

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Ohio Power Company for Authority to) Case No. 13-2385-EL-SSO
Establish a Standard Service Offer)
Pursuant to §4928.143, Ohio Rev. Code,)
in the Form of an Electric Security Plan.)

In the Matter of the Application of)
Ohio Power Company for Approval of) Case No. 13-2386-EL-AAM
Certain Accounting Authority.)

**APPLICATION FOR REHEARING
AND MEMORANDUM IN SUPPORT
OF INDUSTRIAL ENERGY USERS-OHIO**

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TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	5
A. PPA Rider.....	6
B. BTCR.....	8
C. Schedule IRP-D.....	9
D. ROE	10
II. AUTHORIZATION OF THE PPA RIDER IS UNLAWFUL AND UNREASONABLE	11
1. The ESP III Order is unlawful because it authorizes a nonbypassable generation-related rider, the Power Purchase Agreement Rider (“PPA Rider”), which is not included on the list of permissive ESP provisions contained in Section 4928.143(B)(2)	13
2. The ESP III Order is unlawful because it authorizes a procedure by which AEP-Ohio may seek to increase its compensation for wholesale generation-related electric service, which exceeds the Commission’s jurisdiction under Ohio law.....	15
3. The ESP III Order is unlawful and unreasonable because AEP-Ohio did not satisfy the burden of proof to demonstrate that the PPA Rider is a limitation on customer shopping and the Commission’s finding that the PPA Rider is a limitation on customer shopping is not supported by the manifest weight of the evidence	16
4. The ESP III Order is unlawful and unreasonable because the Commission’s finding that the PPA Rider “in theory, has the effect of stabilizing or providing certainty regarding retail electric service” is not supported by the manifest weight of the evidence and is directly contradicted by the Commission’s finding that AEP-Ohio failed to demonstrate that the PPA Rider would promote rate stability.....	22
5. The ESP III Order is unlawful because authorization to establish a placeholder rider, the PPA Rider, and to seek future cost recovery in a future filing, violates the requirements of R.C. 4928.143(B), which limits the terms that may be authorized as terms of an ESP, and R.C. 4928.143(C)(1), which provides that the Commission may approve or modify and approve an ESP, including its pricing and all other terms and conditions, including any deferrals and any future	

	recovery of deferrals, if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142	27
6.	The ESP III Order is unlawful because the Commission authorized a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover anticompetitive subsidies flowing from or to noncompetitive retail electric services to or from competitive wholesale electric service in violation of R.C. 4928.02(H)	29
7.	The ESP III Order is unlawful and unreasonable because the Commission authorized a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover generation-related revenue through a distribution-like rate in violation of R.C. 4928.02(H).....	29
8.	The ESP III Order is unlawful and unreasonable because the Commission, by authorizing a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover generation-related revenue through a distribution-like rider, failed to respect its own prior decision denying authorization of the recovery of generation-related costs through a distribution-like rider, failed to adequately explain why it was departing from its prior decision, and the new course is not lawful or reasonable.....	29
9.	The ESP III Order is unlawful and unreasonable because the Commission authorized the PPA Rider as a placeholder rider by which AEP-Ohio may seek to recover generation-related transition revenue or its equivalent in violation of R.C. 4928.38 and the bar to recovery of transition revenue or its equivalent resulting from AEP-Ohio’s Electric Transition Plan Stipulation	33
10.	The ESP III Order is unlawful and unreasonable because, under the Supremacy Clause of the United States Constitution, the Commission is preempted by the Federal Power Act from authorizing a rider such as the PPA Rider that may authorize AEP-Ohio to increase its compensation for wholesale generation-related services in an amount exceeding that authorized by the Federal Energy Regulatory Commission	37
11.	The ESP III Order is unlawful and unreasonable because the Commission engaged in rulemaking without complying with the requirements of Chapter 119 of the Revised Code as a means of authorizing an application process that would permit AEP-Ohio to seek to recover above-market wholesale generation-related costs	43
12.	The ESP III Order is unlawful and unreasonable because the Commission identified “factors” and a review process to address a	

future filing by AEP-Ohio if it seeks to increase its compensation for generation-related services that are void for vagueness under the due process clauses of the United States Constitution and the Ohio Constitution..... 50

III. AUTHORIZATION OF THE BASIC TRANSMISSION COST RIDER WAS UNLAWFUL AND UNREASONABLE 52

1. The ESP III Order is unlawful because the Commission is preempted from authorizing a transmission-related rider that precludes customers eligible to secure transmission service from PJM (pursuant to the FERC-approved tariff) from doing so and makes them captive to an electric distribution utility for transmission services at prices and terms and conditions that are different from those contained in the PJM tariff..... 53

2. The ESP III Order is unreasonable because the Basic Transmission Cost Rider (“BTCR”) reduces the options available to customers seeking to secure transmission services and frustrates price signals that may assist in providing transmission system reliability 56

3. The ESP III Order is unreasonable because the Commission failed to order the inclusion of affected customers in the resolution process to ensure that customers do not pay twice for the same transmission-related expenses 58

4. The ESP III Order is unlawful because the order presumes that the rate design of the BTCR proposed by AEP-Ohio was reasonable and shifts the burden of demonstrating the unreasonableness of the proposed tariff to intervenors, in violation of the requirement of R.C. 4928.143(C)(1), which places the burden of proof on AEP-Ohio 59

IV. THE ESP III ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE THE COMMISSION APPROVED A RETURN ON EQUITY OF 10.2% BASED ON THE TERMS OF A STIPULATION AND RECOMMENDATION THAT EXPRESSLY PROVIDES THAT IT IS TO HAVE NO PRECEDENTIAL EFFECT 61

V. THE COMMISSION SHOULD GRANT REHEARING AND CLARIFY PORTIONS OF THE ESP III ORDER REGARDING ITS AUTHORIZATION OF A FUTURE FILING UNDER THE PPA RIDER AND SCHEDULE IRP-D 67

1. The Commission should grant rehearing and clarify (1) that the “factors” that it will consider in a “future filing” if AEP-Ohio seeks to increase its compensation for generation-related services include a requirement for AEP-Ohio to propose a “least-cost” hedge and a requirement that the hedge be secured by a competitive bidding

process and (2) that AEP-Ohio will be required to demonstrate that the resulting ESP, if the Commission approves generation cost recovery in a future filing, will satisfy the requirement of R.C. 4928.143(C)(1) that the ESP is more favorable in the aggregate than a Market Rate Offer	67
a. The Commission should impose a requirement that the hedge be “least-cost”	68
b. The Commission should require that AEP-Ohio competitively bid the hedge	69
c. The Commission should require AEP-Ohio to demonstrate that the ESP, if the Commission approves recovery of generation-related costs under the PPA Rider, passes the ESP v. MRO Test.....	70
2. The Commission should grant rehearing for the purpose of clarifying the terms of the modified Schedule IRP-D concerning the definition of “emergency interruption”; further the Commission should clarify that the new Schedule IRP-D will not contain any provision that would permit AEP-Ohio to order a “discretionary interruption”; further, the Commission should clarify that the new Schedule IRP-D will not be subject to a load limitation. If a load limitation is permitted, the Commission should direct that Schedule IRP-D provide for a reasonable process for assigning a load limitation.....	70
VI. CONCLUSION.....	73

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**APPLICATION FOR REHEARING
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Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code (“OAC”), Industrial Energy Users-Ohio (“IEU-Ohio”) respectfully submits this Application for Rehearing of the Opinion and Order approving an Electric Security Plan (“ESP”) for Ohio Power Company (“AEP-Ohio”) issued by the Public Utilities Commission of Ohio (“Commission”) on February 25, 2015 (“ESP III Order”) for the following reasons:

1. **The ESP III Order is unlawful because it authorizes a nonbypassable generation-related rider, the Power Purchase Agreement Rider (“PPA Rider”), which is not included on the list of permissive ESP provisions contained in Section 4928.143(B)(2).**
2. **The ESP III Order is unlawful because it authorizes a procedure by which AEP-Ohio may seek to increase its compensation for wholesale generation-related electric service, which exceeds the Commission’s jurisdiction under Ohio law.**
3. **The ESP III Order is unlawful and unreasonable because AEP-Ohio did not satisfy the burden of proof to demonstrate that the PPA Rider is a limitation on customer shopping and the Commission’s finding**

that the PPA Rider is a limitation on customer shopping is not supported by the manifest weight of the evidence.

4. The ESP III Order is unlawful and unreasonable because the Commission's finding that the PPA Rider "in theory, has the effect of stabilizing or providing certainty regarding retail electric service" is not supported by the manifest weight of the evidence and is directly contradicted by the Commission's finding that AEP-Ohio failed to demonstrate that the PPA Rider would promote rate stability.
5. The ESP III Order is unlawful because authorization to establish a placeholder rider, the PPA Rider, and to seek future cost recovery in a future filing, violates the requirements of R.C. 4928.143(B), which limits the terms that may be authorized as terms of an ESP, and R.C. 4928.143(C)(1), which provides that the Commission may approve or modify and approve an ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.
6. The ESP III Order is unlawful because the Commission authorized a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover anticompetitive subsidies flowing from or to noncompetitive retail electric services to or from competitive wholesale electric service in violation of R.C. 4928.02(H).
7. The ESP III Order is unlawful and unreasonable because the Commission authorized a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover generation-related revenue through a distribution-like rate in violation of R.C. 4928.02(H).
8. The ESP III Order is unlawful and unreasonable because the Commission, by authorizing a placeholder rider, the PPA Rider by which AEP-Ohio may seek to recover generation-related revenue through a distribution-like rider, failed to respect its own prior decision denying authorization of the recovery of generation-related costs through a distribution-like rider, failed to adequately explain why it was departing from its prior decision, and the new course is not lawful or reasonable.
9. The ESP III Order is unlawful and unreasonable because the Commission authorized the PPA Rider as a placeholder rider by which AEP-Ohio may seek to recover generation-related transition revenue or its equivalent in violation of R.C. 4928.38 and the bar to recovery of transition revenue or its equivalent resulting from AEP-Ohio's Electric Transition Plan Stipulation.

10. **The ESP III Order is unlawful and unreasonable because, under the Supremacy Clause of the United States Constitution, the Commission is preempted by the Federal Power Act from authorizing a rider such as the PPA Rider that may authorize AEP-Ohio to increase its compensation for wholesale generation-related services in an amount exceeding that authorized by the Federal Energy Regulatory Commission.**
11. **The ESP III Order is unlawful and unreasonable because the Commission engaged in rulemaking without complying with the requirements of Chapter 119 of the Revised Code as a means of authorizing an application process that would permit AEP-Ohio to seek to recover above-market wholesale generation-related costs.**
12. **The ESP III Order is unlawful and unreasonable because the Commission identified “factors” and a review process to address a future filing by AEP-Ohio if it seeks to increase its compensation for generation-related services that are void for vagueness under the due process clauses of the United States Constitution and the Ohio Constitution.**
13. **The ESP III Order is unlawful because the Commission is preempted from authorizing a transmission-related rider that precludes customers eligible to secure transmission service from PJM (pursuant to the FERC-approved tariff) from doing so and makes them captive to an electric distribution utility for transmission services at prices and terms and conditions that are different from those contained in the PJM tariff.**
14. **The ESP III Order is unreasonable because the Basic Transmission Cost Rider (“BTCR”) reduces the options available to customers seeking to secure transmission services and frustrates price signals that may assist in providing transmission system reliability.**
15. **The ESP III Order is unreasonable because the Commission failed to order the inclusion of affected customers in the resolution process to ensure that customers do not pay twice for the same transmission-related expenses.**
16. **The ESP III Order is unlawful because the order presumes that the rate design of the BTCR proposed by AEP-Ohio was reasonable and shifts the burden of demonstrating the unreasonableness of the proposed tariff to intervenors, in violation of the requirement of R.C. 4928.143(C)(1), which places the burden of proof on AEP-Ohio.**
17. **The ESP III Order is unlawful and unreasonable because the Commission approved a return on equity of 10.2% based on the**

terms of a Stipulation and Recommendation that expressly provides that it is to have no precedential effect.

18. The Commission should grant rehearing and clarify (1) that the “factors” that it will consider in a “future filing” if AEP-Ohio seeks to increase its compensation for generation-related services include a requirement for AEP-Ohio to propose a “least-cost” hedge and a requirement that the hedge be secured by a competitive bidding process and (2) that AEP-Ohio will be required to demonstrate that the resulting ESP, if the Commission approves generation cost recovery in a future filing, will satisfy the requirement of R.C. 4928.143(C)(1) that the ESP is more favorable in the aggregate than a Market Rate Offer.
19. The Commission should grant rehearing for the purpose of clarifying the terms of the modified Schedule IRP-D concerning the definition of “emergency interruption”; further the Commission should clarify that the new Schedule IRP-D will not contain any provision that would permit AEP-Ohio to order a “discretionary interruption”; further, the Commission should clarify that the new Schedule IRP-D will not be subject to a load limitation. If a load limitation is permitted, the Commission should direct that Schedule IRP-D provide for a reasonable process for assigning a load limitation.

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE APPLICATION FOR
REHEARING OF INDUSTRIAL ENERGY USERS-OHIO**

I. INTRODUCTION

In its Application, AEP-Ohio sought authorization of an ESP for the period of June 1, 2015 to May 31, 2018.¹ Four proposals contained in the Application are relevant to this Application for Rehearing. First, AEP-Ohio requested authorization of a nonbypassable rider, the Power Purchase Agreement Rider (“PPA Rider”), which would recover generation-related costs associated with AEP-Ohio’s retained interest in generation plants operated by Ohio Valley Electric Corporation (“OVEC”).² Second, the Application proposed to classify some transmission costs as non-market-based and collect the non-market-based costs from retail customers through a new nonbypassable

¹ AEP-Ohio Ex. 1 at 2. AEP-Ohio also sought authority to terminate the ESP one year early unilaterally. *Id.* at 15. The Commission denied authorization of an early termination provisions. ESP III Order at 86.

² *Id.* at 8-9.

rider, the Basic Transmission Cost Rider (“BTCR”).³ Third, AEP-Ohio sought to eliminate various variable price tariffs including Schedule IRP-D.⁴ Fourth, AEP-Ohio proposed a revised capital structure that included a return on equity (“ROE”) of 10.65%.⁵

A. PPA Rider

In the ESP III Order issued on February 25, 2015, the Commission found that AEP-Ohio had failed to demonstrate the proposed PPA Rider would provide customers the stability benefits, the so-called “hedge,” that AEP-Ohio claimed, but still authorized AEP-Ohio to establish a PPA Rider as a placeholder with an initial rate of zero.⁶ Further, the Commission left open the door for AEP-Ohio to make a “future filing” for authorization to recover generation-related costs and directed AEP-Ohio to address at least four “factors” if it sought cost recovery.⁷

The Commission’s order authorizing the PPA Rider is unlawful for several reasons.

