

ORIGINAL

In The
SUPREME COURT OF OHIO

The Kroger Company, et al.,	:	Case No. 13-521
	:	
Appellants,	:	On appeal from the Public Utilities
	:	Commission of Ohio, Case Nos. Case
v.	:	No. 11-346-EL-SSO, Case No. 11-348-
	:	EL-SSO, Case No. 11-349-EL-AAM,
Public Utilities Commission of Ohio,	:	and 11-350-EL-AAM, <i>In the Matter of</i>
	:	<i>the Application of Columbus Southern</i>
Appellee,	:	<i>Power Company and Ohio Power</i>
	:	<i>Company for Authority to Establish a</i>
and	:	<i>Standard Service Offer Pursuant to</i>
	:	<i>§4928.143, Ohio Rev. Code, in the Form</i>
Ohio Power Company,	:	<i>of an Electric Security Plan, et al.</i>
	:	
Cross-Appellant.	:	

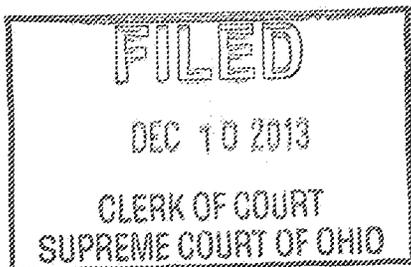
**THIRD MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**THIRD MERIT BRIEF
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

The modified electric security plan (ESP) filed by Cross-Appellant AEP Ohio (also “Company”) proposed a transition to a more fully competitive supply of electricity. The Public Utilities Commission (“Commission”) approved, but modified, the Company’s proposal. The Commission’s approval directed AEP Ohio, among other things, to accelerate this transition.

The Commission did not take this step lightly. The Commission’s order approved mechanisms to preserve the Company’s financial integrity while setting the stage for

ensuring that it did not reap significantly excessive earnings. It approved the recovery of compensatory rates and clarified that those rates applied equally to standard service (non-shopping) customers and customers who choose to shop for supply from competitive providers.

The Commission's order represents a delicate and complicated balance to promote significant change. The Commission achieved this balance in a fair, reasonable, and lawful way. While all affected parties have the right to challenge that decision in this Court, only the Company has the statutory right to walk away. While withdrawing the ESP in such a challenging and quickly changing environment may well be difficult, nothing in the Commission's decision impairs that right.

STATEMENT OF FACTS

On January 27, 2011, AEP Ohio filed an application for a standard service offer (SSO). R.C. 4928.141, App. at 1-2.¹ The application was for approval of an electric security plan. R.C. 4928.143, App. at 2-6. On September 7, 2011, a number of parties filed a Joint Stipulation and Recommendation proposing to resolve not only that application, but a number of other related AEP Ohio cases pending before the Commission, as

¹ References to appellee's attached appendix are denoted "App. at ____;" references to the Appendix of Industrial Energy Users-Ohio filed August 12, 2013 are denoted "IEU App. at ____;" references to the Supplement filed by Industrial Energy Users-Ohio on August 12, 2013 are denoted "IEU Supp. at ____."

well.² Although the Commission initially modified and approved the stipulation, it ultimately found that the stipulation, as a package, did not benefit ratepayers and was not in the public interest. *ESP 2 Case* (Entry on Rehearing) (Jan. 30, 2013), IEU App. at 107-286. The Commission gave the Company the option of withdrawing or modifying its ESP. *ESP 2 Case* (Opinion and Order at 6) (Aug. 8, 2012), IEU App. at 29.

On March 30, 2012, AEP-Ohio filed a modified ESP for the Commission's consideration. The Commission modified and approved that modified ESP on August 8, 2012. *ESP 2 Case* (Opinion and Order) (Aug. 8, 2012), IEU App. at 21-107.

As part of the modified ESP, AEP Ohio proposed a non-bypassable retail stability rider (RSR). It argued that the rider would not only promote rate stability and certainty, but was essential to ensure that the Company did not suffer severe financial repercussions. *Id.* at 26, IEU App. at 49. The Commission modified and approved the RSR. In doing so, the Commission stated that, in light of the fact that the Commission has established a revenue target to be reached through the RSR in this proceeding, the Commission finds that it is also appropriate to establish a significantly excessive earnings test (SEET) threshold to ensure that the Company does not reap disproportionate benefits

² “Including an emergency curtailment proceeding in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA (Emergency Curtailment Cases); a request for the merger of CSP with OP in Case No. 10-2376-EL-UNC (Merger Case); the Commission review of the state compensation mechanism for the capacity charge to be assessed on competitive retail electric service (CRES) providers in Case No. 10-2929-EL-UNC (Capacity Case); and a request for approval of a mechanism to recover deferred fuel costs and accounting treatment in Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR (Phase-in Recovery Cases).” *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.* (“*ESP 2 Case*”) (Opinion and Order at 6, fn. 3) (Aug. 8, 2012), IEU App. at 29.

from the ESP.” *Id.* at 37, IEU App. at 60. The Commission established a 12% SEET threshold for AEP Ohio. *Id.*

AEP Ohio sought rehearing of that determination. Relying on R.C. 4928.143(F) and “extensive testimony from three expert witnesses who testified in length,” the Commission denied the Company’s rehearing request. *ESP 2 Case* (Entry on Rehearing at 41-42) (Jan. 30, 1013), IEU App. at 147-148.

Also as part of its modified ESP, AEP Ohio proposed a transition to a fully-competitive auction-based SSO format. *ESP 2 Case* (Opinion and Order at 38) (Aug. 8, 2012), IEU App. at 61. The Commission approved and modified that proposal, accelerating the transition process. *Id.* at 39-40, IEU App. at 62-63. The Company sought clarification that the state compensation mechanism (SCM) established in the companion *Capacity Case*³ would not apply to the energy auctions, or to non-shopping customers. Reiterating that it had found the SCM to be a just and reasonable rate for capacity, the Commission denied the rehearing request for clarification. *ESP 2* (Entry on Rehearing at 37) (Jan. 30, 1013), IEU App. at 143.

Throughout its decisions on the Company’s second ESP application, the Commission has consistently emphasized its intent that AEP Ohio expeditiously transition to a competitive market. At the same time, the Commission recognized that such a transition is ultimately within the Company’s control.

³ *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 33-36) (Jul. 2, 2012) (“*Capacity Case*”), IEU Supp. at 266-270.

Although the decision for AEP-Ohio to transition towards competitive market pricing is something this Commission strongly supports and the General Assembly anticipated in enacting Senate Bill 221, the fact remains that the decision to move towards competitive market pricing is voluntary under the statute and in the event this ESP is withdrawn or even replaced with an MRO, there is no doubt that AEP-Ohio would not be fully engaged in the competitive marketplace by June 1, 2015.

ESP 2 Case (Opinion and Order at 76) (Aug. 8, 2012), IEU App. at 99.

ARGUMENT

Proposition of Law No. I:

Where the Commission determines that the comparable group threshold has not been met, R.C. 4928.143(F) requires no further analysis. [AEP Ohio Cross-Appeal Prop. No. VI⁴]

This Court has previously approved of the Commission's application of the significantly excessive earnings test (SEET) required by R.C. 4928.143(F). *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276. Initially, it must be determined whether the utility has excessive earnings. In this context "excessive" refers to earnings above those achieved by a comparable group of companies with similar risks. R.C. 4928.143(F), App. at 6. This is the threshold for the examination. If a utility has earnings at or below this threshold there is no reason for the examination to continue. Where excessive earnings do not exist, significantly excessive earnings are a logical impossibility.

⁴ AEP Ohio's first Cross-Appeal proposition is numbered "VI," but is in reality its seventh proposition of law.

In the case below, the Commission had the information necessary to evaluate this threshold level. It had testimony from multiple witnesses addressing the earnings of groups of companies that the witnesses presented as being comparable to AEP Ohio. *ESP 2 Case* (Entry on Rehearing at 41-42) (Jan. 30, 2013), IEU App. at 147-148. Using this information, the Commission established the threshold level to be used in the future SEET case. The Commission reasoned:

Under Section 4928.143(F), Revised Code, the Commission shall annually determine whether the provisions contained within the modified ESP resulted in AEP-Ohio maintaining excessive earnings. The rule further dictates that the review shall consider whether the earnings are significantly in excess of the return on equity of other comparable publicly traded companies with similar business and financial risk. The record in the modified ESP contains extensive testimony from three expert witnesses who testified in length on what an appropriate ROE would be for AEP-Ohio, and all considered comparable companies with similar risk in reaching their conclusions. In addition, three other diverse parties also presented evidence in the record that was consistent with the recommendations presented by the three expert witnesses, which when taken as a whole, demonstrates that a 12 percent ROE would be at the high end of a reasonable range for AEP-Ohio's return on equity. Further, we believe that the SEET threshold of 12 percent is not only consistent with state policy provisions, including Section 4928.02(A), Revised Code, but also reflects an appropriate rate of return in light of the modified ESP's provisions that minimize AEP Ohio's risk.

Id.

Despite AEP Ohio's arguments to the contrary, it is clear that the Commission performed exactly the analysis required under the statute. The Commission considered record evidence of the earned returns of companies with comparable risk and, based upon

that information, determined a threshold. This complies with the legal requirements, and AEP Ohio's arguments to the contrary have no merit.

There is no reason for the Court to reach the merits, however. More salient reasons exist for the Court to reject AEP Ohio's argument. The SEET threshold determined by the Commission below is just that, a *threshold*. It is the first step in a future calculation in a different case which may or may not financially impact the Company. AEP Ohio seeks an advisory opinion, and this Court does not issue advisory opinions.

"Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant." *Ohio Contract Carriers Assn. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942), syllabus. *See also Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 439, 605 N.E.2d 13 (1992) (applying *Ohio Contract Carriers Assn.*). Moreover, it is "well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to * * * refrain from giving opinions on abstract propositions * * *." *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). Further, until a future case occurs and an adjustment results from it, AEP Ohio can show no harm from the Commission's determination. This Court will not reverse a Commission decision without a showing of prejudice. *Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853. The Court should not consider AEP's arguments, as AEP seeks only an advisory opinion and has not been harmed.

Proposition of Law No. II:

R.C. 4928.143(C)(2)(a) permits an electric distribution utility to withdraw an electric security plan (ESP). [AEP Ohio Cross-Appeal Prop. No. VII⁵]

Ohio law permits an electric distribution utility to withdraw an electric security plan (ESP). R.C. 4928.143(C)(2)(a), App. at 4-5. The Company is free to walk away, but has decided not to do so. Nothing in the Commission's order affects AEP Ohio's statutory right to withdraw.

The Commission must either "approve," "modify and approve," or "disapprove" an ESP application. R.C. 4928.143(C)(1), App. at 4. If the Commission modifies and approves an application, the utility "may withdraw the application, thereby terminating it, and may file a new standard service offer." R.C. 4928.143(C)(2)(a), App. at 4-5. There is simply no reason to believe that that ability ends. The plain words of R.C. 4928.143 create an election to withdraw, but nowhere create a time restriction during which the option must be exercised.

In this case, the Commission modified and approved the ESP. The Commission took similar action in the Company's prior SSO case, where it modified and approved the proposed ESP. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets, et al.*, Case Nos. 08-917-EL-SSO, *et al.* ("ESP 1 Case") (Opinion and Order) (Mar. 18, 2009), App. at 7-82. In

⁵ AEP Ohio's second Cross-Appeal proposition is numbered "VII," but is, in reality, its eighth proposition of law.

the appeal of the Commission’s order in that case, Appellant Industrial Energy Users-Ohio argued that the Company should not be permitted to receive the benefit of higher rates while simultaneously reserving the right to withdraw its ESP. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶44. The Court held that it would “not weigh in on whether AEP could collect ESP rates for some period of time and then withdraw the plan,” as the Company had not, to that point, made any attempt to withdraw its plan. *Id.* at ¶48.

That same analysis should be applied to Cross-Appellant AEP Ohio’s argument here. It has made no effort to withdraw its ESP. Absent such an effort, the Company cannot say that it has been denied anything to which it is – or may be – entitled under the statute.

Indeed, until AEP Ohio attempts to withdraw its ESP, it is by no means certain that it even continues to have the right to do so.⁶ Nor is it clear whether AEP Ohio even believes that it continues to have the right to withdraw its ESP. In its merit brief in the earlier ESP appeal, AEP Ohio argued that:

⁶ In the previous appeal, the Commission argued that nothing in the statute precludes an electric utility from charging the rates approved in the ESP while retaining the right to withdraw the ESP. *In re Application of Columbus S. Power Co.*, Merit Brief of the Public Utilities Commission of Ohio at 24, Case No. 09-2022 (Mar. 5, 2010), App. at 87. The Court has not ruled on this issue, nor should it do so here. This Court has repeatedly stated that it will not indulge in advisory opinions. *See, e.g. State ex rel. Keyes v. Ohio Public Employees Retirement System*, 123 Ohio St. 3d 29, 34, 913 N.E.2d 972 (2009); *State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St. 3d 238, 242, 736 N.E.2d 893 (2000). The Court should therefore decline to address this issue.

The right to withdraw an ESP application under R.C. 4928.143(C)(2) contains no time restriction. And it is only logical that an affected utility would want to wait “until the dust settles” through the rehearing and appeal process, which could result in further changes to the ESP, before permanently deciding not to withdraw.

In re Application of Columbus S. Power Co., Merit Brief of Intervening Appellees

Columbus Southern Power Company and Ohio Power Company at 38, Case No. 09-2022 (Mar. 5, 2010), App. at 90. In this case, by contrast, the Company complains that the Commission has reserved the right to further modify the ESP “well after AEP Ohio’s ability to withdraw has ended.” AEP Ohio Second Brief at 46.

Specifically, the Company argues that what it characterizes as an “‘approve the ESP now, but reserve changes for later’ approach is incompatible with AEP Ohio’s statutory right to withdraw its application for an ESP.” AEP Ohio Second Brief at 46. But it is disingenuous for the Company to argue that this uncertainty effectively prevents it from making a decision. The Commission certainly has the authority to further consider and modify the ESP, just as it has the authority to modify virtually any order that it issues. This Court has long recognized that the “commission may modify orders as long as it justifies those changes.” *Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶34, citing *Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984).

In reality, AEP Ohio is not arguing that its *right* to withdraw has been compromised. Rather, AEP Ohio argues that it cannot exercise its right to withdraw where it cannot know – indeed, where it cannot even anticipate – the economic effect of its deci-

sion. AEP Ohio Second Brief at 46. In essence, it contends that its *ability to decide* whether to withdraw must somehow be “meaningful.”

It most certainly can exercise its right to withdraw – it has simply determined not to do so here. The statute’s permissive withdrawal contains no provision assuring perfect, or even useful, information with which to make a decision. The Commission specifically addressed this concern on rehearing:

AEP-Ohio warns that absent a clarification on rehearing, there could be adverse financial impacts of AEP-Ohio based on the Opinion and Order's auction modifications. . . . The entire crux of the Opinion and Order was the value in providing customers with the opportunity to take advantage of market-based prices and the importance of establishing a competitive electric marketplace. AEP-Ohio's proposal is completely inconsistent with the Commission's mission and would preclude AEP-Ohio customers from realizing any potential savings that may result from its expanded energy auctions.

ESP 2 Case (Entry on Rehearing at 36) (Jan. 30, 2013), IEU App. at 142. Indeed, the Commission found the Company’s fear of an adverse financial impact to be unfounded, “as the [Revenue Stability Rider] will in part ensure AEP-Ohio has sufficient funds to efficiently maintain its operations.” *Id.* at 37, IEU App. at 143.

It is equally disingenuous for the Company to argue that the Commission’s decision to address “basic issues of auction design” in a separate docket “seriously impede[s]” the Company’s ability to recover costs. AEP Ohio Second Brief at 46. Obviously, if this uncertainty is so unsettling to the Company it could simply elect to withdraw the ESP application now. There is no statutory provision impeding its ability to do so. It has, however, chosen not to do so.

More significantly, the Company should not now be heard to complain about an approach that it actually *encouraged* the Commission to take. In its memorandum contra opposing requests for rehearing,⁷ AEP Ohio argued that it was not necessary for the Commission to determine details relating to the competitive bid procurement (CBP) process, as these issues would be more appropriately addressed in the subsequent stakeholder process established pursuant to the Commission's Opinion and Order. *ESP 2 Case* (Entry on Rehearing at 34) (Jan. 30, 2013), IEU App. at 140.

