BEFORE THE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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, Ohio Revs. Code, in the Form of an Electric Security Plan.	)	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority	)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

FIRSTENERGY SOLUTIONS CORP.'S
APPLICATION FOR REHEARING OF THE AUGUST 8, 2012 OPINION AND ORDER

Pursuant to R.C. § 4903.10 and O.A.C. 4901-1-35, FirstEnergy Solutions Corp. ("FES") seeks rehearing of the Commission's August 8, 2012 Opinion and Order (the "Order") on the following grounds:

1. The Order is unlawful and unreasonable because it approves an electric security plan ("ESP") that is not more favorable in the aggregate than the expected results of a market-rate offer ("MRO").

    a. The Order is unlawful and unreasonable because the Commission disregarded certain costs of the ESP in applying the statutory test.

    b. The Order is unlawful and unreasonable because the Commission rejected market-priced capacity in the competitive bid process component of an MRO.

2. The Order is unlawful and unreasonable because it approved a Retail Stability Rider ("RSR") that is unauthorized and unsupported.

    a. The Order is unlawful and unreasonable because the RSR is not authorized by R.C. § 4928.143(B)(2)(d) and because no other Ohio law authorizes the recovery of above-market generation-related revenue.

    b. The Order is unlawful and unreasonable because the RSR includes transition revenues that AEP Ohio is not entitled to recover.

c. The Order is unreasonable because there is no support for the Commission's calculation of the RSR.

3. The Order is unlawful and unreasonable because it approves a Generation Resource Rider ("GRR") that is unauthorized and unsupported.

   a. The Order is unlawful and unreasonable because the GRR is prohibited by R.C. § 4928.64(E) and R.C. § 4928.143(B).

   b. The Order is unlawful and unreasonable because the GRR does not meet the requirements of R.C. § 4928.143(B)(2)(c).

4. The Order is unlawful and unreasonable because it approves a "Pool Termination Rider" ("PTR") that is unauthorized and unsupported.

   a. The Order is unreasonable in approving the PTR, which was not requested by AEP Ohio.

   b. The Order is unlawful and unreasonable because the PTR is not authorized by R.C. § 4928.143(B)(2)(h).

5. The Order is unlawful and unreasonable because it approves illegal cross-subsidies to AEP Ohio's competitive generation affiliate, AEP Generation Resources, Inc. ("AEP GenCo").

6. The Order is unlawful and unreasonable because it approves insufficient SSO auctions.

   a. The Order is unreasonable because it directs AEP Ohio to institute only a 60% slice-of-system auction beginning June 2014.

   b. The Order is unlawful and unreasonable to the extent it authorizes AEP Ohio and/or AEP GenCo to receive $188.88/MW-day for capacity provided to SSO customers through the auctions.

7. The Order is unlawful and unreasonable because it authorizes AEP Ohio to manipulate its rate design to limit competition by continuing the Fuel Adjustment Clause on a separate rate-zone basis.

8. The Order is unlawful and unreasonable because it authorizes AEP Ohio to continue anti-competitive policies, including minimum stays and switch fees.

A memorandum in support of this Application is attached hereto and made a part hereof.

Respectfully submitted,

s/ Mark A. Hayden

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MEMORANDUM IN SUPPORT OF FIRSTENERGY SOLUTIONS CORP.'S APPLICATION FOR REHEARING OF THE AUGUST 8, 2012 OPINION AND ORDER

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I. INTRODUCTION

The Commission could not approve the electric security plan ("ESP") as proposed by Ohio Power Company ("AEP Ohio") because it was not more favorable in the aggregate than the expected results of a market-rate offer ("MRO"). In particular, AEP Ohio's proposed nonbypassable Retail Stability Rider ("RSR"), which AEP Ohio estimated would collect $284 million during the three-year ESP period through a $2/MWh charge, ensured that retail customers would pay hundreds of millions of dollars more during the ESP period than they would under an MRO with market pricing. The Commission's decision in its August 8, 2012 Opinion and Order (the "Order") to modify and approve the ESP with increased RSR revenue of $532 million[1] through a $3.50-$4.00/MWh charge only makes the situation worse. The Commission's ESP is, at best, $386 million more costly for customers, and it relies on many of the same illusory qualitative "benefits" claimed by AEP Ohio. With the RSR included, and without any real benefits to customers, the Order is unlawful and unreasonable.

The Order also is unlawful and unreasonable because it approves provisions that are unauthorized by Ohio law and/or violate state policy. These provisions – including the RSR, the Generation Resource Rider ("GRR") and the Pool Termination Rider ("PTR") – cannot stand regardless of whether the ESP is more favorable. Each provision of an ESP must be authorized by R.C. § 4928.143(B)(2) and must meet the requirements set forth in that subsection. These riders do not and, therefore, they must be eliminated.

[1] The Order approved an RSR amount of $508 million over the three-year term of the ESP (*see* Order, p. 35), but the actual RSR revenues will be $24 million higher based on the charges authorized in the Order and AEP Ohio witness Thomas's projected connected load (Order, p. 75, fn. 32). Thus, the RSR revenue totals $532 million.

The ESP as modified by the Commission also includes other approved terms and conditions that enable AEP Ohio to maintain its efforts to block competition and that unreasonably delay the implementation of competition. As stated in the Order, "this Commission understands the importance of customers being able to take advantage of market-based prices and the benefits of developing a healthy competitive market."[2] However, the Commission's modifications fail to ensure that AEP Ohio's customers receive those benefits.

As set forth herein, the Commission's Order is unlawful and unreasonable in a number of respects and must be amended.

II. THE COMMISSION UNLAWFULLY APPROVED AN ESP THAT, AS MODIFIED, IS LESS FAVORABLE IN THE AGGREGATE THAN AN MRO.

The Commission can approve an ESP only if the ESP is "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."[3] The Commission must consider all of the ESP's "terms and conditions"[4] in making this comparison between an ESP and an MRO. The Commission has previously determined that the presence of both quantitative and qualitative benefits will "ensure that, in the aggregate, [a] proposed ESP is more favorable."[5] Here, the Commission properly recognized that the ESP, as proposed by AEP Ohio, required modifications. However, the Commission failed to ensure that its modifications resulted in an ESP that is more favorable to customers. Indeed, even after improperly shortening the MRO period (and, thus, not comparing the ESP to an equivalent MRO), the Commission determined that the MRO was more favorable than the modified ESP by approximately $386 million. The modified ESP lacks both quantitative and

[2] Order, p. 39.

[3] R.C. § 4928.143(C)(1).

[4] R.C. § 4928.143(C)(1).

[5] Dec. 14, 2012, Opinion and Order (regarding AEP Ohio's proposed "Stipulation ESP"), p. 32.

qualitative benefits that would make it more favorable to AEP Ohio's customers than the MRO alternative. The Commission's approval of the ESP with the modifications outlined in the Order is unlawful and unreasonable.

A. The "Non-Quantifiable Aspects" Of The ESP Are Not Worth More Than $386 Million.

The Commission seeks to justify the fact that AEP Ohio's customers will pay AEP Ohio at least $386 million more than they would pay for electric service under an MRO by pointing to "non-quantifiable aspects"[6] of the ESP. However, the aspects identified by the Commission are not benefits of the ESP and are not benefits for customers.[7] Indeed, the fact that the Commission's own quantitative analysis shows that the ESP costs $386 million more than an MRO by itself would require that the ESP be rejected. The alleged qualitative benefits may not be used to bridge hundreds of millions of dollars in quantitative costs. Although qualitative benefits are, by definition, not subject to quantification, the Commission must be able to articulate some rationale as to why the alleged qualitative benefits of an ESP outweigh its costs. Otherwise, the Commission's ESP versus MRO analysis would, in every case, boil down to relying simply on the Commission's say so, leaving the Commission's decision beyond challenge or review. The statutory test was not designed to allow the Commission unfettered discretion.