- The Commission’s finding that it may authorize the PPA Rider as a term of an ESP is unlawful because R.C. 4928.143(B)(2)(d) does not provide authorization for a nonbypassable generation-related rider.

³ *Id.* at 12-13.

⁴ *Id.* at 9.

⁵ AEP-Ohio Ex. 17.

⁶ ESP III Order at 24-25. All other parties opposed AEP-Ohio’s proposed PPA Rider. One party, Ohio Energy Group (“OEG”), recommended a substantially modified version. OEG Ex. 1.

⁷ ESP III Order at 25.

- The Commission's finding that it may increase AEP-Ohio's compensation for wholesale generation-related electric services is unlawful because the finding exceeds the Commission's jurisdiction under Ohio law.
- AEP-Ohio did not satisfy the burden of proof to demonstrate that the PPA Rider is a limitation on customer shopping, and the Commission's finding that the PPA Rider is a limitation on customer shopping is not supported by the manifest weight of the evidence.
- The Commission's finding that the PPA Rider may have the effect of providing certainty or stability in the provision of retail electric service is not supported by the manifest weight of the evidence and is expressly contradicted by the Commission's determination that AEP-Ohio failed to demonstrate that the PPA Rider would promote rate stability.
- The Commission's finding that it can authorize AEP-Ohio to collect above-market wholesale generation-related costs through a separate filing would permit AEP-Ohio to unlawfully evade the requirements of R.C. 4928.02(B) and R.C. 4928.143(C)(1).
- The Commission's finding that it may authorize AEP-Ohio to bill and collect above-market wholesale generation-related costs is unlawful because the authorization would violate R.C. 4928.02(H).
- The Commission's finding that R.C. 4928.02(H) does not bar the authorization of the PPA Rider is unlawful because it departed from prior precedent without a reasoned explanation and the finding that the PPA Rider does not violate the section is neither lawful nor substantively reasonable.

- The Commission’s authorization of the PPA Rider is unlawful because the Commission may not authorize, in practice or theory, the recovery of transition revenue or its equivalent.
- The Commission’s authorization for AEP-Ohio to establish a PPA Rider is preempted by the Federal Power Act (“FPA”).
- The Commission’s establishment of a “rule” defining a future filing to secure authorization of generation-related cost recovery violated the requirements applicable to the Commission for rulemaking under Chapter 119 of the Revised Code and was not a lawful adoption of a “rule” by adjudication.
- The “factors” and “process” the Commission identified for addressing a “future filing” by AEP-Ohio to recover above-market generation-related costs are void for vagueness.

Because the Commission’s orders concerning the PPA Rider and a “future filing” are unlawful and unreasonable, the Commission should grant rehearing and reverse those orders. If the Commission does not reverse the orders authorizing the rider and future filing, it should grant rehearing and clarify the “factors” it will consider in a future filing and include requirements that the “hedge” be “least-cost” and that AEP-Ohio be required to competitively bid for the “products” that it alleges will serve as a “hedge.” Further, the Commission should require AEP-Ohio to demonstrate that the resulting ESP will satisfy the requirements of R.C. 4928.143(C)(1).

B. BTCR

The Commission also authorized AEP-Ohio to implement a modified version of the BTCR, justifying authorization on the claim that the rider was comparable to one the

Commission approved for Dayton Power and Light Company (“DP&L”).⁸ The authorization of the BTCR is unlawful and unreasonable because it invades a field of regulation that is within the exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC”) and the terms of the BTCR will conflict with the FERC-approved transmission rates. Further, the ESP III Order does not address the objection customers raised that the BTCR would frustrate customer choice.

The BTCR is also unreasonable because it fails to address appropriately the double-billing problem the Commission agreed might occur. As the Commission recognized, it was appropriate to address the potential double-billing problem created by the authorization of the BTCR.⁹ In response to that concern, the Commission directed AEP-Ohio and competitive retail electric service (“CRES”) providers to meet and resolve any potential problems, but did not include customers in this resolution process.¹⁰ It is unreasonable to fail to include customers in the resolution process the Commission ordered. If the Commission refuses to reverse its authorization of the BTCR, it should grant rehearing and direct that customers be included in the process to resolve the double-billing problem that will result from the authorization of the BTCR.

C. Schedule IRP-D

The Commission denied AEP-Ohio’s request to eliminate the variable price tariffs including Schedule IRP-D, finding that the competitive market did not yet provide alternatives to these rates.¹¹ The Commission directed that AEP-Ohio revise the Schedule IRP-D, but the Commission’s directions are unclear as to the availability and

⁸ *Id.* at 67-68.

⁹ *Id.* at 68.

¹⁰ *Id.*

¹¹ *Id.* at 39-40.

terms of the new Schedule.¹² Because the Commission's order authorizing the new Schedule IRP-D is not clear, the Commission should grant rehearing and clarify that the Schedule IRP-D should retain the current provisions regarding circumstances giving rise to an emergency interruption. Additionally, the Commission should clarify that it has not authorized AEP-Ohio to retain the current Schedule's provisions regarding discretionary interruptions. Finally, the Commission should clarify that the Schedule will be available without restriction on the total interruptible power contract capacity. If the Commission does limit the load that may be contracted under the Schedule, it should also direct AEP-Ohio to provide a reasonable basis in the Schedule by which to allocate available load.

D. ROE

The Commission approved a revised capital structure with an ROE of 10.2%. As the basis for adopting the ROE, the Commission expressly relied upon a stipulation and recommendation it approved in an AEP-Ohio distribution rate case.¹³ The terms of the stipulation and recommendation, however, provided that it could not be used as precedent in any proceeding other than one seeking enforcement of the stipulation and recommendation.¹⁴ Thus, the Commission's reliance on the stipulation and recommendation was unlawful and unreasonable because that reliance violates the terms of the Commission's order approving the stipulation and recommendation and undermines the ability of parties to resolve matters by agreement.

¹² *Id.* at 40.

¹³ *Id.* at 84.

¹⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger Is Approved, as a Merged Company (collectively AEP Ohio) for an Increase in Electric Distribution Rates, Case Nos. 11-351-EL-AIR, et al., Joint Stipulation and Recommendation (Nov. 23, 2011).*

II. AUTHORIZATION OF THE PPA RIDER IS UNLAWFUL AND UNREASONABLE

AEP-Ohio stated that the effect of the PPA Rider, as proposed, would be to allow AEP-Ohio to recover fully the above-market wholesale generation-related costs it is billed by OVEC.¹⁵ AEP-Ohio also sought authority to expand the rider to include purchase power agreements with its unregulated affiliate.¹⁶ Without the PPA Rider, any above-market cost would be stranded with AEP-Ohio¹⁷ or its unregulated affiliate.

The PPA Rider would not be utilized to provide physical generation supply to AEP-Ohio's customers. Rather, AEP-Ohio proposed to liquidate the power it purchased at wholesale from OVEC (and eventually its unregulated affiliate) into the PJM market and recover the costs not recovered in the PJM markets with the rider.¹⁸ AEP-Ohio claimed that the rider would operate as a "hedge" that has the effect of lowering the volatility of retail electric prices for customers.¹⁹

The claim that the PPA Rider would operate as a hedge was fundamentally wrong. For customers on either fixed-price contracts or the SSO, the rider would inject variable pricing as the "hedge" changed over time and increased their cost of generation service.²⁰ The only stability provided by the PPA Rider is the stability it would provide

¹⁵ Tr. Vol. I at 29-30.

¹⁶ AEP Ex. 1 at 8.

¹⁷ As Dr. McDermott defined stranded costs, it is the amount of investment that the owner cannot recover through market prices. Tr. Vol. XIII at 3148-49. Without the PPA Rider, AEP-Ohio would not be able to recover the cost related to the OVEC Entitlement in the market if the OVEC costs exceeded the price AEP-Ohio could secure for capacity and energy.

¹⁸ AEP-Ohio Ex. 7 at 10.

¹⁹ *Id.* at 10-11; Tr. Vol. II at 566.

²⁰ IEU-Ohio Ex. 1B at 25-26.

AEP-Ohio and its generation affiliate through a guaranteed return on and of generation investments funded by captive retail distribution customers.²¹

In the ESP III Order, the Commission accepted AEP-Ohio's unsupported claim that the rider will operate as a hedge, at least in theory. Although the Commission refused to authorize AEP-Ohio to begin to bill and collect the above-market wholesale generation-related costs of its interest in OVEC, it did authorize AEP-Ohio to establish a placeholder rider. In deciding not to allow collection of the above-market wholesale generation-related costs of OVEC, the Commission concluded that "the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility."²² Based on the record, the Commission was "not persuaded that the PPA rider proposal put forth by AEP Ohio in the present proceedings would, in fact, promote rate stability, as the Company claims, or that it is in the public interest."²³ Even though AEP-Ohio was not authorized to bill and collect from customers the above-market wholesale generation-related costs of OVEC, the Commission authorized AEP-Ohio to establish a PPA Rider for the term of the ESP. To support the authorization, the Commission found that the PPA Rider, in theory, satisfied the requirements of R.C. 4928.143 (B)(2)(d) because it would be a charge that was a limitation on customer shopping that had the effect of stabilizing or providing certainty regarding retail electric service.²⁴ The Commission ordered that the initial rate be set at zero²⁵ and that the PPA Rider be nonbypassable.²⁶

²¹ *Id.* at 25.

²² ESP III Order at 24.

²³ *Id.*

²⁴ *Id.* at 20-22.

²⁵ *Id.* at 25.

If AEP-Ohio seeks authorization to bill and collect above-market wholesale generation-related costs from retail customers, it will need to make an additional filing to justify any requested cost recovery.²⁷ In a filing, AEP-Ohio must address at a minimum several “factors” including the financial need of the generating plant, the necessity of the generation facility, in light of future reliability concerns, a description of how the generating plant is compliant with all pertinent environmental regulations and a plan for compliance with pending environmental regulations, and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within Ohio.²⁸ The Commission also directed that AEP-Ohio include provisions that provide for rigorous Commission oversight of the PPA Rider, an alternative plan for allocating the financial risk of the PPA Rider, and a severability clause so that the ESP would continue if the PPA Rider were invalidated by a court. Additionally, the Commission reserved the option of requiring an independent third party study of the reliability and pricing issues as they relate to an application seeking cost recovery.²⁹ The Commission then will balance, but not be bound, by those factors in deciding whether to approve AEP-Ohio’s request for cost recovery.³⁰

For the following reasons, the Commission should grant rehearing and reverse its decision to authorize the PPA Rider.

- 1. The ESP III Order is unlawful because it authorizes a nonbypassable generation-related rider, the Power Purchase Agreement Rider (“PPA Rider”), which is not included on the**

²⁶ *Id.* at 22.

²⁷ *Id.* at 25.

²⁸ *Id.*

²⁹ *Id.* at 25-26.

³⁰ *Id.* at 25.

**list of permissive ESP provisions contained in Section
4928.143(B)(2)**

In the ESP III Order, the Commission held that it could authorize a nonbypassable generation-related rider, the PPA Rider, under R.C. 4928.143(B)(2)(d).³¹ Because that Section does not allow the Commission to “establish” or authorize a nonbypassable generation-related rider, the ESP III Order’s authorization of the PPA Rider as a nonbypassable rider is unlawful.

Operating as a definitional section, R.C. 4928.143(B) limits the terms of an ESP to those specified in the Section.³² R.C. 4928.143(B)(2) provides only two instances in which the Commission may authorize a nonbypassable generation-related rider, divisions (b) and (c). Under those two divisions, a nonbypassable charge is available to recover costs associated with generating facilities under construction or constructed after January 1, 2009 that meet additional statutory requirements. R.C. 4928.143(B)(2)(d) does not similarly provide that a rider approved under that division may be nonbypassable.

By authorizing nonbypassable riders in only two instances, the General Assembly precluded the Commission from authorizing a nonbypassable generation-related rider under R.C. 4928.143(B)(2)(d).

As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another. This principle is especially pertinent where, as in the cases *subjudice*, the statute involved is a definitional provision. Had the General Assembly intended to allow the utilities to recapture other types of expenses through this rate, it would have expanded the definitions.³³

³¹ *Id.* at 22.

³² *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 520 (2011).

³³ *Montgomery County Bd. of Comm’rs v. Pub. Util. Comm’n of Ohio*, 28 Ohio St.3d 171, 175 (1986) (citations omitted).

Despite the limitations on the Commission’s authority to authorize nonbypassable generation-related riders, the Commission unlawfully authorized the PPA Rider as a nonbypassable rider. Because the Commission is without authority to authorize a term of an ESP unless it is among the terms listed under R.C 4928.143(B)(2), the Commission’s order is unlawful and should be reversed.

2. The ESP III Order is unlawful because it authorizes a procedure by which AEP-Ohio may seek to increase its compensation for wholesale generation-related electric service, which exceeds the Commission’s jurisdiction under Ohio law

The services of a public utility subject to the Commission’s jurisdiction are established through the definitional sections in Chapters 4905 and 4928 of the Revised Code. R.C. 4905.02 provides that a “‘public utility’ includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code.” R.C. 4905.03 then provides a list of the types of public utilities subject to the Commission’s jurisdiction:

As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

...

(C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.

The same definition extends to the Commission’s jurisdiction under Chapter 4928 to electric distribution utilities (“EDU”).³⁴ This definition specifically limits the Commission’s

³⁴ See, e.g., R.C. 4928.01(A)(6) & (7) & 4928.05(A) (defining the Commission’s jurisdiction to supervise and regulate competitive and noncompetitive retail electric service supplied by an electric utility).

jurisdiction over electric light companies, including EDUs, to instances in which a retail service is being provided, *i.e.* electricity is being supplied “to consumers.” By definition, therefore, the jurisdiction of the Commission does not extend to wholesale generation-related electric services.

As proposed, AEP-Ohio would shift the market risk of its contract for wholesale generation-related services with OVEC to AEP-Ohio’s retail customers.³⁵ Although the Commission indicated in the ESP III Order that the implementation details of the rider would be addressed in a future proceeding, it did not reject that portion of the Application by which AEP-Ohio seeks to increase its compensation for wholesale generation-related services. Because Ohio law limits the Commission’s jurisdiction to set charges for a service of an electric light company to electricity being supplied to consumers in Ohio, the Commission’s jurisdiction does not extend to establishing a charge or credit to adjust AEP-Ohio’s compensation for wholesale generation-related electric services. Accordingly, the Commission is without authority under Ohio law to authorize the PPA Rider.

Because the Commission erred in authorizing a rider that would allow AEP-Ohio to seek to recover increased compensation for wholesale generation-related services, the Commission should grant rehearing and reverse its order authorizing AEP-Ohio to establish a PPA Rider.

- 3. The ESP III Order is unlawful and unreasonable because AEP-Ohio did not satisfy the burden of proof to demonstrate that the PPA Rider is a limitation on customer shopping and the Commission’s finding that the PPA Rider is a limitation on customer shopping is not supported by the manifest weight of the evidence**

³⁵ AEP-Ohio Ex. 1 at 8.