The Commission's orders do not "force" AEP Ohio to "buy a pig in a poke." AEP Ohio Second Brief at 47. The Company is free to walk away. Ohio law gives it that right. That AEP Ohio has decided not to do so hardly renders the Commission's decision either unlawful or unreasonable as the Company claims. R.C. 4928.143(C)(2)(a) permits an electric distribution utility to withdraw an ESP. The Commission's order does not affect that right. The Commission's order should be affirmed.

⁷ "AEP Ohio submits that details involving the Competitive Bidding Process related to the energy auctions need not be determined at this time and are more appropriately discussed as part of the auction stakeholder process that was recently initiated pursuant to the Opinion and Order, which will lead up to the Company's CBP filing by the end of 2012." *ESP 2 Case* (Memorandum Contra Intervenors' Applications for Rehearing at 53) (Sep. 17, 2012), App. at 84.

Proposition of Law No. III

The Commission correctly applied the fully-litigated capacity rate to both shopping and non-shopping customers in a consistent, non-discriminatory fashion. [AEP Ohio Cross-Appeal Prop. No. IV⁸]

AEP Ohio argues that the state compensation mechanism (SCM), the \$188.88/MW-day capacity rate approved in the *Capacity Case*⁹, should be applied only to shopping customers, those taking service from competitive retail electric service (CRES) providers. AEP Ohio Second Brief at 47-49. This contention is contrary to the evidence and the jurisprudence of this Court. The Commission stated:

In light of the Commission's decision in the Capacity Case, which determined \$188.88 per MW-day would allow AEP-Ohio to recover its embedded capacity costs without overcharging customers, it would be unreasonable for us to permit AEP-Ohio to recover an amount higher than its cost of service. Further, we disagree with AEP-Ohio's assertion that the Commission should not rely on the Capacity Case in determining the cost of capacity for non-shopping customers beginning January 1, 2015, because, as previously stated, the Commission was able to determine that AEP-Ohio's that \$188.88 per MW-day establishes a just and reasonable rate for capacity. Therefore, consistent with our Opinion and Order, [footnote omitted] the use of \$188.88 per MW-day allows for AEP-Ohio to be adequately compensated and ensures ratepayers will not face excessive charges over AEP-Ohio's actual costs.

ESP 2 Case (Entry on Rehearing at 37) (Jan. 30, 2013), IEU App. at 143.

In the *ESP 2* decision below, the Commission determined *both* a fair and compensatory capacity rate and that it should be applied to shopping and non-shopping

⁸ AEP Ohio's third Cross-Appeal proposition is numbered "VIII" in its Table of Contents, and "IV" in the text of its brief, but is in reality its ninth proposition of law.

⁹ *Capacity Case* (Opinion and Order at 33-36) (Jul. 2, 2012), IEU Supp. at 266-269.

customers alike in non-discriminatory fashion. In doing so, the Commission correctly and consistently applied its findings from the companion *Capacity Case*. In that case, the Commission's rate determination methodology accounted for all of AEP Ohio's energy revenues and costs to serve its system-wide load, including both customers that take service from CRES providers (shopping customers) and standard-service-offer customers served by AEP Ohio (non-shopping customers) itself.¹⁰ *Capacity Case* (Opinion and Order at 33-36) (Jul. 2, 2012), IEU App. at 266-269. Imposing a different rate on non-shopping customers, as AEP Ohio proposes, is improper and discriminatory. The *Capacity Case* determined AEP Ohio's *actual* capacity costs to serve its system-wide load. *Id.* Whether a customer takes service from a CRES provider or AEP Ohio makes no difference – both types of customers ultimately use the same facilities and the same resources at the same time for capacity. In other words, both types of customers – shopping and non-shopping – are similarly situated. While Ohio law does not prohibit rate discrimination *per se*, R.C. 4905.33 does prohibit charging different rates when the utility is performing “a like and contemporaneous service under substantially the same circumstances and conditions.” *Consumers' Counsel v. Pub. Util. Comm.*, 19 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 23; R.C. 4905.33, App. at 1. Discriminatory rates are generally prohibited under R.C. 4928.02(A), as well. Because both shopping and non-shopping customers use the same capacity resources, at the same time, the

¹⁰ AEP Ohio's capacity cost does not depend on who the customer is; rather, the capacity cost depends on AEP Ohio's actual capacity resources. Shopping and non-shopping customers use the same capacity resources.

Commission logically and lawfully applied AEP Ohio's actual capacity cost to both types of customers. To do otherwise would result in arbitrary rate discrimination prohibited by law.

This Court has held that the Commission statutes do not necessarily require uniformity in utility prices and rates. "A reasonable differential or inequality of rates may occur where such differential is based upon some actual and measurable differences in the furnishing of services to the consumer." *Mahoning Cty. Twps.*, 58 Ohio St.2d 40, 44, 1388 N.E.2d 739 (1979). For example, in *County Commissioners Association of Ohio v. Pub. Util. Comm.*, 63 Ohio St.2d 243, 407 N.E.2d 534 (1980), the Court upheld different rates between Ohio counties and Ohio schools. The schools were given special treatment because of (1) their unique status, (2) their unique needs, (3) their inability to pass on costs, and (4) their financial plight. *Id.* at 246. Although there [were] similarities between the counties and the schools, the differences justifi[ed] the differential in treatment both under the statutes and the Ohio and United States Constitutions. *Id.* Here, however, AEP Ohio has provided no evidence of actual and measurable differences between shopping and non-shopping customers. Therefore, the actual capacity cost of \$188.88/MW-day must apply equally to all customers as the Commission correctly found.

AEP Ohio also improperly characterizes the \$188.88/MW-day capacity rate as an "average cost" over time. AEP Ohio Second Brief at 49-50. On the contrary, the rate is the actual cost that was properly determined through a fully-litigated hearing in the *Capacity Case*. There, the Commission determined that \$188.88/MW-day established a

just and reasonable rate for capacity that adequately compensates AEP Ohio and ensures that ratepayers will not face excessive charges in excess of AEP Ohio's actual costs. *ESP 2 Case* (Entry on Rehearing at 37) (Jan. 30, 2013), IEU App. at 143. The \$188.88/MW-day represents AEP Ohio's *actual* cost over time, not an "average cost," as AEP Ohio mistakenly argues. The Commission ordered a fair and compensatory rate.

The Commission properly relied on the \$188.88/MW-day established in the *Capacity Case* to both shopping customers and non-shopping customers, as a proper exercise of its broad discretion to manage its busy case docket. *Capacity Case* (Opinion and Order at 33-36) (Jul. 2, 2012), IEU App. at 266-269. The Commission is not limited to the *ESP 2* case for determining adequate capacity compensation. This Court has recognized that the Commission is vested with broad discretion to manage its dockets so as to avoid undue delay and the duplication of effort, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). The Commission enjoys broad authority in the conduct of its business. *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 2000-Ohio-491, 734 N.E.2d 775, citing *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264 (1978). The Commission properly applied the \$188.88/MW-day rate, that was thoroughly and fully litigated in the *Capacity Case* (and by the same parties in this case),

shopping customers and non-shopping customers. The Commission's determination is lawful, consistent, and logical and should be affirmed.

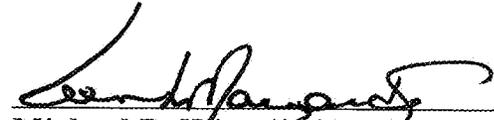
CONCLUSION

Based on extensive record evidence, the Commission lawfully determined an earnings threshold in this case to be used in a future SEET case. The Commission also applied a lawfully determined compensatory capacity rate to all customers, shopping and non-shopping alike, because they are similarly situated. This is what the evidence shows.

AEP Ohio's claims are meritless and should be rejected. If the Company is dissatisfied with the Commission's modification of its proposal, it has the right to withdraw it. That right is not affected by the orders at issue here.

The Court should affirm.

Respectfully submitted,



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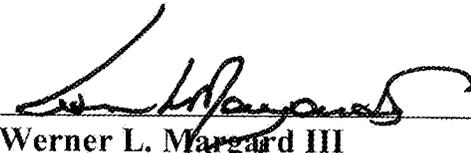
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Third Merit Brief on Behalf of Appellee Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 10th day of December, 2013.


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APPENDIX

**APPENDIX
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4905.33 Rebates, special rates, and free service prohibited.

(A) No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.

(B) No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each

county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

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

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the

facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

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

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan 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. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating

it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that

continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus)
 Southern Power Company for Approval of)
 an Electric Security Plan; an Amendment to) Case No. 08-917-EL-SSO
 its Corporate Separation Plan; and the Sale or)
 Transfer of Certain Generating Assets.)

In the Matter of the Application of Ohio)
 Power Company for Approval of its Electric) Case No. 08-918-EL-SSO
 Security Plan; and an Amendment to its)
 Corporate Separation Plan.)

OPINION AND ORDER

This is to certify that the images appearing are an
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The Commission, considering the above-entitled applications and the record in these proceedings, hereby issues its opinion and order in this matter.

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Janine L. Migden-Ostrander, the Office of the Ohio Consumers' Counsel, by Maureen R. Grady, Terry L. Etter, Jacqueline Lake Roberts, Michael E. Idzkowski and Richard C. Reese, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Columbus Southern Company and Ohio Power Company.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Chester, Wilcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of The Kroger Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Lisa G. McAlister, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, on behalf of Ohio Environmental Council and Dominion Retail, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Mike Settineri and Betsy L. Elder, 52 East Gay Street, Columbus, Ohio 43216-1008, and Bobby Singh, Integrys Energy, 300 West Wilson Bridge Road, Worthington, Ohio 43085, on behalf of Integrys Energy.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Mike Settineri and Betsy L. Elder, 52 East Gay Street, Columbus, Ohio 43216-1008, and Cynthia A. Fonner, Constellation Energy Group, Inc., 550 West Washington Boulevard, Suite 3000, Chicago, Illinois 60661, on behalf of Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Mike Settineri and Betsy L. Elder, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of EnerNoc, Inc. and Consumer Powerline, Inc.

Schottenstein, Zox & Dunn Co., LPA, by Gregory H. Dunn, Christopher L. Miller, and Andre T. Porter, 250 West Street, Columbus, Ohio 43215, on behalf of the Association of Independent Colleges and Universities of Ohio.

Bricker & Eckler, Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio, and Richard L. Sites, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of Ohio Hospital Association.

Bell & Royer Co., LPA, by Langdon D. Bell, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Kevin Schmidt, 33 North High Street, Columbus, Ohio 43215-3005, on behalf of Ohio Manufacturers' Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Direct Energy Services, LLC.

McDermott, Will & Emery, LLP, by Grace C. Wung, 600 Thirteenth Street, N.W., Washington, D.C. 20005, on behalf of Wal-Mart Stores East, LP, and Sam's East, Inc., LP, Macy's, Inc., and BJ's Wholesale Club, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Ohio Association of School Business Officials, Ohio School Boards Association, and Buckeye Association of School Administrators.

Michael R. Smalz and Joseph E. Maskovyak, Ohio State Legal Services Association, 555 Buttles Avenue, Columbus, Ohio 43215, on behalf of Appalachian People's Action Coalition.

OPINION:

I. HISTORY OF PROCEEDINGS

On July 31, 2008, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or the Companies) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. The application is for an electric security plan (ESP) in accordance with Section 4928.143, Revised Code.

By entries issued August 5, 2008, and September 5, 2008, the procedural schedule in this matter was established, including the scheduling of a technical conference and the evidentiary hearing. A technical conference was held regarding AEP-Ohio's application on August 19, 2008. A prehearing conference was held on November 10, 2008, and the evidentiary hearing commenced on November 17, 2008, and concluded on December 10, 2008. The Commission also scheduled five local public hearings throughout the Companies' service area.

The following parties were granted intervention by entries dated September 19, 2008, and October 29, 2008: Ohio Energy Group (OEG); the Office of the Ohio Consumers' Counsel (OCC); Kroger Company (Kroger); Ohio Environmental Council (OEC); Industrial Energy Users-Ohio (IEU); Ohio Partners for Affordable Energy (OPAE); Appalachian People's Action Coalition (APAC); Ohio Hospital Association (OHA); Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (Constellation); Dominion Retail, Inc. (Dominion); Natural Resources Defense Council (NRDC); Sierra Club - Ohio Chapter (Sierra); National Energy Marketers Association (NEMA); Integrys Energy Service, Inc. (Integrys); Direct Energy Services, LLC (Direct Energy); Ohio Manufacturers' Association (OMA); Ohio Farm Bureau Federation (OFBF); American Wind Energy Association, Wind on Wires, and Ohio Advance Energy (Wind Energy); Ohio Association of School Business Officials, Ohio School Boards Association, and Buckeye Association of School Administrators (collectively, Schools); Ormet Primary Aluminum Corporation (Ormet); Consumer Powerline; Morgan Stanley Capital Group Inc.; Wal-Mart Stores East, LP and Sam's East, Inc., Macy's, Inc., and BJ's Wholesale Club, Inc. (collectively, Commercial Group); EnerNoc, Inc.; and the Association of Independent Colleges and Universities of Ohio.

At the hearing, AEP-Ohio offered the testimony of 11 witnesses in support of the Companies' application, 22 witnesses testified on behalf of various intervenors, and 10 witnesses testified on behalf of Staff. At the local public hearings held in this matter, 124 witnesses testified. Briefs were filed on December 30, 2008, and reply briefs were filed on January 14, 2009.

A. Summary of the Local Public Hearings

Five local public hearings were held in order to allow CSP's and OP's customers the opportunity to express their opinions regarding the issues in this proceeding. The hearings were held in the evenings in Marietta, Canton, Lima, and Columbus. Additionally, an afternoon hearing was held in Columbus. At those hearings, public testimony was heard from 21 customers in Marietta, 21 customers in Canton, 17 customers in Lima, 25 customers at the afternoon hearing in Columbus and 40 customers at the evening hearing in Columbus. In addition to the public testimony, numerous letters were filed in the docket by customers stating concern about the applications.

The principal concern expressed by customers, both at the public hearings and in letters, was over the increases in customer rates that would result from the approval of the RSP applications. Witnesses stated that any increase in rates would negatively impact low-income customers, the elderly, and those on fixed incomes. Customers cited the recent downturn in the economy as the primary source of their apprehension. It was noted by many at the hearings that customers are also facing increases in other utility charges, gasoline, food, and medical expenses and that the proposed increases would cause undue hardship. On the other hand, some witnesses at the public hearings and in the letters filed in the docket acknowledged AEP-Ohio as a good corporate partner in their respective communities.

B. Procedural Matters

1. Motion to Strike

On January 7, 2009, AEP-Ohio filed a motion to strike a section of the brief jointly filed by OCC and Sierra (collectively, OCEA). More specifically, AEP-Ohio filed to strike the sentence starting on line 2 of page 63 ["In fact,"] through the first two lines of page 64, including footnotes 244 to 248. AEP-Ohio argues that the above-cited portion of OCEA's brief, regarding the deferral of fuel expenses and the carrying charges and the tax effect thereof, relies upon testimony offered by OCC witness Effron in the FirstEnergy Distribution Case.¹ AEP-Ohio notes that Mr. Effron was not a witness in this ESP proceeding and, therefore, was not available for the Companies, or any other party, to cross-examine. Accordingly, the Companies argue that consideration of Mr. Effron's testimony in this matter would be a denial of the Companies' due process rights, and request that the specified portion of OCEA's brief be stricken. On January 14, 2009, OCC filed a memorandum contra the motion to strike. OCC agreed to withdraw the second and third sentences on page 63, the quoted testimony of Mr. Effron on page 63, and footnotes 244 to 248 on pages 63 and 64. However, OCC contends that AEP-Ohio's

¹ *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company, Case No. 07-551-EL-AIR, et al. (FirstEnergy Distribution Case).*

motion is overly broad and the remaining portion of the brief that AEP-Ohio seeks to strike is appropriate legal argument regarding deferrals on a net-of-tax basis and, therefore, should remain. AEP-Ohio filed a reply on January 16, 2009. AEP-Ohio first notes that because the memorandum contra was filed by OCC only and Sierra did not respond to the motion, it is not clear whether Sierra is also willing to withdraw the portions of the brief listed in the memorandum contra. AEP-Ohio also argues that the remaining portion of this particular argument in OCEA's brief should be stricken with the removal of the footnotes. With this removal, AEP-Ohio then argues that there is no longer any support in the brief for such arguments. By letter docketed January 22, 2009, Sierra confirmed that it joins OCC in OCC's withdrawal of the limited portions of the OCEA brief as stated by OCC in its January 14, 2009, reply.

