BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility.	)))))))	Case No. 05-376-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S JOINT INITIAL COMMENTS

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ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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These comments address Ohio Power Company's ("AEP-Ohio") obligation to refund to 1.2 million AEP-Ohio customers approximately $24.24 million, plus interest, that AEP-Ohio collected for research and development costs for a proposed, but never-constructed, integrated gasification combined cycle ("IGCC") generating facility in Meigs County, Ohio. On August 11, 2014, the Attorney Examiner issued an Entry setting forth a procedural schedule "to assist the Commission in its review of the issues on remand in this case." Entry at 4 (Aug. 11, 2014). The Entry requested parties to "update their position on the issues presented" by filing comments and reply comments. *Id*. Pursuant to the Attorney Examiner's August 11, 2014 Entry in the above-captioned matter, Industrial Energy Users-Ohio ("IEU-Ohio") and the Office of the Ohio Consumers' Counsel ("OCC") hereby jointly file their Initial Comments on behalf of AEP-Ohio's 1.2 million customers.

As discussed below, the Public Utilities Commission of Ohio ("Commission") lacks jurisdiction to authorize AEP-Ohio to retain any portion of the $24.24 million that was collected subject to refund. Neither the law as it existed under Senate Bill 3 ("SB 3") nor current law under Amended Substitute Senate Bill 221 ("SB 221") provide the Commission with any authority to permit AEP-Ohio to retain the $24.24 million. Competitive generation-related costs may not be collected through noncompetitive rates.

Additionally, even if the Commission were not barred from authorizing the recovery of generation-related costs in noncompetitive retail electric rates, AEP-Ohio cannot comply with the Ohio Supreme Court's ("Court") directives that it satisfies the requirements in R.C. Chapter 4909 on remand. Those directives required AEP-Ohio to demonstrate it had noncompetitive costs and assuming AEP-Ohio could meet that threshold demonstration, that AEP-Ohio would refile its case under R.C. Chapter 4909. But because construction of the IGCC never commenced, AEP-Ohio cannot demonstrate compliance with the at least 75 percent complete requirement in R.C. 4909.15(A)(1).

Because the Commission lacks jurisdiction to authorize AEP-Ohio to retain any portion of the $24.24 million that was collected subject to refund, the Commission cannot consider AEP-Ohio's argument that it should be allowed to retain $21.07 million it claims to have expended on research and development costs associated with the IGCC and which AEP-Ohio claims is not transferrable to other projects.

Currently, there are three pending motions in this proceeding requesting a refund, with interest, of the $24.24 million AEP-Ohio collected. These motions were filed in 2008, 2009, and 2011; the latter of which was not opposed by a memorandum contra. Because these motions have merit and the Commission cannot authorize AEP-Ohio to retain any portion of the $24.24 million, these motions should be granted and the Commission should direct AEP-Ohio to refund the $24.24 million, with interest, back to all of AEP-Ohio's customers.

I. BACKGROUND

In 1999, Ohio enacted SB 3 to restructure regulation of the electric utility industry in favor of reforms designed to unlock the dynamic forces of effective competition and provide customers with lower prices, better service, and the benefits of innovation. SB 3 required the separation of the generation, transmission and distribution functions into separate unbundled service components, and it declared the generation function to be a competitive service. R.C. 4928.03. Services not declared competitive remain subject to Commission regulation. R.C. 4928.05(A)(2). SB 3 also set in motion a process by which the competitive generation service provided by incumbent electric distribution utilities ("EDUs") would eventually be available to customers at a market-based price after a transition period, the Market Development Period ("MDP").[1] R.C. 4928.14, *repealed by* SB 221 (2008).

The General Assembly injected some safeguards into SB 3, including, among other things, provisions to ensure that consumers would continue to have access to a reliable supply of electricity after the MDP. The supply assurance was accomplished by

[1] The MDP for each EDU could end no later than December 31, 2005. R.C. 4928.40(B)(1)-(2).

imposing on the EDU a "default supplier" obligation to supply the "competitive service" required by customers not served by a competitive retail electric service ("CRES") provider. This obligation is often called the provider of last resort or "POLR" obligation, but it was designated as the standard service offer ("SSO") in SB 3. R.C. 4928.14, *repealed by* SB 221.