In its Application, testimony supporting the Application, and its testimony at hearing, AEP-Ohio took the position that the PPA Rider was not a limitation on customer shopping. As AEP-Ohio explained, the rider would not affect customer shopping because it was proposing that the rider be nonbypassable.³⁶ After the record closed, however, AEP-Ohio for the first time claimed that the Commission could approve the rider because it operated as a limitation on customer shopping. In support of that new claim, it cited only the testimony of an intervenor's witness.³⁷ This late-found insight does not form a lawful basis for authorizing the PPA Rider since AEP-Ohio failed to carry its burden of proof. Moreover, the conclusion that the PPA Rider operates as a limitation on customer shopping is not supported by the manifest weight of the evidence.

R.C. 4928.143(C)(1) provides that “[t]he burden of proof in [an ESP] proceeding shall be on the electric distribution utility.” The burden of proof created by R.C. 4928.143(C)(1) places on the EDU “the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to the legally required extent.”³⁸

AEP-Ohio filed an application seeking a standard service offer (“SSO”) in the form of an ESP. Having chosen to file for an ESP, AEP-Ohio’s application was required to comply with the requirements of Rule 4901:1-35-03, OAC. The rule provides

³⁶ Application at 8 (“The energy and capacity associated with the Company’s OVEC entitlement will simply be sold into the PJM market. Coupled with the nonbypassable nature of the rider, this will ensure that this provision of the Company’s proposed ESP will have no adverse impact on the SSO auction or the ability of CRES providers to compete for customers on a level playing field.”).

³⁷ Ohio Power Company’s Initial Post Hearing Brief at 28.

³⁸ *Martin v. City of Columbus*, 101 Ohio St. 1, 9 (1920); *Broadway Christian Church v. Williams*, 59 Ohio App. 2d 243, 254 (8th Dist. Ct. App. 1978) (same).

specifically that AEP-Ohio, if it were seeking a term, condition, or charge that operates as a limitation on customer shopping to include in its Application “[a] listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service.”³⁹

In its Application, AEP-Ohio did not advance the claim that the PPA Rider would operate as a limitation on customer shopping. In fact, its Application and supporting testimony stated exactly the opposite. AEP-Ohio’s Application alleged that the Rider “will have no adverse impact on ... the ability of CRES providers to compete for customers. This proposal allows customers to take advantage of market opportunities while providing added price stability.”⁴⁰ In the supporting testimony attached to the Application, AEP-Ohio continued to assert that the PPA Rider did not limit shopping. For example, AEP-Ohio’s policy witness, Mr. Vegas, stated, “Our customers would ... be able to take advantage of market opportunities while the PPA Rider will provide added price stability.”⁴¹ In explaining the operation of the rider, another AEP-Ohio witness, Mr. Allen, provided testimony echoing that of Mr. Vegas:

The energy and capacity associated with the Company’s OVEC entitlement will simply be sold into the PJM market. This along with the nonbypassable nature of the PPA rider will ensure that this element of the Company’s proposed ESP will have no adverse impact on the SSO auction or the ability of CRES providers to compete for customers on a level playing field. This proposal allows customers to take advantage of market opportunities while providing added price stability.⁴²

³⁹ Rule 4901:1-35-03(C)(9)(c)(i), OAC.

⁴⁰ AEP-Ohio Ex. 1 at 8.

⁴¹ AEP-Ohio Ex. 2 at 13.

⁴² AEP-Ohio Ex. 7 at 10.

On cross-examination, Mr. Allen continued to assert that the PPA Rider would not operate as a limitation on customer shopping:

Q: And it's your position that the PPA is not a limitation on customer shopping, correct?

A: It's clearly not.⁴³

Based on the record before the Commission, therefore, AEP-Ohio, the only party with the burden of proof to provide evidence to demonstrate that the PPA Rider would operate as a limitation on customer shopping, testified that "clearly" it would not.

For unstated reasons, the Commission seeks to avoid the evidence offered by AEP-Ohio by speculating on "whether [AEP-Ohio's witness Mr. Allen] specifically considered whether the PPA rider constitutes a financial, rather than a physical, limitation on customer shopping."⁴⁴ The Commission's attempt to overlook AEP-Ohio's failure to carry the burden of proof by speculating on what the AEP-Ohio witness left unsaid, however, cannot legally form a basis for the Commission's authorization of the rider because the Commission is bound to address the merits of the Application on the record of the hearing:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.⁴⁵

⁴³ Tr. Vol. II at 566.

⁴⁴ ESP III Order at 22.

⁴⁵ R.C. 4903.09. Based on the record presented to it, the Commission must explain its rationale, respond to contrary positions, and support its decision with appropriate evidence. *In re Columbus S. Power Co.*, 128 Ohio St.3d at 519.

“The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom.”⁴⁶ Thus, the Commission cannot speculate on what AEP-Ohio’s witness might have considered.

Even if the Commission were permitted to speculate, the Commission’s rules do not provide a basis for construing the rider as a limitation on customer shopping. According to the Commission rules, limitations on customer shopping “would include, but are not limited to, terms and conditions relating to shopping or to a returning to the standard service offer and any unavoidable charges.”⁴⁷ According to AEP-Ohio, the PPA Rider does not affect customer shopping or impose any limitation on a customer returning to the SSO. Since the rider does not change the relationship of a customer to AEP-Ohio regarding the ability to shop or limit the customer’s ability to return to SSO service, no reasoned reading of the record supports a finding that the rider operates as a limitation on customer shopping.

Moreover, the Commission cannot lawfully rely on the testimony of the Ohio Energy Group (“OEG”) to solve the evidentiary problem created by AEP-Ohio’s change of position. AEP-Ohio has the burden of proof to establish the lawfulness and reasonableness of the ESP and its terms.⁴⁸ Because it has the burden of proof, it also initially must advance some evidence to support its claims because it has the “burden of proceeding.” “[T]he burden of proceeding is ... the duty of proceeding with evidence at the beginning or at any subsequent stage of the trial in order to make or meet a prima

⁴⁶ *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 406 (1991) (Brown, J., dissenting)).

⁴⁷ Rule 4901:1-35-03(C)(9)(c)(i), OAC.

⁴⁸ R.C. 4928.143(C)(1).

facie case.”⁴⁹ Failure to meet that burden requires a finding adverse to the party that fails to meet the burden of proceeding.⁵⁰

Based on the record in this case, AEP-Ohio failed to meet the burden of proceeding with evidence to support its post-hearing claim that the PPA Rider is a limitation on customer shopping. As noted above, its Application and supporting testimony stated that the PPA Rider would not limit customer shopping. As also noted above, its witness stated without qualification that the PPA Rider was not a restriction on shopping. In short, AEP-Ohio failed to provide any evidence to satisfy its burden of proceeding on the claim that the rider may be approved because it is a restriction on shopping. Having failed to meet its burden of proceeding, AEP-Ohio has also failed to meet its burden of proof.⁵¹

By relying on the OEG testimony as a basis for approving the PPA Rider, the Commission also has created an unfair disadvantage for those opposing AEP-Ohio’s request for authority to implement the PPA Rider. The opposing parties may not rely upon the Application and supporting testimony to identify the issues they must address at hearing. Instead, they must defend against any party’s contrivance that might be supportive of AEP-Ohio’s proposal.

In summary, the Commission’s finding that the PPA Rider is a limitation on customer shopping is unlawful and unreasonable. The finding is unsupported by the

⁴⁹ *Broadway Christian Church v. William*, 59 Ohio App. 2d at 245.

⁵⁰ *Reeves v. Healy*, 192 Ohio App. 3d 769, 783 (10th Dist. Ct. App. 2011) (failure to establish the standard of care is fatal to a prima facie case of medical malpractice); *Hart v. Somerford Twp. Bd. of Trustees*, 2008 WL 1704244 (12th Dist. Ct. App. Apr. 14, 2008) (trial court decision that cause of action challenging constitutionality of zoning ordinance failed because appellant failed to meet his burden of proof affirmed).

⁵¹ *Broadway Christian Church v. William*, 59 Ohio App. 2d at 245.

manifest weight of the evidence. Additionally, it rests on the Commission's failure to place the burden of proof on AEP-Ohio, as required by R.C. 4928.143(C)(1), and reliance on speculation about what AEP-Ohio might have understood. Because the record provided by AEP-Ohio does not support the Commission's findings that the PPA Rider is a limitation on customer shopping, the Commission should grant rehearing and reverse its authorization of the rider.

- 4. The ESP III Order is unlawful and unreasonable because the Commission's finding that the PPA Rider "in theory, has the effect of stabilizing or providing certainty regarding retail electric service" is not supported by the manifest weight of the evidence and is directly contradicted by the Commission's finding that AEP-Ohio failed to demonstrate that the PPA Rider would promote rate stability**

In its discussion of the PPA Rider, the Commission noted that AEP-Ohio proposed a rider that "is intended to mitigate, by design, the effects of market volatility, providing customers with more stable pricing and a measure of protection against substantial increases in market prices."⁵² Based on AEP-Ohio's "theory," the Commission concluded "there is no question that the PPA rider would produce a credit or charge based on the difference between the wholesale market prices and OVEC's costs, offsetting, to some extent, the volatility in the wholesale market."⁵³ The Commission then finds that "AEP Ohio has demonstrated that the proposed PPA rider would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service."⁵⁴

⁵² ESP III Order at 21.

⁵³ *Id.*

⁵⁴ *Id.*

The record, however, did not support the theory. Even though the Commission found that the PPA Rider may reduce wholesale market volatility in theory, it nonetheless refused to authorize AEP-Ohio to collect its above-market wholesale generation-related costs of OVEC from retail customers because the Commission agreed “with OCC, IEU-Ohio, and other intervenors that the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider’s intended purpose as a hedge against market volatility.”⁵⁵ As a result of the lack of record support for AEP-Ohio’s theory that the PPA Rider would mitigate wholesale price stability, the Commission was “not persuaded that the PPA rider proposal put forth by AEP Ohio in the present proceedings would, in fact, promote rate stability.”⁵⁶

Despite this explicit finding that the proposed rider does not satisfy the requirement of R.C. 4928.143(B)(2)(d) that it have the effect of stabilizing retail electric service, the Commission authorized AEP-Ohio to establish a placeholder PPA Rider with an initial rate of zero and permitted AEP-Ohio to file a new application to seek to collect above-market wholesale generation-related costs of OVEC and potentially other affiliated generation. This authorization is inconsistent with the Commission’s determination that the PPA Rider as proposed does not provide retail rate stability. Accordingly, the Commission had no basis to approve the establishment of a placeholder rider.

Moreover, the decision to approve a placeholder PPA Rider is inconsistent with the Commission’s holding concerning the NERC Compliance and Cybersecurity Rider (“NCCR”), a new nonbypassable rider AEP-Ohio proposed that would authorize

⁵⁵ *Id.* at 24.

⁵⁶ *Id.*

expedited recovery of significant increases in capital and operation and maintenance costs for NERC compliance and cybersecurity.⁵⁷ Based on the record, the Commission concluded that AEP-Ohio had failed to carry its burden of proof, in part because “the types of investments for which AEP Ohio would seek recovery and the magnitude of such investments is not presently known.”⁵⁸ Because AEP-Ohio had failed to carry its burden of proof and demonstrate that the rider would allow recovery of reasonable costs, the Commission denied authorization of the rider.⁵⁹

The precedent established in the ESP III Order regarding the treatment of the NCCR requires that the Commission deny authorization of the PPA Rider, also. AEP-Ohio was required to demonstrate that authorization of the PPA Rider was lawful and reasonable. The Commission, however, found AEP-Ohio had failed to persuade the Commission that the PPA Rider would promote rate stability; additionally, the Commission found that it could not determine the rate impact of the rider.⁶⁰ Having determined that AEP-Ohio had failed to demonstrate that the PPA Rider would have the effect of stabilizing rates and was reasonable in amount, simple consistency with the refusal to authorize to NCCR required the Commission to hold that authorization of the PPA Rider is not lawful or reasonable. Yet the Commission authorized AEP-Ohio to establish the PPA Rider as a placeholder. The authorization cannot be lawfully sustained.

⁵⁷ AEP-Ohio Ex. 1 at 11-12.

⁵⁸ ESP III Order at 62.

⁵⁹ *Id.*

⁶⁰ *Id.* at 24.

In addition to the legal problems with the authorization, another fundamental problem with the Commission's decision approving the PPA Rider is factual: the rider has nothing to do with rate stability. The only stability provided by the PPA Rider is the assurance it provides AEP-Ohio and its generation affiliate that the financial risk they would otherwise face is transferred to retail customers.⁶¹ For retail customers, however, the PPA Rider will alter fixed-price contracts and inject price instability into the SSO. It is the antithesis of what AEP-Ohio asserts.

Moreover, AEP-Ohio's evidence supporting a "theory" that the PPA Rider might reduce retail price volatility was wholly lacking. Other than some general descriptions of the rider that repeat the way the rider is supposed to work, the only evidence the Commission cites as support for AEP-Ohio's theory that the PPA Rider will stabilize retail rates is the "sensitivity analysis" offered by an AEP-Ohio witness.⁶² AEP-Ohio offered this testimony only to demonstrate that a change in wholesale prices would move the rider up or down a certain fixed percentage, all other things being equal.⁶³ The testimony did not address the relative volatility of retail prices as wholesale prices move. In fact, there is no record identifying any connection between the volatility of wholesale prices and the retail prices that either shopping or nonshopping customers pay.

Moreover, AEP-Ohio's sensitivity analysis was grossly flawed. It assumed that wholesale costs of OVEC are static.⁶⁴ OVEC's costs, however, are sensitive to many

⁶¹ IEU-Ohio Ex. 1B at 25-26.

⁶² ESP III Order at 21 (citing rebuttal testimony of William Allen).

⁶³ Tr. Vol. XI at 3213-14.

⁶⁴ Tr. Vol. XI at 3214.

factors including the wholesale market price of power.⁶⁵ As the record demonstrated, as the volume of sales decreases, the cost per megawatt-hour of electricity generated and sold by OVEC goes up because OVEC's sales are reduced and its fixed costs embedded in its contract price are spread over fewer kilowatt-hours of electricity sold.⁶⁶ The evidence of the actual costs of OVEC and their sensitivity to wholesale sales volumes rendered untenable any assumption that OVEC's costs would remain constant when wholesale market prices moved. Because the sensitivity analysis is directly contradicted by the evidence that OVEC's costs per megawatt-hour are sensitive to sales volumes, it is unreasonable for the Commission to rely on that evidence to support the conclusion that the PPA Rider will provide rate stability in theory.

