BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	))))	Case No. 11-4921-EL-RDR

APPLICATION FOR REHEARING OF OHIO POWER COMPANY

Pursuant to Section 4903.10, Ohio Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Ohio Power Company ("AEP Ohio" or the "Company") respectfully files this Application for Rehearing of the Commission's August 1, 2012 Finding and Order. The Commission's August 1, 2012 Finding and Order is unreasonable and unlawful in the following respects:

A. The Commission's Finding and Order modifying previously-adjudicated matters is unreasonable and unlawful.

1. The Commission's finding reversing an adjudicatory determination in a prior final order undisturbed on appeal is unreasonable and unlawful.

a. The cases relied upon by the Commission do not support the finding that the Commission can make changes or modifications to the *ESP I* Order.

b. The Commission ordered change of the previously authorized Weighted Average Cost of Capital carrying cost to the long-term cost of debt is unreasonable and unlawful.

c. The Commission ordered change to use annual compounding to calculate its deferred fuel balance going forward is unreasonable and unlawful.

2. The Commission's Finding and Order retroactively modified terms of an expired Electric Security Plan denying the Company the ability to exercise its statutory right to withdraw from the expired ESP and is therefore unreasonable and unlawful.

B. The Commission's Finding and Order is unreasonable and unlawful to the extent it undermines the securitization efforts under R.C. 4928.23 through 4928.2318 that the Commission encourages.

A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,

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Memorandum in Support

I. Introduction

The Commission's changes to the electric security plan (ESP) from case 08-917 *et al. (ESP I)*, in the August 1, 2012 Finding and Order in this case are unreasonable and unlawful because they violate the rights of the Ohio Power Company ("AEP Ohio" or "Company") and the duties of the Commission under the set of laws promulgated by the General Assembly. The Commission cannot unilaterally change its mind three years after approving an ESP to modify the previously defined parameters of a deferral approved in the initial modification and acceptance of the ESP plan under R.C. 4928.143.

The Commission is barred by the doctrines of *res judicata* for its substantive decisions and *estoppel* based on the statutory scheme of R.C. 4928.143 providing a utility the ability to withdraw from an approval making modifications to the plan. The Commission's finding in this case renders the consent/withdraw rights provided to the utility by the General Assembly meaningless and abuses the Commission's responsibility as trier of fact in evidentiary hearings. This principle is especially compelling since it involves a decision that was appealed to the Supreme Court of Ohio and has become final and non-appealable.

The unilateral decision to modify the terms of a previously finalized fact is akin to signing up for a credit card at 10% annual interest rate, proceeding to spend up to the limit of the card, but when the time comes to pay it back unilaterally declaring that a 5% interest rate will be paid. Such a scenario may seem outrageous. However, here the

Commission retroactively modified a plan changing the underpinnings of matters already decided and relied upon for ongoing company operations. The impact of the Commission's retroactive modifications totals approximately $129 million.

The Commission's finding that it has the ability to unilaterally change previous final non-appealable orders also undermines its efforts to promote the securitization of regulatory assets. If the Commission's holding in this case is not corrected, then no adjudicatory decision would ever be considered final and non-appealable because the Commission could subsequently change the terms of its initial decision (at any time). Such a result, leaving aside the clear violation of established law, could also remove Commission-approved regulatory assets from eligibility for securitization due to the perpetual unsettled terms of the asset that could change in a Commission action years in the future.

The Commission should recognize the errors in its Finding and Order in this case and reinstate the finding from its initial ESP holding that was relied upon by the Company. The change in the carrying charge and the change in the use of annual compounding to calculate its deferred balance on a going forward basis are inappropriate. The initial ESP period has passed and the opportunity to challenge modifications by withdrawing form the plan has also passed. Therefore, the after-the-fact modifications to the adjudicatory findings absent an appellate order are unreasonable and unlawful.