On February 4, 2004, AEP-Ohio filed an application to establish its market-based SSO following the end of its MDP; this application is referred to as AEP-Ohio's Rate Stabilization Plan ("RSP").[2] AEP-Ohio's IGCC generating facility first sprung to life in the Commission's order approving AEP-Ohio's RSP ("RSP Order"). In the RSP Order, the Commission stated:

> As noted earlier in this Order, [AEP-Ohio] will be held forth as the POLR to consumers who either fail to choose an alternative supplier or who choose to return to [AEP-Ohio's] system after taking service from another energy company. Consistent with Ohio law, the POLR designation places expectations upon EDUs; the companies must have sufficient capacity to meet unanticipated demand. Additionally, the Commission is among many state agencies that have been charged by the Governor to enhance the business climate in Ohio as it competes on a regional, national, and global basis for economic development projects. One of the Commission's roles in this endeavor has been to focus on reliable energy. We believe that, consistent with Section 4928.02, Revised Code, Ohio consumers are entitled to a future secure in the knowledge that electricity will be available at competitive prices. We also feel strongly that electric generators of the future should be both environment-friendly and capable of taking advantage of Ohio's vast fuel resources. With the recognition that new technologies must be forthcoming to replace the utilities' aging generation fleet, we urge [AEP-Ohio] to move forward with a plan to construct an integrated gasification combined-cycle (IGCC) facility in Ohio. [AEP-Ohio] should engage the Ohio Power Siting Board in pursuit of such a plant. We are encouraged by emerging information that suggests that

[2] AEP-Ohio's RSP established the terms and conditions under which AEP-Ohio would comply with R.C. 4928.14, which mandated that each EDU offer a market-based SSO beginning with the end of the EDU's MDP. AEP-Ohio's MDP ended on December 31, 2005. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 5 (Jan. 26, 2005) (hereinafter "RSP Order").

> the IGCC technology will be economically attractive. It is worth noting that the Commission is exploring regulatory mechanisms by which utilities, given their POLR responsibilities, might recover the costs of these new facilities.

RSP Order at 37-38.

On March 18, 2005, AEP-Ohio filed the IGCC Application to secure cost recovery assurances for a proposed IGCC generating facility located in Meigs County, Ohio. IGCC Application at 1. The IGCC Application stated that AEP-Ohio was required, pursuant to R.C. 4928.35(D) and R.C. 4928.14, to act as the POLR. *Id.* at 1. Based upon this obligation, AEP-Ohio proposed to construct an IGCC facility if it received *guaranteed cost recovery*. *Id.* at 3.

The IGCC Application separated the request for guaranteed cost recovery into three phases. In Phase I, AEP-Ohio proposed to recover research and development costs associated with pre-construction from before February 2005 until it executed an Engineering, Procurement, and Construction ("EPC") contract. As proposed, the Phase I costs included: (1) the costs to conduct scoping studies on the definition of the configuration of the proposed plant, indicative cost estimates and a high level project schedule; (2) a Front End Engineering and Design ("FEED") process which is a more detailed engineering and design of the hypothetical plant; (3) internal costs for environmental permitting; and, (4) internal costs for overall project management. *Id.* at 5-8. Revenue collected through the Phase I charges would have been credited against costs otherwise eligible to be collected during Phase II. *Id.* at 8-10.[3] Phase III costs

[3] Phase II costs included the recovery of carrying costs on AEP-Ohio's cumulative investment in the IGCC generating facility up until the facility went into service.

included recovery of the capital costs, carrying costs, and operating costs of the IGCC generating facility. *Id.* at 10-12.[4]

On April 10, 2006, the Commission issued the IGCC Order[5] and authorized AEP-Ohio to collect the proposed Phase I research and development costs. IGCC Order at 20. The IGCC Order authorized AEP-Ohio to collect the projected Phase I costs (estimated by AEP-Ohio at about $23.7 million) over a 12-month period beginning in July 2006 through the IGCC Cost Recovery Charge Rider ("Phase I Charges"). *Id*. The Commission found that it had authority to bypass SB 3's market-based pricing requirements for the competitive generation service function on two separate grounds. *Id.* at 17-18. First, the Commission held that SB 3's declaration that the generation service function is competitive was inapplicable to the IGCC Application because the construction and maintenance of the IGCC generating facility could be classified as a distribution ancillary service. *Id*. Second, the Commission held the requirement that the competitive generation rates be market-based was inapplicable because the Commission could authorize an EDU to recover its costs associated with fulfilling its POLR obligation. *Id.* at 18.