Regardless of what, if any, qualitative value those aspects might have, they cannot be said to breach the $386 million gap established by the ESP's price tag. For example, the Commission first points to the ESP's distribution-related riders, such as the ESSR and the

[6] Order, p. 75.

[7] *See* Tr. Vol. IV, pp. 1260-1261 (identifying AEP Ohio's calculation of the ESP's "benefits" as benefits accruing to customers and CRES providers).

gridSmart rider.[8] But, these riders are also available to AEP Ohio via a distribution rate case and thus would be available to AEP Ohio under an MRO. Thus, the ESSR and the gridSmart rider are not benefits of the ESP. The remaining aspects relied on by the Commission relate to AEP Ohio's overdue transition to the competitive market, and those similarly fail to justify the ESP's significantly increased cost.

The Commission believes that AEP Ohio's customers should pay AEP Ohio an additional $386 million during the term of the ESP for the benefits of transitioning to the competitive market. The specific benefits identified are: (1) the acceleration to a 60% slice-of-system energy-only auction in 2014; and (2) the projected right to a 100% energy and capacity auction in 2015 (after the term of the ESP).[9] These are not benefits provided by AEP Ohio to its customers. As the Commission acknowledges, AEP Ohio's customers are paying $388 million under the RSR for these potential auctions: "while the RSR and the inclusion of the deferral within the RSR are the most significant cost associated with the modified ESP, but for the RSR it would be impossible for AEP-Ohio to completely participate in full energy and capacity based auctions beginning in June 1, 2015."[10]

The auction offered for power to be delivered starting June 2015 is not a benefit provided by the ESP. AEP Ohio has no real choice but to hold an auction in June 2015. By June 2015, regardless of the outcome of this proceeding: (1) the AEP Pool Agreement will have terminated (AEP's COO admitted that termination will occur regardless of the form of AEP Ohio's ESP);[11]

[8] Order, pp. 75-76.

[9] Order, p. 76.

[10] Order, p. 76.

[11] Tr. Vol. I, p. 224.

(2) AEP Ohio will have completed corporate separation;[12] and (3) AEP Ohio will be a participant in PJM's RPM capacity market.[13] In short, AEP Ohio will have no generation assets or other generation-related options other than to procure SSO load from a third-party. Whether the SSO commencing June 1, 2015 is based on an MRO or an ESP (which must be better than an MRO), AEP Ohio's customers will benefit simply because of the requirements put in place for SSOs by the General Assembly. Moreover, as discussed below, because AEP Ohio can participate in a full auction now, a 60% energy-only auction in June 2014 is not a benefit.[14]

The Commission's statement that AEP Ohio's transition to market-based pricing is "voluntary"[15] is technically accurate, but it misses the real point. While AEP Ohio has no obligation to establish competitive auctions or an MRO, it must do so *unless* it can provide an ESP SSO that is more favorable than an MRO.[16] Providing competitive market-based pricing or better than market-based pricing is not voluntary. It is required by law. Therefore, it is illogical and unlawful for the Commission to approve an ESP that costs more than an MRO on the ground that the ESP is "qualitatively" more favorable because AEP Ohio's customers will obtain market-based pricing in two and a half years. The General Assembly already has mandated that customers receive the benefit of market-based pricing or better than market-based pricing – and they are entitled to that benefit now. The "transition to market" in two and a half years is not a "benefit" of the ESP.

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[12] *See* Case No. 12-1126-EL-UNC.

[13] Tr. Vol. II, pp. 399-400, 421 (AEP Ohio witness Powers).

[14] *See, e.g.,* Direct Testimony of Tony C. Banks on behalf of FES ("Banks Direct"), pp. 19-20 (discussing how AEP Ohio can participate in an auction now for 100% of its load requirements).

[15] Order, p. 76.

[16] *See* R.C. §§ 4928.141, 4928.142, 4928.143.

The ESP, as modified by the Commission, will cost AEP Ohio's customers at least $386 million more than the expected results of an MRO, and there are no qualitative benefits of the ESP that make up for that significant cost. The Commission's approval of the ESP is unlawful and unreasonable.

B. The Commission's Quantitative Analysis Of The ESP As Modified Is Unsupported And Unreasonable.

1. The Commission unlawfully and unreasonably disregards the costs of the ESP for over 25%[17] of the ESP term.

The Commission's quantitative analysis of the ESP is improper because it ignores certain and quantifiable costs of the ESP. The Commission states that it must "begin evaluating the statutory price test analysis approximately ten months from the present" and, thus, is limited to a comparison of the ESP versus an MRO between June 1, 2013 and May 31, 2015.[18] The Commission bases this limitation of its analysis on the fact that AEP Ohio's quantitative analysis was prepared as of June 2012 and the Order was not issued until August 2012. The Commission further explains that because FES witness Banks offered testimony that AEP Ohio *could* participate in a 100% energy-only auction as of June 2013, then somehow an MRO could not be established until then.[19] This explanation defies logic, reason, and the statutory test required by R.C. § 4928.143(C)(1).

R.C. § 4928.143(C)(1) requires that the ESP, even as modified by the Commission and including all of its terms and conditions, be more favorable in the aggregate than the expected results of an MRO. By virtue of the Order, the ESP could be effective as early as today and, in

[17] AEP Ohio has filed compliance tariffs to be effective with the first billing cycle of September 2012. Thus, the total term of the ESP would be 33 months, nine (27%) of which were excluded by the Commission's analysis of the ESP v. MRO test.

[18] Order, p. 74.

[19] *See* Order, p. 74.

any event, would run from the date AEP Ohio accepts the Commission's modifications until May 31, 2015. There is no term or condition in the ESP that it would not be effective until June 1, 2013. All of its costs must be considered, and ignoring over 25% of the costs of the ESP is highly misleading. The Commission's failure to consider these costs of the ESP is particularly inappropriate given that AEP Ohio has estimated that the proposed ESP will cost customers over $15 million during this time period alone.[20] Further, the statutory analysis should not be affected by the dates of the information provided by the EDU applicant (or any intervenor). Simply because AEP Ohio's analysis begins as of June 2012 cannot change the statutory test. It would allow an EDU to manipulate the Commission's consideration of the ESP.

To the extent AEP Ohio required time to prepare for the auctions, Ohio law provides that AEP Ohio's current ESP, with limited adjustments, continues until a subsequent SSO is authorized.[21] Thus, at the very least, the current ESP rates that would remain in effect until June 2013 should be included in the projected costs of an MRO (assuming it actually would take that long for the auctions to be instituted, and there is no evidence to that effect). The Commission's decision to ignore the costs associated with over 25% of the term of the ESP is unlawful and unreasonable.

2. The Commission's use of the state compensation mechanism price for capacity provided to SSO customers under an MRO is unlawful and unreasonable.

In developing the MRO price to which it compared AEP Ohio's ESP, the Commission incorporated $188.88/MW-day as the price for capacity that would be provided to bidders in an

[20] AEP Ohio itself calculated that the proposed ESP would cost customers $22.6 million more than an MRO from June 2012 to May 2013. AEP Ohio's Reply Brief, Att. B at p. 2. Modifying this calculation to reflect the costs for just September 2012 to May 2013 reflects an increased cost of $16.9 million.

[21] R.C. § 4928.143(C)(2)(b).

MRO CBP.[22] The Commission rejected Intervenors' arguments that the RPM market-based price for capacity must be used to develop the price of a market-rate offer by pointing to AEP Ohio's FRR status, "even though RPM prices are consistent with the state compensation mechanism" established by the Commission.[23] However, Ohio law requires a market-based price for capacity provided in an MRO regardless of AEP Ohio's FRR status.