II. Background

In its first electric security plan AEP Ohio proposed that during the three-year ESP period a portion of its fuel expenses for any customer rate schedule that would otherwise receive annual increases exceeding 15% should be deferred and recovered with carrying charges as part of a phase-in plan under R.C. 4928.144. The Company proposed that the carrying cost on the unrecovered deferred balance be set at the before-tax weighted average cost of capital ("WACC") over the entire phase-in period. Various parties objected to and commented on the Company's' proposal. OCC and others specifically objected to the use of the WACC in determining carrying costs and argued that the deferral balance should be calculated on a net-of-tax basis. After much debate and advocacy among the participating parties and after fully considering and rejecting the specific arguments regarding the WACC and net-of-tax recommendation, the Commission adopted the Company's proposal with only one modification. The Commission lowered the overall rate caps from the 15% proposed by the Company, but otherwise approved the phase-in plan as proposed by the Company. The Commission expressly found that "the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the WACC is reasonable as proposed by the Companies" and that "the carrying charges on the FAC deferrals should be calculated on a gross-of-tax rather than a net-of-tax basis in order to ensure that the Companies recover their actual fuel expenses." *ESP I Order* (March 18, 2009) at 23-24. While the *ESP I Order* was subject to various appeals before the Ohio Supreme Court, no party appealed the Commission's decision to approve the phase-in plan for fuel expense deferrals.

On September 11, 2011, AEP Ohio, as directed by the Commission in *ESP I Order*, filed applications in Case No. 11-4920-EL-RDR and 11-4921-EL-RDR for approval of the phase-in recovery rider ("PIRR") mechanism, to recover the deferred fuel costs as already approved by the Commission as outlined above. In the August 1, 2012 Finding and Order in this case, the Commission approved the application but modified the *ESP I* decision establishing and defining the deferral such that the carrying costs on the deferral balance will be based on the WACC only until such time as the recovery period begins and thereafter will be based on the Company's long-term cost of debt rate.

III. Law and Argument

As pointed out by the Company in its comments in this docket, the Commission does not have the ability to make new modifications to matters previously decided in the *ESP I* docket, like changing the approved basis for calculating the carrying costs, at this time after the ESP I period is over. However, in response to the Company's argument that the Commission lacked the jurisdiction to modify the prior *ESP I Order*, the Commission responded that it "may change or modify earlier orders as long as it justifies the reversal," claiming that the Ohio Supreme Court "has often stated the Commission may change or modify earlier orders as long as it justifies the changes." *PIRR Order* at 19, fn. 11.

The precedent the Commission cites does not support its broad conclusion that it has the authority to retroactively reverse a prior final order adjudicating a contested issue. The Commission is improperly applying the Court's statements regarding the Commission's general authority to prospectively change its position when facts and circumstances justify such change to a case, because in a case such as this, where the prior order was a final order in which the exact issue was contested, adjudicated, and affirmed or not modified on appeal, the Commission's analysis does not apply. As demonstrated below, the Commission's error is apparent from review of the actual cases in which the Court has discussed the Commission's authority to modify precedents. The Commission's holding also violates the withdraw provisions of R.C. 4928.143(C), if applied as declared by the Commission and separately undermines the ability to securitize any regulatory asset approved by the Commission.

A. The Commission's Finding and Order modifying previously-adjudicated matters is unreasonable and unlawful.

1. The Commission's finding reversing an adjudicatory determination in a prior final order undisturbed on appeal is unreasonable and unlawful.

The Commission has only limited authority to modify prior orders and may not reverse a prior final adjudication of an issue. The principle the Commission relies upon is premised upon a statement made by the Court at the conclusion of its opinion in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975), wherein the Court spoke generally to the precedential effect of the Commission's administrative determinations. The Court stated:

> In respect to two issues raised herein, the Commission, in its opinions and orders in subsequent proceedings, has reversed the position taken in these proceedings. In addition, the Commission has departed from its prior determinations in respect to the Lake Shore property used by the Company. Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.

When the statement is read in the context of the full opinion, it is apparent that the Court was speaking to the Commission's authority to prospectively change a "position" and not to the authority to reverse a prior final adjudication of an issue. In the first sentence the Court notes that as to two of the issues in the appeal, the Commission has subsequently "reversed the position taken in these proceedings." The two issues are discussed at pages 412 and 418 of the opinion. With respect to the first issue, the Court held that the Commission erred in including in the rate of return a "zero component" to represent deferred credits and noted that the Commission "has changed its position on this question" in a later case involving Cincinnati Gas & Electric. With respect to the second issue, the Court held that the Commission erred in reducing the amount allowed for materials and supplies simply because the amounts were classified as capital accounts under the Company's accounting system and noted that the Commission rejected the view that accounting treatment should be controlling in a subsequent East Ohio Gas proceeding. In each of these instances, the Commission changed its going-forward "position" on an issue; it did not seek to change a prior final order.