The IGCC Order also found that there was insufficient information in the record for the Commission to authorize recovery of the Phase II and Phase III costs at that time. *Id.* at 20-21. The Commission directed AEP-Ohio to file additional information regarding the Phase II and Phase III costs and noted that it expected to hold additional evidentiary hearings on the supplemental information filed by AEP-Ohio. *Id.* AEP-Ohio

[4] Recovery of the costs during Phase I and Phase II would have been used as a credit against the costs recovered under Phase III. *Id.*

[5] Opinion and Order (April 10, 2006) (hereinafter "IGCC Order").

did not file additional information regarding the Phase II and Phase III costs, and the Commission has not held additional evidentiary hearings regarding the Phase II or Phase III costs.

Various parties, including IEU-Ohio, sought rehearing of the IGCC Order. In the IGCC Entry on Rehearing,[6] the Commission affirmed its authorization of the collection of the projected Phase I research and development costs, but the Commission also held that the Phase I Charges would be collected subject to refund. IGCC Entry on Rehearing at 16. Specifically, the Commission held that if "AEP-Ohio ha[d] not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest." *Id.* at 16. The Commission also held that all Phase I expenditures "will be the subject of subsequent audit(s) to determine whether such expenditures were reasonably incurred to construct the proposed IGCC facility in Ohio." at 16. In its Finding and Order approving the Phase I Charges issued the same day as the Entry on Rehearing, the Commission again announced the same two requirements. Finding and Order at 2 (June 28, 2006) ("Tariff Order").

IEU-Ohio and others appealed the Commission's orders in the case. IEU-Ohio's appeal identified that the Commission was without jurisdiction to authorize a non-market-based rate for a competitive retail electric service and that the Commission had failed to comply with the statutory requirements to authorize a cost-based rate for a noncompetitive retail electric service. IEU-Ohio also requested that the Court direct the

[6] Entry on Rehearing (June 28, 2006) (hereinafter "IGCC Entry on Rehearing").

Commission to order AEP-Ohio to refund the revenue collected through the unlawful Phase I Charges to customers.

On March 13, 2008, the Court issued its decision and reversed the Commission's orders. The Court held that the "classification of AEP's proposed electric-generation facility as a distribution-ancillary service [was] contrary to law." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 22 ("IGCC Decision"). The Court further held that the "commission's holding blurs the legislative distinctions between electric transmission, generation, and distribution" and that the adoption of the Commission's rationale would allow the Commission to reregulate the generation function in violation of SB 3. *Id.* at ¶ 23.

The Court also found that the Commission violated R.C. Chapter 4909 when it authorized the recovery of what the Commission claimed were noncompetitive costs without following the requirements of R.C. Chapter 4909 applicable to noncompetitive costs. The Court further found that "[t]he evidence does not support" the Commission's order permitting AEP-Ohio to recover the Phase I research and development costs under AEP-Ohio's POLR obligation. *Id.* at ¶ 32.

> Additionally, we note that, while the commission details potential problems with the fleet of existing generation facilities, it fails to make any findings regarding the amount of generation that AEP needs to guarantee its Ohio distribution responsibilities. Nor does the record demonstrate what portion of the facility's costs should be attributed to AEP's POLR obligation versus what costs should be recovered through competitive rates when the facility begins generating electricity. Accordingly, the record before us is incomplete in these respects and the commission is instructed to make additional findings in support of its conclusions in this regard. We remand the case to the commission for further proceedings consistent with this opinion.

Id. at ¶ 33 (internal citation omitted). The Court further directed the Commission to "verify that [AEP-Ohio] has complied with the application requirements under R.C. 4909.18" and to discuss AEP-Ohio's "compliance with the 75 percent used-and-useful standard" because AEP-Ohio had "not yet begun construction of the generation facility." *Id.* at ¶ 32.