Pursuant to R.C. § 4928.142, a "market-rate offer shall be determined through a competitive bidding process."[24] In fact, the statute specifically provides that "all costs incurred by the electric distribution utility as a result of . . . procuring generation service to provide the [SSO], including the costs of energy and capacity . . . procured as a result of the competitive bidding process" shall be recovered by the electric distribution utility ("EDU") under the MRO.[25] That AEP Ohio chose to procure capacity from its own supply does not allow AEP Ohio to self-select itself out of the requirements for an MRO. The ESP must be compared to an MRO that includes competitive market-based pricing for the procurement of SSO supply, "including the costs of energy and capacity." The prices established by PJM Interconnection, LLC's ("PJM") Reliability Pricing Model ("RPM") are the market price for capacity in PJM, including AEP Ohio's zone. As has been well-documented throughout this proceeding (as well as in the Capacity Case), all generation providers in Ohio and in the unconstrained zones of PJM receive RPM prices for capacity and the RPM model reflects a competitive, market-based price.[26] Thus, the RPM price is the price that is called for by Ohio law to be used in an MRO.

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[22] Order, p. 74.

[23] Order, p. 74.

[24] R.C. § 4928.142(A)(1).

[25] R.C. § 4928.142(C)(3) (emphasis added).

[26] *See, e.g.,* Direct Testimony of Robert Stoddard on behalf of FirstEnergy Solutions Corp. ("FES") ("Stoddard Direct"), pp. 5-6; Direct Testimony of Daniel Johnson on behalf of Staff ("Johnson

The Commission's use of the $188.88/MW-day state compensation mechanism price also is inappropriate because the state compensation mechanism does not apply to a wholesale CBP. In the Capacity Case, the Commission established the state compensation mechanism pursuant to PJM's Reliability Assurance Agreement (the "RAA").

> In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail.[27]

This provision of the RAA is limited to the authority to establish a state compensation mechanism for capacity provided by AEP Ohio to retail suppliers. Under a wholesale competitive bid process, however, AEP Ohio would remain the load serving entity ("LSE") and the state compensation mechanism is not applicable.[28] Thus, the only proper measure for the price of capacity provided to SSO customers under R.C. § 4928.142's MRO is the competitive RPM, market-based price.

By incorporating the higher $188.88/MW-day price for capacity into the MRO comparison, the Commission's ESP versus MRO analysis is distorted. The MRO prices calculated by the Commission using the state compensation mechanism price for capacity are higher than what an MRO would actually be priced because RPM prices are lower than

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Testimony"), p. 6; Hearing Transcript ("Tr.") Vol. III, p. 766 (AEP Ohio witness Graves acknowledging that the Federal Energy Regulatory Commission ("FERC") recognizes the RPM model as market-based in "design and intent")

[27] Stoddard Direct, pp. 12-13 (quoting the RAA, Schedule 8.1, Section D.8) (emphasis added).

[28] Tr. Vol. III, pp. 792-793 (AEP Ohio witness Graves acknowledging that winning bidders in an SSO CBP would not be retail LSEs, as described in the RAA's provision for a state compensation mechanism); Tr. Vol. VI, p. 1771 (FES witness Stoddard explaining the difference); Direct Testimony of Kevin M. Murray on behalf of IEU-Ohio, p. 6 (same).

$188.88/MW-day over the term of the ESP.[29] Making this one change would make the results of an MRO more favorable than the ESP, as modified by the Commission, by $37 million – a change of $ 47 million over the Commission's calculation.[30]

III. THE COMMISSION UNLAWFULLY APPROVED AND INCREASED THE RSR.

A. The RSR Is Not Authorized By R.C. § 4928.143(B)(2)(d), And AEP Ohio Cannot Otherwise Recover Above-Market Generation-Related Revenue.

In approving the RSR, the Commission effectively provided AEP Ohio with guaranteed generation-related revenue. While repeatedly distinguishing its "revenue target" from a guaranteed return on equity, the Order clearly states that the Commission's modifications to the RSR seek "to establish a revenue target that will allow AEP-Ohio the opportunity to earn a reasonable rate of return."[31] Ohio law requires that AEP Ohio's distribution and generation functions must be treated separately.[32] Nothing in Ohio law provides for guaranteed returns or the Commission's protection to ensure such "opportunity to earn a reasonable rate of return" for a competitive generation service. The Order is thus unlawful.

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[29] *See* FES' Initial Post-Hearing Brief, p. 3 (RPM prices average $69/MW-day over the proposed term of the ESP).

[30] In its Reply Brief, AEP Ohio calculated the impact on its ESP vs. MRO price test of using competitive benchmark prices that reflect capacity at $188.88/MW-day. AEP Ohio Reply Brief, p. 99, Att. B. The Commission appears to adopt this methodology, with modifications to exclude PY 2012/2013 from the analysis and adjust the MRO blending percentages, thus arriving at the purported "ESP benefit" of $9.8 million. *See* Order, pp. 74-75. Replacing the assumed competitive benchmark prices in this analysis with prices reflecting capacity at RPM (*see* Johnson Testimony, Exhibit DRJ-4 and Direct Testimony of Robert Fortney on behalf of Staff, Att. A), results in the MRO being more favorable by approximately $37 million from June 1, 2013 through May 31, 2015.

[31] Order, p. 33.

[32] *See, e.g.,* R.C. § 4928.17 (requiring separate accounting functions for competitive and noncompetitive services).

The Commission's Order approves the RSR based on the authority provided in R.C. § 4928.143(B)(2)(d),[33] but that statute does not authorize the subsidy provided to AEP Ohio through the RSR. Section 4928.143(B)(2)(d) authorizes ESPs to include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.[34]

The Commission's attempts to squeeze the square RSR peg into the round hole of R.C. § 4928.143(B)(2)(d) fail. First, the Commission finds that the RSR promotes retail stability by allowing "AEP-Ohio to maintain a fixed SSO rate."[35] Yet, in approving the RSR, the Commission is authorizing AEP Ohio to increase SSO customers' generation-related prices. Simply because the increase is recharacterized as the RSR rather than the base generation rate is meaningless. SSO customers' rates are increasing through the RSR and, thus, the RSR does not provide any "stability" in retail rates. If AEP Ohio needs additional revenues to provide SSO service, it should recover those revenues through the base generation rate. The RSR, as a nonbypassable rider, instead shifts the revenues required for AEP Ohio to provide generation service to shopping customers, who do not use AEP Ohio's generation. The RSR will further allow AEP Ohio to lower its base generation price-to-compare artificially to avoid additional shopping. Thus, the RSR is simply an anti-competitive subsidy.

The Commission also attempts to justify the RSR's approval under R.C. § 4928.143(B)(2)(d) by finding that the RSR "provides rate stability and certainty through CRES

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[33] Order, p. 31.

[34] R.C. § 4928.143(B)(2)(d) (emphasis added).

[35] Order, p. 32; *see also* pp. 31-32 ("any costs associated with the RSR are mitigated by the effect of stabilizing non-fuel generation rates").

services . . . by allowing customers the opportunity to mitigate any SSO increases through increased shopping opportunities that will become available as a result of the Commission's decision in the Capacity Case."[36] A nonbypassable generation-related rider, of course, does not serve to increase shopping opportunities.[37] To the extent that the Commission is referring to the portion of the RSR allocated to the recovery of the deferral authorized in the Capacity Case, the Commission's decision in the Capacity Case (including the implementation of a deferral) is not a part of the ESP. AEP Ohio would be entitled to recover the deferral outside of the ESP and, thus, the Capacity Case's state compensation mechanism cannot be used to justify the Commission's approval of the ESP.

The RSR provides neither stability nor certainty and, thus, is not authorized by R.C. § 4928.143(B)(2)(d). The RSR is not authorized by any other provision of R.C. § 4928.143(B) and, indeed, the Commission did not identify any other statutory support for the rider. The RSR violates state law and the state's policy to ensure effective competition. Accordingly, the Order's approval of the RSR is unlawful and unreasonable.