The Commission grants, in part, and denies, in part, AEP-Ohio's motion to strike OCEA's brief. The Commission agrees with AEP-Ohio and OCC that the use of Mr. Effron's testimony filed in the FirstEnergy Distribution Case in this proceeding was inappropriate and, therefore, we accept OCC's and Sierra's withdrawal of that portion of their brief. As for the remaining portion of OCEA's brief that AEP-Ohio has requested to be stricken, we agree with OCC that the language that discusses the calculation of deferred fuel expenses on a net-of-tax basis could be construed to be legal argument on brief, which rationalized why the issue should be decided in OCEA's favor. Moreover, we can surmise that if OCEA had recognized its error in the drafting stage of the brief, that OCEA would have drafted similar legal arguments without referencing Mr. Effron's testimony. Accordingly, we will only strike the portions of OCEA's brief that OCC and Sierra have agreed to withdraw.

2. Motion for AEP-Ohio to Cease and Desist

On February 25, 2009, Integrys filed a motion with the Commission requesting that the Commission direct AEP-Ohio to cease and desist the Companies' refusal to process SSO retail customer applications to enroll in the Interruptible Load for Reliability (ILR) Program of PJM Interconnection, LLC (PJM). Integrys also filed a request for an expedited ruling; however, Integrys represented that counsel for AEP-Ohio objected to the expedited ruling request. Integrys is a registered curtailment service provider with PJM and as such receives notices from PJM and coordinates with retail customers to curtail load. Integrys argues that retail customer participation in PJM demand response programs was raised in the Companies' ESP application and has not yet been decided by the Commission. For this reason, Integrys contends that AEP-Ohio lacks the authority to refuse to process the ILR applications and the denial of the application violates the Companies' tariffs. Two other curtailment service providers in the AEP-Ohio service

territory, Constellation and KOREnergy, Ltd., filed memoranda in support of Integrys' motion.²

On March 2, 2009, AEP-Ohio filed a memorandum contra the motion to cease and desist. AEP-Ohio affirms the arguments made in this proceeding to prohibit retail customers from participating in PJM's demand response programs. Further, AEP-Ohio argues, among other things, that despite the claims of Integrys and Constellation, AEP-Ohio is providing, in a timely manner, the load data required for customer enrollment in the PJM ILR program, informs the customer that AEP-Ohio is not consenting to the customer's participation in the program, and discloses that the matter is currently pending before the Commission.

On March 9, 2009, Integrys and Constellation filed a withdrawal of the motion to direct AEP-Ohio to cease and desist. The movants state that despite AEP-Ohio's assertions that the applicants were not eligible to participate in PJM's demand response programs, PJM rejected AEP-Ohio's opposition to the ILR applications and processed the ILR applications. Integrys and Constellation further state that, except for two pending applications, all their customers in the AEP-Ohio service territory have been certified for participation in the PJM programs.

As the parties acknowledge, this matter was presented for the Commission's consideration as part of the ESP application. The Commission, therefore, specifically addresses and discusses the issues raised concerning SSO retail customer participation in PJM demand response programs at Section VI.C of this opinion and order. Accordingly, we grant Integrys' and Constellation's request to withdraw their motion to cease and desist.

II. DISCUSSION

A. Applicable Law

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing AEP-Ohio's application, the Commission is cognizant of the challenges facing Ohioans and the electric industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, which was amended by Senate Bill 221 (SB 221).

Section 4928.02, Revised Code, states that it is the policy of the state, inter alia, to:

² KOREnergy, Ltd., has not filed to intervene in this proceeding and, therefore, its memoranda in support will not be considered.

- (1) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.
- (2) Ensure the availability of unbundled and comparable retail electric service.
- (3) Ensure diversity of electric supplies and suppliers.
- (4) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management (DSM), time-differentiated pricing, and implementation of advanced metering infrastructure (AMI).
- (5) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems in order to promote both effective customer choice and the development of performance standards and targets for service quality.
- (6) Ensure effective retail competition by avoiding anticompetitive subsidies.
- (7) Ensure retail consumers protection against unreasonable sales practices, market deficiencies, and market power.
- (8) Provide a means of giving incentives to technologies that can adapt to potential environmental mandates.
- (9) Encourage implementation of distributed generation across customer classes by reviewing and updating rules governing issues such as interconnection, standby charges, and net metering.
- (10) Protect at-risk populations including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource.

In addition, SB 221 amended Section 4928.14, Revised Code, which now provides that on January 1, 2009, electric utilities must provide consumers with an SSO, consisting of either a market rate offer (MRO) or an ESP. The SSO is to serve as the electric utility's default SSO. The law provides that electric utilities may apply simultaneously for both an

MRO and an ESP; however, at a minimum, the first SSO application must include an application for an ESP. Section 4928.141, Revised Code, specifically provides that an SSO shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the electric utility's rate plan. In the event an SSO is not authorized by January 1, 2009, Section 4928.141, Revised Code, provides that the current rate plan of an electric utility shall continue until an SSO is authorized under either Section 4928.142 or 4928.143, Revised Code.

AEP-Ohio's application in this proceeding proposes an ESP, pursuant to Section 4928.143, Revised Code. Paragraph (B) of Section 4928.141, Revised Code, requires the Commission to hold a hearing on an application filed under Section 4928.143, Revised Code, to send notice of the hearing to the electric utility, and to publish notice in a newspaper of general circulation in each county in the electric utility's certified territory.

Section 4928.143, Revised Code, sets out the requirements for an ESP. Under paragraph (B) of Section 4928.143, Revised Code, an ESP must include provisions relating to the supply and pricing of generation service. The plan, according to paragraph (B)(2) of Section 4928.143, Revised Code, may also provide for the automatic recovery of certain costs, a reasonable allowance for certain construction work in progress (CWIP), an unavoidable surcharge for the cost of certain new generation facilities, conditions or charges relating to customer shopping, automatic increases or decreases, provisions to allow securitization of any phase-in of the SSO price, provisions relating to transmission-related costs, provisions related to distribution service, and provisions regarding economic development.

The statute provides that the Commission is required to approve, or modify and approve the ESP, if the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. In addition, the Commission must reject an ESP that contains a surcharge for CWIP or for new generation facilities if the benefits derived for any purpose for which the surcharge is established are not reserved or made available to those that bear the surcharge.

The Commission may, under Section 4928.144, Revised Code, order any just and reasonable phase-in of any rate or price established under Section 4928.141, 4928.142, or 4928.143, Revised Code, including carrying charges. If the Commission does provide for a phase-in, it must also provide for the creation of regulatory assets by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount, and shall authorize the deferral's collection through an unavoidable surcharge.

By finding and order issued September 17, 2008, in Case No. 08-777-EL-ORD (SSO Rules Case), the Commission adopted new rules concerning SSO, corporate separation, and reasonable arrangements for electric utilities pursuant to Sections 4928.06, 4928.14, 4928.17, and 4905.31, Revised Code. The rules adopted in the SSO Rules Case were subsequently amended by the entry on rehearing issued February 11, 2009.

B. State Policy - Section 4928.02, Revised Code

AEP-Ohio submits that, contrary to the views of the intervenors, Section 4928.02, Revised Code, does not impose additional requirements on an ESP and the ESP should not be modified or rejected because it does not satisfy all of the policies of the state. According to the Companies, "[t]he public interest is served if the ESP is more favorable in the aggregate than the expected results of an MRO" (Cos. Br. at 15).

OHA asserts that the Commission "must view the 'more favorable in the aggregate' standard through the lens of the overriding 'public interest,'" and that the public interest cannot be served if the result is not reasonable (OHA Br. at 10). OPAE/APAC seems to state that the ESP must be more favorable in the aggregate and comply with the state policy, but also recognizes that state policies are to be used to guide the Commission in its approval of an ESP (OPAE/APAC Br. at 3). OEG agrees that the policy objectives are required to be met prior to the approval of an ESP (OEG Br. at 1). The Commercial Group submits that costs must be properly allocated to ensure that the policies of the state are met, to improve price signals, and to ensure effective retail competition (Commercial Group Br. at 5).

In its reply brief, AEP-Ohio maintains that its proposed ESP is consistent with the policy of the state as delineated in Sections 4928.02(A) through (N), Revised Code, and is "worthy of approval, without modification" (Cos. Reply Br. at 7). According to the Companies, the ESP advances the general policy objectives of the policy of the state (Id. at 6-7). Furthermore, the Companies argue that the concerns raised by some intervenors regarding the impact of AEP-Ohio's ESP on the difficult economic conditions would have the Commission ignore the statutory standard for approving an ESP and, instead, establish rates based on the current economic conditions (Cos. Reply Br. at 7). While the Companies believe that aspects of the proposed ESP address these concerns (e.g., fuel deferrals), they argue that their SSO must be established in accordance with applicable ESP statutory provisions (Id.).

As explained above, and previously in our opinion and order issued in the FirstEnergy ESP proceeding,³ the Commission believes that the state policy codified by the General Assembly in Chapter 4928, Revised Code, sets forth important objectives,

³ *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 08-935-EL-SSO, Opinion and Order at 12 (December 19, 2008) (FirstEnergy ESP Case).

which the Commission must keep in mind when considering all cases filed pursuant to that chapter of the code. As noted in the FirstEnergy ESP case, in determining whether the ESP meets the requirements of Section 4928.143, Revised Code, we take into consideration the policy provisions of Section 4928.02, Revised Code, and we use these policies as a guide in our implementation of Section 4928.143, Revised Code. Accordingly, we agree with AEP-Ohio and will use these policies as a guide in our decision-making in this case, just as we did in the FirstEnergy ESP Case (Cos. Reply Br. at 6).⁴ The Commission has reviewed the ESP proposal presented by AEP-Ohio, as well as the issues raised by the various intervenors, and we believe that, with the modifications set forth herein, we have appropriately reached a conclusion advancing the public's interest.

C. Application Overview

In their application, the Companies are requesting authority to establish an SSO in the form of an ESP pursuant to the provisions of Sections 4928.141 and 4928.143, Revised Code. The proposed ESP is to be effective for a three-year period commencing January 1, 2009. According to the Companies, pursuant to the proposed ESP, the overall, estimated increases in total customer rates, including generation, transmission, and distribution, would be an average of 13.41 percent for CSP and 13 percent for OP in 2009, and 15 percent in 2010 and 2011 for both CSP and OP (Cos. Ex. 1, Exhibit DMR-1). The Companies also propose a 15 percent cap per year on the total allowable increases for each customer rate schedule should the actual costs be higher than expected, excluding transmission costs and costs associated with new government mandates (Cos. App. at 6).

III. GENERATION

A. Fuel Adjustment Clause (FAC)

The Companies contend that Section 4928.143(B)(2)(a), Revised Code, authorizes the implementation of a FAC mechanism to recover prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations (Cos. Ex. 7 at 4-7).

⁴ Some intervenors recognize that the state policy objective must be used as a guide to implement the ESP provision (IEU Br. at 19; OP&E/APAC Br. at 3).

1. FAC Costs

The Companies proposed to include in the FAC mechanism types of costs recovered through the electric fuel component (EFC) previously used in Ohio⁵ (Cos. Ex. 7 at 3-4). In addition to those types of costs, the Companies stated that Section 4928.143(B)(2)(a), Revised Code, provides for a broader cost-based adjustment mechanism that authorizes the inclusion of all prudently incurred fuel, purchased power, and environmental components (Id. at 4). Companies' witness Nelson itemized and described the accounts that the Companies proposed to include in their FAC mechanism (Id. at 5-7).

Staff, OCC, and Sierra support the FAC mechanism that will be updated and reconciled quarterly (Staff. Ex. 8 at 3-4; OCEA Br. at 47-48, 67-68; OCC Ex. 11 at 4-5, 31-40). Specifically, Staff witness Strom testified that the costs proposed to be recovered through the FAC mechanism are appropriate and recovery of those costs through a FAC mechanism is logical (Staff Ex. 8 at 3). OCC and Sierra also agree that Section 4928.143(B)(2)(a), Revised Code, authorizes the enactment of a FAC mechanism to automatically recover certain prudently incurred costs (OCEA Br. at 47), and OCC does not seem to oppose the list of categories of accounts proposed to be included in the FAC by Companies witness Nelson (OCC Ex. 11 at 18-20). Additionally, Staff recommended that annual reviews of the prudence and appropriateness of the accounting of FAC costs be conducted (Staff Ex. 8 at 3-4), and OCC recommended that an interest charge be paid to customers on any over-recovered fuel costs in a quarterly period until the subsequent reconciliation occurs, similar to the carrying charge for any under-recovery that she believed the Companies were proposing to collect⁶ (OCC Ex. 11 at 4). Kroger and IEU, however, seem to state that a FAC mechanism cannot be established until a cost-of-service or earnings test is completed (Kroger Br. at 9-10; IEU Br. at 12-15). IEU also questioned the appropriate term of the proposed FAC mechanism (IEU Br. at 13; Tr. Vol. IX at 143-146).

The Commission believes that the establishment of a FAC mechanism as part of an ESP is authorized pursuant to Section 4928.143(B)(2)(a), Revised Code, to recover prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations. Given that the FAC mechanism is authorized pursuant to the ESP provision of SB 221, we will limit our authorization, at this time, to the term of the ESP.

⁵ See Sections 4905.01(G), 4905.66 through 4905.69, and 4909.159, Revised Code (repealed January 1, 2001); Chapter 4901:1-11, Ohio Administrative Code (O.A.C.) (rescinded November 27, 2003).

⁶ In AEP's Brief, the Companies clarified that they did not propose to collect a carrying charge on any FAC under-recovery in one quarterly period until a reconciliation in the subsequent period occurred. The only carrying charge that they proposed was on the FAC deferrals that would not be collected until 2012-2018 (Cos. Br. at 27).

With regard to interest charges assessed on any over- or under-recoveries for FAC costs within the quarterly period until the subsequent reconciliation occurs, we agree with OCC witness Medine that symmetry should exist if interest charges were assessed on any under-recoveries (Tr. Vol. VI at 210). However, we do not conclude that any interest charges on either over- or under-recoveries are necessary as a deterrent to the creation of over- or under-recoveries as OCC witness Medine suggests (Id. at 210-211). As proposed by the Companies and supported by others, the FAC mechanism includes a quarterly reconciliation to actual FAC costs incurred, which will establish the new charge for the subsequent quarter. These quarterly adjustments combined with the annual review proposed by Staff to review the appropriateness of the accounting of the FAC costs and the prudence of decisions made are sufficient to control the over- or under-recoveries that may occur within a particular quarter. Therefore, we find that the FAC mechanism with quarterly adjustments as proposed by the Companies, as well as an annual prudence and accounting review recommended by Staff, is reasonable and should be approved and implemented as set forth herein.

(a) Market Purchases

As part of the FAC costs, the Companies proposed to purchase incremental power on a "slice of the system basis" equal to 5 percent of each company's load in 2009, 10 percent in 2010, and 15 percent in 2011 (Cos. Ex. 2-A at 21). The Companies argue that while these purchases will be included in the FAC mechanism, as the appropriate recovery mechanism for these costs, the purchases are permitted as a discretionary component of an ESP filing authorized by Section 4928.143(B)(2), Revised Code, which states: "The plan may provide for or include, without limitation, any of the following:" (emphasis added) (Cos. Br. at 37). To support its proposal, AEP-Ohio states that the purchases reflect the continued transition to market rates and represent an appropriate recognition of the Companies' incorporation of the loads of Ormet Primary Aluminum Company (Ormet) and the certified territory formerly served by Monongahela Power Company (MonPower) (Cos. Ex. 2-A at 21-22). The Companies further assert that, during the ESP, they should be able to continue to recover a market-based generation price for serving these loads, as was previously authorized by the Commission during the RSP period.

Staff supported market purchases sufficient to meet the additional load responsibilities that the Companies assumed for the addition of the former MonPower customers and Ormet to the Companies' system, which equals approximately 7.5 percent of the Companies' total loads (Staff Ex. 10 at 5). However, based on the size of the additional load assumed by the Companies, Staff only recommended that the incremental power purchases equal, on average, 5 percent of each company's load in 2009, 7.5 percent in 2010, and 10 percent in 2011 (Id.).

The Companies responded to Staff's reduction in the amount of market purchases by adding that the Companies also intended to utilize their proposed levels of market purchases to encourage economic development (Cos. Ex. 2-E at 7).