Finally, the Court held that it did not need to reach IEU-Ohio's request for a refund of the revenue collected through the Phase I Charges as part of its decision in light of its remand of the matter back to the Commission. *Id.* at ¶ 34-35.

Ohio law does not allow AEP-Ohio to retain the $24.24 million that AEP-Ohio collected subject to refund, with interest. Additionally, since the Court remanded the case over six years ago, AEP-Ohio has not complied with the Court's directive to demonstrate that AEP-Ohio had any noncompetitive costs which could be authorized for recovery under R.C. Chapter 4909. Because AEP-Ohio has no lawful claim to the amounts previously collected subject to refund, as discussed in more detail below, the Commission should direct AEP-Ohio to refund the $24.24 million, with interest, to customers.

II. ARGUMENT

A. Since SB 3 was enacted, Ohio law has prohibited utilities from collecting competitive generation-related costs through noncompetitive distribution rates charged to customers

The Commission should direct AEP-Ohio to refund the entire $24.24 million, plus interest, because Ohio law prohibits utilities from collecting competitive retail electric generation-related costs through noncompetitive distribution rates charged to

customers. And the Commission, a creature of statute, has no authority to authorize charges that have no basis in law.[7]

R.C. 4928.01(A)(27) defines "retail electric service" as:

> any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, ***from the point of generation to the point of consumption***. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service. (Emphasis added.)

The General Assembly has declared the entire retail electric generation service component as competitive (from the point of generation to the point of consumption):

> Beginning on the starting date of competitive retail electric service, *retail electric generation*, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.[8] (Emphasis added.)

These definitions have been in place since SB 3 was enacted and continue today following the enactment of SB 221.

During the timeframe when AEP-Ohio's IGCC Application was processed at the Commission and while the Commission's orders in this case were before the Court, SB 3 was in effect. Under SB 3, the Commission had no authority to regulate the price for competitive retail electric service (the Commission could authorize the temporary recovery of transition revenue under R.C. 4928.31 to 4928.40). *See* R.C.

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

[8] R.C. 4928.03.

4928.05(A)(1).[9] SSO rates were frozen and unbundled during each EDU's MDP. Following the end of the MDP for each EDU, SSO rates were required to be market-based. R.C. 4928.14(A) mandated a market-based SSO, and R.C. 4928.14(B) mandated that each electric utility also offer an option to purchase SSO service with a price determined by a competitive bid process ("CBP").[10] R.C. 4928.02(G) further provided that the Commission should "ensure effective competition ... by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service" and vice versa.

[9] During SB 3, R.C. 4928.05(A)(1) read:

> On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter.

[10] R.C. 4928.14(A) provided:

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

R.C. 4928.14(B) provided:

> After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. … At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.

See RSP Order at 7.

Accordingly, during the time that SB 3 was in effect and following the end of AEP-Ohio's MDP, the Commission had no jurisdiction to authorize cost-based recovery for a competitive retail electric service.

Even under current law, AEP-Ohio fares no better. The Commission is still prohibited from authorizing AEP-Ohio to recover research and development costs associated with a proposed but never constructed IGCC generating facility. The entire generation service component from the point of production to the point of consumption remains a competitive retail electric service. R.C. 4928.01(A)(27); R.C. 4928.03. Further, R.C. 4928.02(H) provides that it is the policy of the state 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 or to a product or service other than retail electric service, and vice versa, *including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.* (emphasis added).

R.C. 4928.05(A)(1) prohibits the Commission from regulating the price for competitive retail electric service except under R.C. 4928.141 to 4928.144, the SSO statutes. In addressing an electric utility's ability to collect costs associated with the construction of a generating facility before it is complete and in service, the General Assembly included R.C. 4928.143(B)(2)(b) in the electric security plan ("ESP") statute. This section provides that the Commission may include a provision of an ESP that provides for:

> A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the

> commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, 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. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

One of these conditions requires that any authorization of construction work in progress ("CWIP") under this division is subject to the limitations in R.C. 4909.15, *i.e.*, the IGCC facility must be at least 75 percent complete to recover any CWIP related to the IGCC facility.[11] As discussed above, there is no dispute that the IGCC facility is not at least 75 percent complete.

