MRO or ESP statute, the Commission must set the matter for a hearing and "publish notice [of the hearing] in a newspaper of general circulation in each county in the utility's certified territory."⁹⁷ For an EDU subject to an ESP such as AEP-Ohio, the EDU must also demonstrate that the ESP including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate than an MRO.⁹⁸ In this proceeding, none of these substantive or procedural requirements have been

⁹⁶ *Sporn Decision* at 16-17 (emphasis added).

⁹⁷ Section 4928.141(B), Revised Code.

⁹⁸ Section 4928.143(C)(1), Revised Code.

satisfied. Therefore, the Commission cannot consider, address or authorize the proposed capacity charges.

3. If capacity available from an FRR Entity for use by a CRES supplier is a non-competitive service, the Commission's authority to establish a price for such capacity is governed by Chapter 4909, Revised Code.

As discussed above, Section 4928.03, Revised Code, states that retail electric generation service is a competitive service and Section 4928.05, Revised Code, prohibits the Commission from regulating competitive retail electric services under Chapter 4909, Revised Code. Thus, the so-called cost-based pricing formula which AEP-Ohio proposes to use to substantially increase capacity prices is barred by operation of law.

Even if one suspended reality (as AEP-Ohio often does as a means to its end) and pretended that the Commission has authority to consider and approve AEP-Ohio's cost-based pricing formula to substantially increase capacity prices, the legal bar to AEP-Ohio's proposal is the same.

If the capacity available to a CRES supplier from an FRR Entity was, hypothetically speaking, a non-competitive service, the Commission could not authorize an increase in the price for such service because OP has completely failed to satisfy the statutory requirements imposed by Chapter 4909, Revised Code.

The Commission's authority to set rates for non-competitive retail electric service is defined by Chapters 4901, 4909, 4933, 4935, and 4963, Revised Code.⁹⁹ Relative to the law, OP's proposed cost-based methodology is fundamentally flawed.

⁹⁹ Section 4928.05(A)(2), Revised Code. Under Chapter 4909, Revised Code, a utility can make a "first filing" for a new service to establish a rate and the Commission may approve the application without a hearing. Section 4909.18, Revised Code. If the Commission determines that the application is an application to increase rates, the Commission must follow the rate base rate of return method to evaluate

IEU-Ohio's witness Hess identified a non-exhaustive list of the flaws that AEP-Ohio's formula rate suffers from under traditional cost-based ratemaking.¹⁰⁰ Staff witness Smith further quantified a non-exhaustive list of the adjustments that would be required if AEP-Ohio's formula-rate were reviewed under traditional cost-based ratemaking.¹⁰¹

More fundamentally, however, AEP-Ohio's proposal to increase capacity prices through a so-called cost-based methodology fails to address the extensive statutory requirements contained in Chapter 4909, Revised Code, that, once satisfied, would permit the Commission to consider and potentially approve an application to increase rates and charges.

The first mandatory step in securing an increase in rates under Chapter 4909, Revised Code, is to file a notice of intent to file an application to increase rates.¹⁰² The notice of intent must be sent to the mayor and legislative authority of each municipality served by the EDU.¹⁰³ At least thirty days later, the public utility may then file its application to increase rates.¹⁰⁴ The president or vice-president and the secretary or treasurer of the public utility must also verify the accuracy of the application.¹⁰⁵ The application itself must also contain extensive details.

the utility's revenue requirement (in total) and determine if additional compensation is warranted. Traditional ratemaking does not allow the Commission to adopt transition-to-market or glide path pricing.

¹⁰⁰ IEU-Ohio Ex. 101 at 17-18.

¹⁰¹ See Staff Ex. 103.

¹⁰² Section 4909.43, Revised Code; Rule 4901-7-1, Ohio Administrative Code ("O.A.C."), Appendix at 7.

¹⁰³ Section 4909.43, Revised Code.

¹⁰⁴ *Id.*

¹⁰⁵ Section 4909.18, Revised Code.

An application to increase rates must include a description of its property used and useful in rendering service to the public as laid out in Section 4909.05, Revised Code. An application to increase rates must also include a list of current and proposed rate schedules the public utility seeks to establish.¹⁰⁶ Further, the application must contain: a “complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;” “a statement of the income and expense anticipated under the application filed;” and “a statement of financial condition summarizing assets, liabilities, and net worth.”¹⁰⁷

Once the proper application, and all the appropriate information, has been filed with the Commission, the Staff at the Commission is required by statute to investigate the facts contained in the rate increase application.¹⁰⁸

Once complete, the Staff Report of Investigation must be docketed with the Commission and served on the mayor of all municipalities within the public utility’s service territory.¹⁰⁹

Parties that have intervened in the proceeding are then afforded a statutory right to object to the Staff Report of Investigation.¹¹⁰

These above elements in Ohio’s law regarding how and when the Commission may authorize an increase in rates for a non-competitive service are only some of the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Section 4909.19(C), Revised Code.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

statutory requirements that must be satisfied. Notably, AEP-Ohio has not attempted to satisfy any of the requirements contained in Chapter 4909, Revised Code. Because the Commission Staff's adjustments to AEP-Ohio's cost-based methodology nonetheless rely on AEP-Ohio's approach to justifying a huge increase in the lawful capacity price, the Staff's reworked cost-based method suffers from the same fundamental legal defects that are embedded in AEP-Ohio's proposal.

AEP-Ohio did not file a notice of intent to file an application for a rate increase. AEP-Ohio did not present any evidence that it served a notice on the mayor and legislative authority of each municipality served by the EDU. AEP-Ohio did not present any evidence as to what property was used and useful in rendering capacity service to the public, nor did AEP-Ohio have its information verified by the proper personnel.

Indeed, AEP-Ohio's witnesses claimed to not have a clue as to what "Capacity Resources" were being relied upon to satisfy the PJM resource adequacy obligation and the Commission's Staff knew no more about this subject.¹¹¹ And while AEP-Ohio's so-called cost-based methodology explained by Dr. Pearce explicitly assumes that AEP-Ohio's generation assets are the source of capacity that is available to CRES suppliers,¹¹² this assumption is contrary to the testimony of the AEP-Ohio witnesses that AEP-Ohio offered as "experts" on the subject. Even the AEP-Ohio witnesses who had not fully read the RAA were aware that the capacity resources that AEPSC has relied upon as the FRR Entity are **not** tied to the generating assets owned or controlled by AEP-Ohio. More directly, Dr. Pearce's explicit assumption that AEP-Ohio's generation

¹¹¹ Tr. Vol. XI at 2529-2534; Tr. Vol. XI at 1795-1799.

¹¹² See AEP-Ohio Ex. 102 at 3-24.

assets are the source of capacity that are available to CRES suppliers and thereby must be used to identify a cost-based price is, as Mr. Murray testified, fiction.¹¹³

The admissions by AEP-Ohio's witnesses render AEP-Ohio's so-called cost-based methodology "used and useless" even if law and reality are suspended to indulge consideration of AEP-Ohio's proposal to increase capacity prices by resorting to a so-called cost-based methodology.

The Commission's Staff also did not conduct the statutorily required investigation. In fact, during cross-examination of a Staff witness, Staff's counsel objected on grounds of relevance stating "[t]he record is clear that [Staff witness Smith's testimony] is not a staff report of investigation pursuant to 4909.18."¹¹⁴

In this proceeding, AEP-Ohio did not attempt to satisfy the statutory requirements that would allow the Commission to approve an application to increase rates pursuant to Chapter 4909, Revised Code. Therefore, even if Chapter 4909, Revised Code, could somehow be made relevant by accommodating AEP-Ohio's made-up world, Ohio law precludes the Commission from going there.