Various parties oppose the inclusion of incremental "slice of the system" power purchases in AEP-Ohio's ESP. OEG witness Kollen testified that the Commission should reject this provision of AEP-Ohio's ESP because the Companies have not demonstrated a need for the excess generation purchased on the market to meet its existing load, and such "purchases are not prudent because they will uneconomically displace lower cost Company owned generation and cost-based purchased power that is available to meet their loads" (OEG Ex. 3 at 3, 9-10). IEU witness Bowser agrees that this portion of the ESP should be rejected (IEU Ex. 10 at 9). Kroger witness Higgins also concurs, stating: "The only apparent purpose of these slice-of-system purchases is to serve as a device for increasing prices charged to customers" (Kroger Ex. 1 at 9). OCEA concurs with the testimony offered by these intervenor witnesses (OCEA Br. at 53-55). Intervenors also question this provision in light of the AEP Interconnection Agreement (OEG Ex. 3 at 10-14; OCEA Br. at 54-55).

Given that AEP-Ohio has explicitly stated that the purchased power is not a prerequisite for adequately serving the additional load requirements assumed by AEP-Ohio when adding Ormet and the MonPower customers to its system (Cos. Ex. 2-E at 7), the Commission finds that Staff's rationale for the support of the proposal, as well as the recommendation for a reduction in the amount of purchased power proposed to equal the additional load, fails. We struggle, along with the other parties, to find a rational basis to approve such a proposal in the absence of need. The Commission notes that while we appreciate AEP-Ohio's willingness and cooperation with regard to the inclusion of Ormet and MonPower customers into its system, we believe that the Companies have been able to prepare and plan for the additions to its system under the current regulatory scheme and have been compensated during the transitional period. As for the reliance on the market purchases to promote economic development, the Commission believes that this goal can be more appropriately achieved through other means as outlined in this opinion and order, the Commission's recently adopted rules, and SB 221. Accordingly, we find that AEP-Ohio's ESP shall be modified to exclude this provision.

(b) Off-System Sales (OSS)

Kroger and OEG contend that FAC costs must be offset by a credit for OSS margins, stating that other jurisdictions governing other operating companies of AEP Corporation require such an OSS offset to revenue requirements (Kroger Br. at 11-12; Kroger Ex. 1 at 3, 9, 10; OEG Br. at 10; OEG Ex. 3 at 14-15, 16-17). Kroger argues that it is incongruent to allow a rate increase based on certain costs without examining AEP-Ohio's

net costs to determine that AEP-Ohio's costs have actually increased (Kroger Br. at 11-12). OEG notes that the Companies' profits for 2007 from off-system sales were \$146.7 million for OP and \$124.1 million for CSP (OEG Ex. 3 at 14). OEG reasons that because the cost of the power plants used to generate off-system sales are included in rates, all revenue from the power plants should be a rate credit (OEG Br. 10). OCEA raises similar arguments to those of OEG and Kroger in its brief (OCEA Br. at 57-59). More specifically, OCEA argues that the Companies' proposal to eliminate off-system sales expenses from Ohio ratepayers is not equivalent to providing customers the benefit of off-system sales margins. OCEA notes that, in other cases, the Commission has required electric utilities to share the benefits of off-system sales revenue with jurisdictional customers (OCEA Br. at 58-59).

Staff did not take a position in regard to the intervenors' arguments to offset FAC costs by the OSS margin. Staff, however, concluded that the costs sought to be recovered through the FAC are appropriate (Staff Ex. 10 at 4; Staff Ex. 8 at 3; Staff Br. at 2).

The Companies argue that an OSS offset to FAC charges is not required by Section 4928.143(B)(2)(a), Revised Code, or any other provision in SB 221 (Cos. Ex. 2-E at 8-9; Cos. Reply Br. at 12). The Companies also state that the regulatory or statutory regimes in other states have no bearing on Ohio or Ohio's statutory requirements (Id.). As to the other arguments raised by OEG and OCEA, the Companies argue that the intervenors' arguments ignore the fact that the Companies' ESP reduces the FAC and environmental carrying cost expenses for AEP-Ohio customers based on the calculation of the pool capacity payments in the FAC and use of the pool allocation factor (Cos. Ex. 7, Exhibits PJN-1, PJN-2, PJN-6 and PJN-8).

Upon a review of the record in this case, the Commission is not persuaded by the intervenors' arguments. We do not believe that the testimony presented offered adequate justification for modifying the Companies' proposed ESP to offset OSS margins from the FAC costs. Section 4928.143(B)(2)(a), Revised Code, specifically provides for the automatic recovery, without limitation, of prudently incurred costs for fuel, purchased power, capacity cost, and power acquired from an affiliate. As recognized by the Companies, the pertinent statutory provisions do not require that there be an offset to the allowable fuel costs for any OSS margins. Additionally, Ohio law governs the Companies' ESP application, and thus, we are not persuaded by the arguments of Kroger regarding how other jurisdictions handle OSS margins. Moreover, consistent with our discussion in Section VII of our opinion and order, we do not believe that OSS should be a component of the Companies' ESP, or factored into our decision in this proceeding. Intervenors cannot have it both ways: they cannot request that OSS margins be credited against the fuel costs (i.e., offset the expenses); and, at the same time, ask us to count the OSS margins as earnings for purposes of the significantly excessive earnings test (SEET) calculation.

(c) Alternate Energy Portfolio Standards (including Renewable Energy Credit program)

Section 4928.64, Revised Code, establishes alternative energy portfolio standards which consist of requirements for both renewable energy and advanced energy resources. Section 4928.64(B)(2), Revised Code, introduces specific annual benchmarks for renewable energy resources and solar energy resources beginning in 2009.

The Companies' ESP application included, as a part of the FAC costs, cost recovery for renewable energy purchases and renewable energy credits (RECs) with purchased power reflected in Account 555 and RECs reflected in Account 557 (Cos. Ex. 7 at 6-7, 14). The Companies stated that they plan to purchase almost all of the RECs required for 2009. The Companies further state that they will enter into renewable energy purchase agreements (REPAs) to meet compliance requirements for the remainder of the ESP period, for which they have already conducted a request for proposal (Cos. Ex. 9 at 10-11). The Companies also recognized that recovery of such costs to comply with Section 4928.64(E), Revised Code, is, as stated in the statute, avoidable. Therefore, the Companies explained that they intend to include all of the renewable energy costs within the FAC mechanism and not as part of any FAC deferral. The Companies, however, recognized that their request for proposal and procurement practices for renewable energy will be subject to a prudency review and the renewable purchases subject to a financial audit (Cos. Br. at 96-98).

Staff and OPAE/APAC express concern with the Companies' plan to include renewable energy purchases and RECs as a component of the FAC mechanism (Staff Ex. 4 at 6-7; Staff Br. at 4-5; OPAE/APAC Br. at 11).

The Commission notes that the renewable energy purchases and RECs requirements are based on Section 4928.64(E), Revised Code, and any recovery of such costs is, as the statute provides, bypassable. With the Companies' recognition that such costs must be accounted for separately from fuel costs, and is not to be deferred, the Commission finds that Staff's and OPAE/APAC's issue is adequately addressed. Accordingly, with that clarification, the Commission finds that this aspect of the Companies' ESP application is reasonable and should be adopted.

2. FAC Baseline

The Companies proposed establishing a baseline FAC rate by identifying the FAC components of the current SSO. The Companies started with the EFC rates that were unbundled as part of the electric transition plan (ETP) proceedings (those in effect as of October 5, 1999) (step #1), and then added calendar year 1999 amounts for the additional fuel, purchased power, and environmental accounts that are included in the requested

FAC mechanism for this proceeding (1999 data from FERC Form 1 and other financial records were used as the base period for the additional components that were not in the frozen EFC rates) (step #2) (Cos. Ex. 7 at 8). The Companies then adjusted the 1999 frozen EFC rates (step #1) and the 1999-level rates developed for the additional components (step #2) for subsequent rate changes (step #3) to get the base FAC component that is equal to the fuel-related costs presently embedded in the Companies' most recent SSO (i.e., the RSP) (Id.). The subsequent rate changes that occurred during the RSP period and reflected in step #3 of the Companies' calculation included annual increases of 7 percent for OP and 3 percent for CSP, an increase in CSP's generation rates for 2007 by approximately 4.43 percent through the Power Acquisition Rider, and a reduction in OP's base period FAC rate by the amount of the Gavin Cap and mine investment shutdown cost recovery component that was in OP's 1999 EFC rate given that the Regulatory Asset Charge (RAC) established in the ETP case expired (Id. at 9).

Staff argued that the actual costs should be used in determining the FAC baseline and, therefore, recommended using 2007 actual data, escalated by 3 percent for CSP and 7 percent for OP, as a reasonable proxy for 2008 (Staff Ex. 10 at 3-4). Staff explained that utilizing actual 2007 costs and updating them to 2008 is appropriate given that the resulting amounts should be the costs that the Companies are currently recovering for fuel-related costs (Id.). Additionally, Staff notes that this proposal produces a result that is very close to the result produced by utilizing the Companies' methodology (Staff Br. at 3).

OCC recommended the use of 2008 actual fuel costs to establish the FAC baseline, which will be reconciled to actual costs in the future FAC proceeding (OCC Ex. 10 at 11-14). OCC's witness testified that her concern is that if the FAC baseline is established too low, the base portion of the generation rates (the non-FAC portion) will be established too high (OCC Ex. 10 at 13). In its Brief, OPAE/APAC opposed the Companies' use of 1999 rates as the baseline and seems to support OCC's recommendation to use 2008 fuel costs (OPAE/APAC Br. at 11-12). The Companies' responded by explaining that they did not use 1999 rates as the baseline, rather the 1999 level was just the starting point to calculating the baseline (Cos. Reply Br. at 21). The Companies also stated that a variable baseline was not appropriate as it would result in a variable non-FAC generation rate as well since the non-FAC component of the current generation SSO was determined to be the residual after subtracting out the FAC component (Id.).

As noted by OCC's witness, the 2008 actual fuel costs were not known at the time of the hearing (OCC Ex. 10 at 14). Thus, the Companies and Staff proposed methodologies to obtain a proxy for 2008 fuel costs. While both had a different starting point to the calculation of the 2008 proxy, we agree that in the absence of known actual costs, a proxy is appropriate to establish a baseline. Therefore, based on the evidence presented, we agree with Staff's resulting value as the appropriate FAC baseline.

3. FAC Deferrals

The Companies proposed to mitigate the rate impact on customers of any FAC increases by phasing in their new ESP rates by deferring a portion of the annual incremental FAC costs during the ESP (Cos. App. at 4-5; Cos. Ex. 3 at 11; Cos. Ex. 1 at 13-15). The amount of the incremental FAC expense that would be recovered from customers would be limited so that total bill increases would not be more than 15 percent for each of the three years of the ESP (Id.). The 15 percent target for FAC does not include cost increases associated with the transmission cost recovery rider (TCRR) or with any new government mandates (the Companies' could apply to the Commission for recovery of costs incurred in conjunction with compliance of new government mandates, including any Commission rules imposed after the filing of the ABP-Ohio application (Cos. App. at 6)). The Companies proposed to periodically reconcile the FAC to actual costs, subject to the maximum phase-in rates (Cos. Ex. 1 at 14-15). Under the Companies' proposal, any incremental FAC expense that exceeds the maximum rate levels will be deferred. The Companies project the deferrals under the proposed ESP to be \$146 million by December 31, 2011 for CSP and \$554 million by December 31, 2011 for OP (Cos. Ex. 6, Exhibit LVA-1). If the projected FAC expense in a given period is less than the maximum phase-in FAC rates, the Companies proposed to give the Commission the option of charging the customer the actual FAC expense amount or increasing the FAC rates up to the maximum levels in order to reduce any existing deferred FAC expense balance (Id.). Any deferred FAC expense remaining at the end of 2011 would be recovered, with a carrying cost at the Weighted Average Cost of Capital (WACC), as an unavoidable surcharge from 2012 to 2018 (Id.).

As noted previously, Staff, OCC, and Sierra support the FAC mechanism that will be updated and reconciled quarterly (Staff. Ex. 8 at 3-4; OCC Ex. at 11 at 4-5, 31-40; OCEA Br. at 47-48, 67-68). Staff, OCC, and Sierra, however, oppose the creation of any long-term deferrals for fuel costs (Staff Ex. 10 at 5; OCEA Br. at 62). Similarly, the Commercial Group recommended that "customers pay the full cost of fuel during the ESP" (Commercial Group Ex. 1 at 9). Constellation argued that the deferral proposal should be rejected because it masks the true cost of the ESP generation, deferrals have the effect of artificially suppressing conservation, the carrying costs proposed by the Companies would be set at the Companies' cost of capital, which would include equity, and customers do not want to pay interest on any deferred amounts (instead, customers would rather pay when the costs are incurred so as to not pay the interest) (Constellation Br. at 8-9). The Schools also questioned the need for the phase-in of rates, as well as the avoidability of the surcharge that would be created to collect the deferred fuel costs, with carrying charges, from 2012 to 2018 (Schools Br. at 3).

If the Commission, however, authorizes such deferrals to levelize rates during the ESP period, Staff, OCC, and Sierra believe that the deferrals should be short-term deferrals that do not extend beyond the ESP period (Staff Ex. 10 at 5; OCEA Br. at 62). IEU also supports the use of a phase-in to stabilize rates, but does not believe that Section 4928.144, Revised Code, allows the deferrals to extend beyond the ESP term (IEU Br. at 27-29).

Furthermore, OCC opposed the Companies' use of WACC, stating that such an approach is not reasonable and results in excessive payments by customers (OCC Ex. 10 at 34). Through testimony, OCC asserts that the carrying charges on deferrals should be based on the current long-term cost of debt (OCC Ex. 10 at 34-35; Tr. Vol. VI at 157-158). However, in its joint brief, OCC seems to have modified its position and is now arguing that the carrying charges should be calculated to reflect the short-term actual cost of debt, excluding equity (OCEA Br. at 62). In reliance on OCC's testimony, Constellation submits that it is appropriate to use the long-term cost of debt (Constellation Br. at 8). The Commercial Group also opposed the use of WACC; instead, Commercial Group witness Gorman recommended that the Companies finance the FAC phase-in deferrals entirely with short-term debt given that the accruals are a temporary investment and not long-term capital (Commercial Group Ex. 1 at 9-11).

Additionally, the Commercial Group and OCC argued that the deferred fuel expenses should be calculated to reflect the net of applicable deferred income taxes (Commercial Group Ex. 1 at 9-10; OCEA Br. at 63). Commercial Group witness Gorman testified that if a company does not recover the fuel expense in the year that it was incurred, the company will reduce its current tax expense and record a deferred tax obligation. The deferred tax obligation would then represent a temporary recovery of the fuel expense via a reduction to the current income tax expense (Commercial Group Ex. 1 at 10). Commercial Group witness Gorman then goes on to recognize that the income tax will ultimately have to be paid after the incremental fuel cost is recovered from customers, but states that, while deferred, the company will partially recover its deferred fuel balance through the reduced income tax expense (*Id.*). To bolster their argument that deferred fuel expenses should be calculated on a net-of-tax basis, OCC and Sierra relied, in their brief, on a witness' testimony in an unrelated proceeding, which has been subsequently withdrawn as explained above. Neither OCC nor Sierra offered any record evidence to support its position.

AEP-Ohio, on the other hand, argued that the calculation of carrying charges for the deferrals should not be done on a net-of-tax basis. AEP-Ohio witness Assante testified that limiting the application of the carrying cost rate to a net-of-tax balance of FAC deferrals improperly utilizes a traditional cost-of-service ratemaking approach in a generation pricing proceeding (Tr. Vol. IV at 158-160). Additionally, while the Companies proposed the phase-in proposal to help mitigate increases and believe that their proposal

is reasonable, in light of the opposition received from several parties, the Companies stated that they would accept a modification to their ESP that eliminated such deferrals (Cos. Reply Br. at 41-42).

To ensure rate or price stability for consumers, Section 4928.144, Revised Code, authorizes the Commission to order any just and reasonable phase-in of any electric utility rate or price established pursuant to 4928.143, Revised Code, with carrying charges, through the creation of regulatory assets. Section 4928.144, Revised Code, also mandates that any deferrals associated with the phase-in authorized by the Commission shall be collected through an unavoidable surcharge. Section 4928.144, Revised Code, does not, however, limit the time period of the phase-in or the recovery of the deferrals created by the phase-in through the unavoidable surcharge.

Contrary to OCC and others,⁷ we believe that a phase-in of the increases is necessary to ensure rate or price stability and to mitigate the impact on customers during this difficult economic period, even with the modifications to the ESP that we have made herein. To this end, the Commission appreciates the Companies' recognition that over 15 percent rate increases on customers' bills would cause a severe hardship on customers. Nonetheless, given the current economic climate, we believe that the 15 percent cap proposed by the Companies is too high.⁸ Therefore, we exercise our authority pursuant to Section 4928.144, Revised Code, and find that the Companies should phase-in any authorized increases so as not to exceed, on a total bill basis, an increase of 7percent for CSP and 8percent for OP for 2009, an increase of 6percent for CSP and 7percent for OP for 2010, and an increase of 6percent for CSP and 8percent for OP for 2011 are more appropriate levels.