B. The Order Improperly Authorizes AEP Ohio To Recover Transition Revenues.

The Commission's attempt to distinguish the RSR from the improper recovery of transition revenues also fails. Pursuant to S.B. 3, EDUs had a limited period of time in which to recover transition costs and that time period has closed:

> Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised

[36] Order, p. 31.

[37] An increase in costs to shopping customers does not provide "increased shopping opportunities." Such a charge may reduce "headroom" or margin for suppliers. Reduced margins reduce the opportunity for shopping. Any suggestion otherwise is unsupported.

> Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. **The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.**[38]

AEP Ohio admits that the time in which it could recover transition revenues has closed.[39] Thus, the Commission cannot authorize AEP Ohio to recover any "transition revenues or any equivalent revenues." However, the Commission has done just that in approving the RSR.

In trying to distance the RSR from transition revenues, the Commission states:

> We reject the claim that the RSR allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010 pursuant to Senate Bill 3, as AEP Ohio does not argue its ETP did not provide sufficient revenues . . . .[40]

But whatever the Commission or AEP Ohio may call it, the RSR provides for "transition revenue or other related revenue." The Commission's Order expressly links the RSR to a "guarantee that, in less than three years, AEP-Ohio will establish its pricing based on energy and capacity auctions."[41] In fact, the Commission baldly states that "but for the RSR it would be impossible for AEP-Ohio to completely participate in full energy and capacity based auctions beginning in

[38] R.C. § 4928.38 (emphasis added).

[39] R.C. § 4928.38; AEP Ohio Corporate Separation Plan, Case No. 12-1126-EL-UNC, filed Mar. 30, 2012 ("Under SB3, all of these generation assets were subjected to market and EDUs therefore were given a temporary opportunity to recover stranded generation investments during a transition period. That transition period is over. . . .").

[40] Order, p. 32.

[41] Order, pp. 31-32.

June 1, 2015."[42] This makes clear that the RSR provides revenues that purportedly are required for AEP Ohio's transition to the competitive market. AEP Ohio's COO also acknowledged that the RSR was designed to provide revenues to AEP Ohio for the "transition to market":[43] "The RSR will provide economic stability and certainty for AEP Ohio, our customers and other stakeholders during the market transition term of the modified ESP II and until corporate separation and the Pool Agreement elimination is complete."[44]

The Commission additionally attempts to distinguish the RSR from transitional cost recovery by noting "events that occurred after the ETP proceedings, including AEP-Ohio's status as an FRR entity."[45] These events are irrelevant. The creation of an FRR entity under the RAA and AEP Ohio's options to obtain FRR status did not undo how transition costs would be recovered under S.B. 3. In enacting S.B. 221, and its prohibition on collecting transition charges beyond 2010, the General Assembly must be assumed to have been aware of the RAA and its effect (if any) on the obligations of generation suppliers in Ohio. S.B. 221 did not create an exception for FRR entities. Nor should it have. The Commission cannot avoid the prohibition on the recovery of transition charges now simply by relabeling those charges.

The RSR represents improper transition revenues that AEP Ohio is precluded from recovering and the Commission is prohibited from authorizing. Thus, the Commission's approval of the RSR is unlawful and unreasonable.

[42] Order, p. 76.

[43] Direct Testimony of Robert Powers on behalf of AEP Ohio ("Powers Direct"), p. 18.

[44] Powers Direct, p. 19 (emphasis added).

[45] Order, p. 32.

C. There Is No Basis For The Commission's Revenue Target Underlying Its Modifications To The RSR.

The Commission's approval of the RSR also is unreasonable because the Commission provides insufficient support for the arbitrary $826 million revenue target.[46] The Commission explains its $826 million target as simply the result of "a benchmark . . . in the approximate middle" of AEP Ohio's number that is "too high" and OEG witness Kollen's "appropriate starting point."[47] Further, while seemingly decreasing the RSR by lowering the revenue target, the Commission actually increased the revenue to be received by AEP Ohio and substantially above that proposed by AEP Ohio.[48] This produces an illogical result. Under the RSR, if AEP Ohio's SSO is more anti-competitive – and, thus, more customers are taking generation service from AEP Ohio through the SSO, AEP Ohio would get more money. In the end, while AEP Ohio requested authority to receive a projected $284 million through the RSR over the ESP term, the Commission authorized AEP Ohio to receive *$104 million more* than it requested – $388 million.[49] Such a result is unlawful and highly unreasonable.

More fundamentally, there is no probative record evidence that AEP Ohio warrants additional revenues to protect its financial integrity or ensure its stability to provide generation service under the ESP. The Commission states that "no party disputes that the approval of the RSR will provide AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity as well as its ability to attract capital."[50] This is the wrong analysis. The question is whether

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[46] *See* Order, p. 33.

[47] Order, p. 33.

[48] *See* Order, pp. 34-35.

[49] *See* Order, p. 75, n.32 (noting that, after subtracting the amount allocated to the recovery of the Capacity Case deferral, AEP Ohio would receive $388 million under the Commission's modifications to the RSR).

[50] Order, p. 31.

AEP Ohio needs additional revenue to maintain its financial integrity or attract capital. There is no such probative evidence, and numerous parties dispute that AEP Ohio has such a need. In fact, the record evidence establishes that AEP Ohio is financially strong – including a projected $22 billion excess cash flow for the AEP East fleet over the next 30 years;[51] substantial returns on equity above 12% for 2009, 2010 and 2011;[52] over $1 billion in net income from 2010 to 2011;[53] first quarter 2012 net income of approximately $150 million, even with increased shopping;[54] and the financial stability to project $300 million in dividends in 2012 and 2013 for AEP Ohio's parent, American Electric Power Co.[55] The Commission's approval of the anti-competitive subsidy reflected in the RSR is unsupported and unreasonable.

IV. THE COMMISSION UNLAWFULLY APPROVED THE GENERATION RESOURCE RIDER.

A. The Order Unlawfully Ignores The Express Requirement Of R.C. § 4928.64(E) And The Limitation Of R.C. § 4928.143(B).

After acknowledging FES' and other intervenors' arguments regarding the mandates of R.C. § 4928.64(E), the Commission provides no explanation in the Order as to how it can ignore that statute and approve the GRR as a placeholder that directly violates it.[56] R.C. § 4928.64 sets forth the requirements for EDUs to utilize certain amounts of renewable and alternative energy, including solar energy and/or to acquire renewable energy credits ("RECs"). Within that statute,

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[51] Tr. Vol. III, pp. 854-855; OCC Ex. 104 (June 2011 AEP Recoverability Memo).

[52] Tr. Vol. I, pp. 248-249, 251; FES Ex. 106 (reflecting that AEP Ohio enjoyed a 12.06% ROE in 2011, as shown on Exhibit WAA-6 in the direct testimony of AEP Ohio witness Allen).

[53] Tr. Vol. II, p. 363.

[54] Tr. Vol. I, p. 364 (further acknowledging that the net income is potentially lower than otherwise expected because of a mild winter).

[55] Direct Testimony of Oliver J. Sever on behalf of AEP Ohio, Ex. OJS-2; *see* Tr. Vol. I, p. 321 (AEP Ohio witness Powers acknowledged that that he is "aware that we expect our operating companies to dividend up to the parent").

[56] *See* Order, pp. 21-25.

the General Assembly expressly mandated that: "All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code" (emphasis added). The GRR, as approved by the Order, violates that mandate. The Commission, Staff, and AEP Ohio acknowledged that the only project expected to be included in the GRR is the Turning Point Solar facility, which AEP Ohio seeks to construct for the sole purpose of complying with R.C. § 4928.64.[57] The Commission also acknowledges that AEP Ohio and Staff agree that the Turning Point Solar project is "needed" because of the statutory requirements for solar resources included in R.C. § 4928.64.[58] Thus, even assuming Staff and AEP Ohio are correct, the costs of the Turning Point Solar project that AEP Ohio seeks to include in the GRR are "costs incurred by an electric distribution utility in complying with the requirements of" R.C. § 4928.64. However, in direct violation of R.C. § 4928.64(E), the Order approves the GRR as a nonbypassable rider, rather than bypassable cost recovery.[59] Accordingly, the Commission's approval of the GRR is both unlawful and unreasonable.