4. AEP-Ohio has failed to satisfy the requirements that must be satisfied before the Commission can authorize an increase in rates when the rate increase is requested based on claims that it is needed to avoid financial harm.

Much of the chanting that has accompanied AEP-Ohio's prosecution of its proposal to sharply increase capacity prices consists of implicit and explicit references to financial harm that AEP-Ohio says will fall upon AEP-Ohio or its one shareholder if the Commission does not yield to AEP-Ohio's desire to raise capacity prices and

¹¹³ Tr. Vol. VI at 1346-47.

¹¹⁴ Tr. Vol. IX at 1948.

maintain the enviable profits which Ohio has heretofore helped AEP-Ohio achieve year after year.

The claims of financial harm are, of course, dripping in irony in view of AEP-Ohio's efforts to rate-shock many small businesses off the face of Ohio's map and they are an implicit acknowledgement that AEP-Ohio's current SSO prices are disconnected at a level well above-market.

In effect, AEP-Ohio is asking the Commission to substantially raise prices on CRES suppliers to elevate the competitive benchmark prices that are supposed to discipline AEP-Ohio's SSO prices. AEP-Ohio's circular fox-guarding-the-hen-house approach to providing consumers with the benefits of customer choice and effective competition would be comical if this situation had not, long ago, turned serious.

Historically, the Commission has carefully considered the claims of utilities seeking rate increases to avoid financial harm and it has used its authority under Section 4909.16, Revised Code, to carefully respond to such rate increase proposals. But, here again, AEP-Ohio has not attempted to satisfy any of the requirements that must be met before the Commission can grant a rate increase based on utility claims of financial harm:

[w]hen the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.¹¹⁵

¹¹⁵ Section 4909.16, Revised Code.

The Commission has held that the ultimate question for the Commission to decide in an emergency rate relief case is “whether, absent emergency rate relief, the public utility will be financially imperiled or its ability to render service will be impaired.”¹¹⁶ Additionally, “[i]f the applicant fails to sustain its [heavy] burden of proof on this issue, the Commission’s inquiry is at an end.”¹¹⁷ To review the “ultimate question” the Commission has developed a 4-step process.

[f]irst, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the applicant’s supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation. Next, emergency relief will not be granted pursuant to Section 4909.16, Revised Code, if the emergency request is filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.¹¹⁸

In this proceeding, AEP-Ohio has not offered any evidence demonstrating the nature and extent to which AEP-Ohio will be financially imperiled or its ability to render service will be impaired but for increasing rates. Generalized and unsubstantiated claims of lower returns on common equity than the significantly excessive returns that AEP-Ohio has enjoyed as a result of its Ohio electricity prices do not get the job done. Therefore, the Commission cannot rely upon its authority under Section 4909.16, Revised Code, to consider or act upon AEP-Ohio’s proposal to significantly increase capacity charges.

¹¹⁶ *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order at 6 (Sept. 2, 2009).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

5. The Commission's general supervisory authority cannot be relied upon as the basis to increase rates.

The Commission's general supervisory powers do not grant the Commission the authority to set any and all utility rates; the Commission's rate setting authority is contained in other statutes.¹¹⁹ The Ohio Supreme Court has specifically addressed this subject and has held that where the General Assembly has enacted a ratemaking statute, the Commission cannot usurp that statute by relying on the statutes granting the Commission general supervisory powers.¹²⁰

Additionally, while the Ohio Supreme Court has held that the Commission's general supervisory power is broad, it has done so in the context of orders affecting public safety.¹²¹

If the Commission had the authority to set rates under its general supervisory authority for any matter, including the capacity price which AEP-Ohio can bill CRES

¹¹⁹ Chapter 4909, Revised Code, grants the Commission authority to set rates for non-competitive services. Chapter 4928, Revised Code, grants the Commission authority to set rates for competitive generation services.

¹²⁰ *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835, 840 (1993). In this case, the Ohio Supreme Court had to address whether the Commission could use its seemingly broad grant of authority contained in Section 4901.02, Revised Code ("The commission shall possess the powers and duties specified in, as well as all powers necessary and proper to carry out the purposes of Chapters ...") to promulgate an order that conflicted with other ratemaking statutes. The Court held:

The comprehensive ratemaking formula provided by the General Assembly is meant to protect and balance the interests of the public utilities and their ratepayers alike. *Dayton Power & Light Co. v. Pub. Util. Comm.*, *supra*, 4 Ohio St.3d 91, 4 OBR 341, 447 N.E.2d 733. We cannot conclude that it was the General Assembly's intent under the above enabling statute, R.C. 4901.02(A), to permit the PUCO to disregard *that very formula* in instances in which it simply did not agree with the result Cf. *Consumers' Counsel*, *supra*, 67 Ohio St.2d at 165, 21 O.O.3d at 104, 423 N.E.2d at 828 ("the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the PUCO may effortlessly abrogate that very formula").

Id. at 840.

¹²¹ *Utility Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St. 3d 284, 2009-Ohio-6764 at ¶ 12; *Cincinnati N.O. & T.P. Ry. Co. v. Public Utilities Commission*, 31 Ohio St.2d 81, 86 ("The Public Utilities Commission has plenary power under R.C. 4905.04 to promulgate and enforce orders relating to the protection, welfare and safety of railroad employees.").

providers, it would completely usurp the requirements and restrictions on the Commission's ratemaking authority contained elsewhere in the Ohio Revised Code. As the Ohio Supreme Court has held, the General Assembly could not have intended to grant the Commission unbounded authority under its general supervisory powers and at the same time it enacted specific ratemaking statutes.¹²²

B. Even if the Commission had the statutory authority to authorize a capacity rate increase based on a cost-based method, which it does not, AEP-Ohio has failed to meet its burden of proof that the proposed capacity charge is just and reasonable.

At this point in the proceeding, it is not clear what statutory authority AEP-Ohio (or the Commission) is relying upon to consider a proposal to significantly increase CRES suppliers' capacity price. However, regardless of the statutory process that is connected with each aspect of the Commission's authority to increase electricity prices, AEP-Ohio must meet its burden of proof before the Commission might increase electricity rates. Under any legal theory that AEP-Ohio may (perhaps) ultimately reveal, AEP-Ohio has not met its burden of proof.

1. AEP-Ohio has failed to meet the burden of proof it must demonstrate to establish or increase rates pursuant to an ESP.

AEP-Ohio is currently operating under an ESP and has a modified ESP pending before the Commission in another proceeding. This case was not initiated as a proceeding to establish ESP rates. However, if it was such a proceeding, the process for establishing rates pursuant to an ESP is governed, in part, by Section 4928.143(C)(1), Revised Code, which states "[t]he burden of proof in the proceeding shall be on the electric distribution utility." That burden requires the EDU to

¹²² See *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835, 840 (1993).

demonstrate that the provisions in its ESP application fall within the enumerated categories of Section 4928.143(B)(2), Revised Code.¹²³ The EDU's burden of proof also requires the EDU to prove that the ESP "including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."¹²⁴ AEP-Ohio has not introduced any evidence to demonstrate either point. Thus, AEP-Ohio has not carried its burden of proof to allow the Commission to authorize AEP-Ohio's proposed charge under the ESP statute.

2. AEP-Ohio has not met its burden of proof to increase rates pursuant to Section 4909.18, Revised Code.

Similarly, this case was not initiated as a proceeding to consider a requested increase in rates pursuant to Section 4909.18, Revised Code. If this case involved such a rate increase application, AEP-Ohio must carry the burden of proof to demonstrate the proposals in its application are just and reasonable under the applicable legal standards. As discussed above, AEP-Ohio failed to satisfy the procedural and substantive requirements associated with Ohio's traditional ratemaking formula contained in Chapter 4909, Revised Code.

Under Ohio's traditional ratemaking process, an application to increase rates must contain: a "complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter

¹²³ "The plan may provide for or include, without limitation, any of the following"; *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 32 ("if a given provision does not fit within one of the categories listed "following" (B)(2), it is not authorized by statute.").

¹²⁴ Section 4928.143(C)(1), Revised Code.

referred to in said application;” “a statement of the income and expense anticipated under the application filed;” and “a statement of financial condition summarizing assets, liabilities, and net worth.”¹²⁵ Additionally, Section 4909.04, Revised Code, provides that “the reasonableness and justice of rates and charges” are based on the value of the public utility’s property as set forth in Section 4909.05, Revised Code.

Section 4909.05, Revised Code, contains a detailed list of how to value the various types of public utility property that is “used and useful” in providing “service and convenience” to the public. AEP-Ohio did not introduce any evidence that the costs contained in its FERC Form 1, which AEP-Ohio based its proposal on, complies with the requirements in Section 4909.05, Revised Code. Additionally, and admitted by Staff witness Smith, his analysis did not attempt to verify if the costs in AEP-Ohio’s FERC Form 1 complied with the requirements for valuing property under a traditional application to increase rates.¹²⁶

The evidence introduced by AEP-Ohio does not satisfy AEP-Ohio’s burden to prove its proposal results in just and reasonable rates. Under Ohio law, an application to increase rates must be based on property used and useful in providing service and convenience to the public, as determined by Section 4909.05, Revised Code. AEP-Ohio did not introduce any evidence to suggest the property valuation in its FERC Form 1s meet these criteria. Thus, even if the Commission determined that it could approve a capacity charge under its traditional cost-based ratemaking, and ignored AEP-Ohio’s failure to comply with the statutory requirements discussed above,

¹²⁵ Section 4909.18, Revised Code.

¹²⁶ Tr. Vol. IX at 1940-1941.

AEP-Ohio has still failed to demonstrate that its proposal would result in “just and reasonable” rates.

Furthermore, Staff’s analysis, as presented by Staff witness Smith, did not determine if the costs AEP-Ohio relies on for its cost-based/formula-rate complies with Section 4909.05, Revised Code. Therefore, the Commission cannot approve AEP-Ohio’s proposal under Chapter 4909, Revised Code, because there is no evidence in the record that the Commission could rely upon to determine that AEP-Ohio’s proposal would result in “just and reasonable” rates as required by Sections 4909.04, 4909.05, 4909.18 and 4909.19, Revised Code.

3. AEP-Ohio has failed to meet to burden of proof that applies when a utility is seeking a rate increase to avoid financial harm.

As already explained and while AEP-Ohio has often claimed that it was headed for financial harm if RPM-Based Pricing is restored to its rightful place, AEP-Ohio stopped short of anything more than offering a sky-is-falling monologue.

The Commission has held that a rate increase applicant’s burden of proof is subject to strict scrutiny and a clear and convincing evidentiary standard when the increase is requested to address alleged financial harm.¹²⁷ In order to obtain such rate relief, the applicant must demonstrate: (1) “the existence of an emergency;” (2) the emergency request is not filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code, and (3) the temporary rate relief is only set to the minimum level necessary to avert or relieve the emergency.¹²⁸

¹²⁷ *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order at 6 (Sept. 2, 2009).

¹²⁸ *Id.*

AEP-Ohio has not introduced any evidence that it is entitled to a rate increase *via* the Commission's authority under Section 4909.16, Revised Code. AEP-Ohio's only evidence on the effects of restoring RPM-Based Pricing to its rightful place consists of high-level summaries of total company returns on common equity of 7.6% in 2012 and 2.4% for 2013.¹²⁹ The evidence in this proceeding shows that in 2011, AEP-Ohio paid a cash dividend to its parent of \$650,000,000 on net income of \$464,992,239. AEP-Ohio has offered no evidence to show that it could not address any real financial problem through other means that recognize that it is AEP-Ohio's shareholder and not customers or CRES suppliers who are responsible for the business and financial risks of AEP-Ohio's electric utility business model.¹³⁰

C. Notwithstanding the lack of Commission authority to establish a cost-based rate for capacity, AEP-Ohio has failed to demonstrate the requested capacity charge is just and reasonable.

As discussed *supra*, the Commission lacks the statutory authority to approve AEP-Ohio's proposal to substantially increase CRES capacity prices based on the introduction of a so-called cost-based methodology. Even if it was sensible (and it is not) to tolerate AEP-Ohio's make-believe view of the Commission's role and the Commission's authority, AEP-Ohio has also failed to demonstrate the proposed capacity price increase would result in just and reasonable rates as required by Ohio law. On the other hand, RPM-Based Pricing is just and reasonable.¹³¹

Section 4905.22, Revised Code, obligates every public utility to furnish necessary and adequate service and facilities and requires each public utility to furnish

¹²⁹ AEP-Ohio Ex. 104 at 3.

¹³⁰ Tr. Vol. V at 1045-1049.

¹³¹ See e.g., IEU-Ohio Ex. 102A at 13-32.

and provide such instrumentalities and facilities as are adequate and, in all respects, just and reasonable. It requires that all charges demanded for any service rendered be just and reasonable and not more than the charges allowed by law or by order of the Commission. It also prohibits any utility from demanding or imposing any charge that is unreasonable or unjust.

1. AEP-Ohio has recognized on multiple occasions generation service in Ohio is no longer subject to cost-based rates.

As discussed *supra*, the premise that AEP-Ohio may be authorized to collect cost-based rates for generation service or to increase generation-related rates based on a cost-based methodology has no foundation in Ohio law. Additionally, on multiple occasions, AEP-Ohio has repeatedly acknowledged and the record in this proceeding demonstrates that AEP-Ohio has **not** been subject to cost-based ratemaking for generation service since 2001.

For example, the 2001 Form 10-K filed with the U.S. Securities and Exchange Commission ("SEC") by AEP and its AEP-Ohio subsidiary identified that AEP-Ohio discontinued the application of regulatory accounting for the generation portion of AEP-Ohio's business in Ohio due to the passage of SB 3.¹³² As documented above, AEP-Ohio's FERC Form 1 for the year 2001 contains a similar recognition that generation service in Ohio is not subject to cost-based ratemaking.¹³³

In 2002, when seeking certain findings from this Commission necessary to obtain exempt wholesale generator status, AEP-Ohio argued, in response to a pleading by

¹³² IEU-Ohio Ex. 104 at 58.

¹³³ IEU-Ohio Ex. 114 at 123.6; *see also* IEU-Ohio Ex. 115.

OCC, that the price of generation supply associated with SSO obligations was not subject to economic regulation by the Commission.¹³⁴

In 2002, when AEP issued common equity, the prospectus disclosed to investors that unregulated generation operations included the sale of **capacity**, energy and ancillary services throughout North America and Europe.¹³⁵

In March 2010, AEP-Ohio represented to the Ohio Supreme Court that the purchase of the Waterford and Darby generating facilities required AEP-Ohio to assume all of the attendant risk for cost recovery and that the rates for SSO generation service in Ohio are subject to market-based pricing.¹³⁶

Finally, an impairment analysis conducted by AEP in late 2011 specifically recognized that generating assets owned by AEP-Ohio were not subject to cost-based regulation.¹³⁷

The record demonstrates that since 2001 and for accounting and financial reporting purposes, AEP-Ohio has consistently represented that AEP-Ohio generating assets were subject to market-based rates, and not cost-based ratemaking.