Based on the application, as modified herein, the resulting increases amount to approximate overall average generation rates of 5.47 cents/kWh and 4.29 cents/kWh for CSP and OP, respectively in 2009; 6.07 cents/kWh and 4.75 cents/kWh for CSP and OP, respectively, in 2010; and 6.31 cents/kWh and 5.31 cents/kWh for CSP and OP, respectively, in 2011.

Any amount over the allowable total bill increase percentage levels will be deferred pursuant to Section 4928.144, Revised Code, with carrying costs. If the FAC expense in a given period is less than the maximum phase-in FAC rate established herein, the Companies shall begin amortization of the prior deferred FAC balance and increase the FAC rates up to the maximum levels allowed to reduce any existing deferred FAC expense balance, including carrying costs. As required by Section 4928.144, Revised Code, any deferred FAC expense balance remaining at the end of 2011 shall be recovered

⁷ See, e.g., OCC Reply Br. at 45-46; Constellation Br. at 6-9.

⁸ Numerous letters filed in the docket by various customers confirm our belief.

via an unavoidable surcharge. We believe that this approach balances our objectives of limiting the total bill increases that customers will be charged in any one year with minimizing the deferrals and carrying charges collected from customers.

Based on the record in this proceeding, we do not find the intervenors' arguments concerning the calculation of the carrying charges persuasive. Instead, for purposes of a phase-in approach in which the Companies are expected to carry the fuel expenses incurred for electric service already provided to the customers,⁹ we find that the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the WACC is reasonable as proposed by the Companies. As explained previously, Section 4928.144, Revised Code, provides the Commission with discretion regarding the creation and duration of the phase-in of a rate or price established pursuant to Sections 4928.141 through 4928.143, Revised Code. The Commission is not convinced by arguments that limit the collection of the deferrals to the term of the ESP. Limiting the phase-in to the term of the ESP may not ensure rate or price stability for consumers within that three-year period and may create excessive increases, which may defeat the purpose for establishing a phase-in. The limitation of any deferrals to the ESP term may also negate the cap established by the Commission herein to provide stability to consumers. Therefore, we find that the collection of any deferrals, with carrying costs, created by the phase-in that are remaining at the end of the ESP term shall occur from 2012 to 2018 as necessary to recover the actual fuel expenses incurred plus carrying costs.

Regarding OCC's, Sierra's, and the Commercial Group's recommendations that the tax deductibility of the debt rate be reflected in the carrying charges on a net-of-tax basis,¹⁰ we have recently explained that this recommendation accounts for the deductibility of the debt rate, but does not account for the fact that the revenues collected are taxable.¹¹ If we were to adopt the net-of-tax recommendation, the Companies would not recover the full carrying charges on the authorized deferrals. We believe that this outcome would be inconsistent with the explicit directive of Section 4928.144, Revised

⁹ We agree with the Companies that this decision is consistent with our decision in the recent TCRR and accounting cases with regard to the calculation based on the long-term cost of debt. See *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-1202-EL-UNC, Finding and Order (December 17, 2008) and *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-1301-EL-UNC, Finding and Order (December 19, 2008). However, we believe that, with regard to the equity component, these cases are distinguishable from the current ESP proceeding, where we are establishing the standard service offer and requiring the Companies to defer the collection of incurred generation costs associated with fuel over a longer period. We also believe that this decision is reasonable in light of our reduction to the Companies' proposed FAC deferral cap, which may have the effect of requiring the Companies to defer a higher percentage of FAC costs than what was otherwise proposed.

¹⁰ OCEA Br. at 63-64; Commercial Group Ex. 1 at 9-10.

¹¹ *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., Toledo Edison Co.*, Case No. 07-551-EL-AIR, et al., Opinion and Order at 10 (January 21, 2009).

Code: "If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount." Therefore, we find that the carrying charges on the FAC deferrals should be calculated on a gross-of-tax rather than a net-of-tax basis in order to ensure that the Companies recover their actual fuel expenses. Accordingly, we modify the deferral provision of the Companies' ESP to lower the overall amount that may be charged to customers in any one year.

B. Incremental Carrying Cost for 2001-2008 Environmental Investment and the Carrying Cost Rate

A component of the non-FAC generation increase is the incremental, ongoing carrying costs associated with environmental investments made during 2001-2008. The Companies propose to include, as a part of their ESP, costs directly related to energy produced or purchased. While the Companies are not proposing to include the recovery of capital carrying costs on environmental capital investments in the FAC, the Companies are requesting recovery of carrying charges for the incremental amount of the environmental investments made at their generating facilities from 2001 to 2008. The Companies' annual capital carrying costs for the incremental 2001-2008 environmental investments not currently reflected in rates equals \$84 million for OP and \$26 million for CSP. The Companies' ESP includes capital carrying costs for 2001 through 2008 net of cumulative environmental capital expenditures for each company multiplied by the carrying cost rate.

Each company's capital expenditures in the ESP are determined by the expenditures made since the start of the market development period as offset by the estimate included in the Companies' rate stabilization plan (RSP) case, Case No. 04-169-EL-UNC, and the environmental expenditures included in the Companies' adjustments received in the RSP 4 Percent Cases¹² (Cos. Ex. 7 at 15-17, Exhibits PJN-8, PJN-12). The Companies calculated the carrying cost rate based on levelized investment and depreciation over the 25-year life of the environmental investment. CSP and OP utilized a capital structure of 50 percent common equity and 50 percent debt to calculate the carrying charges, asserting that such is consistent with the capital structure as of March 31, 2008, and consistent with the expected capital structure during the ESP period. Short-term debt and the Gavin Lease were excluded from OP's capital structure. AEP-Ohio asserts that such was the process in the RSP 4 Percent Cases. AEP-Ohio also argues that, for ratemaking purposes, the Gavin Lease is considered an operating lease as opposed to a component of rate base. Further, the Companies reason that the WACC incorporated a 10.5 percent ROE as used by the Commission in the proceeding to transfer

¹² *In re Columbus Southern Power Company and Ohio Power Company*, Case Nos. 07-1132-EL-UNC, 07-1191-EL-UNC, and 07-1278-EL-UNC (RSP 4 Percent Cases).

MonPower's certified territory to CSP (MonPower Transfer Case)¹³ (Cos. Ex. 7 at 16-17, 19, Exhibit PJN-8, Exhibits PJN-10 - PJN-13; Cos. Ex. 7-B at 7).

Staff testified that the Companies should be allowed to recover carrying costs associated with capitalized investments to comply with environmental requirements made between 2001-2008 that are not currently reflected in rates (Staff Ex. 6 at 2, 4-5). Staff confirmed that AEP-Ohio's estimated revenue increases for incremental carrying costs associated with additional environmental investments in the amounts of \$26 million for CSP and \$84 million for OP are not currently reflected in rates (Id.).

OCEA and OEG oppose the Companies' request for recovery of environmental carrying charges on investments made prior to January 1, 2009. OEG contends that the rates in the RSP Case included recovery for environmental capital improvements made through December 31, 2008, as reflected in the RSP 4 Percent Cases. Further, OCEA and OEG argue that SB 221 only permits the recovery of carrying costs associated with environmental expenditures that are prudently incurred and that occur on or after January 1, 2009, pursuant to Section 4928.143(B)(2)(b), Revised Code (OCEA Ex. 10 at 32; OEG Ex. 3 at 21). Thus, OCEA reasons that approval of such expenditures necessitates an after-the-fact review, which cannot be considered in this proceeding. OEG, however, is not opposed to the Companies' increases due to environmental capital additions made after January 1, 2009, in the ESP in accordance with Section 4928.143(B)(2)(b), Revised Code (OEG Ex. 3 at 20). OEG and Kroger argue that the Companies' assertion that existing rates do not reflect environmental carrying costs ignores the Companies' non-environmental investment and the effects of accumulated depreciation and, therefore, according to OEG and Kroger, fails to demonstrate any net under-recovery of generation costs in total by the Companies (OEG Ex. 3 at 21; Kroger Ex. 1 at 10-11). OCEA and APAC/OPAE agree that the Companies have failed to demonstrate that they lack the earnings to make the environmental investments (OCEA Ex. 10 at 32; APAC/OPAE Br. at 5-6).

Further, OCEA asserts that there are several reasons that the Companies' attempt to recover environmental carrying cost during the ESP is unlawful. OCEA contends that it is retroactive ratemaking¹⁴ and Senate Bill 3, which was the governing law from 2001 to 2005, included rate caps pursuant to Section 4928.34(A)(6), Revised Code, and the RSP, applicable to 2006 through 2008, included limitations on the rate increases. Therefore, the Companies can not collect now for costs incurred during those periods. Further, OCEA

¹³ *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, Case No. 05-765-EL-UNC.

¹⁴ *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 25.

states that allowing for recovery of such environmental carrying costs would also violate the Stipulation and the Commission's order in the ETP case.¹⁵

OCEA argues that, should the Commission allow AEP-Ohio to recover carrying costs on environmental investments, the Companies' carrying charges should be based on actual investments made, not actual and forecasted environmental expenditures, and the carrying costs should be adjusted. More specifically, OCEA recommends that because the Companies failed to provide any support or explanation of the calculation of the property taxes or general and administrative components of the carrying cost calculation, the Commission should not grant recovery of these aspects of the Companies' request. Additionally, OCEA and IEU argue that the proposed carrying cost rates do not reflect actual financing for environmental investments, which could impact the calculation of the carrying cost rates (IEU Br. at 21-22, citing IEU Ex. 7 at 132-133; Tr. Vol. XI at 111-113; OCEA Br. at 71-72). The carrying cost rates, according to IEU and OCEA, should be revised to reflect actual financing, including the use of pollution control bonds that have been secured by the Companies (Id.). To support their argument, IEU and OCEA rely on Staff witness Cahaan who testified at the hearing that "if specific financing mechanisms can be identified that would be appropriate and applicable to the assets being financed, I see no reason why those shouldn't be specifically used"¹⁶ (IEU Br. at 21-22; OCEA Br. at 72-73). However, Staff witness Cahaan also stated that "[A]t the time when we looked at the carrying cost calculations it seemed reasonable, given the cost of debt and cost of equity of the company,"¹⁷ which is consistent with his prefiled testimony that said: "I have examined the carrying costs rates provided to Mr. Soliman and found them to be reasonable" (Staff Ex. 10 at 7).

OCEA also recommends that the carrying costs for deferrals of environmental costs be revised to reflect actual short-term cost of debt, as opposed to WACC as proposed by the Companies, and that the calculated carrying charges should not be based on the original cost of the environmental investment but at cost minus depreciation. Thus, OCEA argues that the Companies are seeking a return on and a return of their investment as would be the case under traditional ratemaking, but overstating the depreciation component. OCEA also advocates that the carrying cost rates, 13.98 percent for OP and 14.94 percent for CSP, are too high in light of the economic environment at this time (OCEA Br. at 73-74). Finally, OCEA urges the Commission to offset the Companies' request for carrying charges by the Section 199 provision of the Internal Revenue Code (Section 199). Section 199 allows the Companies to take a tax deduction for "qualified production activities income" equal to 6 percent in 2009 and 9 percent in 2010 and

¹⁵ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Opinion and Order (September 28, 2000).

¹⁶ Tr. Vol. XII at 237.

¹⁷ Id.

thereafter. IEU, OEG, and OCEA request that the Commission adjust the carrying costs for the Section 199 deduction as the Commission has found appropriate in the Companies' 07-63 Case¹⁸ and in the FirstEnergy ESP Case. OCEA argues that while Section 4928.143(B)(2)(a), Revised Code, allows the Companies to automatically recover the cost of federally mandated carbon or energy taxes, which will be passed on to customers, customers should be afforded the benefits of the Section 199 tax deduction (OCEA Br. at 74-75; IEU Br. at 21; IEU Ex. 10 at 6; OEG Ex. 3 at 23).

The Companies emphasize that their request for carrying costs is for the incremental carrying charges on the 2001-2008 investments that the Companies will incur post-January 1, 2009. AEP-Ohio explained that the carrying costs themselves are the costs that the Companies will incur after January 1, 2009, and, therefore, the Companies reason that the "without limitation" language in Section 4928.143(B)(2), Revised Code, supports their request (Tr. Vol. XIV at 93, 114). AEP-Ohio stresses that Section 4928.143(B)(2), Revised Code, is the basis for the carrying cost request as opposed to paragraph (B)(2)(a) of Section 4928.143, Revised Code, as OCEA and OEG claim and, therefore, the arguments as to retroactive ratemaking are misplaced (Cos. Reply Br. at 29-30). Further, the Companies insist that Section 4928.143(B)(2)(b), Revised Code, supports their request, as the carrying charges are necessary to recover the ongoing cost of investments in environmental facilities and equipment that are essential to keep the generation units operating. The Companies assert that the operating costs of their generation units remain well below the cost of securing the power on the market (Cos. Ex. 7-B at 7).

As to the claims that the carrying costs are overstated, the Companies claim that the levelized depreciation approach used by the Companies is better for customers than traditional ratemaking given the relative newness of the environmental investments (Tr. Vol. V at 55-56; Tr. Vol. VII at 22-23). The Companies also argue that the Companies' investments in environmental compliance equipment during 2001-2008 were not factored into the rates unbundled in 2000 and capped under the ETP case as alleged. The rate increase approved, as part of the RSP, and the RSP 4 Percent Cases did not, according to the Companies, provide recovery of the carrying costs to be incurred during the ESP period (Cos. Ex. 7, Exhibits PjN-8 - PjN-9 and PjN-12). The Companies reply that the intervenors' request to adjust carrying charges for the Section 199 deduction is flawed. AEP-Ohio states that the Section 199 deduction is not a reduction to the statutory tax rate used in the WACC, a fact which AEP-Ohio asserts has been recognized by FERC and the Financial Accounting Standards Board. The Companies further note that IEU witness Bowser indeed confirmed that Section 199 does not reduce the statutory tax rate (Tr. Vol. XI at 271-273). The Companies also argue, and IEU witness Bowser agreed, that the Section 199 tax deduction is applicable to AEP Corporation as a whole and not to each operating subsidiary. The Companies note, therefore, that any deduction available to

¹⁸ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 07-63-EL-UNC, Opinion and Order (October 3, 2007) (07-63 Case).

AEP-Ohio is reduced if one of the other AEP Corporation operating affiliates is not eligible for the Section 199 deduction (Cos. Br. 36; Tr. Vol. XI at 266-267). Accordingly, the Companies state that AEP-Ohio has not been able to take the full deduction (Tr. Vol. XIV at 115-117). Further, the Companies argue that the intervenors have misinterpreted the Commission's decision in the FirstEnergy ESP Case to imply that the Commission made an adjustment to account for the Section 199 deduction. For these reasons, the Companies request that the Commission reconsider adjusting carrying charges for the potential Section 199 deduction.

Upon review of the record, we agree with Staff that AEP-Ohio should be allowed to recover the incremental capital carrying costs that will be incurred after January 1, 2009, on past environmental investments (2001-2008) that are not presently reflected in the Companies' existing rates, as contemplated in AEP-Ohio's RSP Case. Further, the Commission finds that this decision regarding the recovery of continuing carrying costs on environmental investments, based on the WACC, is consistent with our decision in the 07-63 Case and the RSP 4 Percent Cases. Additionally, we agree with Staff that the levelized carrying cost rates proposed by AEP-Ohio are reasonable and, therefore, should be approved. We further find, as we concluded in the FirstEnergy ESP Case, that adequate modifications to the Companies' ESP application have been made in this order to account for the possibility of any applicable Section 199 tax deductions.

C. Annual Non-FAC Increases

The Companies proposed to increase the non-FAC portion of their generation rates by 3 percent for CSP and 7 percent for OP for each year of the ESP to provide a recovery mechanism for increasing costs related to matters such as carrying costs associated with new environmental investments made during the ESP period, increases in the general costs of providing generation service, and unanticipated, non-mandated generation-related cost increases. Specifically, as part of this automatic increase, the Companies intend to recover the carrying costs associated with anticipated environmental investments that will be necessary during the ESP period (2009-2011) (Cos. Br. at 27; Cos. Reply Br. at 46-49). The Companies argued that the annual increases are not cost-based and are avoidable for those customers who shop. The Companies also proposed two exceptions to the fixed, annual increases, one for generation plant closures and the other for OP's lease associated with the scrubber at the Gavin Plant, which would require additional Commission approval during the ESP. After establishing the FAC component of the current generation SSO to get a FAC baseline, the Companies determined that the remainder of the current generation SSO would be the non-FAC base component.

The intervenors oppose automatic annual increases in the non-FAC component of the generation rate, and argue that any generation increases should be cost-based (IEU Br.

at 24; OP&E/AP&C Br. at 6; OEG Br. at 12; OCEA Br. 29-31). OEG contends that since the Companies have not provided any support for the automatic annual increases, which could result in total rate increases over the three-year period of \$87 million for CSP and \$262 million for OP, the annual increases should be disallowed (OEG Ex. 3 at 18-19); Similarly, Kroger argues that AEP-Ohio did not appropriately account for costs associated with the non-FAC component of the proposed generation rates (Kroger Br. at 14).

Staff opposes CSP's and OP's recommended annual, non-FAC increases of 3 and 7 percent, respectively (Staff Ex. 10 at 4). Instead, Staff stated that it believes a more appropriate escalation of the non-FAC generation component would be half of the proposed amounts; therefore, recommending annual increases of 1.5 percent for CSP and 3.5 percent for OP (Id.). Staff witness Cahaan rationalized the proposed reduction by stating that "an average of 5% for the two companies may have been a reasonable expectation of cost increases at the time that the ESP was contemplated, but not now. With the recent financial crises, we are entering a recessionary, and possibly a deflationary, period and any expectations of price increases need to be revised downward" (Id.). Furthermore, while recognizing that the ultimate balancing of interests lies with the Commission, Staff witness Cahaan testified that Staff's recommended reduction in the proposed increases was a reasonable balance between the Companies' obligation and costs to serve customers and the current economic conditions (Tr. Vol. XII at 211). The Companies rejected Staff's rationalization for the reduction in their proposed non-FAC increases (Cos. Reply Br. at 49). IEU also rejected Staff's rationalization for the reduction, arguing that no automatic increases are warranted (IEU Br. at 24).

Stating that it is in the public interest for the Companies to continue investing in environmental equipment and to be in compliance with current and future environmental requirements, Staff witness Soliman also recommended that AEP-Ohio be permitted to recover carrying costs for anticipated environmental investments made during the ESP period (Staff Ex. 6 at 5). Staff recommended that this recovery occur through a future proceeding upon the request of the Companies for recovery of additional carrying costs associated with actual environmental investment after the investments have been made (Staff Br. at 6-7). Specifically, Staff suggested that the Commission require the Companies to file an application in 2010 for recovery of 2009 actual environmental investment cost and annually thereafter for each succeeding year to reflect actual expenditures (Tr. Vol. XII at 132; Staff Ex. 10 at 7). OCEA seems to agree with Staff's recommendation (OCEA Br. at 71).

The Companies further respond that Section 4928.143, Revised Code, does not require that the SSO price be cost-based and, instead, Section 4928.143(B)(2)(e), Revised Code, authorizes electric utilities to include in their ESP provisions for automatic increases in any component of the SSO price (Cos. Reply Br. at 48-49).

The Commission finds Staff's approach with regard to the recovery of the carrying costs for anticipated environmental investments made during the ESP to be reasonable, and, therefore, we direct the Companies to request, through an annual filing, recovery of additional carrying costs after the investments have been made.

We also agree with Staff that the economic conditions must be balanced against the Companies' provision of electric service under an ESP. In balancing these two interests, as well as considering all components of the ESP, we believe that it is appropriate to modify this provision of the Companies' ESP and remove the inclusion of any automatic non-FAC increases. As recognized by several intervenors, the record is void of sufficient support to rationalize automatic, annual generation increases that are not cost-based, but that are significant, equaling approximately \$87 million for CSP and \$262 million for OP (see, i.e., OCEA Br. at 29-30, citing Tr. Vol. XIV at 208-209). We also believe the modification is warranted in light of the fact that we have removed one of the Companies' significant costs factored into establishing the proposed automatic increases. Accordingly, we find that the ESP should be modified to eliminate any automatic increases in the non-FAC portion of the Companies' generation rates.

IV. DISTRIBUTION

A. Annual Distribution Increases

To support initiatives to improve the Companies' distribution system and service to customers, the Companies proposed the following two plans, which will result in annual distribution rate increases of 7 percent for CSP and 6.5 percent for OP:

1. Enhanced Service Reliability Plan (ESRP)

The Companies proposed to implement a new, three-year ESRP pursuant to 4928.143(B)(2)(h), Revised Code,¹⁹ which includes an enhanced vegetation initiative, an enhanced underground cable initiative, a distribution automation initiative, and an enhanced overhead inspection and mitigation initiative (Cos. Ex. 11 at 3). While noting that they are providing adequate and reliable electric service, the Companies justify the need for the ESRP by stating that customers' service reliability expectations are increasing, and in order to maintain and enhance reliability, the ESRP is required (Id. at 3, 8, 10-14). AEP-Ohio further states that the three-year ESRP, consisting of the four reliability

¹⁹ On page 72 of its brief, the Companies rely on Section 4928.154(B)(2)(h), Revised Code, to support their request to receive cost recovery for the incremental costs of the incremental ESRP activities. We are assuming that the reference was a typographical error and that the Companies intended to cite to Section 4928.143(B)(2)(h), Revised Code (see Cos. Reply Br. at 50-51).

programs, is designed to modernize and improve the Companies' distribution infrastructure (Id.).

(a) Enhanced vegetation initiative

The Companies state that the purpose of this new initiative is to improve the customer's overall service experience by reducing and/or eliminating momentary interruptions and/or sustained outages caused by vegetation. The Companies proposed to accomplish this goal by balancing its performance-based approach to reflect a greater consideration of cycle-based factors (Id. at 26-28). The Companies state that under their proposed vegetation initiative, they will employ additional resources (approximately double the current number of tree crews in Ohio), employ greater emphasis on cycle-based planning and scheduling, increase the level of vegetation management work performed so that all distribution rights-of-way can be inspected and maintained, and utilize improved technologies to collect tree inventory data to optimize planning and scheduling by predicting problem areas before outages occur (Id. at 28-29).

(b) Enhanced underground cable initiative

The Companies state that the purpose of this initiative is to reduce momentary interruptions and sustained outages due to failures of aging underground cable. The Companies' plan to target underground cables manufactured prior to 1992 to replace and/or restore the integrity of the cable insulation (Id. at 31).

(c) Distribution automation (DA) initiative

The Companies explain that DA is a critical component of their proposed gridSMART distribution initiative that is described below. DA is an advanced technology that improves service reliability by minimizing, quickly identifying and isolating faulted distribution line sections, and remotely restoring service interruptions (Id. at 34-35).

(d) Enhanced overhead inspection and mitigation initiative

The Companies state that the purpose of this initiative is to improve the customer's overall service experience by reducing equipment-related momentary interruptions and sustained outages. The Companies intend to accomplish this goal through a comprehensive overhead inspection process that will proactively identify equipment that is prone to fail (Id. at 18). The Companies also state that the new program will go beyond the current inspection program required by the electric service and safety (ESSS) rules, which is a basic visual assessment of the general condition of the distribution facilities, by conducting a comprehensive inspection of the equipment on each structure via walking the circuit lines and physically climbing or using a bucket truck to inspect (Id. at 19). In conjunction with this program, AEP-Ohio proposes to focus on five targeted overhead

asset initiatives, including cutout replacement, arrester replacement, recloser replacement, 34.5 kV protection, and fault indicator (Id. at 20-22).

Generally, numerous intervenors and Staff opposed the distribution initiatives and cost recovery of such initiatives through this proceeding. Many parties advocated for deferral of these distribution initiatives, and the ESRP as a whole, for consideration in a future distribution base rate case (Staff Br. at 7; Staff Ex. 1 at 6-7; OPAB/APAC at 19; IEU Br. at 25-26; Kroger Br. at 18; OHA Br. at 17; OMA Br. at 6). Further, OCEA argued that the Companies have not demonstrated that the ESRP is incremental to what the Companies are required to do and spend under the current ESSS rules and current distribution rates (OCEA Br. at 44; OCC Ex. 13 at 8-11). While supporting several aspects of the Companies' ESRP programs, Staff witness Roberts also questioned the incremental nature of the proposed ESRP programs (Staff Ex. 2 at 4-6, 13, 17, 18; Tr. Vol. VIII at 70-77).

The Commission agrees, in part, with Staff and the intervenors. The Commission recognizes that Section 4928.143(B)(2)(h), Revised Code, authorizes the Companies to include in its ESP provisions regarding single-issue ratemaking for distribution infrastructure and modernization incentives. However, while SB 221 may have allowed Companies to include such provisions in its ESP, the intent could not have been to provide a 'blank check' to electric utilities. In deciding whether to approve an ESP that contains provisions for distribution infrastructure and modernization incentives, Section 4928.143(B)(2)(h), Revised Code, specifically requires the Commission to examine the reliability of the electric utility's distribution system and ensure that customers' and the electric utilities' expectations are aligned, and to ensure that the electric utility is emphasizing and dedicating sufficient resources to the reliability of its distribution system. Given AEP-Ohio's proposed ESRP, the only way to examine the full distribution system, the reliability of such system, and customers' expectations, as well as whether the programs proposed by AEP-Ohio are "enhanced" initiatives (truly incremental), is through a distribution rate case where all components of distribution rates are subject to review. Therefore, at this time, the Commission denies the Companies' request to implement, as well as recover costs associated therewith, the enhanced underground cable initiative, the distribution automation initiative, and the enhanced overhead inspection and mitigation initiative. With regard to these issues, we concur with OHA: "The record in this case reflects the fact that the distribution prong of AEP's electric service deserves further Commission scrutiny - but not in the context of this accelerated ESP proceeding" (OHA Br. at 17).

Nonetheless, the Commission finds that AEP-Ohio has demonstrated in the record of this proceeding that it faces increased costs for vegetation management and that a specific need exists for the implementation of the enhanced vegetation initiative, as proposed as part of the three-year ESRP, to support an incremental level of reliability activities in order to maintain and improve service levels. The Companies' current

approach to its vegetation management program is mostly reactive (Staff Ex. 2 at 10). While we recognize the difficulties that recent events have caused, we believe that it is important to have a balanced approach that not only reacts to certain incidents and problems, but that also proactively limits or reduces the impact of weather events or incidents. In addition to reacting to problems that occur, it is imperative that AEP-Ohio implements a cycle-based approach to maintain the overall system. To this end, the Companies have demonstrated in the record that increased spending earmarked for specific vegetation initiatives can reduce tree-caused outages, resulting in better reliability (Cos. Ex. 11 at 27-31). OCC witness Cleaver also recognized a problem with the current vegetation management program, and supported the adoption of a new, hybrid approach that incorporates a cycle-based tree-trimming program with a performance-based program (OCC Ex. 13 at 30, 35). Staff witness Roberts further supported the move to a new, four-year cycle-based approach and recommended that the enhanced vegetation initiative include the following: end-to-end circuit rights-of-way inspections and maintenance; mid-point circuit inspections to review vegetation clearance from conductors, equipment, and facilities; greater clearance of all overhang above three-phase primary lines and single-phase lines; removal of danger trees located outside of rights-of-ways where property owner's permission can be secured, and using technology to collect tree inventory data to optimize planning and scheduling (Staff Ex. 2 at 13).

The Commission is satisfied that the Companies have demonstrated in the record that the costs associated with the proposed vegetation initiative, included as part of the proposed three-year ESRP, are incremental to the current Distribution Vegetation Management Program and the costs embedded in distribution rates (Cos. Ex. 11 at 26-31). Specifically, the Companies proposed to employ additional resources in Ohio, place a greater emphasis on cycle-based planning and scheduling, and increase the level of vegetation management work performed (Id. at 28-29). Although OCC's witness questions the incremental nature of the costs proposed to be included in the enhanced vegetation initiative, OCC offered no evidence that the proposed initiative is already included in the current vegetation management program, and thus, is not incremental (OCC Ex. 13 at 30-36). Rather, OCC seems to quibble with the definition of "enhanced." OCC witness Cleaver stated: "I recommend that the Commission rule that the Company's proposed Vegetation Management Programs, while an improvement over its current performance based program, is *not an enhancement but rather a reflection of additional tree trimming needed as a result of their prior program*" (Id. at 35 (emphasis added)). Furthermore, we believe that the record clearly reflects customers' expectations as to tree-caused outages, service interruptions, and reliability of customers' service.²⁰ We also believe that, presently, those customer expectations are not aligned with the Companies' expectations. However, as required by Section 4928.143(B)(2)(h), Revised Code, we believe that the Companies' proposal for a new vegetation initiative more closely aligns

²⁰ A common theme from the customers throughout the local public hearings was that outages due to vegetation have been problematic.

the customers' expectations with the Companies' expectations as it relates to tree-caused outages, importance of reliability, and the increasing frustration surrounding momentary outages with the emergence of new technology.

Accordingly, in balancing the customers' expectations and needs with the issues raised by several intervenors, the Commission finds that the enhanced vegetation initiative proposed by the Companies, with Staff's additional recommendations, is a reasonable program that will advance the state policy. To this end, the Commission approves the establishment of an ESRP rider as the appropriate mechanism pursuant to Section 4928.143(B)(2)(h), Revised Code, to recover such costs. The ESRP rider initially will include only the incremental costs associated with the Companies' proposed enhanced vegetation initiative (Cos. Ex. 11 at 31, Chart 7) as set forth herein. Consistent with prior decisions,²¹ the Commission also believes that, pursuant to the sound policy goals of Section 4928.02, Revised Code, a distribution rider established pursuant to Section 4928.143(B)(2)(h), Revised Code, should be based upon the electric utility's prudently incurred costs. Therefore, the ESRP rider will be subject to Commission review and reconciliation on an annual basis.

As for the recovery of any costs associated with the Companies' remaining initiatives (i.e., enhanced underground cable initiative, distribution automation initiative, and enhanced overhead inspection and mitigation initiative), the ESRP rider will not include costs for any of these programs until such time as the Commission has reviewed the programs, and associated costs, in conjunction with the current distribution system in the context of a distribution rate case as explained above. If the Commission, in a subsequent proceeding, determines that the programs regarding the remaining initiatives should be implemented, and thus, the associated costs should be recovered, those costs may, at that time, be included in the ESRP rider for future recovery, subject to reconciliation as discussed above.

2. GridSMART

The Companies propose, as part of their ESP, to initiate Phase 1 of gridSMART, a three-year pilot, in northeast central Ohio. GridSMART will include three main components, AMI, DA, and Home Area Network (HAN). The AMI system features include smart meters, two-way communications networks, and the information technology systems to support system interaction. AEP-Ohio contends that AMI will use internal communications systems to convey real-time energy usage and load information to both the customer and the company. According to the Companies, AMI will provide the capability to monitor equipment and convey information about certain malfunctions and operating conditions. DA will provide real-time control and monitoring of select

²¹ *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., Toledo Edison Co.*, Case No. 08-935-EL-SSO, Opinion and Order at 41 (December 19, 2008).

electrical components with the distribution system, including capacitor banks, voltage regulators, reclosers, and automated line switches. HAN will be installed in the customer's home or business and will provide the customer with information to allow the customer to conserve energy. HAN includes providing residential and business customers who have central air conditioning with a programmable communicating thermostat (PCT) and a load control switch (LCS), which is installed ahead of a major electrical appliance and will turn the appliance on and off or cycle the appliance on and off. AEP-Ohio reasons that central air conditioners are typically the largest piece of electrical equipment in the home and will yield the most significant demand response benefit (Tr. Vol. III at 304). LCS will provide customers who have a direct load control or interruptible tariff the ability to receive commands from the meter and the option to respond and signal the appropriate action to the meter for confirmation. The Companies propose a phased-in implementation of Phase 1 gridSMART to approximately 110,000 meters and 70 distribution circuits in an approximately 100 square mile area within CSP's service territory (Cos. Ex. 4 at 9, 12-13; Tr. Vol. III at 303-304). The Companies further propose to extend the installation of DA to 20 circuits in areas beyond the gridSMART Phase 1 program. The Companies propose a phased-in approach to fully implement gridSMART throughout their service area over the next 7 to 10 years, if granted appropriate regulatory treatment. The Companies estimate the net cost of gridSMART Phase 1 to be approximately \$109 million (including the projected net savings of \$2.7 million) over the three-year period (Cos. Ex. 4 at 15-16, KLS-1). The rate design for gridSMART includes the projected cost of the program over the life of the equipment. The Companies have requested recovery during the ESP of only the costs to be incurred during the three-year term of the ESP (Cos. Ex. 1 at DMR-4). Thus, AEP-Ohio asserts that it is inappropriate to consider the long-term operational cost savings when the long-term costs of gridSMART have not been included in the ESP for recovery.

Although Staff generally supports the Companies' implementation of gridSMART, particularly the AMI and DA components, Staff raises a few concerns with this aspect of the Companies' ESP application. Staff is concerned that the overhead costs for meter purchasing is overstated and recommends that the overhead costs be reviewed before approval to ensure that the costs are not duplicative of the overhead meter purchasing costs currently recovered in the Companies' rates (Staff Ex. 3 at 3). Staff argues that there is no reason for the Companies to restrict the PCTs to customers with air conditioning only, and recommends that the device be offered to any customer that desires to own this type of thermostat to control air conditioning or other electrical appliances (Staff Br. at 12). Staff and OCC also argue that customers who have invested in advanced technological equipment for gridSMART will not benefit from dynamic pricing and time differentiated rates if the Companies do not simultaneously file tariffs for such services (Staff Ex. 3 at 5; OCEA Br. at 82). Staff recommends that the Companies offer some form of a critical peak pricing rebate for residential customers, and some form of hedged price for commercial customers for a fixed amount of the customers' demand (Staff Ex. 3 at 5).

Further, Staff argues that the Companies' gridSMART proposal does not contain sufficient information regarding any risk-sharing between the ratepayers and shareholders, operational savings, or a cost/benefit analysis, and states that AEP-Ohio did not quantify any customer or societal benefits of the proposed gridSMART initiative (Staff Br. at 12-13). Staff notes that according to the Companies, DA will not be implemented until 2011, the third year of the ESP, and that the ESP proposes to install DA beyond the Phase I gridSMART area (Tr. Vol. III at 246). Staff opposes DA outside of the Phase I area because the Companies' cannot estimate the expected reliability improvements associated with the installation of DA. Staff also argues that DA costs should be recovered through a DA rider. The cost of gridSMART, per AEP-Ohio's proposal, is to be recovered by adjusting distribution rates. Staff is opposed to increasing distribution rates in this proceeding (Staff Ex. 5 at 6). Instead, Staff recommends that a rider be established and set at zero. The Staff argues that a rider has several benefits over the proposed increase to distribution rates, including separate accounting for gridSMART costs, an opportunity to approve and update the plan annually, assurance that expenditures are made before cost recovery occurs, and an opportunity to audit expenditures prior to recovery. Finally, Staff also advocates that the Companies share the financial risk of gridSMART between ratepayers and shareholders, as there is a benefit to the Companies. Additionally, Staff questions whether gridSMART will meet minimum reliability standards. Lastly, Staff asserts that AEP-Ohio should conduct a study that quantifies both customer and societal benefits of its gridSMART plan (Staff Br. at 14).

OCC, Sierra, and OPAE/APAC argue that the Companies' ESP fails to demonstrate that its gridSMART program is cost-effective as required by Sections 4928.02(D) and 4928.64(E), Revised Code, and state that AEP-Ohio's assumption that the societal and customer benefits are self-evident is misplaced (OCEA Br. at 77-80; OPAE/APAC Br. at 17-18). OCC, Sierra, and OPAE/APAC note that there are a number of factors about the program that the Companies have not determined or evaluated, which are essential to the Commission's consideration of the plan. OCC, Sierra, and OPAE/APAC state that the Companies have failed to include any full gridSMART implementation plan or costs, the anticipated life cycle of various components of gridSMART, a methodology for evaluating performance of gridSMART Phase I, an estimate of a customer's bill savings, or the positive impact to the environment or job creation (OCEA Br. at 79-80; OPAE/APAC Br. at 17-18). Further, OCC's witness states that the ESP fails to acknowledge that full system implementation is required before many of the benefits of gridSMART can actually be realized (OCC Ex. 12 at 6). OCC recommends that Phase I have its own set of performance measures, a more detailed project plan, including budget, resource allocation, and life cycle operating cost projections for the full 7-10 year implementation period of gridSMART and beyond, and performance measures for the Commission's approval (OCC Ex. 12 at 18).

AEP-Ohio regards the Staff's proposal to offer PCTs to any customer as overly generous, particularly given that Staff is recommending that the rider be set initially at zero (Cos. Br. at 68-69). AEP-Ohio also submits that it has committed to offering new service tariffs associated with Phase I of gridSMART once the technology is installed and the billing functionalities available (Cos. Ex. 1 at 6; Tr. Vol. III at 304-305; Cos. Br. at 68-69). Further, regarding Staff's policy of risk-sharing, the Companies contend that the assertion that the gridSMART investment benefits CSP just as much as it does customers is not true and, given that the operational savings do not equal or exceed the cost of the program, is without any basis presented in the record. Thus, AEP-Ohio argues that discounting the net cost to be recovered by CSP is unfair and inappropriate (Cos. Reply Br. at 63-64). The Companies are unclear how the Staff expects to determine whether gridSMART meets the minimum reliability standards and contend that this issue was first raised in the Staff's brief. Nonetheless, the Companies argue that imposing reliability standards as to gridSMART Phase I is inappropriate, primarily because strict accountability for achieving the expected reliability impacts does not take into account the many dynamic factors that impact service reliability index performance. Moreover, accurate measurement and verification of the discrete impact of gridSMART deployment on a particular reliability index would be difficult. The Companies also explain that the expected reliability impacts provided to the Staff were based on good faith estimates of the full implementation of gridSMART Phase I as proposed by the Companies. Thus, the Companies would prefer the establishment of deployment project milestones as opposed to specific reliability impact standards.

Although the Companies maintain that their percentage of distribution increase is reasonable and an appropriate part of the ESP package, in recognition of Staff's preference for a distribution rider and to address various parties' concerns regarding the accuracy of AEP-Ohio's cost estimates for gridSMART Phase I, the Companies would agree to a gridSMART Phase I rider set at the 2009 revenue requirement subject to annual true-up and reconciliation based on CSP's prudently incurred net costs (Cos. Reply Br. at 70; Cos. Ex. 1, Exhibit DMR-4).

The Commission believes it is important that steps be taken by the electric utilities to explore and implement technologies, such as AMI, that will potentially provide long-term benefits to customers and the electric utility. GridSMART Phase I will provide CSP with beneficial information as to implementation, equipment preferences, customer expectations, and customer education requirements. A properly designed AMI system and DA can decrease the scope and duration of electric outages. More reliable service is clearly beneficial to CSP's customers. The Commission strongly supports the implementation of AMI and DA, with HAN, as we believe these advanced technologies are the foundation for AEP-Ohio providing its customers the ability to better manage their energy usage and reduce their energy costs. Thus, we encourage CSP to be more expedient in its efforts to implement these components of gridSMART. While we agree

that additional information is necessary to implement a successful Phase I program, we do not believe that all information is required before the Commission can conclude that the program is beneficial to ratepayers and should be implemented. Therefore, we will approve the development of a gridSMART rider, as we agree with the Staff that a rider has several benefits over the proposed annual increase to distribution rates, including separate accounting for gridSMART, an opportunity to approve and update the plan each year, assurance that expenditures are made before cost recovery occurs, and an opportunity to audit expenditures prior to recovery. The Commission notes that recent federal legislation makes matching funds available to smart grid projects. Accordingly, the Companies' gridSMART proposal contained in its proposed ESP to recover \$109 million over the term of ESP, should be revised to \$54.5 million, which is half of the Companies' requested amount. Additionally, we direct CSP to make the necessary filing for federal matching funds under the American Recovery and Reinvestment Act of 2009 for the balance of the projected costs of gridSMART Phase I. The gridSMART rider shall be initially established at \$33.6 million for the 2009 projected expenses subject to annual true-up and reconciliation based on the company's prudently incurred costs.

With the creation of the ESRP rider and the gridSMART rider, the Commission finds that annual distribution rate increases in the amounts of 7 percent for CSP and 6.5 percent for OP to recover the costs for the ESRP and gridSMART programs are unnecessary and should be rejected. Accordingly, the Commission finds that AEP-Ohio's proposed ESP should be modified to include the ESRP rider and the gridSMART rider, as approved herein, and to eliminate the annual distribution rate increases.

B. Riders

1. Provider of Last Resort (POLR) Rider

The Companies proposed to include in their ESP a distribution non-bypassable POLR rider (Cos. App. at 6-8). The POLR charge was proposed to collect a POLR revenue requirement of \$108.2 million for CSP and \$60.9 million for OP (Cos. Ex. 2-A at 34; Cos. Ex. 1, Exhibit DMR-5). The Companies stated that they have a statutory obligation to be the POLR,²² and thus, the proposed POLR charge is based on a quantitative analysis of the cost to the Companies to provide to customers the optionality associated with POLR service (Cos. Ex. 2-A at 25-26). AEP-Ohio argued that this charge covers the cost of allowing a customer to remain with the Companies, or to switch to a Competitive Retail Electric Service (CRES) provider and then return to the Companies' SSO after shopping (Id.). To further support the proposed increase, the Companies added that their current POLR charge is significantly below other Ohio electric utilities' POLR charges (Cos. Ex. 2 at 8). The Companies utilized the Black-Scholes Model to calculate their cost of fulfilling

²² See Section 4928.141(A) and 4928.14, Revised Code.

the POLR obligation, comparing the customers' rights to "a series of options on power" (Cos. Br. at 43; Cos. Ex. 2-A at 31). AEP-Ohio listed the five quantitative inputs used in the Black-Scholes Model: 1) the market price of the underlying asset; 2) the strike price; 3) the time frame that the option covers; 4) the risk free interest rate; and 5) the volatility of the underlying asset (Id.). The Companies assert that the resulting POLR charge is conservatively low (Cos. Br. at 44).

The numerous intervenors and Staff opposed the level of POLR charge proposed by the Companies, as well as the use of the Black-Scholes Model to calculate the POLR charge (OPAE/APAC Br. at 14-17; OCC Ex. 11 at 8-14). Specifically, OCC and others questioned the use of the LIBOR rate as the input for the risk-free interest rate (Tr. Vol. X at 165-182, 188-189; Tr. Vol. XI at 166-182). Staff questioned the risk that the POLR charge was intended to compensate the Companies for, explaining that there are only two risks involved: one risk is the risk of customers returning to the SSO and the other risk is that the customers leave and take service from a CRES provider (migration risk) (Staff Ex. 10 at 6). Staff witness Cahaan testified that the risk associated with customers returning to the SSO could be avoided by requiring the customer to return at a market price, instead of the SSO rate, which would either be paid directly by the returning customer or any incremental cost of the purchased power could be flown through the FAC (Id.). Staff witness Cahaan admitted that if customers are permitted to return at the SSO rate, without paying the market price or without compensating the Companies for any incremental costs of the additional purchased power that they would be required to purchase, then the Companies would be at risk (Tr. Vol. XIII at 36-37). Thus, Staff witness Cahaan concluded that, if the risk of returning is addressed, then the migration risk is the only risk that should be compensated through a POLR charge (Id. at 7).

The Companies responded that their risk is not alleviated by customers agreeing to return at market price, arguing that future circumstances or policy considerations may require them to relieve customers of their promises to pay market price when circumstances change (Cos. Ex. 2-A at 27-30). AEP-Ohio's witness expressed skepticism as to a future Commission upholding such promises (Id.). AEP-Ohio also opposed recovering any costs for market purchases incurred for returning customers through the FAC as an improper subsidization of those customers who chose to shop, and then return to the electric utility, by non-shopping customers (Cos. Ex. 2-E at 14-16). Furthermore, the Companies claim that their risk of being the POLR exists, regardless of historic or current shopping levels (Id.). Nonetheless, AEP witness Baker testified that, even adopting Staff witness Cahaan's theory that the Companies are only at risk for migration (the right of customers to leave the SSO), migration risk equals approximately 90 percent of the Companies' POLR costs pursuant to the Black-Scholes model (Tr. Vol. XIV at 204-205; Cos. Ex. 2-E at 15-16).

As the POLR, the Commission believes that the Companies do have some risks associated with customers switching to CRES providers and returning to the electric utility's SSO rate at the conclusion of CRES contracts or during times of rising prices. However, we agree with the intervenors and Staff that the POLR charge as proposed by the Companies is too high, but we do not agree that there is no risk or a very minimal risk as suggested by some. As noted by several intervenors and Staff, the risk of returning customers may be mitigated, not eliminated, by requiring customers that switch to an alternative supplier (either through a governmental aggregation or individual CRES providers) to agree to return to market price, and pay market price, if they return to the electric utility after taking service from a CRES provider, for the remaining period of the ESP term or until the customer switches to another alternative supplier. In exchange for this commitment, those customers shall avoid paying the POLR charge. We believe that this outcome is consistent with the requirement in Section 4928.20(J), Revised Code, which allows governmental aggregations to elect not to pay standby service charges, in exchange for agreeing to pay market price for power if they return to the electric utility. Therefore, based on the record before us, we conclude that the Companies' proposed ESP should be modified such that the POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith, including the migration risk. The Commission accepts the Companies' witness' quantification of that risk to equal 90 percent of the estimated POLR costs,²³ and thus, finds that the POLR rider shall be established to collect a POLR revenue requirement of \$97.4 million for CSP and \$54.8 million for OP. Additionally, the POLR rider shall be avoidable for those customers who shop and agree to return at a market price and pay the market price of power incurred by the Companies to serve the returning customers. Accordingly, the Commission finds that the POLR rider, which is avoidable, should be approved as modified herein.

2. Regulatory Asset Rider

The Companies proposed to begin the recovery of a variety of regulatory assets that were authorized in various Commission proceedings regarding the Companies' electric transition plan (ETP), rate stabilization plan (RSP), line extension program, green pricing power program, and the transfer of the MonPower's service territory to CSP. In their application, the Companies proposed to begin the amortization of these regulatory assets in 2011 and complete the amortization over an eight-year period. The projected balances at the end of 2010 to amortize are \$120.5 million for CSP and \$80.3 million for OP. AEP-Ohio asserts that these projected balances, or the value on June 30, 2008, were not challenged by any party. To recover these regulatory assets, the Companies created a RAC rider to be collected from customers in 2011 through 2018. The rider revenues will be reconciled on an annual basis for any over- or under-recoveries.

²³ See Cos. Ex. 1, Exhibit DMR-5.

Staff proposed that the eight-year amortization period proposal be deferred until the Companies' next distribution rate case where all components of distribution rates are subject to review (Staff Ex. 1 at 4). AEP-Ohio responded that SB 221 authorizes single-issue ratemaking related to distribution service, which is what it is proposing. AEP-Ohio also notes that the only opposition to the Companies' proposal is with regard to the collection of the historic regulatory assets, which was by Staff (Cos. Reply Br. at 94). The Companies submit that Staff's preference to deal with this issue in a distribution rate case is irrelevant and inconsistent with the statute.

The Commission finds that the Companies have not demonstrated that the creation of the RAC rider in its proposed ESP, as a single-issue ratemaking item for distribution infrastructure and modernization incentives, fulfills the requirements of SB 221 or advances the state policy. Therefore, the Commission finds that the RAC rider should not be approved in this proceeding. We note, however, that we agree with Staff that the consideration of the requested amortization of regulatory assets is more appropriate within the context of a distribution rate case where all distribution related costs and issues can be examined collectively. Accordingly, the Commission finds that AEP-Ohio's proposed ESP should be modified to eliminate the RAC rider.

3. Energy Efficiency, Peak Demand Reduction, Demand Response, and Interruptible Capabilities

(a) Energy Efficiency and Peak Demand Reduction

Section 4928.66, Revised Code, requires the electric utilities to implement energy efficiency programs that will achieve energy savings and peak demand programs designed to reduce the electric utility's peak demand. Specifically, an electric utility must achieve energy savings in 2009, 2010, and 2011 of .3 percent, .5 percent, and .7 percent, respectively, of the normalized annual kWh sales of the electric utility during the preceding three calendar years. This savings continues to rise until the cumulative savings reach 22 percent by 2025. Peak demand must be reduced by one percent in 2009 and by .75 percent annually until 2018.

CSP and OP include, as part of their ESP, an unavoidable Energy Efficiency and Peak Demand Reduction Cost Recovery Rider (EE/PDR rider). The estimated annual DSM program cost (including both EE and PDR) is to be trued-up annually to actual cost and compared to the amortization of the actual deferral on an annual basis via the EE/PDR rider (Cos. Ex. 6 at 47-48).