As the Court has admonished the Commission before, “[r]uling on an issue without record support is an abuse of discretion and reversible error.”⁶⁷ As the Commission explicitly determined, the PPA Rider would not have the effect of stabilizing retail electric service. Additionally, the claim that the rider may in theory have the effect of stabilizing retail electric service is based on a “sensitivity analysis” that was insensitive to the actual costs of production of OVEC. Because the Commission authorized the PPA Rider when the Commission's own findings do support the conclusion that the rider will have the effect of stabilizing or providing certainty regarding retail electric service, the Commission erred. Accordingly, it should grant rehearing and reverse its authorization to AEP-Ohio to establish the PPA Rider.

⁶⁵ IEU-Ohio Ex. 6 at 2.

⁶⁶ *Id.* (the fixed costs are spread out over less units of electricity, thereby increasing the unit cost of electricity).

⁶⁷ *In re Columbus S. Power Co.*, 128 Ohio St.3d at 519.

5. **The ESP III Order is unlawful because authorization to establish a placeholder rider, the PPA Rider, and to seek future cost recovery in a future filing, violates the requirements of R.C. 4928.143(B), which limits the terms that may be authorized as terms of an ESP, and R.C. 4928.143(C)(1), which provides that the Commission may approve or modify and approve an ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142**

The Commission, as a creature of statute, has no authority to act beyond its statutory powers.⁶⁸ R.C. 4928.143(B)(1) and (2) set out the terms that the Commission may authorize as a provision of an ESP, and none authorizes a placeholder rider. Further, the Commission may approve or modify and approve an application for an ESP only if it determines that the ESP is more favorable in the aggregate than an MRO. By approving a placeholder rider as a term of AEP-Ohio's next ESP, the Commission has permitted AEP-Ohio to avoid a requirement that it demonstrate that the ESP approved in the ESP III Order will satisfy the requirement that the ESP is more favorable in the aggregate than a Market Rate Offer, the ESP v. MRO Test. For these reasons, the Commission's authorization of the PPA Rider as a placeholder rider is unlawful.

The items that may be approved as part of an ESP are limited to those authorized by R.C. 4928.143(B)(1) and (2).⁶⁹ R.C. 4928.143(B)(1) authorizes the Commission to include provisions in the ESP relating to the supply and pricing of retail generation service.⁷⁰ All other provisions, that is, everything other than the retail

⁶⁸ *Discount Cellular, Inc. v. Pub. Util. Comm'n of Ohio*, 112 Ohio St.3d 360, 373 (2007).

⁶⁹ Section 4928.143(A), Revised Code, further provides that the Commission is directed to authorize an ESP "as prescribed under division (B) of this Section."

⁷⁰ Section 4928.143(B)(1), Revised Code.

generation service component, may be authorized under only the nine enumerated provisions of (B)(2).⁷¹

No provision of R.C. 4928.143(B)(1) or (2) provides for the authorization of a placeholder rider. Each provision specifically provides that the Commission may authorize the recovery of various costs, either immediately or through a phase-in. Further, none authorizes the two-step process that would result from the establishment of a placeholder rider and subsequent initiation of a charge through a separate filing unrelated to a deferral and its recovery. Accordingly, R.C. 4928.143(B) does not authorize the Commission to authorize AEP-Ohio to establish a placeholder rider.

Additionally, R.C. 4928.143(C)(1) requires the Commission to find that it is without authority to approve a placeholder rider. Before the Commission may approve or modify and approve an application for an ESP, the Commission must find that the ESP, “so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.”⁷² Thus, the Commission can approve a rider as a term of the ESP only if it addresses all the expected charges that will be imposed by the ESP, including those deferred for future recovery, and finds that the result is better than the expected results of an MRO.

As approved by the Commission, the ESP is quantitatively better than an MRO by \$44 million, but only because the PPA Rider is set initially at a rate of zero. The Commission, however, has provided that AEP-Ohio may seek to recover above-market

⁷¹ *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d at 520.

⁷² R.C. 4928.143(C)(1).

wholesale generation-related costs of OVEC and other generating facilities of AEP-Ohio's unregulated competitive affiliate⁷³ through a "future filing" in which AEP-Ohio must address several "factors."⁷⁴ None of those factors includes a requirement for the Commission to reconsider whether the ESP would continue to pass the ESP v. MRO Test if AEP-Ohio is authorized to begin additional cost recovery. Thus, if AEP-Ohio pursues authorization and secures the collection of the above-market costs of the wholesale generation of OVEC or other generation facilities owned by its unregulated competitive affiliate, AEP-Ohio will evade its burden of proof to demonstrate that the ESP, including those additional generation-related costs, passes the ESP v. MRO Test.

Because authorization of a placeholder rider violates the requirements of R.C. 4928.143(B) and (C)(1), the ESP III Order is unlawful. Accordingly, the Commission should grant rehearing and reverse its order permitting AEP-Ohio to establish the PPA Rider as a placeholder rider.

- 6. The ESP III Order is unlawful because the Commission authorized a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover anticompetitive subsidies flowing from or to noncompetitive retail electric services to or from competitive wholesale electric service in violation of R.C. 4928.02(H)**
- 7. The ESP III Order is unlawful and unreasonable because the Commission authorized a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover generation-related revenue through a distribution-like rate in violation of R.C. 4928.02(H)**
- 8. The ESP III Order is unlawful and unreasonable because the Commission, by authorizing a placeholder rider, the PPA Rider, by which AEP-Ohio may seek to recover generation-related revenue through a distribution-like rider, failed to**

⁷³ ESP III Order at 25.

⁷⁴ *Id.*

respect its own prior decision denying authorization of the recovery of generation-related costs through a distribution-like rider, failed to adequately explain why it was departing from its prior decision, and the new course is not lawful or reasonable

R.C. 4928.02(H) states the state policy to ensure effective competition in the provision of retail electric service. The first clause of the division 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 a product or service other than retail electric service or vice versa. The second clause prohibits the recovery of any generation-related costs through distribution or transmission rates.⁷⁵ Testimony demonstrated that the rider violated the first clause,⁷⁶ and IEU-Ohio argued that the rider would also violate both clauses. In support of the claim that the rider would violate R.C. 4928.02(H), IEU-Ohio relied upon the Commission's prior refusal to allow AEP-Ohio to recover generation-related closure costs through a nonbypassable rider in the *Sporn* case.⁷⁷ In response to arguments that the PPA Rider could not be authorized because it would violate both clauses of R.C. 4928.02(H), the Commission determined that authorization of the PPA Rider does not violate that division because it is a "generation rate."⁷⁸ It also refused to apply its prior holding in *Sporn* to deny the authorization of the PPA Rider.⁷⁹ The Commission's decision to find that the

⁷⁵ See *Elyria Foundry Co. v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 305 (2007).

⁷⁶ IEU-Ohio Ex. 1B at 15.

⁷⁷ IEU-Ohio Initial Brief at 13-15. The prior Commission order denying recovery of generation closure costs is *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order (Jan. 11, 2012) ("*Sporn*").

⁷⁸ ESP III Order at 26.

⁷⁹ *Id.*

authorization of the PPA Rider does not violate R.C. 4928.02(H) is unlawful for several reasons.

As the testimony of IEU-Ohio demonstrated, authorization of the PPA Rider will result in an anticompetitive subsidy to or from a noncompetitive retail electric service from or to a service other than retail electric service. As approved, the PPA Rider would require all retail distribution customers to incur a charge or credit designed to collect the difference of AEP-Ohio's costs and wholesale revenue related to its interest in OVEC ("OVEC Entitlement"). When the difference is a charge, AEP-Ohio would recover the costs of the OVEC Entitlement that exceed the market prices for the Entitlement, a subsidy to AEP-Ohio. When the difference is a credit (as unlikely as that may be), retail customers would receive a subsidy of any wholesale revenue from the OVEC Entitlement that exceeds AEP-Ohio's costs. "In either case, the result runs afoul of Ohio's pro-competitive policies and the law."⁸⁰ The Commission's approval of the PPA Rider, therefore, violates the state policy contained in the first clause of R.C. 4928.02(H), which requires the Commission to avoid anticompetitive subsidies.

The authorization of the PPA Rider also violates the purpose of the second clause of R.C. 4928.02(H). Although the Commission has characterized the rider as a "generation charge," it also authorized the charge to be nonbypassable. It operates in exactly the same manner as a distribution charge. Thus, the authorization of the PPA Rider violates the second clause as well as the first.

The Commission also erred when it did not apply its prior decision in the *Sporn* case to deny authorization of recovery of generation-related costs through a

⁸⁰ IEU-Ohio Ex. 1B at 15.

nonbypassable rider.⁸¹ The Supreme Court has instructed that the Commission should "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law."⁸² If the Commission reverses direction as it has done in the ESP III Order, it must explain why it is not following its prior precedent and demonstrate that the new course is substantively reasonable and lawful.⁸³ The Commission's explanation in this instance fails to adequately explain the deviation from the prior decision or produce a result that is lawful and reasonable.

First, the Commission's explanation that *Sporn* can be distinguished because the PPA Rider is a generation rider is no explanation at all. In the *Sporn* case, the Commission did not limit the holding of its decision to the fact that AEP-Ohio was seeking to recover generation-related costs through what it termed a distribution rider. Rather, the Commission found that the policy expressed in R.C. 4928.02(H) "requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail service."⁸⁴ In this case, the Commission has ignored the policy identified by R.C. 4928.02(H) and the *Sporn* case to open the door for AEP-Ohio to subsidize competitive wholesale generation facilities with noncompetitive, *i.e.*, nonbypassable, charges. The authorization of the rider is a violation of the state policy, whether the rider is described as a generation charge or a distribution charge.

Second, the "new course" on which the Commission strays is not substantively reasonable or lawful. As discussed above, the authorization of the PPA Rider not only

⁸¹ ESP III Order at 26.

⁸² *Cleveland Electric Illuminating Co. v. Pub. Util. Comm'n of Ohio*, 42 Ohio St.2d 403, 431 (1975).

⁸³ *In re Columbus S. Power Co.*, 128 Ohio St.3d at 523.

⁸⁴ *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012).

violates the state policy expressed in R.C. 4928.02(H), but also exceeds the Commission's jurisdiction and is not supported by findings of fact that the rider can be approved under R.C. 4928.143(B)(2)(d). Further, as discussed below, the authorization violates the limitation on the Commission's authority to approve the recovery of transition revenue or its equivalent and is preempted by the FPA. Because the failure to follow *Sporn* does not produce a result that is lawful and reasonable, the Commission erred.

R.C. 4928.02(H) states a state policy under which the Commission is mandated to ensure effective competition in the provision of retail electric service. The authorization of the PPA Rider fails to advance that policy and is an unwarranted break from precedent. Because authorization of the PPA Rider violates both policy and precedent, the Commission should grant rehearing and reverse its authorization of the rider.

9. The ESP III Order is unlawful and unreasonable because the Commission authorized the PPA Rider as a placeholder rider by which AEP-Ohio may seek to recover generation-related transition revenue or its equivalent in violation of R.C. 4928.38 and the bar to recovery of transition revenue or its equivalent resulting from AEP-Ohio's Electric Transition Plan Stipulation

The Commission authorized AEP-Ohio to establish the PPA Rider as a placeholder rider over the objection that the rider would violate R.C. 4928.38 and permit AEP-Ohio to violate the terms of its agreement in 2000 to forgo all generation-related transition revenue.⁸⁵ The Commission concluded that the rider would not permit AEP-Ohio to collect untimely transition revenue because "the PPA rider constitutes a rate

⁸⁵ IEU-Ohio Initial Brief at 15-18.

stability charge ... authorized pursuant to R.C. 4928.143(B)(2)(d).⁸⁶ The Commission did not address whether the authorization of the rider violated the terms of the 2000 settlement. Because the Commission cannot authorize transition revenue or its equivalent under any circumstances except those expressly provided by R.C. 4928.31 to 4927.40, the Commission erred.

The procedures for asserting a one-time claim set out in R.C. 4928.31 to 4928.40 specifically limited AEP-Ohio to seek recovery of transition revenue in its electric transition plan filing in 1999. Any lawful recovery of either generation-related transition revenue or regulatory assets could not continue after they were scheduled to terminate under those plans.⁸⁷ Following the Market Development Period (“MDP”), moreover, the Commission cannot lawfully “authorize the receipt of transition revenues or any equivalent revenues by an electric utility.”⁸⁸ “With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market.”⁸⁹

R.C. 4928.143(B)(2)(d) does not carve out an exception to the statutory bar on the authorization of the billing and collection of transition revenue or its equivalent. When the General Assembly adopted Amended Substitute Senate Bill 221 (“SB 221”), it rejected in R.C. 4928.141 the continuation of any further recovery of transition revenue beyond that previously authorized under R.C. 4928.31 to R.C. 4928.40. Further, the General Assembly did not repeal the prohibition on the authorization and recovery of

⁸⁶ ESP III Order at 26.

⁸⁷ R.C. 4928.141 & R.C. 4928.40(A).

⁸⁸ R.C. 4928.38.

⁸⁹ *Id.*

transition revenue or its equivalent found in R.C. 4928.38. Thus, the Commission remains bound by the prohibition found in R.C. 4928.38.

Although the Commission refused to permit AEP-Ohio to bill and collect transition revenue or its equivalent at this time, the Commission has left open the door by authorizing AEP-Ohio to establish a placeholder rider for above-market generation-related cost recovery.⁹⁰ Under the authorization, AEP-Ohio may apply to recover the above-market wholesale costs of OVEC or other generation facilities.⁹¹ As presented in the current case and the pending application to expand the PPA Rider filed by AEP-Ohio,⁹² the charge to customers would be based on the difference between what AEP-Ohio receives from PJM for wholesale power and capacity and the “costs” established under a purchase power agreement with AEP-Ohio’s affiliate generation company⁹³ or the amounts billed to it by OVEC under the Inter-Company Power Agreement (“ICPA”).⁹⁴ The PJM revenues are determined by the market-based prices established by the PJM tariffs. When the generation-related costs exceed the market-based revenue, the difference is “the costs ... unrecoverable in a competitive market.”⁹⁵ As Dr. McDermott explained in a different context, these above-market costs are “stranded”

⁹⁰ ESP III Order at 25.

⁹¹ Although the Commission expressly withheld decision on how the charge may be implemented, it did not reject AEP-Ohio’s claim that it can seek recovery of the above-market generation-related wholesale costs of its generation facilities. *Id.*

⁹² *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.*, Application (Oct. 3, 2014) (“PPA Expansion Case”).

⁹³ *Id.*, Direct Testimony of Kelly D. Pierce (Oct. 3, 2014).

⁹⁴ AEP-Ohio Ex. 7 at 8.

⁹⁵ R.C. 4928.39(C).

because the investment cannot be recovered through market prices.⁹⁶ The PPA Rider, thus, would permit AEP-Ohio to recover transition revenue or its equivalent.