The language of R.C. § 4928.64(E) is explicit and unconditional. But even if one were to look beyond the language of the statute, principles of statutory construction and the language of R.C. § 4928.143(B) confirm that R.C. § 4928.64(E)'s requirement for bypassable cost recovery prevails. The Order's approval of the GRR rests on R.C. § 4928.143(B), which sets forth the provisions that may be included in an ESP, and ignores R.C. § 4928.64. Section 4928.143(B)

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[57] *See* Order, p. 20.

[58] Order, p. 20, fn. 7; *see also* Tr. Vol. VI, p. 2058 (AEP Ohio witness Dias admitting that Turning Point "ties into the alternative energy requirement mandates that EDU has responsibility for"); Tr. Vol. II, p. 704 (AEP Ohio witness Nelson admitting that Turning Point will be used to help AEP Ohio meet its renewable energy requirements under S.B. 221).

[59] Order, p. 24 (approving the GRR as a nonbypassable rider "as long as AEP-Ohio takes steps to share the benefits of the project's energy and capacity . . . with all customers").

does authorize, under certain conditions not met here, nonbypassable recovery of costs associated with generating facilities. The reference to cost recovery for "an electric generating facility," as described in § 4928.143(B)(2)(c), is a general reference to generation provided by EDUs, whereas the cost recovery for only renewable and alternative generation resources, as described in § 4928.64, is more specific. Pursuant to R.C. § 1.51:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Here, at the very least, the conflict between the bypassable mandate of R.C. § 4928.64(E) and the nonbypassable option of R.C. § 4928.143(B)(2)(c) must be said to be irreconcilable. Thus, the specialized provision of R.C. § 4928.64(E) for the costs associated with renewable generation resources "prevails as an exception to the general provision" of § 4928.143(B)(2)(c) for the costs associated with theoretically any type of generation resources.

Further, the General Assembly's intent that R.C. § 4928.64(E)'s requirement for bypassable cost recovery prevail is confirmed by the language of R.C. § 4928.143(B). The General Assembly expressly provided that § 4928.143(B) would prevail over other statutory conflicts "except . . . division (E) of section 4928.64."[60] Thus, there is no question that R.C. § 4928.64(E) controls over any general cost recovery provided for under R.C. § 4928.143(B). The Order's approval of the GRR, which violates R.C. § 4928.64(E), is therefore unlawful.

[60] R.C. § 4928.143(B) (emphasis added).

B. The Order Unlawfully And Unreasonably Approves The GRR Pursuant To R.C. § 4928.143(B)(2)(c) Even Though The GRR Does Not Meet The Requirements Of That Statute.

The Order's reliance on R.C. § 4928.143(B)(2)(c) to approve the GRR is unlawful and unreasonable. In its Order, the Commission approved the placeholder GRR pursuant to R.C. § 4928.143(B)(2)(c), but repeatedly acknowledged that the GRR had not met the requirements of that statute. Section 4928.143(B)(2)(c) includes several requirements that must be met before the GRR could be approved. Specifically, cost recovery is only allowed for:

> The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility.

The Commission admits that AEP Ohio has not met these requirements for the GRR:

> Staff notes that <u>there are a number of statutory requirements pursuant to Section 4928.143(B)(2)(c), Revised Code, that [AEP Ohio] has not satisfied as a part of this modified ESP proceeding</u> but will be addressed in a future proceeding, including the cost of the proposed facility, alternatives for satisfying the in-state solar requirements, a demonstration that Turning Point was or will be sourced by a competitive bid process, . . . the facility's output is dedicated to Ohio consumers and the cost of the facility, among other issues.[61]

Even at the most basic level, the fact that AEP Ohio has failed to provide such fundamental information about the proposed GRR should preclude its approval. The General

[61] Order, pp. 22 (emphasis added); *see also* Order, p. 24 ("AEP-Ohio <u>will be</u> required to address each of the statutory requirements, <u>in a future proceeding</u>, and to provide additional information including the costs of the proposed facility, to justify recovery under the GRR.") (emphasis added).

Assembly directed the Commission to analyze all of the terms and conditions proposed in an ESP.[62] AEP Ohio did not provide the necessary information to allow the Commission to analyze the GRR, and certainly not enough information to allow for approval of the GRR. But the fact that AEP Ohio admittedly has not met the requirements of the statute – including, for example, the requirement that the project be competitively sourced[63] – expressly prohibits the Commission from approving the GRR.

The GRR further fails to meet the requirements of R.C. § 4928.143(C)(1), which requires that, if an ESP contains a surcharge under (B)(2)(c), "the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge." Again, the Order acknowledges that AEP Ohio has failed to meet that requirement, but unlawfully approves the GRR anyway.[64]

The most egregious example of the Order's unlawful approval of the GRR is found in the Commission's unsupported determination that, despite express statutory language to the contrary, it has "discretion" to determine whether there is a "need" for the Turning Point Solar project in a separate proceeding. As set forth above, under R.C. § 4928.143(B)(2)(c), "no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility" (emphasis added). The obvious intent is that the need determination be made

[62] R.C. § 4928.143(C)(1).

[63] For example, the Order does not even discuss whether the Turning Point Solar project was competitively sourced – and it was not. Direct Testimony of Jonathan A. Lesser on behalf of FES ("Lesser Direct"), pp. 67-68 ("AEP Ohio did not competitively bid Turning Point."); Tr. Vol. II, pp. 573-574 (AEP Ohio witness Nelson testifying that he did not know if the contracts associated with Turning Point have been competitively bid, or whether the selection of Turning Point or the acquisition of the solar panels was competitively bid); *see also* Tr. Vol. IX, p. 2644 (NRDC witness Lyle testifying that he had not seen any evidence that the Turning Point project was solicited through a competitive process).

[64] *See* Order, p. 24 (discussing the requirement, but deferring any consideration of how that requirement will be accomplished to a future proceeding).

in the ESP proceeding itself so that the Commission can properly and fully perform the ESP vs. MRO comparison. Despite this express language, the Commission "interprets the statute not to restrict our determination of the need and cost for the facility to the time an ESP is approved."[65] This conclusion is flatly wrong and directly contradictory to the language of R.C. § 4928.143(B)(2)(c), which is unambiguous and, therefore, not open to interpretation. The General Assembly specifically required the determination of need "in the proceeding," meaning the proceeding in which the ESP is being considered for approval – not "a proceeding," "any proceeding," or "another proceeding," but "the proceeding." The General Assembly included the additional directive that the Commission "first determine[] in the proceeding" that there is a need for the facility. Thus, the need for the facility to be included in a rider as part of an ESP must be determined before the ESP is approved. Nothing in the statutory language authorizes the Commission to use its "broad discretion" as to how and when it determines that the nonbypassable rider is "need[ed]."

AEP Ohio failed to establish any "need" for the GRR or the Turning Point Solar project in the proceeding and, to the contrary, admitted that it has no need for additional generation.[66] Therefore, the Order's approval of the GRR pursuant to R.C. § 4928.143(B)(2)(c) is unlawful and unreasonable.

[65] Order, p. 24.

[66] AEP Ohio admitted that Turning Point is not needed since AEP Ohio is long on energy and capacity for the foreseeable future *See, e.g.,* Tr. Vol. I, pp. 226-227 (AEP Ohio witness Powers); Vol. II, pp. 564-65, 569-570, 633 (AEP Ohio witness Nelson testifying that AEP Ohio "has had capacity and energy well in excess of its internal customers' needs and it has been selling a significant amount to its sister companies in the pool.").

V. THE COMMISSION UNLAWFULLY APPROVED THE "POOL TERMINATION RIDER."

A. The Order Unreasonably Approves A Rider That Was Not Included In AEP Ohio's Application.

The Commission states, as the introduction to its approval of the PTR, that "AEP-Ohio requests approval of a Pool Termination Rider (PTR), initially set at zero."[67] This is false. AEP Ohio did not request approval of a "Pool Termination Rider" or any other rider associated with the purported costs that AEP Ohio anticipates it may incur as a result of termination of the AEP Pool. There is no description of any such "Pool Termination Rider" in AEP Ohio's Application.[68] AEP Ohio also did not submit any redlined tariff reflecting such a proposed rider.[69] AEP Ohio witness Roush agreed that the proposed ESP did not include a rider related to Pool modification.[70] He also agreed that his testimony did not include any estimate of the impact of such a rider on rates.[71] Similarly, AEP Ohio witness Nelson testified that AEP Ohio was not seeking compensation for the termination of the AEP Pool in this proceeding.[72] As a result, the Commission erred in finding that AEP Ohio was seeking approval of a PTR. Since AEP Ohio made no effort to justify such as a rider, there is no record evidence supporting its approval. The Commission's consideration and approval of the "PTR" is unreasonable.

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[67] Order, p. 47.

[68] *See, generally*, Application.

[69] *See* Direct Testimony of David M. Roush on behalf of AEP Ohio, Ex. DMR-5 (redlined tariffs).

[70] Tr. Vol. IV, p. 1110.

[71] Tr. Vol. IV, p. 1111.

[72] Direct Testimony of Philip J. Nelson on behalf of AEP Ohio, pp. 22-23 (further testifying that AEP Ohio may seek compensation if its Corporate Separation plan is not approved as filed); *see also* Tr. Vol. II, pp. 583-584 (AEP Ohio witness Nelson admitting that "we haven't laid out all the details because I don't think we know all the components at this time").

B. The Order Unlawfully Approves The PTR Under R.C. § 4928.143(B)(2)(h).

The Commission based its approval of the PTR on "statutory support" found in R.C. § 4928.143(B)(2)(h), even though that subsection is clearly inapplicable. R.C. § 4928.143(B)(2)(h) authorizes an ESP to include:

> Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility.[73]

The subsection, thus, relates solely to "distribution service." But, the PTR has nothing to do with distribution. As the Order acknowledges, the only pool termination-related request issued by AEP Ohio was the request for "permission to file" for additional revenue "to offset the revenue losses caused by termination of the Pool Agreement since a significant portion of AEP-Ohio's total revenues come from sales of power to other Pool members."[74] The Order further acknowledges AEP Ohio's position that its request is driven by its purported "need to find new or additional revenue to recover the costs of operating its generating assets."[75] Thus, the pool modification provision is generation based. It has nothing to do with AEP Ohio's distribution service. Accordingly, the Commission's approval of the "PTR" purportedly under the authority of R.C. § 4928.143(B)(2)(h) is unlawful.

The Commission's approval of the PTR based on the distribution-related provision of R.C. § 4928.143(B)(2)(h) is particularly inappropriate given AEP Ohio's impending corporate separation. AEP Ohio admitted that, at the time the AEP Pool terminates, the generating assets

[73] R.C. § 4928.143(B)(2)(h) (emphasis added).

[74] Order, pp. 47-48.

[75] Order, p. 48.

will be held by a separate, competitive affiliate.[76] Therefore, any revenue "losses" would be the losses of a competitive generation provider. The competitive generation provider has no "distribution service" and there is no provision in R.C. § 4928.143, or in any other Ohio law, that would entitle a competitive generation provider to recover "lost revenues" from EDU customers on a nonbypassable basis. Such cross-subsidies are expressly prohibited.[77] There is no justification for providing pool modification revenue to AEP GenCo after corporate separation, and any pool modification provision would be an improper cross-subsidy. Accordingly, the Commission's approval of the PTR is unlawful.

VI. THE COMMISSION UNLAWFULLY APPROVED ILLEGAL CROSS-SUBSIDIES TO AEP GENCO.

The Order includes broad (and vague) authority for AEP Ohio to pass numerous above-market revenue streams to a competitive affiliate – in violation of the requirement for prudent purchased power costs and the Commission's charge to foreclose cross-subsidies and promote competition.[78] Section 4928.143(B) limits the scope of purchased power costs that can be charged to customers through an SSO. Specifically, an ESP may only provide for the:

> Automatic recovery of any of the following costs of the electric distribution utility, **provided the cost is prudently incurred**: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and **including purchased power acquired from an affiliate**; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes.[79]

[76] Tr. Vol. II, p. 619.

[77] R.C. § 4928.02(H) (setting forth the state policy to "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 . . . , including by prohibiting the recovery of any generation-related costs through distribution or transmission rates").

[78] *See* Order, pp. 58-60.

[79] R.C. § 4928.143(B)(2)(a) (emphasis added).

As the Order acknowledges, after AEP Ohio's corporate separation, AEP Ohio – the EDU – will be required to purchase both energy and capacity to supply the SSO.[80] AEP Ohio has proposed to purchase energy and capacity for its SSO load from its competitive affiliate, AEP GenCo. The costs of AEP Ohio's purchased power and capacity from AEP GenCo, pursuant to R.C. § 4928.143(B)(2)(a), must be shown to be "prudently incurred." Instead of applying the statutory standard, however, the Commission finds that the pass-through of above-market energy and capacity from AEP Ohio to AEP GenCo is "appropriate and reasonable."[81] That is not the statutory standard and, as such, the Commission's finding is unlawful.

AEP Ohio presented no evidence that its proposed purchased power price during the ESP term would be prudent. The record evidence establishes, in fact, that the proposed charges for power and capacity acquired from AEP GenCo would be anything but prudent. For example, the proposed capacity price, even at the $188.88/MW-day equivalent, is significantly higher than the prices that can be acquired through the market.[82] AEP Ohio admitted that it has done nothing to evaluate the terms of its proposed arrangement with AEP GenCo or whether other lower-priced options are available in the competitive market.[83] AEP Ohio also refused to commit to future prudency audits.[84] In short, AEP Ohio's proposal fails to meet the requirements of R.C. § 4928.143(B)(2)(a). Thus, AEP Ohio's proposal (and the Commission's approval) would be unlawful.

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[80] Order, pp. 57, 59-60 ("[T]he primary issues to be considered in this modified ESP proceeding is how the divestiture of the generation assets and the agreement between AEP-Ohio and GenResources will impact SSO rates.").

[81] Order, p. 60.

[82] *See* Order, p. 59; *compare* FES' Initial Post-Hearing Brief, p. 3 (RPM, market-based prices for capacity average $69/MW-day over the three-year term of the ESP) .

[83] Tr. Vol. II, pp. 523-524, 608.

[84] Tr. Vol. II, p. 622.

The Commission's approval of the pass-through of above-market generation revenues to AEP GenCo is unlawful and unreasonable for another, independent reason: the pass-throughs constitute illegal cross-subsidies. State law and policy expressly preclude cross-subsidies. It is the state's policy 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."[85] The General Assembly directed that the Commission "shall ensure [that this policy, and all other state policy] is effectuated."[86] Further, Ohio law prohibits AEP Ohio, after its corporate separation, from "extend[ing] any undue preference or advantage to any affiliate . . . engaged in the business of supplying the competitive retail electric service."[87]

Despite the numerous laws and policies that preclude subsidies flowing to AEP GenCo, the Commission detailed four revenue streams that it found to be "appropriate and reasonable" for AEP Ohio to pass to its competitive generation affiliate.[88] To make matters worse, while AEP GenCo is receiving these above-market revenues, the Commission expressly authorized AEP GenCo's participation in AEP Ohio's energy-only auctions.[89] Indeed, each of the "appropriate" revenue streams constitutes an improper cross-subsidy that will harm the competitive market that the Commission is charged to protect.[90]

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[85] R.C. § 4928.02(H) (emphasis added).

[86] R.C. § 4928.06(A) ("Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.")

[87] R.C. § 4928.17(A)(3) (setting forth requirements for corporate separation plans).

[88] Order, p. 60.

[89] Order, p. 40 ("[N]othing within this Order precludes AEP-Ohio or any affiliate from bidding into any of these auctions.") (emphasis added).

[90] *See, e.g.,* R.C. § 4928.06(A), (C), (E)(1).

- *The Order unlawfully approved the pass-through of non-deferral RSR revenues.*

As explained in the Order, the RSR revenues were approved because the additional revenues "provide AEP-Ohio with sufficient revenue to ensure it maintains its financial integrity" and purportedly allow "AEP-Ohio to maintain a fixed SSO rate."[91] Thus, the revenue is simply a subsidy to AEP Ohio, which then becomes a cross-subsidy when passed on to AEP GenCo. There is absolutely no record evidence regarding AEP GenCo's financial status, much less the revenues that it would need to maintain "financial integrity" as a competitive entity. Regardless, the Commission has no authority to "ensure [AEP GenCo] maintains its financial integrity" or to impose additional charges to allow "[AEP GenCo] to maintain a fixed SSO rate." As described above, the purchased power costs imposed after AEP Ohio's corporate separation must be prudent; such above-market subsidies are not.

Further, this above-market revenue stream is anti-competitive as it would subsidize AEP GenCo at the wholesale level and retail level.[92] The above-market revenues would allow AEP GenCo to reduce its bid price and undercut the market bids made by other generation suppliers in a wholesale auction. The above-market revenues also would allow AEP GenCo to offer retail offers (directly or through, for example, AEP Retail) that undercut the market offers made by other CRES providers within and outside of AEP Ohio's service territory. Accordingly, it is unlawful and unreasonable for AEP GenCo to receive the RSR subsidies.

- *The Order unlawfully approved the pass-through of embedded cost-based capacity revenue.*

After it receives AEP Ohio's generating assets, AEP GenCo will be a competitive generation provider in Ohio that must compete to provide service. As such, it is not entitled to

[91] Order, pp. 31-32 (emphasis added).

[92] *See* Lesser Direct, p. 49.

receive any price for its capacity other than the competitive market-based price for capacity that all other generation providers receive – RPM prices. If AEP GenCo is allowed to receive the equivalent of the above-market $188.88/MW-day price for capacity provided to SSO and shopping customers, it will receive more revenue than every other generation provider in the unconstrained zone of PJM.[93] This will provide an improper, undue preference to AEP GenCo based simply on its affiliated status with AEP Ohio. It also will distort the competitive wholesale and retail market, as described above. Accordingly, it is unlawful and unreasonable for AEP GenCo to receive an above-market price for capacity.

- *The Order unlawfully approved the pass-through of "generation based revenues from SSO customers."*

The base generation price charged to SSO customers prior to AEP Ohio's energy-only auctions (or included in the partial energy-only auctions) is a revenue stream that represents additional improper revenues to which AEP GenCo is not entitled. AEP Ohio has admitted that its base generation price is not based on cost or market priced components.[94] There is no record evidence, then, to support AEP GenCo's right to recover to an arbitrary (i.e., nonmarket-based) price for energy and capacity from SSO customers. Moreover, AEP Ohio has argued that the base generation rate reflects a $355/MW-day charge for capacity.[95] If true, or even if the base generation rate incorporates the equivalent of the above-market $188/MW-day charge for

[93] Further, it is unclear how capacity will be priced for SSO customers under the partial energy-only auctions. For example under the 60% auction for service beginning June 1, 2014: if the price resulting from the energy auction and the $188.88/MW-day equivalent capacity price are blended on a 60/40 basis with the proposed ESP base generation price (which includes the cost of capacity), then AEP GenCo may receive even more than an equivalent of $188.88/MW-day for capacity because AEP Ohio has maintained that the price for capacity contained in the base generation rate approximates $355/MW-day. *See* Tr. Vol. V, p. 1438.

[94] Tr. Vol. IV, p. 1112.

[95] Tr. Vol. V, p. 1438.

capacity, then the base generation revenue reflects an inappropriate cross-subsidy to the benefit of AEP GenCo and the detriment of the competitive market.

- *The Order unlawfully approved the pass-through of revenues associated with "energy sales to shopping customers."*

It is unclear what revenues associated with "energy sales to shopping customers" AEP Ohio, an EDU, will have after corporate separation. To the extent this language would allow AEP Ohio to serve as a CRES provider and/or somehow pass through the retail costs of AEP Retail's energy sales, it is wholly inappropriate, imprudent, unreasonable and unlawful.

AEP GenCo is not entitled to receive any revenue from AEP Ohio that is not acquired through a prudent or competitive process. Thus, the Commission's approval of at least four above-market, arbitrary cross-subsidies that violate Ohio law and policy is unlawful and unreasonable.

VII. THE COMMISSION UNREASONABLY APPROVED INSUFFICIENT SSO AUCTIONS.

A. The Order Unreasonably Authorizes AEP Ohio To Institute Only a 60% Slice-of-System Auction Beginning June 2014.

Throughout the Order, the Commission repeatedly recognized the benefits that competition provides to customers. Indeed, the Commission noted that it "understands the importance of customers being able to take advantage of market-based prices and the benefits of developing a healthy competitive market" and, in response to OCC's arguments, that "slowing the movement to competitive auctions would ultimately harm residential customers by precluding them from enjoying any benefits from competition."[96] But rather than modify AEP Ohio's ESP to provide those benefits to customers now, the Order continues to "slow the movement to competitive auctions." The Order requires a nominal 10% auction at an undefined

[96] Order, p. 39.

period of time and an energy-only auction for only 60% of its load, but not until June 2014.[97] Such a delay is unreasonable and ignores the substantial record evidence that AEP Ohio can hold an auction now. Neither AEP Ohio's FRR status nor its participation in the AEP Pool preclude AEP Ohio from conducting an auction.[98] And, AEP Ohio provided no probative or quantitative evidence of any "financial harm" that would result from participating in the competitive market required by Ohio law.[99] As FES witness Banks testified (on which testimony the Commission later relied), AEP Ohio is capable of holding an auction as of June 2013.[100] Thus, AEP Ohio's SSO customers could receive the benefits of competition in just 9 months. There is no basis on which to delay a fully competitive SSO. The Commission's acquiescence to AEP Ohio's foot dragging is unreasonable and unsupported.

B. To The Extent The Order Authorizes AEP Ohio and AEP GenCo To Provide Capacity To Support The Auctions At A Price Of $188.88/MW-Day, The Order Is Unlawful And Unreasonable.

The Order does not explicitly establish the price AEP Ohio is entitled to charge SSO customers for capacity when energy is provided to SSO customers via the auctions. If the Commission authorized AEP Ohio to charge (and then pass on to AEP GenCo) the $188.88/MW-day price for SSO capacity, such a decision is unlawful and unreasonable for numerous reasons. As discussed above, AEP GenCo is not entitled to receive, and is in fact prohibited from receiving, a cross-subsidy of above-market revenue based on its affiliated relationship with AEP Ohio. AEP GenCo will be a participant in the competitive market and

[97] Order, pp. 39-40.

[98] Tr. Vol. I, p. 277 (AEP Ohio Powers acknowledging that AEP Ohio's FRR status is not an impediment); Tr. Vol. III, p. 789 (AEP Ohio witness Graves acknowledging same); Direct Testimony of Rodney Frame on behalf of FES, p. 3 (unrebutted testimony that no provisions of the AEP Pool Agreement preclude an auction).

[99] Tr. Vol. II, p. 559 (AEP Ohio witness Nelson admitting that he did not even make an effort to quantify the financial harm that AEP Ohio claims would result from a CBP prior to corporate separation).

[100] Banks Direct, p. 20 *cited in* Order, p. 74.

must be subject to the same market forces to which all other generation providers are subject and which benefit customers by promoting lower prices. Even more fundamentally, the $188.88/MW-day price resulting from the "Capacity Case" is inapplicable to the price for capacity provided to SSO customers.

As described above, PJM's RAA, which set the parameters for the Capacity Case, applies to determine the price for capacity provided by an FRR entity for shopping load.[101] The Commission's authority under the RAA is limited to the authority to establish a state compensation mechanism for capacity provided by AEP Ohio to retail suppliers. Under the auctions, however, AEP Ohio would continue to serve as the LSE and the state compensation would be inapplicable.[102] The only proper measure for the price of capacity provided to SSO customers under an ESP is the prudency standard required by R.C. § 4928.143(B)(2)(a), as discussed above. AEP Ohio has failed to establish, and the Commission has failed to consider, whether the $188.88/MW-day price for capacity is prudent – and it is not. It is well above the applicable RPM market-based price for capacity. Accordingly, any approval for AEP GenCo (or AEP Ohio) to provide capacity for SSO customers at $188.88/MW-day is unlawful and unreasonable.

VIII. THE COMMISSION UNREASONABLY AUTHORIZED AEP OHIO TO MANIPULATE ITS RATE DESIGN THROUGH THE IMPLEMENTATION OF THE FAC.

The Order unreasonably authorizes AEP Ohio to continue the Fuel Adjustment Clause ("FAC") on a separate rate-zone basis. AEP Ohio has merged. Rather than operate two separate and distinct utilities – Columbus Southern Power Company ("CSP") and Ohio Power Company

[101] Stoddard Direct, pp. 12-13 (quoting the RAA, Schedule 8.1, Section D.8) (emphasis added).

[102] Tr. Vol. III, pp. 792-793 (AEP Ohio witness Graves acknowledging that winning bidders in an SSO CBP would not be retail LSEs, as described in the RAA's provision for a state compensation mechanism); Tr. Vol. VI, p. 1771 (FES witness Stoddard explaining the difference); Murray Direct, p. 6 (same).

("OPC") – all that remains is OPC. Thus, there is no basis on which to continue to implement the FAC separately. By continuing to charge customers separately, OPC customers will be subject to a more drastic increase in fuel prices in 2013 than will customers of the now-defunct CSP.[103] In the meantime, OPC's customers will pay artificially reduced fuel costs that will dissuade competition.[104] AEP Ohio's and the Commission's explanation that the delayed implementation of a merged FAC is appropriate because it is "consistent" with the proposed handling of the PIRR is meaningless.[105] The PIRR recovers pre-merger fuel deferrals, which accumulated while the two utilities were separate. The costs passed on through the FAC are costs incurred by the post-merger OPC, and OPC will incur these costs regardless of the PIRR recovery.

Indeed, AEP Ohio witness Roush agreed that there is no legitimate rate design purpose served by continuing the FAC on an un-merged basis.[106] The merger has resulted in AEP Ohio no longer having fuel costs (or other costs) by rate zone.[107] As AEP Ohio witness Roush explained, "I think merging any number of these rates are the end objective because we now only have Ohio Power Company as a merged entity, so the underlying data, the underlying costs, there's only a single set of books now for Ohio Power Company, so ultimately all of the riders should be merged."[108] The only result of maintaining zonal rates for fuel cost recovery is that pre-merger CSP customers will be discriminated against by being forced to pay more than pre-

[103] Lesser Direct, p. 45. *See* Tr. Vol. IV, pp. 1075-76 (AEP Ohio witness Roush agreeing that, while FAC rates are not merged, pre-merger OPC customers will pay less than pre-merger CSP customers for fuel).

[104] Lesser Direct, p. 46.

[105] Order, p. 17.

[106] Tr. Vol. IV, p. 1077.

[107] Tr. Vol. IV, p. 1083-84.

[108] Tr. Vol. IV, p. 1082-83.

merger OPC customers for the same service. This violates R.C. § 4905.33 and R.C. § 4905.35. It is unreasonable to allow for an anti-competitive and discriminatory rate design without any rational basis.

IX. THE COMMISSION UNREASONABLY AUTHORIZED AEP OHIO TO CONTINUE ANTI-COMPETITIVE POLICIES.

The Order approves, with little to no analysis or justification, AEP Ohio's request to maintain anti-competitive barriers to shopping, including minimum stays and uniquely harmful switch fees.[109] The only record evidence regarding these provisions establishes that they serve simply as a barrier to shopping by limiting customers from freely moving into or out of the competitive market and charging customers directly if they do.[110] Indeed, AEP Ohio's $10 switch fee is higher than all other Ohio EDUs and is charged directly to customers, rather than allowing CRES providers to pay the fee.[111] For example, Duke Energy Ohio (a similarly situated EDU whose SSO was approved by the Commission in December 2011[112]) charges only a $5 switch fee and the fee is billed to CRES providers, and imposes no minimum stays.[113] AEP Ohio provided no reasonable justification for its minimum stays or the higher switch fee imposed on customers – nor any explanation as to why the switch fee could not be charged to CRES providers as is done by other Ohio EDUs – other than unsupported conclusions and a reliance on

[109] Order, p. 42.

[110] Banks Direct, p. 31 ("By implementing these minimum stays, AEP Ohio makes it more difficult for customers to switch, and thereby hinders effective competition and favors its own generation service."); Tr. Vol. XIII, pp. 3707-3708 (RESA witness Ringenbach); Tr. Vol. VII, p. 2327 (DERS witness Walz); Direct Testimony of Vincent Parisi on behalf of IGS, pp. 24-25; Direct Testimony of David Fein on behalf of Constellation NewEnergy, p. 31.

[111] Banks Direct, p. 31 ("The increased fee and the direct billing of that fee to customers have a negative impact on competition by placing additional penalties on customers who shop.").

[112] *See* Case No. 11-3549-EL-SSO.

[113] Banks Direct, p. 31; Duke Energy Ohio Tariff, PUCO Electric No. 19, Sheet No. 22.8.

previous practice.[114] The Order, not surprisingly, relies vaguely on such generic and unsupported testimony. Such a decision is unreasonable.

The Commission's approval also is unlawful. As the Commission noted in the Order, it must be "guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code."[115] But AEP Ohio's barriers to shopping violate numerous state policies, including those that seek to "[e]nsure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power" and to "[e]nsure effective competition in the provision of retail electric service."[116] AEP Ohio's new "process" to return shopping customers to SSO service if they have a 60-day delinquency of more than $50[117] – which was wholly unaddressed in the Order – is similarly anti-competitive. It also violates the state policy to "[p]rotect at-risk populations," [118] who are the most likely to be affected by this "process." The Order's approval of these provisions that violate state policy is unlawful and unreasonable.

X. CONCLUSION

For the foregoing reasons, the Commission should grant FES' Application for Rehearing to correct the errors described herein.

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[114] Tr. Vol. IV, pp. 1115, 1119-1120, 1201-1203 (AEP Ohio witness Roush admitting that AEP Ohio has done no analysis of potential customer "gaming" of the system and that the cost calculation underlying the $10 switch fee has not been updated since AEP Ohio's 1999 ETP case).

[115] Order, p. 13.

[116] R.C. § 4928.20 (I), (H).

[117] Tr. Vol. VI, p. 1956, 1958; FES Ex. 119 (May 16, 2012 Email from OhioChoiceOperations@AEP.com).

[118] *See* R.C. § 4928.02(L).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Application for Rehearing of the August 8, 2012 Opinion and Order* and the *Memorandum in Support* thereof were served this 7th day of September, 2012, via e-mail upon the parties below.

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