In sum, the law does not permit AEP-Ohio to retain these dollars collected from customers. The collection was prohibited under SB 3 (the law in effect when the Commission processed the IGCC Application and the Court reversed the Commission). It is also prohibited under current law. Accordingly, the Commission should direct AEP-Ohio to refund to customers the entire $24.24 million, plus interest.

B. AEP-Ohio should refund the entire $24.24 million, with interest, to customers because it was collected subject to refund with interest, and AEP-Ohio cannot comply with the Court's remand directives

As discussed above, generation-related costs are prohibited from being collected in noncompetitive rates under both SB 3 and SB 221. However, even assuming that was not the case, AEP-Ohio has failed to comply with the Court's directive on remand

[11] R.C. 4909.15(A)(1) provides: "The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress *but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.*" (emphasis added).

that it demonstrate it has noncompetitive costs related to its obligation to provide an SSO.

In its decision reversing and remanding the case to the Commission, the Court held that the Commission had failed to make findings regarding "the amount of generation that AEP needs to guarantee its Ohio distribution responsibilities" or "what portion of the facility's costs should be attributed to AEP's POLR obligation versus what costs should be recovered through competitive rates when the facility begins generating electricity." IGCC Decision at ¶ 33. The Court directed AEP-Ohio to demonstrate on remand that it had any noncompetitive costs that could be recovered and to do so in compliance "with the application requirements under R.C. 4909.18" and the "the 75 percent used-and-useful standard." *Id.* at ¶ 32.

In the six years since the Court remanded the case back to the Commission, AEP-Ohio has not taken any steps the Court identified. In its June 29, 2011 Statement, AEP-Ohio admits that it had not yet begun a continuous course of construction of the IGCC facility. Further, on July 30, 2012, the Ohio Power Siting Board ("OPSB") revoked AEP-Ohio's certificate to construct the IGCC facility.[12] Thus, the IGCC facility is not at least 75 percent complete.

AEP-Ohio also cannot show that the IGCC facility is needed to satisfy its obligation to provide an SSO. PJM Interconnection, L.L.C. ("PJM") is tasked with ensuring reliability across the PJM system, and AEP-Ohio is a member of PJM. To meet the needs of electricity consumers, PJM solicits Capacity Resource commitments, governed by rules embodied in PJM's Reliability Assurance Agreement ("RAA"), a

[12] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Meigs County, Ohio*, Case Nos. 06-30-EL-BGN, *et al.,* Entry at 2-3 (July 30, 2012).

Federal Energy Regulatory Commission ("FERC")-approved agreement. PJM designed its Reliability Pricing Model ("RPM") to send appropriate price signals to market participants to develop sufficient Capacity Resources, either in the form of additional generation, demand response, or transmission upgrades to address any reliability concerns.[13] Thus, if the reliability of the electric grid in AEP-Ohio's service area is threatened, PJM will act accordingly to secure the necessary Capacity Resources to cure any reliability issues.

Finally, beginning January 1, 2015, all of the energy for AEP-Ohio's SSO load will be procured through a competitive auction. As a result, the financial responsibility for providing real-time energy to AEP-Ohio's SSO customers has been transferred to auction winners (the physical responsibility for ensuring real-time reliability remains with PJM regardless of whether or not a CBP auction is in place for the SSO). Therefore, AEP-Ohio cannot demonstrate that the IGCC facility is needed to guarantee that SSO customers receive retail electric generation service.

Accordingly, AEP-Ohio has not and cannot comply with the Court's remand directives to justify retaining any portion of the $24.24 million, even if the retention of any portion of the $24.24 million was not prohibited by law.

C. AEP-Ohio should be directed to refund the entire $24.24 million, with interest, at the same rate AEP-Ohio requested in its IGCC Application

When the Commission authorized the Phase I Charges, it did so subject to refund, with interest. IEU-Ohio urges the Commission to apply the same interest rate

[13] And PJM is constantly reviewing its rules and market design to ensure that reliability is maintained throughout the PJM Region. *See, e.g.,* Winter 2014 Lessons Learned and Recommendation (May 27, 2014), available at: http://www.pjm.com/~/media/committees-groups/committees/oc/20140603/20140603-item-05b-cold-weather-recommendations.ashx (last accessed September 5, 2014).

that AEP-Ohio requested in this matter: 12.78 percent for the Columbus Southern Power Company ("CSP") zone and 12.73% for the Ohio Power Company ("OP") zone. Direct Testimony of Philip J. Nelson at 4-5 (May 5, 2005). Thus, the $12.35 million collected from CSP customers should be refunded at a 12.78% interest rate, and the $11.89 million collected from OP customers should be refunded at a 12.73% interest rate.