In the second sentence in the quote, the Court references what it considers to be a different scenario altogether – a departure from "prior determinations." This issue is discussed at page 416 of the Court's opinion. The Commission concluded in the case under review that because the filled lands upon which the Company's Lakeshore Power Plant is situated is land titled to the State of Ohio, it should not be included as the Company's property for rate base purposes. The Company argued, however, that "this identical question was at issue" in two prior Commission proceedings and in both instances the land was included in rate base. The Court noted that the issue also was appealed to the Court after the first proceeding and not disturbed. The Court held: "We are not inclined to now reexamine or overrule the foregoing holding. The Commission's conclusion not to include the filled land in the Company's rate base is not in conformity with that decision and therefore is *unreasonable and unlawful*." *Id*. at 416 (emphasis added).

The final sentence in the citation from the *CEI* case highlights the importance of the predictability in Commission rulings and the need to avoid changes absent mistakes.

Even considering a change in a position, the Court warned the Commission against changes. The Court stressed the Commission's need to respect its precedent to assure predictability of Commission decisions as "essential." The Court was only discussing actions to ensure consistent rulings on positions before the Commission and only discussing the opportunity to deviate in the presence of a clear error with the prior position. The Court's warning to the Commission goes even further if it is applied to prior adjudicated facts from a proceeding. Here the Commission merely changed its mind on an adjudicatory determination, regardless of the fact that the Commission did not assert any claim or error with the previous fact. The predictability highlighted by the Court as "essential" in the broader instance of general position is surely violated by the Commission's actions in this case changing adjudicated matters.

Thus, the *CEI* case did not establish a general rule giving the Commission discretion to reverse prior orders so long as it justifies the change, especially where (as here) the prior order has otherwise been fully implemented and the modification retroactively extinguishes a right of the utility and causes financial harm to the utlity. The Court recognized two distinct situations – one in which the Commission deviates from it own prior "position" on a general issue and one in which the Commission seeks to reverse an adjudicatory determination in a prior final order undisturbed on appeal. The case suggests that in the first situation the Commission has the limited authority to change its *position* when the need for change is clear or it is shown that prior decisions are in error. It holds, to the contrary, however, that it is "unreasonable and unlawful" for the Commission to change a prior adjudicatory order that was undisturbed on appeal. The Commission's determination in the *ESP I Order* that carrying cost on the fuel deferrals would be calculated gross-of-tax using a WACC basis falls squarely within this specific holding in the *CEI* case as an adjudicated finding that cannot be changed after the fact, not a general position that the Commission may revisit in the presence of error.

The Court, citing to the above quoted passage in *CEI*, spoke again on the Commission's authority to modify its orders in *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49 (1984). The statement there is that "[w]hen the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified." *Id*. at 50-51. The language should not be interpreted broadly out of context. It is clear from the facts and posture of the case, that the Court was not addressing a situation, like the *PIRR Order*, in which the Commission reverses an adjudicatory determination set forth in a final order. The case before the Court was an appeal from a rate case in which one issue was the amount of station connection expense that could be properly included in the test year in light of a prior administrative order requiring such costs to be phased-in over a four year period. Under the administrative order, only 50% of the actual test year costs would be included as allowable expenses in the test year, but the Commission approved a Staff recommendation that allowed 75% of the actual costs to be included. The Court's implicit suggestion that the Commission might have been able to justify its decision to cut short the previously ordered four-year phase-in period (even though it did not do so) is not surprising, and does not suggest that the Commission is always free to change its prior order so long as it gives a reasonable justification.

To the contrary, there is a clear distinction between administrative orders that are legislative in nature and orders that are adjudicatory in nature. *Res judicata* principles do not apply to the former but are clearly applicable to the latter. See e.g. *Cincinnati Bell v. Pub. Util. Comm*., 12 Ohio St.3d 280 (1984) (citing *State Corp. Comm. of Kansas v. Wichita Gas Co*. (1934), 290 U.S. 561, 569, 54 S.Ct. 321, 324, 78 L.Ed. 500). Thus, while the Court's statement in *Consumers' Counsel* could be read out of context, to suggest that the Commission has broad authority to modify prior orders where the prior order is merely an administrative order, it cannot be extended to final adjudicatory orders to which *res judicata* principles apply.