D. AEP-Ohio agreed to forgoe any claim for stranded generation costs and this commitment bars AEP-Ohio's proposal to impose a lost revenue charge on CRES suppliers serving shopping customers.

While the form of AEP-Ohio's "cost-based" formula proposed in this proceeding may be different in name than the transition revenue claim previously advanced by OP and CSP in the ETP proceedings, it is undisputed that the "cost-based" formula

¹³⁴ IEU-Ohio Ex. 118 at 6.

¹³⁵ IEU-Ohio Ex. 112 at S-3; *see also* Tr. Vol. V. at 932-933.

¹³⁶ Tr. Vol. V at 878-881.

¹³⁷ IEU-Ohio Ex. 124.

proposal in this proceeding is, in substance, another claim for generation plant-related transition revenue.¹³⁸ The proposal which AEP-Ohio has put forward in this proceeding is designed to provide AEP-Ohio with revenue it says it will lose if customers shop and CRES suppliers pay a market-based capacity price.¹³⁹ It is a proposal to recover lost revenue based on a cost to market comparison for generation-related services. And, this new transition revenue claim comes well after the time period specified by SB 3 for bringing a transition revenue claim.¹⁴⁰

AEP-Ohio has also characterized its proposal to set capacity prices well above market as a transition mechanism that limits shopping.¹⁴¹

On February 27, 2012, AEP-Ohio filed a motion seeking authorization to implement the two-tiered pricing scheme until the Commission resolves this case.¹⁴² In response to the Commission's Entry on Rehearing rejecting the Stipulation on February 23, 2012, AEP-Ohio explained that it believed it had the ability to establish cost-based rates, but complained that it was being forced to move to RPM-priced capacity "without a reasonable transition mechanism" for "a transition period."¹⁴³ In a press release on the same day, the Chief Executive Officer of AEP stated, "[t]he settlement agreement allowed AEP Ohio a reasonable transition to market over a period of time."¹⁴⁴

¹³⁸ See Tr. Vol. I at 137.

¹³⁹ See AEP-Ohio Ex. 101 at 4-12.

¹⁴⁰ Section 4928.32, Revised Code (an ETP, including requests for transition revenues, had to be filed within 90 days of October 5, 1999).

¹⁴¹ See IEU-Ohio Ex. 102A at 17-19; Section 4928.40, Revised Code.

¹⁴² IEU-Ohio Ex. 101 at 11.

¹⁴³ Ohio Power Company's Motion for Relief and Request for Expedited Ruling at 5 (February 27, 2012).

¹⁴⁴ IEU-Ohio Ex. 101 at Ex. JEH-2 (AEP-Ohio's Press Release from February 27, 2012).

AEP-Ohio, however, has elsewhere admitted that Ohio law no longer allows for a transition charge to recover lost revenue associated with above-market generation assets.

On March 30, 2012, AEP-Ohio filed an application with the Commission to secure approval of changes to its corporation separation plan correctly noting that it could no longer recover transition revenues.¹⁴⁵ As part of that filing, AEP-Ohio is seeking a waiver of Rule 4901:1-37-09(C)(4), O.A.C., which requires AEP-Ohio to provide the market value of the generating plants AEP-Ohio is proposing to transfer. In support of its waiver request, AEP-Ohio stated:

[t]he request to waive Admin. Code Rule 4901:1-37-09(C)(4) is reasonable because [AEP Ohio] seeks to transfer its generating assets to an affiliate within the same parent corporation, in compliance with the mandate of R.C. 4928.17. ***Under SB 3, all of these generation assets were subjected to market and EDUs therefore were given a temporary opportunity to recover stranded generation investments during a transition period. That transition period is over.*** EDUs can no longer recover stranded generation investments, and transferring the generation assets based on an arbitrary determination of their current fair market value rather than net book value would be inappropriate.¹⁴⁶

Notwithstanding AEP-Ohio's views on whether any transition period may be appropriate, the law and the facts in this proceeding are quite clear.

First, pursuant to SB 3, an EDU's ability to seek recovery of above-market generation transition charges terminated with the end of its MDP.¹⁴⁷ Second, as previously noted herein and conceded by several AEP-Ohio witnesses during their cross-examination, CSP and OP are parties to a binding settlement agreement

¹⁴⁵ IEU-Ohio Ex. 101 at 13-14 (quoting *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Application at 7 (March 30, 2012)).

¹⁴⁶ *Id.* (emphasis added).

¹⁴⁷ Section 4928.38, Revised Code.

resolving their respective ETP cases in which they voluntarily agreed to forego recovery of any generation transition revenues.¹⁴⁸ AEP-Ohio's FERC Form 1 for 2001 documents the effect of this binding agreement on AEP-Ohio's ability to recover generation-related "stranded costs." Thus, AEP-Ohio is barred by the terms of the ETP stipulation from proposing and charging a generation-related lost revenue charge (regardless of what it is called or the methodology by which it is computed). The ETP stipulation is a binding and enforceable agreement and the Commission must not permit AEP-Ohio to further evade its obligations under that agreement.

1. AEP-Ohio's impairment test confirms it does not have any stranded costs.

Notwithstanding the unlawful nature of the request, AEP-Ohio's need for additional transition revenue is not supported by AEP-Ohio's own internal analysis. Specifically, as demonstrated by IEU-Ohio Exhibit 124, in late 2011 AEP undertook an impairment analysis for all of its generating facilities, including the generating facilities owned by AEP-Ohio. That analysis concluded the generating assets were not impaired.

E. Both state policy and AEP-Ohio's actions demonstrate continued use of RPM is an appropriate market price for capacity.

Section 4928.02, Revised Code, contains State policies regarding competitive retail electric service. These include:

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

¹⁴⁸ Tr. Vol. I at 49-56; see *also* Tr. Vol. I at 146-147 and Tr. Vol. V. at 883.

- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power.¹⁴⁹

These policies highlight the General Assembly's command that the Commission rely upon competition to discipline generation-related electricity prices in Ohio.

AEP-Ohio has itself embraced competitive electricity markets when it suited AEP-Ohio's business objectives at the time. For example, in 2007, AEP-Ohio argued that Ohio was part of a robust regional energy market and urged the Commission to move forward with a CBP for the provision of SSO generation service:

[t]he competitive significance of RTOs is well recognized. In *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Docket No. RM06-10-000, FERC Statutes and Regulations ¶31,233 (October 20, 2006) ("*Order 688*"), the FERC found that both MISO and PJM are independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy. The FERC also found that the existence of wholesale markets for long-term sales of capacity and electric energy is satisfied by the existence of long-term bilateral contracts for sales of capacity and energy and is a sufficient indication of a market.¹⁵⁰

¹⁴⁹ Section 4928.02, Revised Code.

¹⁵⁰ *Order 688* ¶117.

The PJM energy market provides substantial benefits to the region based on its ability for utilities and customers to access a larger number of generation resources to fulfill load requirements while utilizing a robust transmission system. PJM's methodology results in the least cost generating units serving the load requirements, subject to any transmission constraints. This method is similar to the one performed by AEP for its system prior to joining PJM. PJM, however, provides access to additional generating units and the capability of importing generation from MISO without paying additional transmission rates. The resulting dispatch price provides transparent economic signals that guide short- and long-run decisions by participants and regulators.¹⁵¹

In fact, in its initial comments in that proceeding, AEP-Ohio indicated that if a CBP were held to obtain SSO generation for AEP-Ohio's load, given AEP-Ohio's FRR status, AEP-Ohio **would sell capacity to winning bidders at the RPM clearing price until such time as AEP-Ohio could terminate its FRR status.**¹⁵²

AEP-Ohio has also relied upon RPM as the appropriate price for capacity in other proceedings before the Commission as has its affiliates in other jurisdictions. When presenting its first ESP to the Commission, AEP-Ohio witness J. Craig Baker relied upon estimated capacity prices based upon RPM to develop competitive benchmark prices.¹⁵³ Further, as discussed in the testimony of IEU-Ohio witness Kevin M. Murray, a number of other AEP operating companies used RPM-based capacity in real-time pricing options available in other nearby states.¹⁵⁴

1. The claim that AEP-Ohio's capacity is dedicated to its Ohio retail load is "absolute fiction."

A central theory that AEP-Ohio relies upon to advance the claim it is entitled to a cost-based rate for capacity is wrong. AEP-Ohio suggests that because it "self-

¹⁵¹ IEU-Ohio Ex. 102A at 10-11.

¹⁵² *Id.* at 11.

¹⁵³ IEU-Ohio Ex. 103 at 11.

¹⁵⁴ IEU-Ohio Ex. 102A at 27-28.

supplies” capacity as an entity electing the FRR option within PJM’s capacity market, its “self-supplied” capacity is somehow dedicated to serve OP’s Ohio load (both shopping and non-shopping). AEP-Ohio then uses this flawed theory to claim it is somehow entitled to demand and receive a cost-based formula-rate for capacity charged to CRES suppliers serving OP retail distribution customers.

For example, AEP-Ohio witness Richard E. Munczinski testified that because AEP-Ohio is an FRR Entity, “its capacity is dedicated to its Ohio customers.”¹⁵⁵ In Mr. Munczinski’s opinion, because CRES suppliers elected to not self-supply capacity,¹⁵⁶ CRES suppliers merely act as “a middle-man on capacity flowing from AEP-Ohio.”¹⁵⁷ This misguided notion about the role of AEP-Ohio’s owned or controlled generating assets is also embedded in the reasoning of AEP-Ohio witness Dr. Pearce. Dr. Pearce reasoned that because AEP-Ohio is “self-supplying” its own generation resources, it must therefore follow that the cost to provide this capacity is “the embedded capacity cost of AEP Ohio’s generation.”¹⁵⁸

AEP-Ohio’s claims suffer from a number of flaws. First, as the record in this proceeding demonstrates, an entity electing the FRR option is not required to own the generation resources it submits in an FRR plan to PJM.¹⁵⁹ Under the FRR option, generating units in an FRR plan can include capacity rights pursuant to a bilateral

¹⁵⁵ AEP-Ohio Ex. 101 at 10.

¹⁵⁶ Mr. Munczinski conceded during his cross examination that the self-supply option for CRES suppliers was not a realistic option because the option would have had to occur prior to March 2009 for the 2012/2013 delivery year. Tr. Vol. I at 71. Of course, there was no reason prior to March 2009 for a CRES supplier to elect the self-supply option because capacity at that time was priced based upon RPM, a fact conceded by an AEP witness. Tr. Vol. I at 91-93; see also Tr. Vol. V at 886.

¹⁵⁷ AEP-Ohio Ex. 101 at 5.

¹⁵⁸ AEP-Ohio Ex. 102 at 5.

¹⁵⁹ Tr. Vol. V at 975; see also Tr. Vol. I at 90.

contract and are not limited to owned capacity.¹⁶⁰ The FRR Capacity Resources can also include demand response and energy efficiency resources.¹⁶¹

Second, AEP-Ohio is not an FRR Entity itself, but rather the conglomerate of AEP East operating companies (with AEPSC acting on behalf of the individual AEP operating companies) is the entity recognized by PJM as having FRR status.¹⁶² Thus, there has never been an FRR plan that was submitted to PJM by AEP-Ohio. Instead, a single FRR plan was submitted by AEPSC on behalf of all of the AEP East operating companies since the inception of the RPM market.¹⁶³ As Mr. Nelson reluctantly acknowledged during his cross-examination by IEU-Ohio, AEP-Ohio's owned and controlled generating assets are not the Capacity Resources used for purposes of the AEPSC FRR election.¹⁶⁴

More fundamentally flawed, however, is AEP-Ohio's suggestion that as an FRR Entity, specific Capacity Resources are dedicated to serving AEP-Ohio's FRR load. PJM's RAA is a binding contract approved by FERC¹⁶⁵ and governed by the laws of Delaware for the purpose of defining rights and obligations under the agreement.¹⁶⁶ As explained previously, the purpose of the RAA states that it is to be implemented in a manner consistent with the development of a robust competitive market.¹⁶⁷ As

¹⁶⁰ Tr. Vol. V at 979.

¹⁶¹ Tr. Vol. V at 976.

¹⁶² Tr. Vol. I at 89-90; see *a/so* Tr. Vol. II at 467.

¹⁶³ Tr. Vol. I at 147.

¹⁶⁴ Tr. Vol. X at 2529-2534.

¹⁶⁵ Tr. Vol. VI at 1346.

¹⁶⁶ Tr. Vol. II at 469.

¹⁶⁷ Tr. Vol. II at 468. More specifically Article 2 of the RAA provides as follows:

This Agreement is intended to ensure that adequate Capacity Resources, including planned and Existing Generation Capacity Resources, planned and existing Demand

IEU-Ohio witness Murray explained and no other party contested, the RAA itself dispels the notion that capacity anywhere in PJM, regardless of FRR or RPM status, is dedicated to specific customers or load.

By its terms, the RAA is a mutual assistance agreement through which signatory parties agree to share Capacity Resources throughout the region.¹⁶⁸ The RAA exists, in part, because the sharing of Capacity Resources on a region-wide basis allows individual LSEs to carry a lower level of Capacity Resources and still achieve the desired level of reliability within the PJM Region.¹⁶⁹ Thus, AEP-Ohio's claim that AEP-Ohio's Capacity Resources are specifically dedicated to Ohio load is, as AEP-Ohio's witnesses agreed, wrong and the AEP-Ohio proposed cost-based pricing method that relies upon this bankrupt assumption is useless even if the Commission could or should attempt to develop a cost-based price for the FRR Capacity Resources that are actually used by AEPSC to satisfy its FRR Entity Capacity Resource obligation.

Resources, Energy Efficiency Resources, and ILR will be planned and made available to provide reliable service to loads within the PJM Region, to assist other Parties during Emergencies and to coordinate planning of such resources consistent with the Reliability Principles and Standards. Further, it is the intention and objective of the Parties to implement this Agreement in a manner consistent with the development of a robust competitive marketplace. To accomplish these objectives, this Agreement is among all of the Load Serving Entities within the PJM Region. Unless this Agreement is terminated as provided in Section 3.3, every entity which is or will become a Load Serving Entity within the PJM Region is to become and remain a Party to this Agreement or to an agreement (such as a requirements supply agreement) with a Party pursuant to which that Party has agreed to act as the agent for the Load Serving Entity for purposes of satisfying the obligations under this Agreement related to the load within the PJM Region of that Load Serving Entity. Nothing herein is intended to abridge, alter or otherwise affect the emergency powers the Office of the Interconnection may exercise under the Operating Agreement and PJM Tariff.

FES Ex. 110A at 21.

¹⁶⁸ Tr. Vol. VI at 1346-1348.

¹⁶⁹ *Id.*; see also FES Ex. 110A at 4.

F. The AEP-Ohio proposed cost-based capacity pricing methodology and the sharp capacity price increase that the methodology would produce result in an unlawful and unreasonable subsidy.

Additionally, the proposed cost-based capacity pricing method advanced by AEP-Ohio would unfairly and unlawfully work to subsidize AEP-Ohio's competitive position with regard to the "deregulated" generation business. Among the many fundamental defects, the establishment of a cost-based rate for capacity would be contrary to the state's policies proscribing subsidies from flowing between competitive and noncompetitive services, to the detriment of generation function competitors and shopping and non-shopping customers alike.¹⁷⁰

A cost-based price for capacity would allow AEP-Ohio to impose and collect revenue from a currently higher-than-market charge on the CRES suppliers seeking customers in AEP-Ohio's service area while various AEP-Ohio affiliates are actively acquiring market share in both the wholesale and retail markets associated with other service areas through the use of RPM-Based Pricing. This violates Ohio law and is fundamentally unfair – to customers throughout Ohio, the broader PJM region, and to CRES suppliers.

Section 4928.02(H), Revised Code, states the general policy prohibiting anticompetitive subsidies. In AEP-Ohio's *Sporn* proceeding, the Commission held that Section 4928.02(H), Revised Code:

requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. OP seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR. Approval of such a charge would effectively allow the Company to recover competitive, generation-

¹⁷⁰ See Section 4928.02(H), Revised Code; *Sporn Decision* at 19.

related costs through its noncompetitive, distribution rates, in contravention of the statute.

Despite the plain meaning of Section 4928.02(H), Revised Code, and the Commission's recent refusal to authorize the recovery of the unamortized generation-related costs of Sporn 5 through a nonbypassable charge, AEP-Ohio nonetheless persists, in Ohio and at FERC, with wave after wave of proposals to recover generation-related costs that it claims in regulatory filings (that are contradicted by AEP-Ohio's internal analysis) are not recoverable in the generation market.

As discussed previously, AEP-Ohio's capacity pricing proposal would have all CRES suppliers pay AEP-Ohio's capacity charge because CRES suppliers now have no alternative.¹⁷¹ Because all CRES suppliers will be required to pay the charge if they seek to provide retail electric service in AEP-Ohio's service territory, AEP-Ohio will effectively receive a preference and subsidy for the competitive generation business in violation of the requirements of Section 4928.02(H), Revised Code.

Further, AEP-Ohio's proposal would create an unreasonable advantage for AEP-Ohio's retail affiliates to enter other Ohio service territories. While AEP-Ohio's retail affiliates are competing successfully in the CBPs of Duke and FirstEnergy areas for SSO load,¹⁷² AEP-Ohio is refusing to initiate the very type of CBP that it has used and supported in the past until dubious claims regarding the effect of the AEP System Interconnection Agreement (sometimes called the "Pool Agreement") and the RAA on its ability to participate in an SSO auction are resolved to the satisfaction of

¹⁷¹ Exelon Ex. 101 at 8.

¹⁷² IEU-Ohio Ex. 102A at Ex. KMM-2 & 3.

AEP-Ohio.¹⁷³ Additionally, AEP-Ohio is seeking to subsidize its generation function with above-market capacity prices (or more likely, retain its SSO load by pricing capacity to thwart competitive entry).¹⁷⁴ The unfairness of permitting AEP-Ohio affiliates to compete for customers in other service territories while AEP-Ohio is proactively foreclosing competitive entry through its waves of above-market capacity pricing proposals, perpetual mysteries created by AEP-Ohio's untimely and non-transparent implementation plans and active evasion of the Commission's expectations regarding the generating resources that would be bid into the BRA for the 2015/2016 PJM delivery year is patent.

An FRR election does not provide a basis for securing approval of discriminatory capacity prices. From 2007 through the end of 2011, AEP-Ohio used RPM-Based Pricing. During this period, the FRR option and the AEP System Interconnection Agreement were both in force in their current form.¹⁷⁵ Both Duke's and FirstEnergy's EDUs are also operating under the FRR alternative, and each provided capacity to CRES suppliers at the RPM price (Duke) or a very similar market-based price established by separate integration auctions (FirstEnergy).¹⁷⁶ Likewise, CRES suppliers serving customers taking distribution service in the Duke, FirstEnergy, and The Dayton Power & Light ("DP&L") service territories compensate the EDUs at the RPM or, in the case of FirstEnergy, a very similar market-based price established by separate

¹⁷³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Ohio Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Ohio Power Company's Modified Electric Security Plan at 10-11 and Testimony of Robert Powers (Mar. 30, 2012).

¹⁷⁴ FES Ex. 102 at 5.

¹⁷⁵ Tr. Vol. I at 31-32, 57-59; Tr. Vol. II at 396-403, 494.

¹⁷⁶ IEU-Ohio Ex. 102A at 22-23.

integration auctions.¹⁷⁷ In contrast, AEP-Ohio has not identified any legitimate legal or practical reason why its generation function prices cannot and should not be subjected to market forces.

In summary, AEP-Ohio's proposed cost-based capacity pricing method would, if approved, unlawfully subsidize AEP-Ohio's and AEP's generation function, produce discriminatory and non-comparable prices within AEP-Ohio's distribution service area and provide AEP's generation business with an undue advantage in both AEP-Ohio's distribution service territory and throughout Ohio.

G. The proposed cost-based capacity pricing method produces results that are not comparable to the generation supply prices paid by SSO customers.

Charging CRES suppliers for capacity based on the proposed cost-based methodology advanced by Dr. Pearce results in the generation capacity price embedded in SSO rates not being comparable to the capacity priced charged to CRES suppliers.

Section 4928.02(B), Revised Code, provides that it is policy of the state of Ohio to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." The concept of comparability is a core element in Ohio's electric industry restructuring; the word "comparable" is often repeated in the combined output of SB 3 and SB 221.

While AEP-Ohio witness Allen suggested¹⁷⁸ that the AEP-Ohio SSO rates are comparable to the \$355/MW-day price, there is no explicit capacity charge in any SSO

¹⁷⁷ *Id.* at 24-25.

¹⁷⁸ Tr. Vol. III at 635-637.

rate.¹⁷⁹ Further, when specifically requested to identify the capacity component of its SSO rates, AEP-Ohio could not or chose not to do so.¹⁸⁰ Thus, it is impossible to identify whether the proposed cost-based capacity charge that AEP-Ohio has asked the Commission to approve for capacity provided to CRES suppliers is comparable to the capacity-related charge embedded in the default generation supply portion of the SSO prices.

As discussed in the testimony of IEU-Ohio witness Murray, structural differences between SSO rates and the formula-based rate AEP-Ohio would like to impose upon CRES suppliers makes it difficult, if not impossible, to achieve true comparability.¹⁸¹ The different approaches to rate design between the SSO rates and the proposed capacity charges make it difficult for customers to compare competitive service offers “apples to apples” and develop a meaningful comparison with the SSO option.

In this proceeding, AEP-Ohio has not presented any evidence to demonstrate that its proposed cost-based capacity rate to be charged to CRES suppliers is comparable to the SSO default generation supply service and price. Indeed, the combination of AEP-Ohio's positions that it can, on the one hand, establish non-cost-based default generation supply prices (which have historically been justified based on market price estimates) and, on the other hand, contemporaneously impose a cost-based capacity price formula on CRES suppliers defies the purpose of the concepts of comparability and non-discrimination; concepts that are key to successfully restructuring

¹⁷⁹ AEP-Ohio Ex. 101 at 10; FES Ex. 108 at 3; Tr. Vol. I at 67-70.

¹⁸⁰ IEU-Ohio Ex. 102A at Ex. KMM-10.

¹⁸¹ IEU-Ohio Ex. 102A at 29-32.

the electricity industry to allow competition to serve the public interest in reasonable prices and reliable service.¹⁸²

H. As discussed herein, the Commission must dismiss AEP-Ohio's capacity proposal.

As discussed previously, the Commission does not have jurisdiction to authorize AEP-Ohio's significantly above-market capacity pricing proposal.¹⁸³ AEP-Ohio has not presented any evidence in this proceeding to attempt to demonstrate the Commission has jurisdiction. In fact, when presented with such an opportunity, AEP-Ohio has claimed the Commission lacks jurisdiction to set the very rate contained in its testimony and presented during the hearing.¹⁸⁴ Due to the clear lack of jurisdiction, IEU-Ohio filed a motion to dismiss this proceeding on April 10, 2012. Rather than grant or dismiss the motion on the merits, the Commission has allowed this proceeding to needlessly continue.¹⁸⁵

Following the close of AEP-Ohio's case-in-chief, IEU-Ohio again moved to dismiss the proceeding because AEP-Ohio had failed to introduce any evidence that would satisfy the various burdens of proof that exist under the Commission's ratemaking

¹⁸² See *id.*; Chapter 4928, Revised Code; see also *American Electric Power Service Corporation (AEP)*, 67 FERC ¶ 61,168 at 61,490 (1994) (the comparability standard as applied by FERC provided that "an open-access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system."); *Promoting Wholesale Competition Through Open-Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Docket Nos. RM95-8-000 and RM94-7-001, Notice of Proposed Rulemaking, 60 Fed. Reg. 17662 (Apr. 7, 1995), FERC Statutes and Regulations ¶ 32,514 (1995) (open-access NOPR).

¹⁸³ See *supra* at 28-42.

¹⁸⁴ See e.g., AEP-Ohio Ex. 101 at 3 ("the wholesale capacity rate to be charged by [AEP-Ohio] to CRES providers should be decided not by the Commission,").

¹⁸⁵ Tr. Vol. I at 21-22.

authority.¹⁸⁶ As presented above, that burden falls upon AEP-Ohio.¹⁸⁷ Presented with a second opportunity to dismiss a proposal that the Commission has no authority to grant upon which AEP-Ohio failed to satisfy its statutory burden of proof, the Commission again deferred ruling on IEU-Ohio's motion to dismiss and allowed this proceeding to drag on.¹⁸⁸

The Commission should put an end to AEP-Ohio's efforts to curtail shopping and customer choice and grant IEU-Ohio's motions to dismiss.

I. AEP-Ohio's proposals are illegal and contrary to the public interest based on the common law principles codified in Ohio's Valentine Act.¹⁸⁹

Because of Ohio's declaration in Section 4928.03, Revised Code, that generation service is a competitive service and the pro "customer choice" policies in Section 4929.02, Revised Code, Ohio's laws directed at anticompetitive conduct must be considered by the Commission for purposes of addressing AEP-Ohio's efforts to clog commerce with shopping-blocking or shopping impeding charges and a complicated maize created by AEP-Ohio to befuddle any consumers that may embark on a shopping journey.

Ohio's Valentine Act (Chapter 1331, Revised Code), like the federal Sherman Act, uses the language of the late nineteenth century when it speaks of "trusts" and declares them to be unlawful and against public policy. Section 1331.01, Revised Code, defines a trust as "a combination of capital, skills or acts by two or more

¹⁸⁶ Tr. Vol. V at 1056-1061.

¹⁸⁷ See *supra* at 43-47.

¹⁸⁸ Tr. Vol. V at 1061.

¹⁸⁹ Much of the discussion below regarding the Valentine Act and the nature and scope of Ohio's prohibitions on anticompetitive behavior is taken from the Brief submitted by the Ohio Attorney General on March 23, 2012 in *Google, Inc. vs. myTriggers.com, Inc.*, Case No. 11AP-1003, Court of Appeals, Tenth Appellate District, On Appeal from the Franklin County Common Pleas Court.

persons...” for any of six enumerated anticompetitive purposes. The circumstances surrounding the passage of the Valentine Act in 1898, however, make it clear that this broad language was intended to encompass a much wider array of anticompetitive combinations (everything from a powerful single firm wielding its power to control production or prices (*i.e.*, a combination of the “capital” of shareholders), to collusive agreements among multiple firms in the market (*i.e.*, a combination of “acts” by conspiring firms)).

The Valentine Act’s prohibition of “trusts” was not a new concept under Ohio law. Rather, it was a codification of well-established common law principles, consistent with those embodied in the Sherman Act passed at the federal level eight years earlier.¹⁹⁰ At the heart of those common law principles is the idea that monopolies – concentrations of power in a single entity – are antithetical to the public good and should be prohibited.¹⁹¹ Indeed the statutory chapter created by the Valentine Act is titled “Monopolies”, leaving no doubt as to the intended reach of the legislation.

There is no more clear indication that the Ohio common law which formed the foundation of the Valentine Act prohibited anticompetitive practices than the Ohio Supreme Court’s decision in *State v. Standard Oil Co.*, handed down six years prior to the enactment of the Valentine Act and two years after the enactment of the Sherman Act. Attorney General David K. Watson brought suit against The Standard Oil Company (“Standard Oil”), alleging that the company was an unlawful trust – a single firm

¹⁹⁰ See *United States Telephone Co. v Central Union Telephone Co.* 202 F2nd 66, 70 (6th Cir. 1913) (common law principles regarding restriction of competition are codified for Ohio in the Valentine Act and for the United States in the Sherman Act).

¹⁹¹ See *Central Ohio Salt Co. v Guthrie*, 35 Ohio St. 666, 672 (1880) (public policy “unquestionably” favors competition and opposes monopolies); *Crawford & Murray v Hugh B. Wick* 18 Ohio St. 190, 206 (1868) (voiding a bond that restrains trade because it “tends to a monopoly, and is against the public good”).

comprised of interests that controlled the price of oil to the detriment of the public.¹⁹² The Attorney General prevailed. The Court found Standard Oil to be a combination “whereby many separate interests being united under one management, form a virtual monopoly, through the power acquired, of so controlling the production and price of petroleum and its products as to destroy competition”.¹⁹³

The passage of the Valentine Act in 1898 codified the common law that unreasonable concentrations of power are unlawful and injurious to the public good. Demonstrating the importance of these policies, the General Assembly provided for both **criminal and civil** enforcement. In 1905, the Ohio Supreme Court considered the appeal of Perley W. Gage from his criminal conviction under Ohio’s new antitrust law for participating in The Delaware Coal Exchange, “an association of persons organized for the purpose of preventing competition in the sale, and to maintain a uniform and graduated figure for the sale of coal...”¹⁹⁴ In affirming a Valentine Act conviction, the Court pointed out that the acts of this single entity violated Ohio’s antitrust law saying: “The Delaware Coal Exchange, as its purpose is defined in the indictment, is a trust within both the third and fourth subdivision of the first section of the act and that section defines the combinations which the act prohibits.”¹⁹⁵

In *Gage*, the Ohio Supreme Court recognized that Ohio’s new Valentine Act, like the common law on which it was based, proscribed combinations such as those the

¹⁹² *State v. Standard Oil Co.*, 49 Ohio St.137 (1892) (hereinafter “*Standard Oil*”).

¹⁹³ *Id.* at 186.

¹⁹⁴ *State of Ohio v. Gage*, 72 Ohio St. 210 (1905) (hereinafter “*Gage*”).

¹⁹⁵ *Id.* at 229

Court in *Standard Oil* described as “many separate interests being united under one management.”¹⁹⁶

As the evidence in this proceeding shows again, AEP-Ohio itself consists of separate distribution, transmission, generation, regulated and unregulated lines of business that have different interests that operate under one management which is effectively AEPSC, acting as agent for AEP-Ohio alone in some cases and acting on behalf of all the AEP operating companies in other cases as AEPSC so elects. It is clear from the admissions made by representatives of AEP-Ohio that its capacity charge ambitions are directed at restraining commerce.¹⁹⁷ AEP-Ohio has pursued this goal both through the combination of various interests that are subject to AEP’s management and through agreements with numerous parties (including the Commission’s Staff) (such as the Stipulation which the Commission eventually rejected and the parties’ joint defense agreement that committed such stakeholders to support and defend the unlawful Stipulation).

Section 1331.01(B)(5), Revised Code,¹⁹⁸ makes it clear that the types of agreements that are unlawful and void under the Valentine Act include pool agreements

¹⁹⁶ *Standard Oil* at 183.

¹⁹⁷ FES Ex. 102 at Ex. TCB-1 to TCB-5.

¹⁹⁸ Section 1331.04, Revised Code, states:

A violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code, is a conspiracy against trade. No person shall engage in such conspiracy or take part therein, or aid or advise in its commission, or, as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, or rates, or furnish any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violate said sections. Each day’s violation of this section is a separate offense.

Section 1331.06, Revised Code, states:

A contract or agreement in violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code, is void.

and other contracts "... of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected."

Since AEP-Ohio, its affiliates and, *via* the Stipulation, other parties have relied on the AEP Pool Agreement and the RAA to fix or affect the capacity price applicable to

Section 1331.08, Revised Code, states:

In addition to the civil and criminal penalties provided in sections 1331.01 to 1331.14 of the Revised Code, the person injured in the person's business or property by another person by reason of anything forbidden or declared to be unlawful in those sections, may sue therefor in any court having jurisdiction and venue thereof, without respect to the amount in controversy, and recover treble the damages sustained by the person and the person's costs of suit. When it appears to the court, before which a proceeding under those sections is pending, that the ends of justice require other parties to be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside in the county where the action is pending.

Section 1331.99, Revised Code, states:

- (A) Whoever violates section 1331.02 or 1331.05 of the Revised Code is guilty of a felony of the fifth degree.
- (B) Whoever violates section 1331.04 or division (L) of section 1331.16 of the Revised Code is guilty of a misdemeanor of the first degree.
- (C) Whoever violates section 1331.15 of the Revised Code is guilty of a misdemeanor of the second degree.

CRES suppliers and nonbypassable charges payable by electricity purchasers so as to preclude free and unrestricted competition among themselves, purchasers or consumers in the sale of competitive generation service, they have engaged in acts made unlawful by the Valentine Act.

The Ohio Supreme Court has reaffirmed that the Valentine Act reaches all anticompetitive conduct – collusive or otherwise – as recently as 2005. In *Johnson v. Microsoft Corporation*,¹⁹⁹ the Plaintiff sued Microsoft under the Valentine Act alleging that its unilateral practices had monopolized the market for computer operating systems, causing computer prices to increase for consumers. In rejecting the Plaintiff's cause of action under Ohio's Consumer Sales Practices Act, ("CSPA"), the Court observed: "the Valentine Act, not the CSPA, provides the exclusive remedy for engaging in monopolistic pricing practices in Ohio...."²⁰⁰ The Court's decision necessarily implies that the Valentine Act covers anticompetitive conduct by a single actor.

So, separate and apart from the fundamental defects in vague legal theories that AEP-Ohio has advanced to support its proposed capacity pricing formula for CRES suppliers and its total failure to carry its burden of proof and persuasion, the Valentine Act compels the Commission to reject AEP-Ohio's anticompetitive scheme to preclude free and unrestricted competition among purchasers or consumers in the sale of competitive generation service.²⁰¹ If the System Interconnection Agreement among and between various affiliates of AEP-Ohio and the RAA are agreements having the effect

¹⁹⁹ 106 Ohio St.3d 278, 279 (2005).

²⁰⁰ *Id.* at 288-289.

²⁰¹ Before the Commission steps outside the law and the discipline of the public interest and again assists AEP-Ohio in AEP-Ohio's campaign to preclude free and unrestricted competition among purchasers or consumers, IEU-Ohio urges the Commission to seek the advice of counsel.

of precluding free and unrestricted competition between the parties to such agreements, purchasers or consumers, the agreements are void by operation of Ohio law.

IV. CONCLUSION AND REQUEST FOR REIMBURSEMENT OF LITIGATION COSTS

As demonstrated throughout this Brief and for at least the third time, the Commission cannot, and should not, authorize AEP-Ohio to significantly increase CRES capacity prices through the use of a so-called cost-based formula-rate.

Assuming that the Commission has subject matter jurisdiction to address capacity service pricing for a CRES supplier (and AEP-Ohio claims the Commission does not have such jurisdiction), AEP-Ohio has satisfied none of the statutory provisions under which the Commission may lawfully authorize rate increases.

Ohio law bars AEP-Ohio's proposal since it is a proposal to collect transition revenue well after the time for doing so has run, establish an anticompetitive subsidy for the benefit of AEP-Ohio and affiliates, produces non-comparable rates and services and violates AEP-Ohio's agreement to not impose any lost revenue charges on shopping customers.

As demonstrated by the record evidence, AEP-Ohio's proposal would, if approved by the Commission, offend the policies contained in Section 4928.02, Revised Code, and would serve to undermine competition in the State.

For these reasons, it would be patently illegal and unfair for the Commission to approve OP's proposed capacity charges. Accordingly, IEU-Ohio urges the Commission to put an end to AEP-Ohio's latest scheme to raise electric bills and block shopping.

As a final matter, IEU-Ohio believes that it is imperative that the Commission recognize the stakeholder resource drain caused by AEP-Ohio's many efforts to hide the real effects of its proposals, bypass Ohio law and common sense and otherwise work to offend the public interest. The cost of securing transcripts alone for the many layers of regulatory proceedings that AEP-Ohio has been allowed to initiate and maintain to push its illegal agenda is a barrier to meaningful stakeholder participation.

It is IEU-Ohio's view that OCC, APJN, FES and IEU-Ohio have provided substantial representation in this and related proceedings on behalf of the public interest and a large segment of AEP-Ohio's customers not actively involved in these cases. It is IEU-Ohio's view that but for the dedicated work of these parties to preserve and develop many of the issues in these proceedings, the public interest would have been imperiled by AEP-Ohio's mission. Clearly, the evidence presented and legal arguments made by these parties, and most specifically IEU-Ohio and FES in conjunction with the Stipulation Rehearing Entry, have been the most significant factor in the Commission's willingness and legal ability to put things rights. It is IEU-Ohio's view that the unique circumstances in *In Re Commission-Ordered Investigation of Ameritech Ohio*, Case No. 99-938-TP-COI, Entry (July 12, 2001), are present here and that the Commission can and should require AEP-Ohio to reimburse stakeholders for their litigation costs.

AEP-Ohio's threats make it clear that rejection of its proposal in this proceeding will set AEP-Ohio in motion to pursue other bogus legal theories and attempt to further perfect claims that rob consumers of their earned opportunity to reduce their electric bills through "customer choice". As part of the relief granted in this proceeding, IEU-Ohio urges the Commission to direct AEP-Ohio to reimburse all consumer representative stakeholders for the cost of participation in this proceeding and the costs

of participating in the Stipulation ESP proceeding as such costs were incurred by all consumer representative stakeholders who opposed the Stipulation with such reimbursement occurring through a cash payment.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Post-Hearing Brief* was served upon the following parties of record this 23rd day of May 2012 via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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