The time by which the authorization of transition revenue or its equivalent may be authorized and collected, however, has expired. The MDP ended no later than December 31, 2005. The period for recovery of regulatory assets ended no later than December 31, 2010. Because the PPA Rider would allow AEP-Ohio to seek to recover a claim for transition revenue or its equivalent that is barred by statute, the Commission erred when it authorized AEP-Ohio to establish a PPA Rider and should reverse the authorization.

Additionally, authorization of the PPA Rider is barred by AEP-Ohio's 2000 settlement of its electric transition plan ("ETP") case. In that case, AEP-Ohio sought to recover generation-related transition revenue and regulatory assets. The transition revenue issues were addressed by a stipulation ("ETP Stipulation"), in which AEP-Ohio agreed to forgo collecting above-market transition revenue associated with its generation assets.⁹⁷ Thus, AEP-Ohio is barred from seeking recovery of transition revenue or its equivalent by the ETP Stipulation. Accordingly, the Commission should reverse the authorization of the PPA Rider.

Although IEU-Ohio raised the bar of the ETP Stipulation to transition revenue recovery in testimony and its brief,⁹⁸ the Commission does not address its reason for not enforcing the terms of the stipulation as a bar to the PPA Rider.⁹⁹ Because the

⁹⁶ Tr. Vol. XIII at 3148-49.

⁹⁷ IEU-Ohio Ex. 1B at 16.

⁹⁸ IEU-Ohio Initial Brief at 17-18.

⁹⁹ The references to the recovery of transition revenue or its equivalent in the ESP III Order are limited to a discussion of the effect of R.C. 4928.38. ESP III Order at 26.

issue was squarely raised, the Commission “should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.”¹⁰⁰ Accordingly, the Commission also erred when it failed to address and find that the ETP Stipulation barred authorization of the PPA Rider. To correct the error, the Commission should grant rehearing and reverse its authorization of the rider.

10. The ESP III Order is unlawful and unreasonable because, under the Supremacy Clause of the United States Constitution, the Commission is preempted by the Federal Power Act from authorizing a rider such as the PPA Rider that may authorize AEP-Ohio to increase its compensation for wholesale generation-related services in an amount exceeding that authorized by the Federal Energy Regulatory Commission

In the ESP III Order, the Commission declined “to address constitutional issues raised by the parties in these proceedings, as, under the specific facts and circumstances of these cases, such issues are best reserved for judicial determination.”¹⁰¹ The issue of preemption, however, is squarely presented to the Commission in this proceeding, and the Commission should have found that it is preempted from approving a rider that will increase AEP-Ohio’s compensation for wholesale generation-related electric services.

Previously, the Commission has not been reluctant to address whether it is preempted from acting on a request for an order.¹⁰² In one recent case, AEP-Ohio sought and received authority for an above-market wholesale “capacity charge.” In that case, the Commission did not defer and instead determined, incorrectly, that it had the

¹⁰⁰ *In re Columbus S. Power Co.*, 512 Ohio St.3d at 519.

¹⁰¹ ESP III Order at 26.

¹⁰² See, e.g., *In re Ohio Power Co.*, Case No. 85-726-EL-AIR, Opinion and Order (July 10, 1986).

authority to increase AEP-Ohio's compensation for wholesale capacity service.¹⁰³ There is no reason for the Commission to refrain in this instance from addressing the preemptive effect of the FPA on the Commission's authority to authorize the PPA Rider.

If the Commission addresses the preemptive effect of the FPA, it should find that the PPA Rider cannot be authorized lawfully because the Commission is invading the exclusive jurisdiction of FERC to establish prices for wholesale generation-related electric services. Under the Supremacy Clause of the United States Constitution¹⁰⁴, federal law preempts state legislation and regulating authority (1) if Congress, in enacting a federal statute, has expressed a clear intent to preempt state law; (2) if it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has left no room for the states to supplement the federal law; or (3) if compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policies embodied in the laws at issue.¹⁰⁵

Two recent federal district court decisions demonstrate that attempts by states to increase the compensation of a generation owner for wholesale capacity and energy services are preempted because they invade a field of regulation within the exclusive

¹⁰³ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 13 (July 2, 2012). The Opinion and Order is currently on appeal. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Sup. Ct. Case No. 2013-0228, Notice of Appeal of Appellant Industrial Energy Users-Ohio (Feb. 6, 2013). The appeal presents to the Court the Commission's erroneous determination that it is not preempted by the Federal Power Act from increasing AEP-Ohio's compensation in violation of the terms of the Reliability Assurance Agreement, a federally approved tariff. *Id.* at 2.

¹⁰⁴ U.S. Const., Art. VI.

¹⁰⁵ *Marketing Research Services, Inc. v. Pub. Util. Comm'n of Ohio*, 34 Ohio St.3d 52, 55 (1987).

authority of FERC. In the first decision, *PPL Energyplus, LLC v. Nazarian*,¹⁰⁶ a federal district court in Maryland reviewed an order of the Maryland Public Service Commission ("Maryland Commission") that increased compensation for the provision of wholesale electric services of an entity that was seeking to construct a generation plant ("Generation Owner"). In the challenged order, the Maryland Commission directed the incumbent local electric utilities to enter into contracts with the Generation Owner. The contracts would have required the local electric utilities to pay the Generation Owner the difference between what the Generation Owner received for market-based sales of capacity and energy to PJM and a contract price established by the Maryland Commission based on the cost of construction and operation of the plant for twenty years. Any loss or gain that the local electric utilities incurred under the contracts ordered by the Maryland Commission was to be passed on to Maryland ratepayers by the local electric utilities.¹⁰⁷ The federal court concluded that the Maryland Commission's order fixed the monetary value of wholesale generation-related capacity and energy services provided by the Generation Owner.¹⁰⁸ As a result, the court held that the Maryland Commission's order was preempted because the Commission was without authority to establish the price for wholesale energy and capacity sales.¹⁰⁹ Based on the Court's determination that FERC has exclusive authority in that field and has fixed the price for wholesale energy and capacity sales in the PJM markets as the market-based price produced by the auction processes approved by FERC and utilized

¹⁰⁶ Case No. 1:12-cv-01286-MJG at 84-86, 2013 WL 5432346 *30 (D.MD Sept. 30, 2013) ("*PPL I*"), *aff'd*, *PPL Energy Plus, LLC et al. v. Nazarian*, Case No. 13-2419, Slip Op. (4th Cir. June 2, 2014).

¹⁰⁷ *Id.* at *33-*34.

¹⁰⁸ *Id.* at *34.

¹⁰⁹ *Id.* at *35.

by PJM, the Court declared the action of the Maryland Commission to be preempted.¹¹⁰ In the opinion affirming the decision of the district court, the Fourth Circuit Court of Appeals agreed that the Maryland Commission was preempted because the field of wholesale energy prices was exclusively within the jurisdiction of FERC.¹¹¹

In *PPL Energy Plus, LLC, et al., v. Robert M. Hanna, et al.*,¹¹² a federal district court in New Jersey reached the same result, concluding that state legislation that attempted to encourage the construction of new generation plants by guaranteeing a price of capacity to the builder was preempted. In the New Jersey case, the state legislature passed legislation “to provide a transaction structure that would result in new power plants being constructed in the PJM territories that benefit New Jersey.”¹¹³ The law authorized the New Jersey Board of Public Utilities (“Board”) to issue an SSO capacity agreement and directed the State’s four EDUs to enter into contracts with generators to pay any difference between the Reliability Pricing Model-Based Price (“RPM-Based Price”) and the development costs of the generators that the Board approved.¹¹⁴ Like the Maryland federal court, the New Jersey federal court found that the New Jersey legislation was preempted because the FPA occupied the field of wholesale electricity sales, including the price at which electricity is sold at wholesale.¹¹⁵ Based on its finding that the state law was preempted, the federal court declared the

¹¹⁰ *Id.* at *42.

¹¹¹ *PPL Energy Plus, LLC et al. v. Nazarian*, Case No. 13-2419, Slip Op. (4th Cir. June 2, 2014). It also found that the Maryland Commission’s order was preempted because it conflicted with the accomplishment of federal policies. *Id.*, Slip Op. at 25.

¹¹² Civ. Action No. 11-745, 2013 WL 5603896 at *19 (D.N.J. Oct. 11, 2013) (“*PPL II*”),

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *35.

statute under which the Board had authorized above-market payments to the generator “null and void.”¹¹⁶

The order approving the PPA Rider, likewise, is preempted by federal law because it permits AEP-Ohio to seek to increase its compensation for above-market wholesale generation-related costs. Under the terms of the ESP III Order, AEP-Ohio may seek to recover the above-market wholesale generation-related costs that it does not recover through its sales into PJM’s markets under the placeholder rider through another filing. If the Commission approves the filing to increase the rider to authorize AEP-Ohio to increase its compensation, AEP-Ohio would be guaranteed a recovery of its above-market wholesale generation-related costs.¹¹⁷ (Also, like the Maryland Commission, the Commission would be authorizing AEP-Ohio to shift the revenue responsibility of the shortfall to customers from AEP-Ohio’s sole shareholder.) Through the same sort of mechanisms the Maryland and New Jersey courts held were preempted by the FPA, the PPA Rider would increase the compensation for wholesale generation-related capacity and energy services AEP-Ohio receives. Because wholesale electricity compensation is within the exclusive jurisdiction of FERC, however, the Commission is preempted from authorizing the PPA Rider.

The Commission has also included at least one “factor” to address in a future filing that triggers federal preemption. The future filing AEP-Ohio is directed to make must address the “necessity of the generating facility, in light of future reliability

¹¹⁶ *Id.* at *38.

¹¹⁷ In a separate application, the PPA Expansion Case, AEP-Ohio has sought to recover wholesale generation-related costs associated with facilities of its unregulated generation affiliate that exceed the revenues it receives from PJM for the capacity and energy provided by those facilities. The application presents a similar violation to that presented by AEP-Ohio’s attempt to recover the above-market wholesale generation-related costs of its interest in OVEC.

concerns, including supply diversity.”¹¹⁸ The regulation of interstate transmission and bulk power system reliability, however, is within the exclusive jurisdiction of FERC.¹¹⁹ In particular, FERC has jurisdiction under Section 215 of the FPA for approving reliability standards of the bulk power system.¹²⁰ Under FERC rules, moreover, the RTO is given exclusive authority for maintaining the short-term reliability of the grid it operates.¹²¹

In a recent FERC decision, FERC clearly set out its controlling authority regarding the reliability of the bulk power market. After FERC received two applications seeking approval of above-market compensation for the sale of wholesale generation-related services in the region under the supervision of the New York Independent Service Operator (“NYISO”) after the New York Public Service Commission had determined that facilities scheduled for mothballing were needed for reliability, FERC determined that the tariffs of NYISO were not just and reasonable and ordered NYISO to file a tariff and pro forma agreement for a reliability must-run agreement.¹²² The Commission determined that the tariff changes were necessary to prevent undue discrimination so to “ensur[e] the continued reliable and efficient operation of the grid, and of NYISO’s markets.”¹²³ Having determined that the NYISO should file the must-run tariff, FERC then required that the tariff address the process for identifying a plant that should be considered for must-run status, the independent studies to be performed to determine if the plant should be treated as a must-run unit, and the evaluation of

¹¹⁸ ESP III Order at 25.

¹¹⁹ FPA § 201(a), 16 U.S.C. § 824(a).

¹²⁰ FPA § 215, 16 U.S.C. § 824o; 18 C.F.R § 39.2.

¹²¹ 18 C.F.R § 35.34.

¹²² *New York Independent System Operator, Inc.*, 150 FERC ¶61116 (Feb. 19, 2015).

¹²³ *Id.*, para. 3.

alternatives.¹²⁴ Further, the tariff must set out the compensation mechanism, including how payments may be recovered if the plant becomes economic after it is declared a must-run facility.¹²⁵ As this FERC order demonstrates, FERC has and has exercised its exclusive authority over the reliability of the bulk electric market, authority that preempts the Commission's unlawful attempt to provide a procedure to address a request for additional wholesale generation-related compensation for AEP-Ohio based on consideration of grid reliability.

Although all parties to this proceeding share the Commission's concern for system reliability, the authority to address wholesale generation-related pricing and the reliability of the transmission grid rests exclusively with FERC. Because FERC has exclusive jurisdiction, this Commission is preempted from authorizing additional compensation now or in the future and cannot legally address bulk market reliability in a future filing.¹²⁶ Accordingly, the authorization of the PPA Rider was in error, and the Commission should grant rehearing and reverse that authorization.

11. The ESP III Order is unlawful and unreasonable because the Commission engaged in rulemaking without complying with the requirements of Chapter 119 of the Revised Code as a means of authorizing an application process that would permit AEP-Ohio to seek to recover above-market wholesale generation-related costs

Although the Commission denied AEP-Ohio's request to bill and collect the above-market wholesale generation-related costs of OVEC in the ESP III Order, it also issued a "rule" by which AEP-Ohio may assert a claim to recover above-market costs of

¹²⁴ *Id.*, paras. 12-15.

¹²⁵ *Id.*, paras. 17-21.

¹²⁶ As noted above, Ohio law does not authorize the PPA Rider. The Commission can avoid the preemptive effect of federal law by correctly determining that it is without authority to authorize the rider under R.C. 4928.143(B)(1) or (2).

generation. If AEP-Ohio makes a future filing seeking cost recovery, it must provide the Commission at a minimum information addressing four factors, a proposal for Commission oversight, an alternative plan to allocate the rider's financial risk between AEP-Ohio and its ratepayers, and a provision that will allow the ESP to continue if a court invalidates the recovery mechanism.¹²⁷ The Commission has subsequently directed another EDU to comply with filing requirements established in the ESP III Order.¹²⁸ By amending the Commission's rules governing an ESP in the ESP III Order, the Commission has violated the rulemaking requirements contained in Chapter 119 of the Revised Code.

Although "[t]he decision whether to proceed by rule or adjudication generally is for an administrative agency in the first instance,"¹²⁹ that discretion does not apply when the Commission is subject to a statutory requirement to issue rules to carry out particular actions.¹³⁰ With regard to the approval of an ESP, the Commission is under a mandatory requirement to issue rules. "To the extent necessary, the commission shall adopt rules to carry out [Chapter 4928]."¹³¹

As mandated by R.C. 4928.06(A), the Commission has adopted a rule governing the filing and review of an application seeking to implement an SSO in the form of an

¹²⁷ ESP III Order at 25-26.

¹²⁸ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry at 2 (Mar. 23, 2015).

¹²⁹ *Duff Truck Line v. Pub. Util. Comm'n of Ohio*, 46 Ohio St.2d 186, 193 (1976).

¹³⁰ *Wayne County Comm'rs v. McAvoy*, 1980 WL 353586 at *3 (10th Dist. Ct. App. July 29, 1980) (Ohio EPA could not issue permit prior to adoption of rules required by statute; *Duff* distinguished because the Commission did not have a mandatory requirement to make rules and regulations governing motor transportation companies under R.C. 4921.04 and 4921.07).