D. The $24.24 million, plus interest, should be refunded to customers who paid the Phase I Charges and in the same manner that the charges were collected

The Commission should direct AEP-Ohio to refund $24.24 million, plus interest, to all customers because all customers paid the Phase I Charges. Although the Phase I Charges were bypassable, at the time they were collected there was no shopping (or extremely limited amounts of shopping) in AEP-Ohio's service area.[14] Accordingly, all of AEP-Ohio's customers paid the Phase I Charges. The Phase I Charges were also collected on a cents per kilowatt-hour ("kWh") basis from customers.[15] Therefore, the $24.24 million, plus interest, should be refunded to customers through a cents/kWh credit.

[14] *See* RSP Order at 14 (as of January 2005 shopping in CSP's territory had not exceeded 3.4 percent and in OP's territory had not exceeded zero percent); *Summary of Electric Customer Choice Switch Rates in Terms of Sales* (as of March 31, 2008, shopping in CSP's territory was 0.634 percent and in OP's territory was zero percent), available at: http://www.puco.ohio.gov/emplibrary/files/util/MktMonitoringElecCustSwitchRates%5CSWITCH%20RATES%20SALES%5C2008%5C1Q2008.pdf

[15] *See* June 29, 2011 Statement at 4; *see also* Compliance Tariff at Sheet 76-1 (April 20, 2006).

E. AEP-Ohio's argument that it should be permitted to retain a portion of the customer-funded Phase I Charges should be rejected for the reasons discussed above. However, it is premature in any event because AEP-Ohio has failed to comply with the Court's remand directive to demonstrate it had noncompetitive costs, the extent of the noncompetitive costs, and to do so in the context of R.C. Chapter 4909

AEP-Ohio argues in the June 29, 2011 Statement that its refund obligation should be limited to only $3.166 million, plus interest, because AEP-Ohio expended $21.074 million on Phase I of the IGCC generating facility.[16] AEP-Ohio further argues that they need not refund the dollars collected from customers because the expenditures were not transferrable to other projects.

The Commission should reject the arguments set forth by AEP-Ohio in its June 29, 2011 Statement because, as discussed above, the Commission lacks jurisdiction to permit AEP-Ohio to retain any of the $24.24 million. Furthermore, even if the Commission could authorize AEP-Ohio to retain any of the $24.24 million that was collected subject to refund, AEP-Ohio must first comply with the Court's directives. Those directives included that AEP-Ohio was to demonstrate it had noncompetitive costs and was to identify the extent of the noncompetitive costs in the context of R.C. Chapter 4909. AEP-Ohio has not provided the required notice or filed the required application to increase rates under R.C. 4909.18. Additionally, AEP-Ohio's argument that it be permitted to retain $21.074 million of the $24.24 million it collected is premature because the audit ordered by the Commission in the IGCC Entry on Rehearing has not been completed. IGCC Entry on Rehearing at 16.

[16] June 29, 2011 Statement at 3.

III. CONCLUSION

As discussed above, the Commission should direct AEP-Ohio to refund to all of its customers the entire $24.24 million, plus interest, at AEP-Ohio's grossed-up weighted average cost of capital ("WACC") rate. There is no lawful basis for the Commission to authorize AEP-Ohio to retain the $24.24 million collected from customers subject to refund. Nor can AEP-Ohio satisfy the Court's remand directives. Accordingly, IEU-Ohio and OCC urge the Commission to grant the three pending motions seeking a refund of the entire $24.24 million, plus interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's and the Office of the Ohio Consumers' Counsel's Joint Initial Comments* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 5th day of September 2014, *via* electronic transmission.

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Summary: Comments Industrial Energy Users-Ohio's and the Office of the Ohio Consumers' Counsel's Joint Initial Comments electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio