BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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BY
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The Office of the Ohio Consumers' Counsel ("OCC"), representing the 1.2 million residential customers of Ohio Power Company (the "Company" or "AEP-Ohio") applies for rehearing of the July 2, 2012, Opinion and Order ("July 2 Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, the OCC seeks to protect customers from paying hundreds of millions of dollars that may result from the unjust and unreasonable rates in the Commission's Order in this case.

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, OCC asserts that the Opinion and Order was unjust, unreasonable, and unlawful in the following particulars:

A. The PUCO Erred Because It Allowed Wholesale Capacity Costs To Be Deferred For Potential Collection From Customers In Retail Electric Service Rates Set Under The Company's Electric Security Plan.

B. The PUCO Erred In Adopting Cost-Based Pricing Instead Of The Reliability Pricing Model As The State Compensation Mechanism.

C. The PUCO Erred As It Has No Authority To Establish A Wholesale Capacity Rate Under Revised Code Chapters 4905 And 4909.

D. The PUCO Erred In Creating Unfair Competition With Potential Subsidies, Double Payments, And Discrimination.

1. If the PUCO allows AEP-Ohio to collect from retail customers (and not CRES providers) the difference between its costs of capacity and the discounted rate it charges CRES providers, the result will be an anticompetitive and unlawful subsidy.

2. Collecting deferrals from customers will cause customers, both shopping and non-shopping, to pay twice for the capacity—a result that violates R.C. 4928.141, R.C. 4928.02(A) and R.C. 4928.02(L).

3. Charging non-shopping SSO customers a higher capacity charge than shopping customers violates the anti-discrimination provisions of R.C. 4928.141, 4928.02(A) and R.C. 4905.33 and 4905.35.

E. The PUCO Erred When It Fashioned A Capacity Charge System That Is Not Based Upon The Record It Had Before It And That Denied Parties Due Process In This Case And In The AEP ESP Case Where The Commission Referred The Issue For Resolution After The ESP Hearings Had Concluded.

F. The PUCO Erred In Ruling That The Company Can Defer The Difference Between $188.88 And RPM, As There Is No Law Or Evidence In The Record To Address Or Support A Mechanism For Collecting The Capacity Charge Deferrals.

G. The PUCO Erred In Determining The Company's Costs Are $188.88/MW-Day Because There Was No Evidence Presented to Support Such A Finding.

1. The Commission selected an unsupported Return on Equity that increases the PUCO Staff's recommendation by $10.09/MW-day, and is greater than OEG's Return on Equity recommendation.

H. The PUCO Erred In Allowing AEP-Ohio To Collect Carrying Charges On The Deferrals Based On The Weighted Average Cost Of Capital Until The Recovery Mechanism Is Approved.

An explanation of the basis for each ground for rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the OCC's claims of error, the PUCO should modify its Order.

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

A significant issue here is the impact on customers' electric bills from the PUCO's decision to give competitors a discount on their payments to AEP-Ohio for capacity--a discount that could be hundreds of millions of dollars and that customers may be asked to subsidize. Commissioner Roberto, in her dissenting and concurring opinion, referred to this outcome as "an unnecessary, ineffective, and costly intervention into the market."[1]

Capacity charges represent the costs of a utility making its generation units available to provide electric service to a customer. This proceeding is significant to residential customers because it affects the capacity charges they ultimately may pay. Indeed, parties in the AEP-Ohio Electric Security Plan ("AEP ESP") proceeding (Case No. 11-346-EL-SSO, et al.) have estimated that the capacity cost deferrals authorized as a result of this proceeding may be as great as $725 million to $800 million, before

[1] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case no. 10-2929-EL-UNC, Opinion and Order (July 2, 2012) at 4.

considering the large expense of the carrying charges that the PUCO allowed AEP-Ohio to accrue.[2]

Through its July 2 Order the Commission reversed[3] its earlier decision to establish Reliability Pricing Model ("RPM") market-based capacity as the state compensation mechanism for Ohio. Instead, on July 2, the PUCO found that the state compensation mechanism was to be a cost, not market based, approach. The PUCO determined that the record in this proceeding supports a cost of capacity of $188.88/MW-day for AEP Ohio's fixed resource requirement ("FRR") obligations to CRES providers.[4] But instead of ordering AEP Ohio to charge competitive retail electric service ("CRES") providers AEP's cost of capacity, the PUCO ordered AEP-Ohio to charge CRES providers the RPM market-based rate of $20.01/ MW-day.[5] The PUCO authorized AEP-Ohio to defer the difference between AEP-Ohio's costs and the RPM capacity rates charged to CRES providers.[6] The Commission indicated it would establish "an appropriate recovery mechanism" for these deferred costs in the Company's electric security plan, meaning the PUCO will identify who will pay an extraordinary amount of deferred costs.[7] That ESP case decision is expected in early August.[8]

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[2] 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 § 4928.143, Revised Code, In the Form of an Electric Security Plan, et al,,* Case No. 11-246-EL-SSO, Reply Brief of Ohio Manufacturer's Association Energy Group at 8; Reply Brief of Industrial Energy Users of Ohio ("IEU") at 20 (July 9, 2012).

[3] See *In the Matter of the Commission Review of the Capacity Charges of Ohio Power, Company and Columbus Southern Power Company,* Case No. 10-2929-EL-UNC, Entry at 2 (December 8, 2010).

[4] Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012) at 33.

[5] Id. at 23.

[6] Id. at 38.

[7] Id. at 24.

[8] Id.

There was no evidence presented during the hearing to support the findings that the Company is entitled to recover its costs for capacity or that AEP-Ohio's costs are $188.88/ MW-day. In addition, it is not clear from the Commission's July 2 Order whether the Company will be permitted to collect from customers the difference between the PUCO-determined cost and the rate charged CRES providers, plus interest.

The purpose of this proceeding was for the PUCO to determine the capacity price that AEP-Ohio will charge to CRES providers in Ohio. The function of AEP-Ohio's ESP was to decide the default or SSO pricing for customers who do not shop. But the line between these two proceedings has been effectively blurred as a result of the Commission's July 2 Order.

Given the new development of the PUCO's authorization of deferrals with the potential that customers may be required to pay AEP-Ohio for the deferrals (plus carrying charges), OCC's position is as follows. First, OCC maintains that the Commission should have reaffirmed RPM market-based capacity prices as the state compensation mechanism for AEP-Ohio. Second, if the Commission proceeds with imposing capacity cost deferrals, the deferred amounts **should not** be collected from customers. Residential customers should not be required to subsidize CRES providers for capacity purchased from AEP-Ohio—CRES providers (the cost-causers) should be responsible for paying the Company's costs. Third, if the PUCO intends to require retail customers to subsidize capacity-related discounts (in the form of deferrals) for CRES providers, then AEP-Ohio's Standard Service Offer ("SSO") customers should not be required to pay such subsidies that benefit CRES providers and their shopping customers. Accordingly, OCC requests rehearing on the issues discussed in detail below.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that within thirty days after an order is issued by the Commission "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[9] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[10]

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[11] If the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same ***."[12]

OCC participated in this case, and thus, meets the statutory conditions that apply to an applicant for rehearing under R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

[9] R.C. 4903.10.

[10] Id.

[11] Id.

[12] Id.

III. ARGUMENT

A. The PUCO Erred Because It Allowed Wholesale Capacity Costs To Be Deferred For Potential Collection From Customers In Retail Electric Service Rates Set Under The Company's Electric Security Plan.

The PUCO authorized the Company to defer its incurred capacity costs that it does not collect from CRES providers. In authorizing the deferral, the PUCO appears to be setting the stage for the Company to collect what the PUCO determined were "wholesale capacity costs"[13] from third parties, including retail customers, under some provision of the Company's electric security plan.

The Commission states in the July 2 Order that "[a]lthough Chapter 4928, Revised Code, provides for market-based pricing for retail electric generation service, those provisions **do not apply because**, as we noted earlier, capacity is a **wholesale rather than a retail service**."[14] Sales of electric capacity for resale to retail customers are wholesale transactions. Wholesale transactions fall under the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). However, the PUCO explains that it has limited jurisdiction in this case "for the sole purpose of establishing an appropriate state compensation mechanism," consistent with the governing section of the PJM Reliability Assurance Agreement ("RAA").[15]

But the PUCO went beyond its limited jurisdiction because it did not solely establish an appropriate state compensation mechanism upon which the wholesale

[13] Opinion and Order at 13 (although the capacity service benefits shopping customers "in due course, they are initially one step removed from the transaction, which is more appropriately characterized as an intrastate wholesale matter between AEP-Ohio and each CRES provider operating in the Company's service territory.").

[14] Id. at 22. (Emphasis added).

[15] Id. at 13.

capacity price for CRES would be based. The PUCO also authorized AEP-Ohio to defer its incurred capacity costs not recovered from CRES provider billings. The Commission states that the manner in which AEP-Ohio will be able to collect these costs will be decided when the PUCO issues its ruling in the Company's pending electric security plan case ---a case that establishes a standard service offer for *retail* generation under AEP Ohio's electric security plan. That standard service offer is for "competitive electric retail service" that must be provided to consumers "on a comparable and nondiscriminatory basis within its service territory."[16] The Company's ESP is filed pursuant to Chapter 4928 of the Revised Code.

The Commission expressly determined in this proceeding that the provision of capacity for CRES providers by AEP Ohio is not a "retail electric service" under R.C. 4928.02(A)(27),[17] but instead is a wholesale service. This means the deferrals arising from provision of this wholesale service created in this proceeding cannot be collected as part of the retail service rates established under an electric security plan that will be decided in the ESP case. The Commission has no jurisdiction to authorize AEP-Ohio to collect **wholesale electric costs** for capacity service made available to shopping customers, from **retail SSO customers**.

Wholesale capacity costs are the responsibility of the unregulated CRES providers. Customers do not owe the utility wholesale capacity costs for providing retail electric service. CRES providers owe the utility for providing wholesale capacity. But

[16] See R.C. 4928.141, requiring an electric distribution utility to provide consumers a standard service offer either through an electric security plan or a market rate offer.

[17] Opinion and Order at 13.

the PUCO appears to be authorizing the utility to collect wholesale electric costs from retail SSO customers. This it cannot do for a number of reasons.

The Ohio Supreme Court has held that, if a given provision of an ESP does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized by statute.[18] The deferrals created in the July 2 Order do not fit within the provisions of R.C. 4928.143(B)(2), and thus, cannot be authorized by the PUCO as part of an ESP.[19]

Moreover, the Commission cannot approve an ESP that violates state policy provisions of R.C. 4928.02, such as 4928.02(A),[20] (H),[21] and (L),[22] as explained in further detail in OCC assignment of error D below.[23] Even though the Commission declared that Chapter 4928 is not applicable to this proceeding,[24] it is that chapter of the Revised Code that governs how and if the Commission can permit AEP-Ohio to recover the deferrals it created in this proceeding in the AEP-ESP proceeding. In this regard, the

[18] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32.

[19] See also, IEU-Ohio Brief (Case No. 11-346-EL-SSO) at 57-58. Industrial Energy Users of Ohio ("IEU") argued in the AEP ESP case that the lost revenues sought to be collected through the Rate Stability Rider ("RSR") are "transition costs" that cannot be collected. IEU identified the RSR as an "illegal attempt to collect transition revenue." IEU explained that, under Senate Bill 3 in 1999, there was an opportunity for electric utilities to seek revenue for transitioning to competition – and that opportunity "has long since passed * * * " OCC agrees that this is another basis under which the Commission could and should reject the RSR.

[20] R.C. 4928.02(A) states that it is the policy of the state to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."

[21] R.C. 4928.02(H) states that it is the policy of the state to "[e]nsure 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."

[22] R.C. 4928.02(L) states that it is the policy of the state to "[p]rotect at-risk populations..."

[23] See *Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305, where the Ohio Supreme Court reversed the orders of the PUCO with respect to the authorization of the increased fuel-cost deferrals, finding that it is Ohio's policy to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies.

[24] Opinion and Order at 22.

PUCO is a creature of statute[25] and has no authority other than that given to it by the General Assembly.

The Commission seems to assume that deferrals created under its regulatory authority in R.C. Chapters 4905 and 4909 can be incorporated into the Company's ESP. But the electric security plan is governed by a different chapter of the Ohio Revised Code (Chapter 4928). While the Commission found an obligation under traditional regulation to ensure that jurisdictional utilities receive reasonable compensation for services they render,[26] there is no corresponding obligation under Chapter 4928.

Indeed, there is no statutory basis to allow collection of these deferred charges from customers under the provisions of an ESP. The charges do not fit under any provision of R.C. 4928.142(B)(2). If it were argued that such charges fit under division (B)(2)(d), as a charge that has the effect of stabilizing or providing certainty, that argument fails. That statutory subdivision only permits a charge to stabilize or provide certainty specifically as it relates to **retail electric service**. Because the capacity charge is a wholesale capacity charge to CRES suppliers, and CRES suppliers ultimately choose how (if at all) that charge is flowed through to retail shopping customers, there is no direct connection and no conclusive rate stability or certainty.

The Commission authorized the capacity charges -- and the deferrals -- specifically under R.C. 4905.04, 4905.05, and 4905.06, and generally under R.C.

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[25] *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051

[26] Opinion and Order at 22.

Chapters 4905 and 4909.[27] AEP-Ohio's ESP, however, is governed by R.C. 4928.143. The only deferrals mentioned in R.C. 4928.143 are "deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding *retail electric service*."[28]

But in the July 2 Order the Commission did not find that the deferral would have the effect of "stabilizing or providing certainty" regarding retail electric service. Instead, the Commission recognized that "the provision of capacity for CRES providers by AEP-Ohio, pursuant to the Company's FRR capacity obligations, is **not a retail electric service** as defined by Ohio law."[29] The deferral itself was created out of the Commission's concept that "RPM-based capacity pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations."[30] Thus, instead of creating a deferral that meets the requirements of R.C. 4928.143(B)(2)(d), the Commission went beyond the statute governing ESPs.

Next, the deferral is unlawful under R.C. 4928.144, which states, in pertinent part: "[t]he public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established **under sections 4928.141 to 4928.143 of the Revised Code**, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers." (Emphasis added). Here, by ordering AEP-Ohio to charge CRES providers RPM-based capacity prices, then

[27] Id.

[28] R.C. 4928.143(B)(2)(d).

[29] Opinion and Order at 13. (Emphasis added).

[30] Id. at 23.

deferring the difference between those prices and the Company's capacity costs for potential recovery through the ESP, the Commission appears to be potentially creating a phase-in of AEP's wholesale capacity charges. This does not comport with R.C. 4928.144 because (a) the rate was not established as a retail electric service rate under R.C. 4928.141 to 4928.143, and (b) as mentioned above, the deferral is not necessary to ensure rate or price stability for retail electric service to consumers. Accordingly, the Commission should grant rehearing of this issue.

B. The PUCO Erred In Adopting Cost-Based Pricing Instead Of The Reliability Pricing Model As The State Compensation Mechanism.

Given the precedent established by the PUCO and the FERC,[31] and considering that AEP-Ohio has historically used RPM priced capacity for sales to CRES providers, the Commission should have found that the appropriate price for capacity is the RPM market-based price. RPM priced capacity is appropriate because these prices represent the true market value of capacity and take into consideration market risks, while cost-based capacity prices do not. RPM priced capacity also provides the most efficient market prices, which avoids creating any distortions of the market. The Commission even acknowledged the benefits of RPM pricing, stating that "RPM based capacity pricing has been used successfully throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on an even playing field."[32] But it appears that the Commission, in attempting to find a path between the opposing claims of the Company

[31] FERC has ruled that only in the **absence of a state compensation mechanism** does an FRR Entity have the option to make a filing with the FERC to change to cost-based recovery. FES Ex. 101, Stoddard at 11, citing to *American Electric Power Serv. Corp*., 134 FERC 61039 (2011).

[32] Opinion and Order at 23.

and the CRES providers, has harmed Ohio customers—the very interest that competition is supposed to be serving.

The Commission implicitly adopted RPM-based capacity prices as of December 8, 2010, as the compensation mechanism (under Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement "RAA") in combination with retail rates that included the collection of capacity costs through provider-of-last-resort ("POLR") charges.[33] However, in the July 2 Order, after declaring Ohio's state compensation mechanism as RPM-market-based prices, the PUCO contravened its decision and ruled that AEP-Ohio can defer its wholesale capacity costs and seek to collect those costs from customers through a recovery mechanism in the ESP proceeding. This was erroneous for several reasons.

First, the plain language of PJM's RAA states:

> *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. (Emphasis added.)

If there is no state compensation mechanism, the price for capacity is the same as in the "unconstrained portions of the PJM Region," in this case, RPM market-based prices. But, in the absence of a state compensation mechanism, an EDU may choose to make a filing with FERC under Section 205 of the Federal Power Act proposing to

[33] Case No. 10-2929-EL-UNC, Entry at 2 (December 8, 2010). See also *American Electric Power Serv. Corp*., 134 FERC 61039 (2011), where the FERC found that it was "uncontroverted" that the PUCO adopted RPM as the state compensation mechanism, at ¶9.

change the basis for compensation. In this case, the PUCO declared that there was a state compensation mechanism: RPM market-based prices. Then the PUCO contradicted its own ruling, ordering that the cost-based state mechanism would not be the capacity price that is applicable to CRES providers.

Second, the FERC has held that "the PJM RAA **does not permit** AEP to change a state imposed allocation mechanism."[34] Since the PUCO declared as of December 8, 2010, that Ohio had a state compensation mechanism, thereby claiming jurisdiction over this matter from FERC, it is unclear why the PUCO opened a separate proceeding to re-examine the state compensation mechanism.[35] There was either a state compensation mechanism as of December 8, 2010, or there was not. AEP-Ohio cannot change the state-imposed mechanism. And AEP-Ohio's Section 205 filing (where the Company requested it be compensated based on its costs) was denied by the FERC because the PUCO declared that Ohio had a state compensation mechanism.[36] Now, the PUCO has implemented a state mechanism that is cost-based, but apparently not applicable to CRES providers.

Third, there is no authority that mandates that a state's compensation mechanism must be based on the cost of capacity. In fact, the RAA states that an FRR entity can make a Section 205 filing (in the absence of a state compensation mechanism) requesting to change the basis for compensation **to a *method based* on costs**. The RAA does not say an FRR entity is **entitled** to recover all of its costs.

[34] *American Electric Power Serv. Corp.*, 134 FERC 61039 (2011) at ¶ 12. (Emphasis added).

[35] See Entry (March 7, 2012) at 17.

[36] Id.

Further, every intervening party to this proceeding recommended that the Commission maintain RPM market-based capacity prices as the state mechanism. But in the July 2 Order, the Commission stated:

> Upon review of the **considerable evidence** in this proceeding, we find that the record supports compensation of $188.88/MW-day as an appropriate charge to enable AEP-Ohio **to recover its capacity costs for its FRR obligations from CRES providers**.[37]

Rather than reaffirm that Ohio's state compensation mechanism is RPM, as it previously declared in its December 8, 2010 Entry, the PUCO created a hybrid approach. Under the PUCO's new approach, CRES providers are given the benefit of having AEP-Ohio charge them RPM (market-based) prices, at a discount from AEP-Ohio's costs. And the PUCO will arrange for AEP-Ohio to be compensated for this discount so it can recover its costs.

But there is a major problem. Someone has to subsidize the discount for the PUCO's plan to work. And the subsidy for the discount will be massive. Thus, the PUCO's approach of trying to reconcile the irreconcilable positions of AEP-Ohio and its competitors may have the unfortunate result of leaving customers to foot the extraordinary bill for the subsidy to competitors. The magnitude of what customers may have to pay is reflected in the fact that the PUCO's "cost-based" price is approximately nine-times greater than the current market-based RPM price.[38]

Most perplexing perhaps is the Commission's acknowledgement that "pursuant to the FPA [Federal Power Act], electric sales for resale and other wholesale transactions are generally subject to the exclusive jurisdiction of FERC [Federal Energy Regulatory

[37] Opinion and Order at 12.

[38] The current market-based RPM price $20.01/MW-day, whereas the PUCO's cost-based price is $188.88/MW-day.

Commission]." However, the PUCO claimed that it has jurisdiction in this proceeding for **the sole purpose** of "establish[ing] a state compensation mechanism."[39] But the result of the Commission's July 2 Order is a state compensation mechanism that does not apply to the CRES providers, as they will pay AEP-Ohio the market-based RPM prices. It appears the PUCO will instead attempt to allow AEP-Ohio to recover the "cost-based" state compensation mechanism from **retail** customers, by permitting AEP-Ohio to seek a recovery mechanism in the ESP proceeding. That is wrong and anti-competitive as it distorts competition. AEP-Ohio should only be permitted to recover its wholesale "costs for its FRR obligations" from CRES providers. CRES providers are the cost-causers of the wholesale transaction and consequently they, not retail customers, should pay AEP-Ohio

Finally, the PUCO stated in its March 7, 2012 Entry that "the [current] state compensation mechanism [i.e. RPM prices] could risk an unjust and unreasonable result."[40] But the PUCO, in seeking to avoid an "unjust and unreasonable result" for AEP-Ohio, has apparently shifted the unreasonable result to customers in the form of payments to support a massive subsidy to competitors. To this end, the Commission has erred by creating a state compensation mechanism that 1) appears to be inapplicable to CRES providers, 2) could result in unlawful subsidies and double payments for capacity, 3) is discriminatory, and 4) could potentially charge wholesale costs to retail customers. That is unjust and unreasonable.

[39] Id.

[40] Id at 16.

The Commission should have reaffirmed the state compensation mechanism for capacity as RPM market-based prices. That is the outcome the considerable evidence presented in this case supports.

C. The PUCO Erred As It Has No Authority To Establish A Wholesale Capacity Rate Under Revised Code Chapters 4905 And 4909.

The Commission stated in the July 2 Order, "[s]ections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction."[41] However, the Commission has overstepped its authority under these statutes. These statutes merely give the PUCO **general** authority to supervise and regulate all public utilities within its jurisdiction. They are not ratemaking statutes.

As it relates to EDUs, R.C. 4905.04 only gives the Commission "the power and jurisdiction to supervise and regulate public utilities [and] * * * to require all public utilities to furnish their products and render all services exacted by the commission or by law…."[42] R.C. 4905.05 merely gives the Commission certain limited rights over public utilities' property and records. And R.C. 4906.05 provides the Commission with general supervisory powers over public utilities' property and records.

None of these statutes, which the Commission claims to be the basis for its action in this proceeding,[43] allows the Commission to set wholesale capacity prices, let alone permit the shifting of wholesale costs to retail electric service customers through the ESP retail rates. Indeed, nothing in either Chapter 4905 or Chapter 4909 gives the

[41] Id. at 12.

[42] The remainder of the statute is concerned only with railroads.

[43] Opinion and Order at 12.

Commission the authority to set wholesale rates and allow deferral of wholesale costs to be collected through ESP retail rates.

The Commission is a creature of statute and can only exercise the authority granted it under Ohio law.[44] The PUCO acknowledges that it "may exercise only the authority conferred upon it by the Generally Assembly."[45] Nothing in Ohio law allows the Commission to create a deferral under R.C. Chapter 4905 or 4909 to be collected through an ESP authorized under R.C. 4928.143. The wholesale cost deferral established in this case violates Ohio law and cannot be discharged through the ESP in this proceeding.

D. The PUCO Erred In Creating Unfair Competition With Potential Subsidies, Double Payments, And Discrimination.

The PUCO states in its Order:

> …the Commission will authorize AEP-Ohio to modify its accounting procedures, pursuant to Section 4905.13, Revised Code, **to defer incurred capacity costs not recovered from CRES provider billings** during the ESP period to the extent that the total incurred capacity costs do not exceed the capacity pricing that we approve below. Moreover, the Commission notes that we will establish an appropriate recovery mechanism for such deferred costs and address any additional financial considerations in the 11-346 proceeding.[46]

The Commission erred in allowing the Company to defer incurred capacity costs not recovered from CRES provider billings. The result will be unfair competition, potentially

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[44] *Columbus S. Power Co. v. Pub. Util. Comm*. (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820; *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

[45] Opinion and Order at 12.

[46] Id. at 23.

unlawful subsidies, double payments and discriminatory pricing for the reasons detailed below.

1. If the PUCO allows AEP-Ohio to collect from retail customers (and not CRES providers) the difference between its costs of capacity and the discounted rate it charges CRES providers, the result will be an anticompetitive and unlawful subsidy.

The Commission determined that AEP-Ohio's wholesale cost of capacity is $188.88/MW-day. But under the PUCO's approach it appears AEP-Ohio may be permitted to collect from retail customers (and not from CRES providers)[47] the difference between the cost of AEP-Ohio's capacity and the RPM price it will charge CRES providers for capacity for shopping customers. If this is the case, the PUCO's approach has created a subsidy for CRES providers, whereby third parties may have to pay AEP-Ohio to make it whole so that it can charge CRES providers less than the PUCO-determined cost of capacity.

R.C. 4928.02(H) states:

It is the policy of this state to do the following throughout this state:

* * *

> (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;

In Commissioner Roberto's concurring and dissenting opinion, she refers to this payment as a "significant, no-strings-attached, unearned benefit" to entice more sellers

[47] The July 2, 2012 Opinion and Order is not clear who will be responsible for paying the difference between the RPM market-based price, and the $188.88 per MW day price.

into the market.[48] She further states that the deferral mechanism is "an unnecessary, ineffective, and costly intervention into the market" that she cannot support.[49] OCC agrees, as there is no basis to extend this benefit to CRES providers at the expense of retail customers, and especially no basis to make non-shopping customers pay for this anticompetitive subsidy.

OCC recommended that AEP-Ohio's charge for capacity be set at the market price, through the use of the Reliability Pricing Model.[50] If this had been done, there would have been no discount for capacity, no subsidy to CRES providers, no deferrals, and competition would have been furthered. But the PUCO's decision in this case seems to be an attempt to find a point in-between what AEP-Ohio wants and what CRES providers want. Customers are caught in the middle, where the middle is defined as potentially paying AEP-Ohio hundreds of millions of dollars in deferred capacity costs.

R.C. 4928.02(H) prohibits anticompetitive subsidies from noncompetitive retail electric service to competitive retail service. Under this statute, it would unlawful to collect the capacity costs (whether or not deferred) from retail customers.

2. Collecting deferrals from customers will cause customers, both shopping and non-shopping, to pay twice for the capacity—a result that violates R.C. 4928.141, R.C. 4928.02(A) and R.C. 4928.02(L).

R.C. 4928.02(A) requires ensuring that "non-discriminatory" and "reasonably priced retail electric service" is available to consumers. R.C. 4928.141 requires the utility to provide a standard service offer of retail electric service on a "comparable and non-discriminatory basis." R.C. 4928.02(L) requires that the PUCO "protect at-risk

[48] Id., Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4.

[49] Id.

[50] Opinion and Order at 19.

populations." If the deferred capacity costs (i.e. subsidy amounts) are in fact directly collected from customers,[51] instead of from the CRES providers, hundreds of millions of dollars will be added to customers' bills.[52] Such a result would be contrary to these requirements under the statute.

Commissioner Roberto saw that customers may indeed bear the burden of paying for the subsidy provided to CRES. She explained that shopping customers may pay twice for the capacity unless the CRES providers directly pass through RPM market-based prices:

> If the retail providers do not pass along the entirety of the discount, **then consumers will certainly and inevitably pay twice for the discount today granted to the retail suppliers**. To be clear, unless every retail provider disgorges 100 percent of the discount to consumers in the form of lower prices, shopping consumers will pay more for Fixed Resource Requirements service than the retail provider did. This represents the first payment by the consumer for the service. Then the deferral, with carrying costs, will come due and the consumer will pay for it all over again -- plus interest.[53]

Under AEP-Ohio's proposed Modified ESP, SSO customers (non-shopping customers) are paying and will continue to pay what AEP-Ohio claims is its embedded cost of capacity ($355/MW-day) through base generation rates which remain frozen during the term of the ESP.[54] Unless the Commission orders the Company to reduce

[51] It is not clear from the PUCO's July 2, 2012 Opinion and Order who will be responsible for paying the deferrals.

[52] See Reply Brief of IEU (Case No. 11-346-EL-SSO et al.) estimating that deferrals created will amount to $800 million, without considering carrying charges.

[53] Opinion and Order, Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4. (Emphasis added).

[54] See Tr. Vol. III at 716, where Company Witness William Allen stated: "[w]hat I did is I compared the SSO revenues that the company is collecting today and I compared that to the revenues the company would recover if we were charging that -- all that load $355 a megawatt day. **Those rates are equivalent**." See also, Tr. Vol. II at 247, where Company Witness Kelly Pearce states: "[a]s far as just comparing the strict level of the charges, again, is what they look like within a rough approximation, they appear to be equal."

these base generation rates for non-shopping customers, the SSO customers will be overpaying (at approximately $355/MW-day) compared to what the PUCO determined was AEP's capacity cost ($188.88/MW-day). And there is an extreme discrepancy when comparing $355/MW-day to what the PUCO determined to charge CRES providers for capacity (RPM market-based rates). SSO customers would also pay more for capacity through SSO rates than shopping customers (whose capacity could be priced at the much lower RPM price of capacity charged to CRES providers). This will mean that SSO customers are not receiving the "comparable and non-discriminatory" SSO rates the utility must offer under law.[55] It also means that customers will not receive the "nondiscriminatory" and "reasonably priced" retail electric service that the Commission must ensure under R.C. 4928.02(A).

In addition to shoppers potentially paying twice, non-shopping customers could also pay twice for capacity costs. If the price of $188.88/MW-day is not used for SSO (non-shopping) customers, then these customers will pay for capacity once in an overstated (above the $188.88/MW-day) SSO rate and then a **second** time if they end up paying for the capacity cost deferrals that the PUCO has created in this case (or if they pay the Rate Stability Rider). This violates R.C. 4928.141, 4928.02(A) and R.C. 4928.02(L).

3. Charging non-shopping SSO customers a higher capacity charge than shopping customers violates the anti-discrimination provisions of R.C. 4928.141, 4928.02(A) and R.C. 4905.33 and 4905.35.

R.C. 4928.02(A) requires that consumers have "nondiscriminatory" retail electric service. R.C. 4928.141 requires the utility to provide consumers a standard service offer

[55] See R.C. 4928.141.

on a "comparable and non-discriminatory basis." Further, R.C. 4905.33 prohibits a public utility from charging greater or lesser compensation for services rendered for "like and contemporaneous service under substantially the same circumstances and conditions." R.C. 4905.35 prohibits a utility from giving any "undue or unreasonable preference or advantage" to any person.

The capacity that the Company provides for service to non-shopping customers is no different than the capacity provided for service to shopping customers (through capacity made available to CRES providers). SSO (non-shopping) customers are paying base generation rates with $355/MW-day for capacity embedded in their rates contrasted with CRES providers serving shopping customers at RPM prices (currently $20/MW day). That is discriminatory. It violates R.C. 4928.141, 4928.02(A), and R.C. 4905.33 and 4905.35.

Such an approach also fails to provide correct price signals to all customers (not just shoppers). This is because it allows vastly different prices to be charged for the same service. It also causes an illegal subsidization of switching customers by non-switching customers. That subsidy will occur if capacity sales to CRES providers are priced at RPM and no adjustment is made to the capacity component of non-shopping customers' generation rates.

E. The PUCO Erred When It Fashioned A Capacity Charge System That Is Not Based Upon The Record It Had Before It And That Denied Parties Due Process In This Case And In The AEP ESP Case Where The Commission Referred The Issue For Resolution After The ESP Hearings Had Concluded.

The Commission left the mechanism for collecting the capacity cost deferrals to be decided in the AEP ESP proceeding.[56] But the primary capacity-related issue in the AEP ESP proceeding was the Company's alleged or claimed discounts for capacity (i.e., the two-tiered pricing scheme for capacity and the alternative $10/MWh shopping credit) from the Company's proposed $355/MW-day capacity price. This is wrong.

The appropriate mechanism for collecting any capacity cost deferrals was not placed in issue by AEP-Ohio's application, by the PUCO staff or by the parties in the AEP ESP proceeding. There was no evidence presented in the AEP ESP proceeding related to the appropriate mechanism for collecting these deferrals established in the present case. Accordingly, the Commission does not have any record, let alone a complete record, in the AEP ESP case on which it can determine how such capacity cost deferrals can or should be treated. And, under R.C. 4903.09, the Commission must base its decision on facts in the record.[57] To this end, the Ohio Supreme Court has held that "the purpose of R.C. 4903.09 is to provide [the] court with sufficient details to enable [it] to determine, upon appeal, how the commission reached its decision."[58] And only where "there was enough evidence and discussion in order to enable the PUCO's reasoning to

[56] OCC may seek rehearing of the Capacity Charge Order.

[57] *Ideal Transportation Co. v. Pub. Util. Comm.*, 42 OhioSt.2d 195 (1974).

[58] See *Cleveland Elec. Illuminating Co. v. PUC*, 4 Ohio St. 3d 107, 110 (Ohio 1983), citing to, *General Tel. Co. v. Pub. Util. Comm*. (1972), 30 Ohio St. 2d 271.

be readily discerned" has the Ohio Supreme Court found substantial compliance with R.C. 4903.09.[59]

A proposed collection mechanism was not a subject of the AEP ESP proceeding. To this end, the Commission's July 2 Order was issued one week prior to the filing of post-hearing reply briefs in the AEP ESP proceeding. It was unreasonable for this issue to be thrust into the AEP ESP proceeding at such a late date to determine the appropriate mechanism for collections, with no evidence or record on the issue.

The hearings for the capacity case and the AEP-ESP were separate and distinct. Separate expert testimony and evidence was presented in each case. Separate initial and reply briefs were filed in each case. The issues were distinct for each proceeding, and the legal counsel, parties and witnesses were not all identical for each proceeding. But now, as a result of the July 2 Order, parties will potentially have to raise the same arguments twice in applications for rehearing -- in this proceeding, and in the AEP-ESP proceeding. It is unreasonable for the PUCO to issue an Order that joins these separate proceedings.

The Commission noted that the very purpose for this proceeding was to "**fully develop the record** to address the issue raised expeditiously."[60] So it does not logically follow that the Commission declared that it will address a mechanism for collecting the capacity charge deferrals later in **the separate AEP ESP** proceeding, where there is no record on the issue.

[59] *MCI Telecommunications Corp. v. Public Utilities Com.*, 32 Ohio St. 3d 306, 312 (Ohio 1987).

[60] Capacity Charge Case, Entry at 3 (May 3, 2012). (Emphasis added).

F. The PUCO Erred In Ruling That The Company Can Defer The Difference Between $188.88 And RPM, As There Is No Law Or Evidence In The Record To Address Or Support A Mechanism For Collecting The Capacity Charge Deferrals.

The Commission found that the record supports compensation of $188.88/MW-day as an appropriate charge to enable AEP-Ohio to recover its capacity costs for its FRR obligations from CRES providers.[61] But there is no basis in the record in this proceeding to authorize the capacity cost deferrals. The evidence in this proceeding focused solely on the price that AEP-Ohio is to charge CRES providers for capacity.

The deferral of capacity costs was never discussed, analyzed or supported by evidence in this proceeding. The only explanation of deferrals appears to be that the Commission believes that deferrals are necessary "to encourage the development of retail competition in AEP-Ohio's service territory."[62]

But the record does not establish (1) a connection between the deferrals and the development of retail competition or (2) the need for development of retail competition beyond what is currently occurring.[63] As explained above, per R.C. 4903.09, the Commission must base its decision on facts in the record.[64] R.C. 4903.09 is not satisfied when the Commission does not explain its reasoning or rationale[65] for deferring capacity

[61] Id.

[62] Order at 33.

[63] See Commissioner Roberto's Concurring and Dissenting opinion at 4 (concluding that the record does not support that competition has suffered sufficiently or will suffer sufficiently as a result of the state compensation mechanism to warrant a costly and ineffective intervention in the market).

[64] *Ideal Transportation Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 195 (1974).

[65] In *OCC v. Pub. Util. Comm., et al.*, 10 Ohio St. 3d 49, the Ohio Supreme Court found that the Commission "failed to justify" its decision to cut short a previously ordered four-year phase-in period, thus, reversing the order of the Commission, at 51. Accordingly, the Commission must explain changes in its precedent.

costs.[66] Here there was no "findings of fact" with respect to deferrals because there is no record on this issue in this proceeding.

A new capacity cost deferral collection mechanism has not been a subject of this or any other proceeding. It is therefore unreasonable and unlawful for this issue to be introduced through the July 2 Order.

G. The PUCO Erred In Determining The Company's Costs Are $188.88/MW-Day Because There Was No Evidence Presented to Support Such A Finding.

Throughout the extensive evidentiary hearing in this proceeding, only four proposals were presented with respect to capacity charges. The first, which was supported by all intervening parties in this proceeding, was the RPM market-based price. The intervening parties in this proceeding opposed the Company's position that it should be compensated for its costs, and argued that market-based pricing arising out of PJM's RPM is the appropriate pricing mechanism for CRES providers and their customers.[67] None of the intervening parties advocated for the combination of CRES providers paying RPM prices, and then customers paying the rest of the Company's "costs."

AEP-Ohio argued that it is entitled to recover its costs, and proposed a $355.72/MW-day cost-based charge. The Company's $355.72/MW-day proposal is **significantly higher** than the PJM RPM price for capacity that otherwise would apply,

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[66] *See* e.g. *MCI Telecommunications Corporation v. Pub. Util. Comm.*(1987), 513 N.E.2d 337, 343 ("PUCO orders which merely ma[ke] summary rulings and conclusions without developing supporting rationale or record support have been reversed and remanded"): *OCC v. Pub. Util. Comm.* (1986), 856 N.E.2d 213, 224 (Court remanded the Commission's modified order on the basis that it allowed changes to its order without record evidence or explanation). *Id.* at 224.

[67] FirstEnergy Solutions, RESA, Constellation Energy Commodities Group, Inc., Exelon Energy Company, Inc., IGS, the Ohio Manufacturer's Association, National Federation of Independent Businesses, Buckeye Association of School Administrators, et al, and the Ohio Energy Group all submitted direct testimony in favor of RPM pricing. In addition, Industrial Energy Users-Ohio critiqued the Company's cost-based approach calling it "strategically asymmetrical, unbalanced, unjust and unreasonable." IEU Ex. 101, at 18.

despite the fact that the Company has used the market-based RPM to price capacity to CRES providers since 2007.

The PUCO Staff supported RPM pricing, but also proposed an alternative cost-based charge of $144.58/MW-day.[68] Similarly, the Ohio Energy Group ("OEG") supported RPM pricing, but as an alternative recommendation suggested that the capacity price should be no higher than $145.79/MW-day, which was the RPM-based price for the 2011/2012 PJM delivery year.[69]

But no party recommended, or provided evidence in support of, a $188.88/MW-day capacity price. While the PUCO noted that its $188.88/MW-day cost-based charge was "**fairly in line** with OEG's alternate recommendation that the capacity charge not exceed $145.79/MW-day"[70] -- there is a forty-three dollar per MW-day difference between the two proposals. A forty-three dollar difference is **significant**. To put this difference in perspective, forty-three dollars is more than **two-times** the current RPM price market-based rate of $20.01/ MW-day. And it is twenty-percent greater than the highest price recommended by OEG and the PUCO Staff. OEG's alternative proposal was based on the RPM clearing price for the 2011/2012 PJM delivery year.

The Commission's price is based upon the PUCO Staff's calculated cost-based price (an approach the Staff did not ultimately favor or recommend) but reflects adjustments made by the Commission to increase Staff's recommended price by more than forty dollars/MW-day.

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[68] Staff Ex. 103, Direct Testimony of Ralph Smith at 9 and 10. Note also that Staff Witness Emily Medine later revised the energy credit proposed by witness Harter and recommended a $146.41 merged CSP and OPCo capacity daily rate with energy credit and ancillary services receipts. See Staff Ex. 105, Medine at ESM-4, page 1 of 1.

[69] OEG Ex. 102 at 10-11.

[70] Opinion and Order at 35. (Emphasis added).

1. The Commission selected an unsupported Return on Equity that increases the PUCO Staff's recommendation by $10.09/MW-day, and is greater than OEG's Return on Equity recommendation.

The Company presented a ROE range of 10.5 to 11.15 percent.[71] Inexplicably, the Commission selected the highest ROE proposed by any party to this case. The PUCO provided no explanation or rationale to allow AEP-Ohio to earn more through wholesale capacity charges (and related deferrals that may be paid by retail customers) than is reasonable for it to earn through retail distribution rates, except to say "AEP-Ohio's recommendation of 11.15 percent is reasonable and should be adopted."[72] This violates R.C. 4903.09 whereby the Commission must base its decisions on facts in the record. And it must do more than reach a summary conclusion that 11.15 percent is reasonable, without explaining the basis for reaching its conclusion.[73] The Ohio Supreme Court has held that, "[t]aken literally, R.C. 4309.09 requires the PUCO orders to contain specific findings of fact and conclusions of law."[74] PUCO orders which merely "made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded."[75]

Had the Commission adopted a ROE recommendation that was fully supported by the record, the capacity charge would have been much lower. For instance, had the PUCO selected the ROE recommended by Staff, the $188.88 capacity charge would be

[71] See Opinion and Order at 26, citing to AEP-Ohio Ex. 142 at 17-18.

[72] Opinion and Order at 34.

[73] See e.g. *General Telephone Co. v. Pub. Util. Comm.* (1972), 285 N.E.2d 34 (Ohio Supreme Court reversed and remanded a PUCO order because it merely recited a rate of return, but did not say why it chose the rate that it did, or why it found other parties' recommendations unpersuasive).

[74] *MCI Telecommunications Corp. v. Public Utilities Com.*, 32 Ohio St. 3d 306, 311 (Ohio 1987).

[75] Id. at 312, citing to *Consumers' Counsel v. Pub. Util. Comm.* 58 Ohio St. 2d 108; *Braddock Motor Freight, Inc. v. Pub. Util. Comm.* (1963), 174 Ohio St. 203, 22 O.O. 2d 173, 188. N.E. 2d 162.

$10.09 less/MW-day. And if the Commission used the midpoint of OEG's recommendation, (nine percent) the cost-based capacity charge proposed by the Commission would be even less, and therefore closer in line to the alternative price proposed by OEG ($145.79/MW-day). At a minimum, the $188.88/MW-day charge proposed by the Commission should be reduced.

H. The PUCO Erred In Allowing AEP-Ohio To Collect Carrying Charges On The Deferrals Based On The Weighted Average Cost Of Capital Until The Recovery Mechanism Is Approved.

As explained *supra*, the PUCO's decision to defer capacity costs is unreasonable and unlawful. However, if the Commission is going to permit AEP-Ohio to accrue and later collect carrying charges on the deferrals, those charges should be reduced to the Company's long-term cost of debt rather than the weighted average cost of capital ("WACC"). In this regard, the PUCO authorized the Company to collect carrying charges on capacity cost deferrals based on the Company's WACC **until such time as a recovery mechanism is approved** in 11-346."[76] "Thereafter, AEP-Ohio should be authorized to collect carrying charges at its long-term cost of debt."[77] The Commission noted that it would "establish an appropriate recovery mechanism for such deferred costs and address any additional financial considerations in the 11-346 proceeding."[78]

Setting the carrying cost at the weighted cost of capital is not reasonable and will result in excessive payments by customers, if customers are ordered to pay for the deferrals. Thus, the carrying charges on the deferrals should be reduced to the Company's long-term cost of debt at all times.

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[76] Id. at 23-24. (Emphasis added).

[77] Id. at 24.

[78] Id.

IV. CONCLUSION

For the reasons articulated herein, the Commission's July 2, 2012 Opinion and Order is unjust and unreasonable. To protect customers, the Commission should grant OCC's application for rehearing and modify the July 2 Order as recommended by OCC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Application for Rehearing of the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 1st day of August, 2012.

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.