¹³¹ R.C. 4928.06(A).

ESP.¹³² In particular, the rule addresses the information that an EDU must include in its application seeking a rider under R.C. 4928.143(B)(2)(d) as follows:

Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, shall include, at a minimum, the following information:

(i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification shall be provided.

(ii) A description and quantification or estimation of any charges, other than those associated with generation expansion or environmental investment under divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, which will be deferred for future recovery, together with the carrying costs, amortization periods, and avoidability of such charges.

(iii) A listing, description, and quantitative justification of any unavoidable charges for standby, back-up, or supplemental power.¹³³

The rule does not contain a provision for a post-approval filing to set a charge to recover above-market costs.

In the ESP III Order, the Commission substantially expanded the opportunity for AEP-Ohio to seek to recover above-market generation-related costs in an ESP. First, it created the opportunity to make such a filing. Second, it laid down filing requirements the EDU must comply with if it seeks to recover the above-market costs through a rider approved under R.C. 4928.143(B)(2)(d). As stated in the ESP III Order, the filing must address the following matters:

¹³² Rule 4901:1-35-03, OAC.

¹³³ Rule 4901:1-35-03(C)(9)(c), OAC.

financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. The Commission also reserves the right to require a study by an independent third party, selected by the Commission, of reliability and pricing issues as they relate to the application. AEP Ohio must also, in its PPA rider proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers. Finally, AEP Ohio must include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or part at any point, by a court of competent jurisdiction.¹³⁴

As demonstrated by the Commission's ESP III Order and a recent entry in a pending application for an ESP filed by the FirstEnergy EDUs, the Commission has adopted a rule within the meaning of R.C. 119.01. In the ESP III Order, the Commission set out a procedure and filing requirements.¹³⁵ As demonstrated by an Entry issued March 23, 2015 in a pending FirstEnergy ESP application, those "rules" affect proceedings other than those related to AEP-Ohio's request for above-market wholesale generation-related costs recovery. In the Entry, the attorney examiner authorized additional discovery, the filing of additional testimony, and continued the hearing date so that parties could "address whether and how the Commission's findings in the [ESP III Order] should be considered in evaluating FirstEnergy's application."¹³⁶

¹³⁴ ESP III Order at 25-26.

¹³⁵ *Id.*

¹³⁶ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry at 2 (Mar. 23, 2015).

Thus, the “future filing” requirements and review process described by the Commission and quoted above is a “standard, having a general and uniform operation, adopted, promulgated, and enforced” by the Commission. The new requirements are a statement of the “agency position which has legal consequences”¹³⁷ for EDUs and intervenors in proceedings in addition to this proceeding to establish an ESP for AEP-Ohio.

The Commission’s order stating the factors and review process, moreover, is more than an explanation of the existing rules. “It does more than simply aid in the interpretation of existing rules or statutes. Instead, it prescribes a legal standard that did not previously exist.”¹³⁸ With regard to a filing to authorize collection of above-market costs of generation, the ESP III Order “significantly broadened” the current rules.¹³⁹

Because the Commission was engaged in a rulemaking amending its current rules to include requirements authorizing and defining filing requirements applicable to an EDU seeking to collect above-market generation-related costs, the Commission was required to comply with the requirements of R.C. 119.03. “In the adoption, amendment, or rescission of any rule, an agency shall comply with the ... procedure” set out in that section requiring notice, hearing, publication, and filing and review by the appropriate state agencies and legislative committees. The Commission, however, did not comply

¹³⁷ *Appalachian Power Co. v. U.S. Environmental Protection Agency*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

¹³⁸ *Fairfield County Bd. of Comm’rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶29 (Ohio Sup. Ct. Mar. 24, 2015).

¹³⁹ *Appalachian Power Co. v. U.S. Environmental Protection Agency*, 208 F.3d at 1028.

with any of those mandatory procedures to amend the Commission's rules governing applications for an ESP.

Having failed to comply with the procedural requirements of R.C. 119.03, the rule is not valid. "Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.03, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule."¹⁴⁰

The reason for requiring compliance with the rulemaking procedures of R.C. 119.03 is to assure openness and fairness.¹⁴¹ "The rulemaking requirements of R.C. Chapter 119 are mandatory protections against the arbitrary imposition of regulatory requirements. They are fundamental to the administrative process and apply broadly to any action by an agency that functions as a rule."¹⁴² "Requiring [an agency] to undertake rulemaking procedures before applying the new standard ... ensures that all stakeholders ... have an opportunity to express their views on the wisdom of the proposal and to contest its legality if they so desire."¹⁴³

The need for a full and fair rulemaking process is particularly apparent in this case. As discussed above, authorization of the recovery of such costs exceeds the Commission's jurisdiction under both state and federal law. As discussed below, the "rule" the Commission issued is vague and incomplete. Thus, the Commission's failure

¹⁴⁰ R.C. 119.02.

¹⁴¹ *Fairfield County Bd. of Comm'rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶30; *Condee v. Lindley*, 12 Ohio St.3d 90, 93 (1984).

¹⁴² *Fairfield County Bd. of Comm'rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶36.

¹⁴³ *Id.* at ¶30.

to properly expose its proposed “rule” to a valid rulemaking process has produced an illegal and unreasonable result.

The Commission, moreover, cannot justify its action in this case as a standard application of the adjudication process. In the situations in which the Commission may adopt a “rule” by adjudication, “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”¹⁴⁴ As demonstrated above, the Commission is without authority to authorize AEP-Ohio to bill and collect above-market wholesale generation-related revenue. Thus, the Commission’s adoption of a “rule” by adjudication to address requests for cost recovery is unlawful because the Commission is without jurisdiction to establish AEP-Ohio’s compensation for a wholesale generation-related electric service.

Additionally, an ESP hearing is not a legal substitute for the procedures required by R.C. 119.03. As the Court recently concluded, an agency hearing is not legally sufficient when the standard adopted by the agency affects the rights of persons that are not parties to the proceeding:

[T]hose who will be affected have not been provided with the full panoply of rights afforded by R.C. Chapter 119. Without the benefit of the procedure prescribed by that chapter, affected persons are denied access to the process that the General Assembly intended them to have, i.e., the early, informed, and meaningful opportunity to challenge the legality of the standards ... and the underlying assumptions, data, logic, and policy choices that [the agency] made in developing those standards.¹⁴⁵

Similarly, the hearing on AEP-Ohio’s Application is not legally sufficient as a basis for the Commission to adopt “factors” to be addressed in a “future filing” that the

¹⁴⁴ *SEC v. Chenery*, 318 U.S. 80, 95 (1943).

¹⁴⁵ *Fairfield County Bd. of Comm’rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶47.

Commission has determined is generally applicable to other proceedings. “Affected persons” not involved in the AEP-Ohio case have been denied access to the rulemaking process that Ohio law requires.

By authorizing a future filing and establishing factors to be addressed in that filing, the Commission has engaged in rulemaking outside the mandatory requirements of Chapter 119. Because the Commission has engaged in unlawful and unreasonable rulemaking, it should grant rehearing and reverse its finding authorizing AEP-Ohio to make an additional filing as described by the Commission.

12. The ESP III Order is unlawful and unreasonable because the Commission identified “factors” and a review process to address a future filing by AEP-Ohio if it seeks to increase its compensation for generation-related services that are void for vagueness under the due process clauses of the United States Constitution and the Ohio Constitution

As discussed above, the Commission has adopted several factors that AEP-Ohio must include in a future filing to recover above-market generation-related costs through the PPA Rider.¹⁴⁶ The Commission also stated that the list of “factors” is the minimum that AEP-Ohio must address and that the Commission will not be bound by these factors in deciding whether to approve a request to recover above-market generation-related costs.¹⁴⁷ Based on the lack of definition of either the factors the Commission may consider or the weight those factors will be given, the Commission’s attempt to define the basis for approving a future filing is void for vagueness.

¹⁴⁶ ESP III Order at 25.

¹⁴⁷ *Id.*

In administrative proceedings, an agency may issue rules that trigger a due process violation¹⁴⁸ because they are vague.¹⁴⁹ A rule violates due process if it is so vague and indefinite that it sets forth no standard or rule or if it is substantially incomprehensible.¹⁵⁰ The void-for-vagueness doctrine addresses the right to notice of the standards that will be fairly applied.¹⁵¹

The “rule” the Commission has announced in the ESP III Order provides the Commission with unlimited discretion on what and how it addresses a request in a future filing to recover above-market generation-related costs. Although the Commission identifies four factors that must be included in a future filing, these factors are the “minimum.” Other factors may be relevant or even determinative, but the Commission provides no notice of what those may be. This lack of definition carries over to the Commission’s decision making. Even if the parties address the factors identified by the Commission, the Commission refuses to be “bound by” the evidence regarding those factors. Further, while it states that it will “balance” the factors, the Commission offers no indication of how it will strike the balance.¹⁵² At its core, the “rule” the Commission announced in the ESP III Order regarding a hearing and decision on a “future filing” allows the Commission to engage in an arbitrary process.

¹⁴⁸ U.S. Const., Amend. V & Amend. XIV, § 1; Ohio Const., Art. 1, § 16.

¹⁴⁹ *State Racing Comm’n v. Robertson*, 111 Ohio App. 435 (10th Dist. Ct. App. 1960).

¹⁵⁰ *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 131 (2008).

¹⁵¹ *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 396 (2012) (internal citations and quotation marks omitted).

¹⁵² As discussed above, the lack of objective criteria for decision making presents a separate problem for the Commission because the Commission cannot engage in subjective decision making. *Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 61 Ohio St.3d at 406.

Further, the “rule” must bear a “direct” relationship to matters within the authority of the agency to regulate.¹⁵³ In this instance, the Commission seeks to address matters wholly outside its jurisdiction including environmental compliance, in regard to both known and unknown future standards, and grid reliability and wholesale price issues that are solely within the jurisdiction of FERC.¹⁵⁴ Thus, there is no direct relationship between the factors and the Commission’s jurisdiction that prevents a finding that the loosely-drawn rule is not void for vagueness. Accordingly, the Commission should grant rehearing and reverse its ESP III Order authorizing a future filing based on a “rule” that is void for vagueness.

III. AUTHORIZATION OF THE BASIC TRANSMISSION COST RIDER WAS UNLAWFUL AND UNREASONABLE

In the Application, AEP-Ohio proposed to modify the current method by which transmission-related costs are collected in its certified distribution service area. It sought to classify some transmission services as non-market-based, to provide those services to both nonshopping and shopping customers, and to collect the costs of providing those services through the nonbypassable BTCR.¹⁵⁵ Market-based transmission services would be part of the SSO auction product supplied by the SSO

¹⁵³ *State Racing Comm’n v. Robert*, 111 Ohio App. at 439.

¹⁵⁴ ESP III Order at 25.

¹⁵⁵ AEP-Ohio Ex. 1 at 12-13; IEU-Ohio Ex. 1B at 28. “Non-market based transmission charges” are identified by AEP-Ohio as the following items: ID# 1100 Network Integration Transmission Service; ID# 1108 Transmission Enhancement; ID# 1320 Transmission Owner Scheduling, System Control and Dispatch Service; ID# 1330 Reactive Supply and Voltage Control from Generation and Other Source Service; ID# 1450 Load Reconciliation for Transmission Owner Scheduling, System Control and Dispatch Service; ID# 2130 Firm Point-to-Point Transmission Service; and ID# 2140 Non-Firm Point to-Point Transmission Service. AEP-Ohio Ex. 15 at Att. F (highlighted items); see, *also*, IEU-Ohio Ex. 10.

auction winners to nonshopping customers.¹⁵⁶ CRES providers would supply market-based transmission services for shopping customers.¹⁵⁷

Over the objections of IEU-Ohio, the Commission authorized AEP-Ohio's request to implement the BTCR with a modification that allowed it to include PJM's Generation Deactivation charges.¹⁵⁸ The Commission determined that the BTCR was comparable to the transmission charges approved for other EDUs and that authorization of the rider did not pose significant risk of double-billing customers that are currently under contract with a CRES provider.¹⁵⁹ Although the Commission concluded that double-billing did not present a "significant risk," it nonetheless directed that AEP-Ohio and CRES providers work together to ensure that customers do not pay twice for the same transmission-related expenses.¹⁶⁰

- 1. The ESP III Order is unlawful because the Commission is preempted from authorizing a transmission-related rider that precludes customers eligible to secure transmission service from PJM (pursuant to the FERC-approved tariff) from doing so and makes them captive to an electric distribution utility for transmission services at prices and terms and conditions that are different from those contained in the PJM tariff**

Under Section 201 of the FPA, FERC has jurisdiction over transmission-related services.¹⁶¹ In Order 888, FERC ordered functional unbundling of wholesale generation and transmission services. It also imposed a similar open access requirement on unbundled retail transmission service in interstate commerce. If a state has unbundled

¹⁵⁶ IEU-Ohio Ex. 1B at 28.

¹⁵⁷ *Id.*

¹⁵⁸ ESP III Order at 67.

¹⁵⁹ *Id.* at 66-68.

¹⁶⁰ *Id.* at 68.

¹⁶¹ FPA § 201(B)(1), 16 U.S.C. § 824(b)((1).

its retail electric service, then FERC may require the utility to transmit a competitor's electricity over its lines on the same terms that the utility applies to its own energy transmission.¹⁶² Because FERC has exclusive authority over transmission services in interstate commerce, state action in the same field is preempted.¹⁶³

FERC has exclusive jurisdiction to establish the price of retail transmission through the PJM tariffs for customers of Ohio EDUs because Ohio law requires EDUs to unbundle their electric services and to transfer the control of transmission facilities to a qualifying transmission entity. To implement unbundling, Senate Bill 3 ("SB 3") required an EDU to file unbundled rate components in its transition plan.¹⁶⁴ To assure that the EDU recovered the costs it incurred for securing transmission services to serve its retail load, the Commission has authority to provide recovery of FERC-approved transmission-related costs imposed on or charged to the utility by FERC or a regional transmission organization.¹⁶⁵

The transmission service provider in the AEP-Ohio service territory is PJM. Under the PJM Open Access Transmission Tariff ("OATT"), a Transmission Customer is any Eligible Customer that meets certain contracting requirements¹⁶⁶ and includes "[a]ny retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider or a Transmission Owner offer transmission service, or pursuant to a voluntary offer of such service by a Transmission Owner that is

¹⁶² *New York v. FERC*, 535 U.S. 1 (2002).

¹⁶³ *Id.*

¹⁶⁴ R.C. 4928.12 & 4928.35.

¹⁶⁵ R.C. 4928.05(A)(2).

¹⁶⁶ PJM Open Access Transmission Tariff, Section 1.45, viewed at <http://pjm.com/documents/agreements.aspx>.

an Eligible Customer under the Tariff.”¹⁶⁷ By definition, therefore, the PJM OATT provides that retail customers may secure transmission service under the federally approved tariff rates.¹⁶⁸

In the ESP III Order, the Commission approved a nonbypassable rider to collect some of the PJM charges related to service provided to both SSO and CRES customers that are imposed by PJM on a nonbypassable basis. This rider thus would interfere with the customer’s ability to contract directly with PJM.

Further, as IEU-Ohio demonstrated in its testimony, the BTCR would not flow through the amounts assignable to customers in the same manner as that provided by the PJM transmission tariff. For example, the PJM tariff allocates Network Integration Transmission Service (“NITS”) costs (which are the majority of the costs to be collected through the BTCR) through each customer’s peak load contribution to the single highest peak load in each transmission pricing zone.¹⁶⁹ As approved, the BTCR would allocate NITS costs among customer classes based upon the classes’ coincident peak demand, and the BTCR charges would be billed to customers with demand-based charges based on monthly billing demand, which is typically based on either the customer’s monthly peak demand or a demand ratchet.¹⁷⁰ “A customer’s monthly peak demand or demand ratchet will have little, if any, relationship to the single zonal coincident peak within the

¹⁶⁷ *Id.*, Section 1.11.

¹⁶⁸ AEP-Ohio current tariffs recognize that a customer may contract with PJM for transmission service. Ohio Power Company Terms and Conditions of Open Access Distribution Service, Original Sheet No. 103-25D, viewed at <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/Columbus%20Southern%20Power,%20OHIO%20POWER%20COMPANY/PUCO%2020%20Standard%20Service.pdf>.

¹⁶⁹ IEU-Ohio Ex. 1B at 32.

¹⁷⁰ ESP III Order at 68. See IEU-Ohio Ex. 1B at 32.

PJM zone.”¹⁷¹ Thus, the BTCR will conflict with the rate outcomes required by the FERC-approved PJM tariffs.

Because the Commission has invaded a field of regulation within the exclusive jurisdiction of FERC and the ESP III Order’s authorization of a rate design conflicts with the outcomes required by the FERC-approved tariffs, the Commission’s action is preempted and void.

2. The ESP III Order is unreasonable because the Basic Transmission Cost Rider (“BTCR”) reduces the options available to customers seeking to secure transmission services and frustrates price signals that may assist in providing transmission system reliability

Like federal policy reflected in Order 888 supporting service unbundling, R.C. 4928.02(B) provides that it is the policy of the State to “[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs.” It is common practice for customers receiving service from a CRES provider to structure their contracts to treat transmission and ancillary services costs (*i.e.* the costs AEP-Ohio wants to collect through the BTCR) as either a cost reflected in a fixed-price offer or a pass-through cost.¹⁷² Either approach may be viewed as beneficial from a customer standpoint.¹⁷³ Under a fixed-price approach, the CRES provider is assuming the transmission pricing risk, and this risk transfer can be valuable to the customer.¹⁷⁴

¹⁷¹ IEU-Ohio Ex. 1B at 32.

¹⁷² *Id.* at 31.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

Under a pass-through, customers have an incentive to proactively reduce their usage during times of peak demand.¹⁷⁵

The approved BTCR, however, removes customers' ability to "elect" the price, terms, conditions, and quality options for non-market-based transmission service. By design, a nonbypassable charge cannot be negotiated to assign the price risk of transmission service. As a result, customer choice is frustrated.

The BTCR also has an additional cost because it frustrates the price signals provided by the FERC-approved tariff.¹⁷⁶ Of the five non-market-based cost categories listed on Exhibit AEM-3, attached to Ms. Moore's testimony, PJM bills all but Scheduling on a one coincident peak ("1 CP") basis.¹⁷⁷ Scheduling is billed on an energy basis to Load Serving Entities. Under the BTCR, AEP-Ohio will allocate four of the five non-market-based cost categories to the rate schedules in the same manner as PJM bills the costs; however, AEP-Ohio will assign reactive supply costs to the rate classes on an energy basis.¹⁷⁸ After the charges are allocated to the rate schedules, AEP-Ohio will collect these costs through a combination of demand and energy charges.¹⁷⁹ However, AEP-Ohio does not plan to use a demand-metered customer's individual contribution to the 1 CP as the demand billing determinant.¹⁸⁰ Instead, AEP-Ohio will bill demand charges based upon a different demand-billing determinant, a customer's monthly peak

¹⁷⁵ *Id.*

¹⁷⁶ FERC has approved the PJM tariffs on the basis that the tariffs "help[] ensure that customers have incentives to curtail loads during peak periods." *Occidental Chemical Corp. v. PJM Interconnection, LLC and Delmarva Power and Light Co.*, 120 FERC ¶61,275 at para. 2 (2003).

¹⁷⁷ Tr. Vol. IV at 1061-63.

¹⁷⁸ Tr. Vol. IV at 1064-65; AEP-Ohio Ex. 13 at AEM-3.

¹⁷⁹ Tr. Vol. IV at 1066-67.

¹⁸⁰ Tr. Vol. IV at 1067.

demand (or through a demand ratchet).¹⁸¹ As noted previously, customer's monthly peak demand or demand ratchet will have little, if any, relationship to the single zonal coincident peak within the PJM zone. As a result, the BTCR would eliminate the demand response opportunity that is signaled to customers obtaining transmission service, directly or indirectly, through PJM.¹⁸²

Other than pointing to the comparability of a nonbypassable rider approved for DP&L, the Commission does not address the reasonableness of the rate design.¹⁸³ Yet, even in regard to comparability, the AEP-Ohio rider is materially different from that of DP&L.¹⁸⁴ In addition to the false premise that the rider should be approved because it would be comparable to those of other EDUs, the authorization of the BTCR will violate state policy to ensure customer choice and will send price signals inconsistent with the Commission's concern for reliability. Because the authorization is unreasonable, the Commission should grant rehearing and reverse its authorization of the rider.

3. The ESP III Order is unreasonable because the Commission failed to order the inclusion of affected customers in the resolution process to ensure that customers do not pay twice for the same transmission-related expenses

In the ESP III Order, the Commission directed AEP-Ohio and CRES providers to work together, with Staff if necessary, to ensure that customers are not billed twice for transmission services.¹⁸⁵ The ESP III Order is unreasonable since the Commission fails

¹⁸¹ Tr. Vol. IV at 1067; IEU-Ohio Ex. 1B at 32.

¹⁸² IEU-Ohio Ex. 1B at 32.

¹⁸³ ESP III Order at 68.

¹⁸⁴ See IEU-Ohio Initial Brief at 38-39.

¹⁸⁵ ESP III Order at 68.

to include an opportunity for affected customers to participate in the process to assure that those customers taking service from a CRES provider are not double-billed for transmission-related costs.

The Commission does not explain in its ESP III Order the reason for excluding customers from the process it has ordered. As currently constituted, however, the process is fundamentally flawed since neither AEP-Ohio nor the CRES providers will be injured if they do not come to some agreement to prevent double-billing. In fact, their incentive is to do nothing since ignoring the problem will make it easier for one or the other to benefit from double-billing.

Because retail customers taking service under CRES contracts are the intended beneficiaries of the resolution process the Commission has ordered, they should be included to counter the incentives of the AEP-Ohio and CRES providers to do nothing. Accordingly, the Commission should grant rehearing and revise its ESP III Order so that customer representatives are made a part of the process.

4. The ESP III Order is unlawful because the order presumes that the rate design of the BTCR proposed by AEP-Ohio was reasonable and shifts the burden of demonstrating the unreasonableness of the proposed tariff to intervenors, in violation of the requirement of R.C. 4928.143(C)(1), which places the burden of proof on AEP-Ohio

Although AEP-Ohio proposed to impose a new charge on shopping customers by requesting authorization of a nonbypassable transmission charge, it did not provide any evidence regarding the effect of its proposed rate design of the BTCR on shopping customers. IEU-Ohio recommended that the Commission reject AEP-Ohio's proposed rider because it would not send appropriate price signals to customers.¹⁸⁶ Alternatively,

¹⁸⁶ IEU-Ohio Ex. 1B at 32.

IEU-Ohio recommended that the Commission direct AEP-Ohio to assign Reactive Supply costs to customer classes on a 1 CP basis and direct AEP-Ohio to use a 1 CP billing determinant for demand-metered customers. AEP-Ohio responded to the alternative request by arguing that IEU-Ohio's recommendation concerning Reactive Supply costs would have unknown consequences and that its current proposal was consistent with its treatment of those costs for SSO customers.¹⁸⁷

The Commission refused to adopt IEU-Ohio's recommendation.¹⁸⁸ To justify the refusal to allocate Reactive Supply costs based on a 1 CP method or to use a 1 CP determinant for billing demand-metered customers, the Commission indicated that IEU-Ohio's proposals would have an unknown impact on customer bills and, in the absence of any analysis, it would be inappropriate to modify the current cost allocation methodology.¹⁸⁹ The Commission's rationale for denying both recommendations unlawfully shifts the burden of proof to IEU-Ohio to show the unreasonableness of AEP-Ohio's proposal.

Although R.C. 4928.143(C)(1) places the burden of proof on the EDU, AEP-Ohio did not provide any evidence regarding the effect of its proposed rate design of the BTCR on shopping customers. Yet, the Commission approved that rate design and rejected a reasonable alternative offered by IEU-Ohio because IEU-Ohio's proposals "would have an unknown impact on customer bills and, in the absence of any analysis, it is inappropriate to modify the Company's current cost allocation methodology."¹⁹⁰ The

¹⁸⁷ ESP III Order at 67.

¹⁸⁸ *Id.* at 68.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

effect of the Commission's decision is to ignore the obligation of the EDU to carry the burden of proof, and instead require an intervenor to show that the EDU's unsupported claim is unreasonable. By ignoring that AEP-Ohio has the burden of proof to demonstrate the reasonableness of the proposed rate design, the Commission erred.

Further, the rate design proposed by IEU-Ohio is presumptively reasonable. It is consistent with the billing determinants of PJM, which the FERC has previously determined are just and reasonable. The design of the PJM rates also "send a very transparent pricing signal to each customer to reduce demand during peak load conditions and thereby reduce congestion that may otherwise result in higher prices or degradation of reliability."¹⁹¹ In contrast, there is no basis in the record to find that the rate design recommended by AEP-Ohio is reasonable. Accordingly, the Commission erred when it approved a rate design without record support.¹⁹²

Because the Commission has unlawfully transferred the burden of proof regarding the rate design of the BTCR from AEP-Ohio and the rate design of the BTCR is unreasonable, the Commission should grant rehearing and either reject the BTCR or adopt the rate design proposed by IEU-Ohio.

IV. THE ESP III ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE THE COMMISSION APPROVED A RETURN ON EQUITY OF 10.2% BASED ON THE TERMS OF A STIPULATION AND RECOMMENDATION THAT EXPRESSLY PROVIDES THAT IT IS TO HAVE NO PRECEDENTIAL EFFECT

In its Application, AEP-Ohio requested that the Commission approve an ROE of 10.65% which would be incorporated into the Weighted Average Cost of Capital

¹⁹¹ IEU-Ohio Ex. 1B at 32.

¹⁹² *In re Columbus S. Power Co.*, 128 Ohio St.3d at 519.

("WACC") used to establish the rates of certain riders.¹⁹³ The Commission modified AEP-Ohio's request and reduced the ROE to 10.2%.¹⁹⁴ To support the authorization of 10.2%, the Commission expressly relied on the terms of the Stipulation and Recommendation approved by the Commission in AEP-Ohio's last distribution rate case ("Distribution Stipulation").¹⁹⁵ For the reasons discussed below, the Commission's reliance on the Distribution Stipulation to support the approved ROE was unlawful and unreasonable.

AEP-Ohio initiated a distribution rate case on January 27, 2011.¹⁹⁶ AEP-Ohio, several intervenors, and Commission filed the Distribution Stipulation on November 23, 2011 as a proposed resolution of the issues in the case.¹⁹⁷ With one minor addition, the Commission approved the Distribution Stipulation on December 14, 2011.¹⁹⁸

As a Commission-approved resolution of contested issues, the Distribution Stipulation "represent[ed] a serious compromise of complex issues and involve[d] substantial benefits that would not otherwise have been achievable."¹⁹⁹ Further, the Distribution Stipulation stated that the "agreements herein represent a fair and reasonable solution to the issues raised *in these cases*."²⁰⁰ Among the many issues addressed in provisions concerning the revenue requirement, the settling parties

¹⁹³ AEP-Ohio Ex. 17 at 9-13.

¹⁹⁴ ESP III Order at 84.

¹⁹⁵ *Id.* at 84.

¹⁹⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger Is Approved, as a Merged Company (collectively AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, *et al.*, Application (Jan. 27, 2011).

¹⁹⁷ *Id.*, Joint Stipulation and Recommendation (Nov. 23, 2011).

¹⁹⁸ *Id.*, Opinion and Order at 11-14 (Dec. 14, 2011).

¹⁹⁹ *Id.*, Joint Stipulation and Recommendation at 3.

²⁰⁰ *Id.* (emphasis added).

recommended “for purposes of this Stipulation reached *in these cases* ... the return on equity (ROE) used for [AEP-Ohio] ... is 10.2%.”²⁰¹ The settling parties then set out their agreement to terms affecting the collection of the authorized revenue, including adjustments recognizing the effect of the Distribution Investment Rider (approved in a then-pending ESP case), which reduced the base revenue increase to zero.²⁰² Other provisions of the Distribution Stipulation resolved issues concerning recovery of regulatory assets, rate decoupling, rate design, and a pole attachment tariff.²⁰³

In addition to the specific terms of the ROE provision that recommended that the ROE be 10.2% and its use was limited to the Distribution Case, the Distribution Stipulation also recommended that the Stipulation could not be used by any party²⁰⁴ in another proceeding except as specified. Paragraph V.B. of the Distribution Stipulation states:

Except for enforcement purposes or to establish that the terms of the Stipulation are lawful, neither this Stipulation nor the information and data contained herein or attached hereto shall be cited as a precedent in any future proceeding for or against any Signatory Party, or the Commission itself, if the Commission approves the Stipulation. Nor shall the acceptance of any provision within this settlement agreement be cited by any party or the Commission in any forum so as to imply or state that any signatory party agrees with any specific provision of the settlement. More specifically, no specific element or item contained in or

²⁰¹ *Id.*, Joint Stipulation and Recommendation at 5 (emphasis added).

²⁰² *Id.*, Joint Stipulation and Recommendation at 7.

²⁰³ *Id.*, Joint Stipulation and Recommendation at 8-13.

²⁰⁴ As the ESP III Order demonstrates, AEP-Ohio violated the use limitations it agreed to as part of the Commission-approved Distribution Stipulation:

Addressing Walmart's argument regarding the average ROE for other distribution only entities, AEP Ohio points out that the most relevant historical ROE is the one authorized for the Company by the Commission. AEP Ohio notes that Dr. Avera's ROE recommendation of 10.65 percent is squarely within the range recently established for the Company by the Commission, namely above the 10.20 percent ROE approved in [the Distribution Rate Case]

ESP III Order at 83.

supporting this Stipulation shall be construed or applied to attribute the results set forth in this Stipulation as the results that any party might support or seek, but for this Stipulation in these proceedings or in any other proceeding.²⁰⁵

The settling parties also provided the reasons for limiting the use of the terms of the Distribution Stipulation to the enforcement of it:

This Stipulation contains a combination of outcomes that reflects an overall compromise involving a balance of competing positions, and it does not necessarily reflect the position that one or more of the Signatory Parties would have taken on any individual issue. Rather the Stipulation represents a package that, taken as a whole, is acceptable for the purposes of resolving all contested issues without resorting to litigation.²⁰⁶

Subsequent to the Commission's adoption of the Distribution Stipulation, the Commission stated that no party to the Distribution Stipulation could rely on its terms to support its position in a separate matter. The Commission did so in addressing a Staff recommendation that the 10.2% ROE provided for in the Distribution Stipulation be applied in another proceeding involving an AEP-Ohio wholesale capacity pricing proposal. The Commission rejected Staff's effort to import the Distribution Stipulation's 10.2% ROE into the capacity pricing proceeding, stating:

As AEP-Ohio notes, Staff's recommended return on equity was solely based on the negotiated return on equity in the Company's distribution rate case (Staff Ex. 103 at 12-13), which has no precedential effect pursuant to the express terms of the stipulation adopted by the Commission in that case.²⁰⁷

²⁰⁵ *Id.*, Joint Stipulation and Recommendation at 14.

²⁰⁶ *Id.*, Joint Stipulation and Recommendation at 14-15.

²⁰⁷ *In the Matter of the Commission's Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 34 (July 2, 2012) ("Capacity Case Order").

Thus, the Commission has held that parties, including its own Staff, cannot rely on the terms of the Distribution Stipulation to support a litigation position in another unrelated case.

The Commission's refusal to permit its Staff to misuse the Distribution Stipulation to support its litigation position is consistent with the treatment of settlements under the Rules of Evidence. Under Rule of Evidence 408, neither the furnishing nor the offering or promising of a compromise is admissible as to the validity of a claim or its amount. "The purpose of Rule 408 is ... to encourage settlements and compromises of disputed claims, which would be discouraged if such evidence were admissible."²⁰⁸ In particular, the courts give effect to the intent of the parties that they do not intend to admit the "liability" in entering into a compromise.²⁰⁹ Improper admission of such evidence is reversible error.²¹⁰ The bar on the use of settlements includes a bar on the use of settlements with administrative agencies.²¹¹

When the Commission ought to be encouraging parties to sensibly depart from issue-specific litigation positions in favor of a settlement containing an integrated package of outcomes (the totality of which allows parties to put down their issue-specific litigation positions), the Commission has done the opposite. In the ESP III Order, the Commission expressly relied on the Distribution Stipulation to support its authorization of the 10.2% ROE:

In the Distribution Rate Case, the Commission adopted a joint stipulation and recommendation submitted by the parties, which included approval of

²⁰⁸ *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 16 F.Supp.2d 460, 473 (D.N.J. 1998).

²⁰⁹ *Id.*

²¹⁰ *Benoit, Inc. v. District Board of Trustees of St. Johns River Community College*, 463 So.2d 1260 (Fla. App. 1984), *rehearing granted on other grounds*, 1985 Fla. App. Lexis 12432.

²¹¹ *U.S. v. Austin*, 54 F.3d 394 (7th Cir. 1995).

an ROE of 10.00 percent for CSP and 10.30 percent for OP, or an ROE of 10.20 percent for the merged corporate entity. Distribution Rate Case, Opinion and Order (Dec. 14, 2011) at 12, 14. Following our review of the record in the present ESP proceedings, we find that it is appropriate to maintain the ROE of 10.20 percent authorized for AEP Ohio in the Distribution Rate Case.²¹²

Moreover, the Commission also noted that the Distribution Stipulation did not permit any party to rely on it for purposes of supporting the party's position, but carved out an exception for itself:

The Commission recognizes that the ROE was adopted pursuant to the stipulation in the Distribution Rate Case, which was intended by the parties to have no precedential effect. The Commission has stated, however, that, while parties may agree not to be bound by the provisions contained within a stipulation, such limitations do not extend to the Commission.²¹³

By ignoring the explicit limitations on the use of the Distribution Stipulation, the Commission unilaterally, unreasonably, and unlawfully violated the Commission-approved terms of the Distribution Stipulation. In doing so, the Commission has again sent a clear message that any party that may seek to resolve contested issues through a packaged settlement must assume that the Commission will selectively extract one aspect of the settlement package and use the extracted aspect to, procedurally and substantively, resolve contested issues in another proceeding.

Because the Commission has acted unlawfully and unreasonably, it should grant rehearing, resolve the contested ROE issue based on the record evidence, and provide a written explanation of such resolution. In doing so, the Commission should clearly state that AEP-Ohio's ROE-related reliance on the Distribution Stipulation breached duties it owed to other parties to the Commission-approved Distribution Stipulation and

²¹² ESP III Order at 84.

²¹³ *Id.*

that the Commission shall, in all future proceedings, properly respect and enforce the use limitations contained in Commission-approved settlements.

V. THE COMMISSION SHOULD GRANT REHEARING AND CLARIFY PORTIONS OF THE ESP III ORDER REGARDING ITS AUTHORIZATION OF A FUTURE FILING UNDER THE PPA RIDER AND SCHEDULE IRP-D

In addition to the provisions of the ESP III Order that are unlawful, the Order also contains provisions that require clarification. For the reasons discussed below, IEU-Ohio requests that the Commission grant rehearing to modify and clarify the factors the Commission will consider in a future filing to recover above-market generation-related costs (if it refuses to reverse its authorization) and the provisions concerning the scope of Schedule IRP-D.

- 1. The Commission should grant rehearing and clarify (1) that the “factors” that it will consider in a “future filing” if AEP-Ohio seeks to increase its compensation for generation-related services include a requirement for AEP-Ohio to propose a “least-cost” hedge and a requirement that the hedge be secured by a competitive bidding process and (2) that AEP-Ohio will be required to demonstrate that the resulting ESP, if the Commission approves generation cost recovery in a future filing, will satisfy the requirement of R.C. 4928.143(C)(1) that the ESP is more favorable in the aggregate than a Market Rate Offer**

The Commission stated that AEP-Ohio must address several factors if it seeks cost recovery under the PPA Rider, but noted that the list of factors was the minimum list that AEP-Ohio should address.²¹⁴ If the Commission does not grant rehearing and reverse the authorization of the PPA Rider for the reasons urged in this Application for Rehearing, it should grant rehearing and expand the factors that the Commission will

²¹⁴ ESP III Order at 25. The Commission identifies four factors that AEP-Ohio must address, at a minimum, if it seeks to charge customers under the PPA Rider. These factors are the financial need of the generating plant, the need of the plant to address reliability concerns, the plant’s compliance with existing environmental regulations and its plan for compliance with pending environmental regulations, and the effect of closure of the plant on electric prices and economic development in the state. *Id.*

review in a future filing and include requirements that AEP-Ohio address whether the rider is the “least-cost alternative” for providing a hedge and the effect of the rider on the ESP v. MRO Test. Further, the Commission should require AEP-Ohio to competitively bid any product for which it seeks to recover the costs through the PPA Rider. While these additions to the review will not make the rider lawful under R.C. 4928.143(B)(2)(d), they will advance the reasonable concern of customers that any cost of a “hedge” they are required to pay as a result of a Commission order is least-cost and market-tested.

a. The Commission should impose a requirement that the hedge be “least-cost”

In a “future filing,” the Commission should require AEP-Ohio to demonstrate that the costs it is seeking to recover are the “least-cost” alternative to securing the “hedge.” The inclusion of a requirement to address whether the PPA Rider would provide a least-cost alternative is consistent with the Commission’s rules. In its rule addressing provisions for automatic adjustments of costs under R.C. 4928.143(B)(2)(a), the Commission provides that the costs incurred and recovered for fuel and purchased power are to be reviewed quarterly and annually and requires the EDU annually to “demonstrate that the costs were prudently incurred ... and, if a significant change in costs has incurred [*sic*], include an analysis comparing the electric utility’s resource and/or environmental compliance strategy with supply and demand-side alternatives.” Simply put, the Commission requires the EDU to address whether less expensive alternatives for generation-related services are available. A similar requirement should apply to the so-called hedge.

State policy also requires the Commission to require AEP-Ohio to address whether it is proposing a least-cost alternative to supply a hedge on the generation portion of the customer's retail electric service. R.C. 4928.02(A) provides that it is the state policy to ensure the availability of unbundled retail electric service and to ensure that retail electric service is reasonably priced. A customer looking for a hedge would be expected to select the hedge that is the least costly among similar products. If the Commission is taking over the decision for the customer regarding the amount of hedging the customer should have, effectively reducing the value of customer choice, then it should also assure that the hedge it is requiring customers to purchase is a least-cost option.

b. The Commission should require that AEP-Ohio competitively bid the hedge

The Commission also should clarify that AEP-Ohio should seek competitive bids for the "hedge." The policy supporting the use of competitive bidding to source the hedge is already embedded in Ohio law. Under R.C. 4928.143(B)(2)(c), for example, the Commission may approve a surcharge as a term of an ESP for a generation facility that is used and useful on or after January 1, 2009, and that is owned or operated by an EDU, if it was sourced through a competitive bidding process.²¹⁵ R.C. 4928.142 also requires a competitive solicitation to set the price of the MRO.²¹⁶ Likewise, the Commission has found significant qualitative value in expediting the use of an auction process to establish the price of SSO service in an ESP.²¹⁷ In keeping with the

²¹⁵ R.C. 4928.143(B)(2)(c).

²¹⁶ R.C. 4928.142.

²¹⁷ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 76 (Aug. 8, 2012).

Commission's desire to use an auction process to improve outcomes for customers, the Commission should require that any "hedge" be the result of an open, fair, and transparent competitive bidding process.

c. The Commission should require AEP-Ohio to demonstrate that the ESP, if the Commission approves recovery of generation-related costs under the PPA Rider, passes the ESP v. MRO Test

Additionally, the Commission should require AEP-Ohio to demonstrate the ESP passes the ESP v. MRO Test if the Commission approves the recovery of generation related costs in a future filing. State law requires that the ESP be more favorable in the aggregate than an MRO before the Commission may approve it. AEP-Ohio should not be permitted to increase its price of the ESP unless the ESP with the new PPA Rider charges continues to be more favorable in the aggregate than an MRO. Accordingly, the Commission should require that AEP-Ohio support its filing with a demonstration that the ESP will continue to pass the ESP v. MRO Test if the Commission approves the recovery of the requested costs.. Further, the Commission should state that an EDU's failure to demonstrate that the ESP with the additional recovery of costs passes the ESP v. MRO Test would result in a rejection of the requested additional recovery.

- 2. The Commission should grant rehearing for the purpose of clarifying the terms of the modified Schedule IRP-D concerning the definition of "emergency interruption"; further the Commission should clarify that the new Schedule IRP-D will not contain any provision that would permit AEP-Ohio to order a "discretionary interruption"; further, the Commission should clarify that the new Schedule IRP-D will not be subject to a load limitation. If a load limitation is permitted, the Commission should direct that Schedule IRP-D provide for a reasonable process for assigning a load limitation**

In its Application, AEP-Ohio sought authority to eliminate Schedule IRP-D.²¹⁸ In the ESP III Order, the Commission rejected AEP-Ohio's request, but also directed that "the IRP-D should be modified to provide for unlimited emergency interruptions and that the \$8.21/kW-month credit should be available to new and existing shopping and non-shopping customers."²¹⁹ The current Schedule IRP-D provides for unlimited emergency interruptions and limited discretionary interruptions, and limits by rate zone the total load that may be subject to the credit.²²⁰ Because it is unclear what modifications of the Schedule IRP-D the Commission is directing AEP-Ohio to implement, IEU-Ohio seeks clarification.

First, the current rider permits unlimited emergency interruptions so long as they are related to the AEP Emergency Operating Plan, for system integrity purposes, or for emergency sales to other utilities.²²¹ IEU-Ohio requests clarification that the Commission's ESP III Order does not expand the conditions under which AEP-Ohio may interrupt for purposes of an emergency.

Second, IEU-Ohio requests clarification that the Commission has not authorized AEP-Ohio to retain the terms of current Schedule IRP-D regarding discretionary interruptions. The order states that the Schedule IRP-D should provide for unlimited emergency interruptions; it makes no reference to the retention of a provision for

²¹⁸ AEP-Ohio Ex. 1 at 9.

²¹⁹ ESP III Order at 40.

²²⁰ Ohio Power Company Rider IRP-D, Original Sheet No. 427, viewed at <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/Columbus%20Southern%20Power,%20OHIO%20POWER%20COMPANY/PUCO%2020%20Standard%20Service.pdf>.

²²¹ Ohio Power Company Rider IRP-D, Original Sheet No. 427-2, viewed at <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/Columbus%20Southern%20Power,%20OHIO%20POWER%20COMPANY/PUCO%2020%20Standard%20Service.pdf>.

discretionary interruptions.²²² So that there is no future dispute regarding the scope of the new Schedule IRP-D that AEP-Ohio should file, the Commission should clarify that AEP-Ohio should not include any provision for discretionary interruptions.

Third, IEU-Ohio requests clarification that the Commission is directing that AEP-Ohio will remove the current load limitation on the availability of Schedule IRP-D. The current tariff is limited to 75,000 KW in the Columbus Southern Power rate zone and 450,000 KW in the Ohio Power rate zone.²²³ With the expansion of the customers that may take advantage of the Schedule to include new shopping and nonshopping customers, the requested clarification is needed and reasonable.

Fourth, IEU-Ohio seeks clarification of the process AEP-Ohio should use to allocate load if the Commission determines that AEP-Ohio may limit the load available under Schedule IRP-D. The current Schedule IRP-D does not address the manner in which load is assigned to various customers if customer requests exceed load limitations. An assignment process at a minimum should grandfather existing customers and provide a fair means of assigning any remaining available load to customers seeking to expand their current load and customers seeking to contract for load under the Schedule.

For the reasons discussed above, the Commission should grant rehearing and clarify, and modify as recommended, its orders regarding the authorization of Schedule IRP-D.

²²² ESP III Order at 40.

²²³ Ohio Power Company Rider IRP-D, Original Sheet No. 427-1, viewed at <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/Columbus%20Southern%20Power,%20OHIO%20POWER%20COMPANY/PUCO%2020%20Standard%20Service.pdf>.

VI. CONCLUSION

For the reasons stated above, the ESP III Order is unlawful and unreasonable. Accordingly, the Commission should grant rehearing and modify the ESP III Order.

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 *Application for Rehearing of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 27th day of March 2015, *via* electronic transmission.

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