If there were any doubt as to the true import of the *CEI* case or the *Consumers' Counsel* case, it is resolved by *Office of the Consumers' Counsel v. Pub. Util. Comm*., 16 Ohio St.3d 9 (1984). In that case, OCC challenged the Commission's decision to limit the refund of over recovered system loss costs to the specific audit period under review. The Court held that OCC was barred from raising this argument because the Commission previously had reviewed the electric utility's fuel procurement practices, including the computation of system loss costs, during the period of time for which OCC sought a refund and found them proper. Neither OCC nor any other party applied for rehearing or appealed that prior order. The Court stated: "The inevitable conclusion from these facts is that OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate the issue of the RFC rate which was previously determined to be proper. * * * * This question was directly at issue in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question." *Id*. at 10. This decision cements the conclusion that, while the Commission may have some limited authority to change its general positions when justified, it has no jurisdiction to change or modify an adjudicatory determination made in a prior final order.

There is no basis to the argument that the doctrine of *res judicata* does not apply to the Commission. This is a particularly unsound argument when the prior order was appealed and the issue was affirmed or undisturbed. Once an appeal is filed, jurisdiction over the case passes from the Commission to the Court. Absent a remand, the Commission never regains jurisdiction over issues determined in the case. That is why the Commission could not reverse the prior determination that CEI's Lakefront Power Plant was to be included in its rate base and OCC could not challenge the over-recovery of system loss costs from a prior period. In each instance the Commission would be reversing a prior order made final by the exhaustion of the appeal process, thereby in effect reversing a judgment of the Supreme Court itself. So too, the Commission lost jurisdiction over the WACC issue after it was finally adjudicated at the conclusion of the appeal of the *ESP I Order*.

This principle of the finality of adjudicative decisions is consistent across the country. [*See Sexton v. Mount Olivet Cemetery Ass'n,* 720 S.W.2d 129, 137 (Tex. App-Austin 1986) dealing with an agency's power to reopen an administrative proceeding to reconsider an earlier agency adjudicative order that was never set aside on judicial review and had been in effect for three years; *Elliot Electric/Kentucky v. Kentucky Occupational Safety and Health Review Commission,* 323 S.W.3d 373, 378 (Ky. 2010) *citing Kentucky Bd. Of Medical Licensure v. Ryan,* 151 S.W.3d 778, 780 (Ky. 2004) stating that an administrative agency does not have the inherent or implied power to reopen or reconsider a final decision and finality cannot become anything other than finality for purposes of additional adjudication; *Rivers v. Florida Dept. of Revenue,* 508 So.2d 360 (Fla-1987), *citing Taylor v. State*, 493 So.2d 498 (Fla. 1st DCA 1986) noting that there is no express authority for an administrative agency to retain jurisdiction over its final order, once filed, so as to permit the agency to withdraw the order and change or modify it.] The Commission should recognize the difference in reconsidering an overall position and retroactively modifying an adjudicated fact from a previous case. The case the Commission is estopped from changing the decision reached on this adjudicated fact.

a. The cases relied upon by the Commission do not support the finding that the Commission can make changes or modifications to the *ESP I* Order.

The Finding and Order includes a reference to cases purported to support that the idea that the Supreme Court of Ohio has recognized the right of the Commission to change or modify earlier orders as long as it justifies such changes. (See note 11 at 19.) The cases cited by the Commission do not support the Commission's modifications in this case.

Ohio Consumers' Counsel v. Pub. Util. Comm., 110 Ohio St.3d 394 (2006) does not support the Commission's decision because the proceeding under review and the prior proceedings did not involve the identical issue and because the proceeding under review was a complaint case. In DP&L's ETP case, Case No. 99-1687-EL-ETP, the Commission, among other things, approved DP&L's proposal to charge CRES providers for the costs associated with billing-system changes required to implement competition. The Commission also froze distribution rates for the duration of the market development period, which was planned to end in December 2006. In a later proceeding, Case No. 02-2779-EL-ATA, the Commission extended DP&L's market development period and continued the distribution rate increase through December 2008. Thereafter certain

CRES providers filed a complaint alleging that the rate DP&L charged CRES providers for the billing system changes was excessive and unreasonable.

The parties to that complaint case, except for OCC, agreed to a stipulation that substantially limited the amount to be charged to CRES providers and allowed DP&L to recover the balance of the costs of the billing system changes from all its customers, starting in 2006. *Ohio Consumers' Counsel*, 110 Ohio St.3d at 394. The Commission approved the stipulation over OCC's objection that charging customers for the balance of billing system costs not recovered from the CRES providers violated the Commission's prior orders in that it allowed for a distribution rate increase in violation the freeze order in the prior cases. *Id.* at 399. In rejecting OCC's argument, the Commission in its order and in its brief to the Ohio Supreme Court argued that the Commission has the statutory authority under R.C. 4905.26 to modify rate orders through complaint proceedings even though the modification might otherwise be "an impermissible collateral attack" on a prior order outside the context of a complaint proceeding. PUCO Merit Brief, 2005 WL 4154638 at 17-21. The Commission also argued to the Court that the new rider to recover the deferred costs due to billing system changes was not inconsistent with its prior Electric Transition Plan or Market Development Period Extension orders because those orders merely allowed for the deferral of the costs and did not dictate any particular recovery method. *Id*. at 21-23. As a result, the Commission must acknowledge now that the case is not relevant outside the context of a complaint proceeding and is not applicable here in any event because here there is a definite reversal of a key issue actually decided in the prior final order. [1]

Ohio Consumers' Counsel v. Pub. Util. Comm., 114 Ohio St.3d 340 (2007) is also readily distinguishable from the Finding and Order in this case. The Court there held that the Commission was free to modify the prior order because it "[did] not agree that the Commission's decision amounted to a relitigation of previously determined issues." *Id.* at 342. The Court reaffirmed that "[c]ollateral estoppel has been applied to commission proceedings." *Id.* The Court, however, found that "[t]he doctrine is inapplicable here because there was no relitigation in this matter of a point of law or finding of fact that was passed upon by the commission in the MDP-extension case." *Id.* While the Court's opinion also discusses the Commission's authority to modify earlier orders, *id.* at 343, this discussion cannot be separated from the fact that the modifications did not amount to relitigating an issue actually adjudicated in the prior proceeding. In fact, this discussion reflects the Commission's representations in its own merit brief that it was free to modify its prior order precisely because there were different issues and a new time frame. PUCO Merit Brief, 2006 WL 6663655 at * 27.

In re Application of Columbus S. Power Co., 128 Ohio St.3d 512 (2011) likewise does not support the broad position that the Commission may modify any prior order so

[1] The unique complaint authority conveyed in R.C. 4905.26 does permit decisions that might otherwise be precluded by collateral estoppel. *Allnet Communications Sers., Inc. v. Pub Util. Comm.* (1987), 32 Ohio St.3d 115, 117. But the scope of the statute involves rates, tariffs and utility practices that may have become unjust or unreasonable – not prior Commission adjudicatory decisions. Further, an evidentiary hearing is required as a prerequisite to exercising authority under R.C. 4905.26. Even in the context of a valid R.C. 4905.26 proceeding, the Commission could not revisit and modify a remedy previously adopted through a final adjudicatory order. In short, R.C. 4905.26 is inapplicable here.

long as it justifies any change. In that case, OCC challenged the Commission decision to allow CSP to retain the proceeds of its off-system sales rather than crediting such sales to retail customers in its electric security plan. *Id.* at 522-23. OCC's argument was based on the Commission's departure from prior pre-deregulation precedent that had required electric utilities to share the revenue from such sales with customers. The argument was that the Commission had changed its going-forward policy position on an issue, not that it had modified a specific determination made in a prior final order. The Court found the prospective change in position justified by the sea change in the applicable law effected by S.B. 221. In other words, the Commission was free to consider anew how revenue from off system sales should be treated now that the regulatory environment was fundamentally altered.

The Ohio Supreme Court has not held that the Commission is free to retroactively reverse an adjudicatory determination made in a prior final order, affirmed or undisturbed on appeal. None of the cases the Commission cites for such authority involved such a reversal of a prior final adjudication. On the two occasions on which the Court has actually considered the Commission's authority to reverse a prior final adjudication of an issue, the Court held *res judicata* principles did apply and the reversal would be unlawful.

b. The Commission ordered change of the previously authorized Weighted Average Cost of Capital carrying cost to the long-term cost of debt is unreasonable and unlawful.

The Commission should reinstate its previous adjudicatory finding from the *ESP I* proceeding and authorize the Company to collect carrying charges on the unamortized balance of deferred fuel costs based on AEP Ohio's Weighted Average Cost of Capital.

As discussed above, in its March 18, 2009 *ESP I* decision the Commission previously considered this very argument and denied the present modification:

> Based on the record in this proceeding, we do not find the intervenors' arguments concerning the calculation of the carrying charges persuasive. Instead, for purposes of a phase-in approach in which the Companies are expected to carry the fuel expenses incurred for electric service already provided to the customers, we find that the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the WACC is reasonable as proposed by the Companies.

(*ESP I*, Opinion and Order at 23 note omitted.) Further, as stated in the December 14, 2011 Opinion and Order in this proceeding:

> The Companies offer that the carrying charge rate on deferred fuel expense was argued extensively by the parties to the ESP 1 case, and the Commission ultimately decided that the WACC, as proposed by the Companies, was reasonable. … The Commission agrees with the Signatory Parties that the carrying charge on the deferred fuel expenses was established in the ESP 1 proceeding.

(*ESP II*, Opinion and Order at 58.) In sum, the carrying charge issues were fully litigated in the *ESP I* case and the Commission adjudicated that the WACC was a reasonable carrying cost rate. The Commission admits that it approved the WACC recovery over the entire period in the Finding and Order in this case (See August 1, 2012 Finding and Order at 17-18). In accordance with the *ESP I* decision and §§4928.144 and 4928.143(C)(2)(b), Ohio Rev. Code, the Commission must confirm that the WACC is the appropriate carrying cost rate to use during the 2012-2018 amortization and recovery period.

The Commission itself recognizes the duty under R.C. 4928.144 when exercising its right to phase in the impact of an electric security plan to make adjudicatory findings. At page 52 of the August 8, 2012 Opinion and Order in the modified ESP II plan for AEP Ohio in *11-346 et. al*, the Commission stated:

> Where the Commission establishes a phase-in [R.C. 4928.144], the Commission must also authorize the creation of the regulatory asset to defer the incurred costs equal to the amount not collected, plus carrying charges on the amount not collected, and authorize the recovery of the deferral and carrying charges by way of a non-bypassable surcharge.

These are specific findings the Commission must make to exercise its statutory right to phase-in rates through deferrals under R.C. 4928.144. While the Commission may choose a different policy in a future ESP to guide its exercise of its rights, it cannot retroactively modify its adjudicatory decisions concerning this exercise of R.C. 4928.144 from a previous ESP now completed, absent the jurisdiction being provided through a remand from the Court.

The modifications to the *ESP I* decision, beyond the legal impediments, also ignore the impact of applying a debt rate to the regulatory asset. As previously pointed out by AEP Ohio, using the long-term debt rate for the carrying cost of these assets would result in an a need to adjust AEP Ohio's capital structure to reduce the amount of long term debt by a corresponding amount of the regulatory assets. By assigning the long-term debt and corresponding cost to the regulatory assets, that debt should no longer be a part of the Company's remaining capital structure. Without an adjustment to reflect the exclusion of such debt, there would effectively be double counting the use of long term debt as a funding source. The long term debt in the cost of capital schedule should be adjusted to remove the regulatory asset balances plus equity carrying charges as of August 31, 2010, which results in the percentage of long-term debt moving to a much lower percentage in the capital structure and raises the cost of capital.

The Commission also fails to give proper consideration to the fact that the deferrals were already funded with a combination of debt and equity. In March 2009, following the Commission's order that established the PIRR regulatory assets, AEP announced its plans to offer approximately 50 million shares of the Company's common stock. In 2009, AEP contributed $550 million in equity to Ohio Power when it became clear that there would be fuel deferrals that would be recovered over a number of years.[2] The Commission should not change the underlying approvals that the Company relied upon and made financial decisions to enable and facilitate the Commission's modifications to the *ESP I* application. The Commission should reinstate the carrying charges based on a WACC as the appropriate carrying charge as approved in the ESP I final, non-appealable *ESP I* order.

c. The Commission ordered change to use annual compounding to calculate its deferred fuel balance going forward is unreasonable and unlawful.

The Commission's directive to change the calculation of the deferred fuel balance on a going forward basis is also an unreasonable and unlawful modification. It is clear by the Commission's admission that it is modifying its previous decisions due to its concern for the current economy, that the change from monthly to annual compounding to calculate the deferred fuel balance was an effort to further decrease the level of the fuel deferral impact. While the Commission's effort may be well-intentioned in its desire to modify previously-approved matters to address current concerns, the change is not supported by any record and undermines the process and approvals in the *ESP I* proceeding.

[2] This investment was mentioned in the Company comments in this docket and are also seen in the testimony of Company witness Renee Hawkins in the modified ESP proceeding *11-346 et al.,* testifying to $550 million equity infusion from AEP to AEP Ohio. *See 11-346 et al.* May 17, 2012 Tr. Vol. II at 470.

The Commission's modification to order the Company to start calculating its deferred fuel balance using annual compounding also ignores the fact that these are unrecovered deferred costs of the Company. The Commission exercised its rights under R.C. 4928.144 to phase-in a certain level of fuel costs facing the Company during the pendency of the *ESP I* period. That process required a very specific calculation and process under R.C. 4928.144 and as outlined by the Company at the time. While the phasing in of utility costs associated with the fuel deferrals was exercised by the Commission to alleviate the impact on customers, it should not be forgotten that the Company is attempting to recover deferrals of up to three year old costs. A change at this point to calculate the fuel deferral on an annual basis financially harms the Company without justification.

Approval of carrying charges calculated on a monthly basis is an appropriate method for riders approved by the Commission. In fact, all of AEP Ohio's other riders with carrying costs are calculated on a monthly basis. The Transmission Cost Recovery Rider and the Economic Development Rider both use the same monthly basis. The recently approved Distribution Asset Recovery Rider (DARR) approved[3] in Case Nos. 11-351-EL-AIR *et al.* included a monthly basis for applying the carrying charges. The DARR involves a significant regulatory asset that is being amortized over a number of years. Monthly compounding more accurately reflects the Company's carrying costs on a contemporaneous basis. Likewise, the example provided by Company witness Len Assante in the ESP I proceeding did not apply carrying charges calculated on an annual

[3] The Commission approved this as part of an overall settlement in these cases, but the Commission approved the settlement under the test for stipulations that includes ensuring the provisions of the settlement do not violate any regulatory practices of principles.

basis. The introduction of the annual charges was first raised in the comments in this proceeding and should not be provided as a retroactive modification to the ESP I decision. The Commission should change its order on rehearing to not require an annual compounding going forward but allow the monthly basis to continue going forward.

2. The Commission's Finding and Order retroactively modified terms of an expired Electric Security Plan denying the Company the ability to exercise its statutory right to withdraw from the expired ESP and is therefore unreasonable and unlawful.

The Commission is estopped by R.C. 4928.143 from unilaterally modifying a provision of a *ESP I* due to the Company's statutory right to withdraw from the ESP based on Commission modifications. The Commission's decision to change its mind on decisions made in modifying AEP Ohio's prior ESP due to new circumstances turns R.C. 4928.143 on its head and denies AEP Ohio its ability to exercise its statutory right to withdraw from the Commission modified plan. Under R.C. 4928.143, the utility has the right to withdraw from a plan modified by the Commission. Specifically, R.C. 4928.143 (C)(2) states in pertinent part:

> If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

The Commission's Finding and Order purports to modify the prior approval of the Electric Security Plan, which is a defined item created by statute, even though the ESP has expired and otherwise been fully implemented.

The Commission decision in this case violates R.C. 4928.143(C)(2)because it is impossible for AEP Ohio to exercise its right under the statute to withdraw from the ESP and terminate the plan because it is already over. As admitted by the Commission in the Finding and Order, it adopted this provision of the original ESP plan authorizing deferrals with carrying costs at the pre-tax WACC rate and recovered by a nonbypassable surcharge to start on January 1, 2012, and continue through December 31, 2018. (Finding and Order at 17.) The WACC carrying charge award left undisturbed totals around $129 million and was a materially beneficial provision of the *ESP I* decision that compensates AEP for the equity[4] issued as a result of the deferrals that were ordered. Its removal would be just cause for AEP Ohio to withdraw from the plan, had it been decided that way up front. However, the ability for the Commission to unilaterally change that decision or modify the plan of this one remaining issue from that past plan renders the statutory right for a utility to withdraw meaningless. The Company cannot withdraw from a prior ESP plan that is no longer in effect. The Company is trapped by the Commission's retroactive modification, unarmed without the General Assembly's intended check and balance to counteract such impacts.

There is a sequence to R.C. 4928.143 that the Commission's changes to its initial ESP decision in this case violate. First, a utility files a plan. Second, the duty shifts to the Commission to accept, deny or modify and accept. Once the Commission acts, the utility has the right to consider the entirety of the modifications made and determine if it will withdraw from the plan or not. However, a holding that allows the Commission to defer a large part of an ESP plan under R.C. 4928.144 for future recovery as part of its overall modifications, and then turn around years later and adversely diminish the

[4] See footnote 2.

approved terms of that collection when the other terms of the plan are complete, is unreasonable and unlawful.

Through its *ESP I* decision in 2009, the Commission defined an ESP modification and approval for the Company to consider withdrawal in its consideration of the initial ESP. The Company did not withdraw and implemented and lived under the plan modified by the Commission. The Commission is now estopped from unilaterally changing its prior findings in an ESP proceeding relied upon by the Company when such change effectively negates the utility from exercising its right under the statute to withdraw from the plan based on such modifications.

B. A Commission finding instituting a right to change a final non-appealable order could prevent utlilization of the securitization mechanism of all Commission-created regulatory assets.

The Commission Finding and Order includes the passage of the securitization legislation under R.C. 4928.23 through 4928.2318 as a development justifying its change from its findings in a final non-appealable order. Ironically, the Commission's holding in the Finding and Order in this case undermines the ability for any regulatory asset approved by the Commission to ever be eligible for such treatment. A basic prerequisite to be eligible to securitize a regulatory asset is that the matter be a final non-appealable order.

The Ohio Revised Code sections governing securitization have a very specific requirement that any phase-in costs reflected in a request for securitization be part of a final order for which appeals have been exhausted. Specifically, R.C. 4928.23 states in pertinent part:

> 4928.23(J) "Phase-in costs" means costs, inclusive of carrying charges incurred before, on, or after the effective date of this section, authorized

> by the commission before, on, or after the effective date of this section to be securitized or deferred as regulatory assets in proceedings under section 4909.18 of the Revised Code, sections 4928.141 to 4928.143, or 4928.144 of the Revised Code, or section 4928.14 of the Revised Code as it existed prior to July 31, 2008, *pursuant to a final order for which appeals have been exhausted.*

Emphasis added. The language indicates that uncertain results that could still change at a future point in time by appeal are not eligible for securitization. The holding by the Commission goes a step further to remove the final order connotation to its orders, due to the ongoing review and lack of finality of its decisions.

In this case the Commission has admitted that it factually established the asset and recovery of it in the *ESP I* proceeding. However, the Commission states in this Finding and Order that it is now changing its findings from that final non-appealable order due to its ongoing supervision and jurisdiction. However, under the Commission's rationale the ability to change the specifics of a calculation of an approved regulatory asset from a three year old decision, after the case was reviewed by the Supreme Court of Ohio, actually means that no Commission order is ever a final non-appealable order. Applying the Commission's rationale, approved regulatory assets are never final and are never eligible to be securitized. Surely this cannot be the Commission's intent.

If the Commission wanted to ensure securitization as soon as possible, it would declare that the regulatory asset is already a non-appealable final order that is not subject to any change or review outside of the mechanism established in the *ESP I* order. If the Commission made that finding then there would be no risk of ongoing changes to the elements being applied in the mechanism and the risk of change at any point in time when the Commission changes its mind again due to other circumstances. The

Commission's finding in this case undermines the ability to securitize this or any other Commission created regulatory asset. The Commission should honor its previous declared treatment of this asset and rehabilitate the ability for assets to take advantage of the securitization statutes.

IV. Conclusion

Ultimately, the Commission-ordered retroactive modifications of the WACC and monthly compounding of the fuel deferrals amounts to an approximate $129 million impact on AEP Ohio. That is a significant amount of money to pull out from under the feet of the utility especially at a time when the statutory protection of withdrawing from such modifications provided by the General Assembly as a check and balance, has been erased by the retroactive nature of the decision. For the foregoing reasons, Ohio Power Company requests that the Commission change its Finding and Order on rehearing to reinstate the adjudicatory findings from its final non-appealable order in the *ESP I* proceeding and ensure the other changes made in this case are corrected as outlined above.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion has been served, via first class mail and/or electronic service, to the counsel identified below this 31st day of August 2012.

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