(b) Baselines and Benchmarks

In the ESP, the Companies have established the baselines for meeting the benchmarks for statutory compliance by weather normalizing retail sales, excluding

economic development load, accounting for the load of former MonPower service territory and the Ormet/Hannibal Real Estate load, accounting for future load growth due to the Companies' economic development efforts, and accounting for increased load associated with the funds for economic development purposes pursuant to the order in Case No. 04-169-EL-ORD (RSP Order)²⁴ (Cos. Ex. 8 at 4; Cos. Ex. 2A at 46-51). The Companies contend that its process is consistent with Sections 4928.64(B) and 4928.66(A)(2)(a), Revised Code. The Companies request that the methodology be adopted in this proceeding so as to provide the Companies clear guidance with statutory compliance mandates. Further, the Companies reserve their right to request additional adjustments due to regulatory, economic, or technological reasons beyond the reasonable control of the Companies.

As to the calculation of the Companies' baseline, Staff asserts that the former MonPower load was acquired prior to the three-year period (2006 to 2008) and is not truly economic development. Therefore, Staff contends that the MonPower load is not a reasonable adjustment to the baseline. Staff suggests that the Companies' savings and peak demand reductions for 2009 be as set forth by Staff witness Scheck (Staff Ex. 3 at 6-8, Ex. GCS-1 and Ex. GCS-2). Staff recommends that CSP and OP make a case-by-case filing with the Commission to receive credit for the energy savings and peak demand reduction efforts of the electric utility's mercantile customers. Staff argues that because programs like PJM's demand response programs are not committed for integration into the electric utilities' energy efficiency and peak reduction programs, such credits should not count towards AEP-Ohio's annual benchmarks and retail customers who have such agreements should not receive an exemption from AEP-Ohio's energy efficiency cost recovery mechanism (Staff Br. at 17-19; Staff Ex. 3 at 6-11).

Kroger recommends an opt-out provision of the rider for non-residential customers that are above a threshold aggregate load (10 MW at a single site or aggregated at multiple sites) within the AEP-Ohio service territories. Kroger proposes that, at the time of the opt-out request, the customer would be required to self-certify or attest to AEP-Ohio that for each facility, or aggregated facilities, the customer has conducted an energy audit or analysis within the past three years and has implemented or plans to implement the cost-effective measures identified in the audit or analysis. Kroger argues that the unavoidable rider penalizes customers who have implemented cost efficient DSM measures. Kroger contends that this is consistent with the intent of Section 4928.66(A)(2)(c), Revised Code (Kroger Ex. 1 at 13-14).

IEU notes that the Commission has previously rejected a proposal similar to Kroger's opt-out proposal with a demand threshold for mercantile customers in Duke's

²⁴ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 04-169-EL-ORD, Opinion and Order (January 26, 2005) (RSP Order).

ESP case.²⁵ IEU urges the Commission, consistent with Section 4928.66, Revised Code, and its determination in the Duke ESP case, to reject Kroger's request (IEU Reply Br. at 22).

The Commission concludes that the acquisition of the former MonPower load should not be excluded from baseline. The MonPower load was not a load that CSP served and would have lost, but for some action by CSP. Therefore, we find that the Companies' exclusion of the MonPower load in the energy efficiency baseline is inappropriate. The Commission does not believe that all economic development should automatically result in an exclusion from baseline. On the other hand, we agree with the Companies' adjustment to the baseline for the Ormet load. We note that the Companies and Staff agree that the impact of customer-sited specific DSM resources will be included in the Companies' compliance benchmarks and adjusted for any existing resources that had historic implication during the years 2006-2008. The Commission also recognizes that Staff and the Companies agree that the appropriate approach would be for the Companies to make case-by-case filings with the Commission to receive credit for contributions by mercantile customers.

In regards to Kroger's recommendation, for an opt-out process for certain commercial or industrial customers, the Commission finds Kroger's proposal, as advocated by Kroger witness Higgins, too speculative. It is best that the Commission determine the inclusion or exemption of a mercantile customer's DSM on a case-by-case basis. We note that Section 4928.66(A)(2)(c), Revised Code, provides, in pertinent part, the following:

Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customer to commit those capabilities to those programs.

This provision of the statute permits the Commission to approve a rider that exempts mercantile customers who commit their capabilities to the electric utility. However, the statute does not dictate a minimum consumption level. For these reasons, the Commission rejects Kroger's proposal.

²⁵ *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Opinion and Order (December 17, 2008) (Duke ESP Order).

(c) Energy Efficiency and Peak Demand Reduction Programs

The Companies propose ten energy efficiency and peak demand reduction programs that will be refined and supplemented at the completion of the Market Potential Study through the creation of a working collaborative group of stakeholders.

As part of the Companies' energy efficiency and peak demand reduction plan, the Companies propose to spend \$178 million on the following programs: (1) Residential Standard Offer Program, Small Commercial and Industrial Standard Offer Program, Commercial and Industrial Standard Offer Program; (2) Targeted Energy Efficient Weatherization Program; (3) Low Income Weatherization Program; (4) Residential and Small Commercial Compact Fluorescent Lighting Program; (5) Commercial and Industrial Lighting Program; (6) State and Municipal Light Emitting Diode Program; (7) Energy Star® New Homes Program; (8) Energy Star® Home Appliance Program; (9) Renewable Energy Technology Program; (10) Industrial Process Partners Program (Cos. Ex. 4 at 20-22). OEG supports the Companies EE/PDR rider as a reasonable proposal (OEG Ex. 2 at 13). OPAE generally supports the Companies proposed programs as reasonable for low-income and moderate income customers. However, OPAE requests that the Companies be required to empower the collaborative to design appropriate programs, provide funding for existing programs that can rapidly provide energy efficiency and demand response reductions, and to retain a third-party administrator to manage program implementation (OPAE Ex. 1 at 16-17; OPAE/APAC Br. at 21-22).

Staff also generally approves of the Companies' demand-side management and energy efficiency programs. However, Staff notes that certain of AEP-Ohio's programs are expensive and should be required to comply with the Total Resources Cost Test (Staff Br. at 17-19; Staff Ex. 3 at 6-11).

OCC makes five specific recommendations (OCC Ex. 5 at 9). First, OCC contends that the Companies DSM programs for low-income residential customers are adequate but should be available to all residential customers in Ohio. Second, OCC recommends that AEP-Ohio work with Columbia Gas of Ohio, Inc., to develop a one-stop home performance program in year two of the ESP. Third, OCC recommends that programs for consumers above 175 percent of the federal poverty level should be competitively bid and customers charged for services according to a sliding fee scale based on income. Fourth, like Staff, OCC contends that all programs should be evaluated for cost-effectiveness pursuant to the Total Resource Cost Test. Finally, OCC expresses concern regarding the administrative costs of the programs, in comparison to energy efficiency programs offered by other Ohio utilities and recommends that the administrative cost of the DSM program (administrative, educational, and marketing expenses) be determined by the collaborative, and limited to 25 percent of the program costs to ensure that the majority of the program dollars reach the customers (Id.).

The Commission directs, as the Companies submit in their ESP, that the collaborative process be used to contain administrative cost of the EE/PDR programs and to ensure, with the possible exception of low-income weatherization programs, that all programs comply with the Total Resource Cost Test. We do not agree with OP&E/APAC that a third-party administrator is necessary to act as a liaison between the Companies and the collaborative. Thus, the Companies should proceed with the proposed EE/PDR programs proposed in its ESP as justified by the market project study and as refined by the collaborative.

(d) Interruptible Capacity

The Companies count their interruptible service towards their peak demand reduction requirements in accordance with Section 4928.66(A)(2)(b), Revised Code. More specifically, the Companies propose to increase the limit of OP's Interruptible Power-Discretionary Schedule (Schedule IRP-D) to 450 Megawatts (MW) from the current limit of 256 MW and to modify CSP's Emergency Curtailable Service (ECS) and Price Curtailable Service (PCS) to make the services more attractive to customers. The Companies request that the Commission recognize the Companies' ability to curtail customer usage as part of the peak demand reductions (Cos. Ex. 1 at 5-6).

Staff advocates that any credits awarded for the annual peak demand reduction targets for the Companies' interruptible programs should only apply when actual reductions occur (Staff Ex. 3 at 11). OCEA argues that interruptible load should not be counted toward AEP-Ohio's peak demand reduction as it is contrary to the intent of SB 221 to improve grid reliability and would be based on load under the control of the customer rather than AEP-Ohio. Further, OCEA argues that the Companies would reap an inequitable benefit from interruptible load (possibly in the form of off-system sales) that is not reduced at peak which would allow the Companies to sell the load or avoid buying additional power. OCEA contends that any such benefit is not passed on to customers (OCEA Br. at 102-103; Tr. Vol. IX at 68-69).

The Companies argue that capacity associated with interruptible customers should be counted toward compliance with the requirements of Section 4928.66, Revised Code, as the ability to interrupt is a significant demand reduction resource to AEP-Ohio. Further, the Companies state that interruptions have a real impact on customers and the Companies do not want to interrupt service when there is no system or market requirement to do so (Cos. Ex. 1 at 6). The Companies note that Section 4928.66(A)(1)(b), Revised Code, requires the electric utility to implement programs "designed to achieve" a specified peak demand reduction level as opposed to "achieve" a specified level of energy savings as required by Section 4928.66(A)(1)(a), Revised Code. Staff witness Scheck admits that the plain meaning of "designed to achieve" and "achieve" are different (Tr. Vol. VIII at 208). The Companies argue that the different language in the statutory requirements is intended to recognize the differences between energy efficiency programs

and peak demand reduction programs. As such, the Companies contend that Staff's position is not supported by the language of the statute and it does not overcome the policy rationale presented by the Companies. The Companies also note that, in the context of integrated resource planning, interruptible capabilities are counted as capacity and evaluated in the need to plan for new power facilities. Finally, the Companies note that the Commission defines native load as internal load minus interruptible load.²⁶ For these reasons, the Companies contend that their interruptible capacity should be counted toward their compliance with the peak demand reduction benchmarks (Cos. Br. 114-115; Cos. Reply Br. at 90-93).

Further, the Companies claim that interruptible customers receive a benefit in the form of a reduced rate for taking interruptible service irrespective of whether their service is actually curtailed. AEP-Ohio notes that it includes such interruptible service as a part of its supply portfolio, unlike the PJM demand response programs, which is based on PJM's zonal load. Therefore, AEP-Ohio asserts there is no disparate treatment between counting interruptible capabilities as part of peak demand reduction compliance requirements and prohibiting retail participation in wholesale PJM demand reduction programs (Cos. Reply Br. at 90-91). Further, as to OCEA's claims regarding interruptible customer load, the Companies argue that the assertions are without merit or basis in the statute. The Companies argue that counting interruptible load fits squarely within the stated intent of the statute that programs be "designed to achieve" peak demand reduction and facilitates the ability to avoid the construction of new power plants. As to the customer's control of interruptible load argument, the Companies note that the customer has a choice to "buy through" to obtain replacement power at market prices to avoid curtailment and in such situations the Companies' supply portfolio is not affected. Regarding OCEA's assertion that the Companies might benefit from the associated interruption, AEP-Ohio acknowledges that off-system sales are indirectly possible, as are other circumstances, based on the market price. Nonetheless, AEP-Ohio argues that such does not alter the fact that AEP-Ohio's retail supply obligation is reduced and the supply portfolio is not accessed to serve the retail customer. Accordingly, AEP-Ohio asserts that interruptible tariff capabilities should count toward the Companies' peak demand reduction compliance requirements.

The Commission agrees with the Staff and OCEA that interruptible load should not be counted in the Companies' determination of its EE/PDR compliance requirements unless and until the load is actually interrupted. As the Companies recognize, it is imperative, with regard to the PJM demand response programs, that the Companies have

²⁶ See proposed Rule 4901:5-5-01(Q), O.A.C., *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221, Case No. 08-888-EL-ORD (Green Rules)*.

some control or commitment from the customer to be included as a part of AEP-Ohio's Section 4928.66, Revised Code, compliance requirements.

Further, the Commission emphasizes that we expect that applications filed pursuant to Section 4928.66(A)(2)(b), Revised Code, to be initiated by the electric utility only when the circumstances are justified. At the time of such filing by an electric utility, the Commission will determine whether the electric utility's continued compliance is possible under the circumstances.

4. Economic Development Cost Recovery Rider and the Partnership with Ohio Fund

The Companies' ESP application includes an unavoidable Economic Development Rider as a mechanism to recover costs, incentives and foregone revenue associated with new or expanding Commission-approved special arrangements for economic development and job retention. The Companies propose quarterly filings to establish rates based on a percentage of base distribution revenue subject to a true-up of any under- or over-collection in subsequent quarterly filings. In addition, the Companies propose the development of a "Partnership with Ohio" fund from shareholders. The fund would consist of a \$75 million commitment, \$25 million per year of the ESP, from shareholders. The Companies' goal is for approximately half of the fund to be used to provide assistance to low-income customers, including energy efficiency programs for such customers, and the balance to be used to attract and retain business development within the AEP-Ohio service area (Cos. Ex. 1 at 12; Cos. Ex. 3 at 15-16; Cos. Ex. 6 at 49; Tr. Vol. III at 115-119).

OCC proposes that the Commission continue its policy of dividing the recovery of forgone revenue subsidies equally from AEP-Ohio's shareholders and customers or require shareholders to pay a larger percentage. Further, OCC expresses some concern that the rider may be used in an anti-competitive manner as it is not likely that incentives and/or discounts will be offered to shopping customers. To address OCC's anticompetitive concerns, OCC proposes that the Commission make the economic development rider avoidable or establish the charge as a percentage of the customer's entire bill rather than a percentage of distribution charges. OCC also recommends that all parties participate in the initial and annual review of the economic development contracts and that, at the annual review, if the customer has not fulfilled its obligation, the arrangement be cancelled, the subsidy paid back, and the Companies directed to credit the rider for the discounts (OCC Ex. 14 at 4-8; OCEA Br. at 104-106).

The Companies contend that Section 4905.31, Revised Code, as amended by SB 221, explicitly provides for the recovery of foregone revenues for entering into reasonable arrangements for economic development and, thus, OCC's recommendation to continue the Commission's previous policy is misplaced. Further, the Companies note that the

Commission's approval of any special arrangement will include a public interest determination. Thus, the Companies argue that OCC's recommendation for all parties to initially and annually review economic development arrangements is unnecessary, bureaucratic and burdensome, and should be rejected. The Companies contend that economic development and full recovery of the foregone revenue for economic development is consistent with SB 221 and a significant feature of the Companies' ESP, which should not be modified by the Commission (Cos. Br. at 132).

The Commission finds that OCC's concerns are unfounded and unnecessary at this stage. The Commission is vested with the authority to review and determine whether or not economic development arrangements are in the public interest. OCC's request is denied.

OPAE and APAC argue that the Companies have not provided any assurances that the \$75 million will be spent from the Partnership with Ohio fund if the Commission modifies the ESP and fails to state how much of the fund will be spent on low-income, at-risk populations (OPAE/APAC Br. at 19-20). The Companies submit that, if the ESP is modified, they can then evaluate the modified ESP in its entirety to determine whether this fund proposal contained in the ESP requires elimination or modification (Tr. Vol. III at 137-138; Tr. Vol. X at 232-233).

While the Partnership with Ohio fund is a key component of the economic development proposal, in light of the modifications made to the ESP pursuant to this opinion and order, we find that the Companies' shareholders should fund the Partnership with Ohio fund, at a minimum of \$15 million, over the three-year ESP period, with all of the funds going to low-income, at-risk customer programs. Accordingly, we direct AEP-Ohio to consult with Staff to administer the program established herein.

C. Line Extensions

In its ESP, AEP-Ohio proposes to modify certain existing line extension policies and charges included in its schedules (Cos. Ex. 10 at 5-14). Specifically, the Companies requested a modification to their definition of line extension and system improvements, a continuation of the up-front payment concept established in Case No. 01-2708-EL-COI,²⁷ an increase in the up-front residential line extension charges, implementation of a uniform, up-front line extension charge for all nonresidential projects, the elimination of the end use customer's monthly surcharge, and the elimination of the alternative construction option (Id. at 3-4, 6-7, 10-12).

²⁷ *In the Matter of the Commission's Investigation into the Policies and Procedures of Ohio Power Company, Columbus Southern Power Company, The Cleveland Electric Illuminating Company, Ohio Edison Company, The Toledo Edison Company and Monongahela Power Company Regarding the Installation of New Line Extensions*, Case No. 01-2708-EL-COI, et al., Opinion and Order (November 7, 2002).

Staff testified that distribution-related issues and costs, such as those related to line extensions, be examined in the context of a distribution rate case (Staff Ex. 13 at 4). IEU concurred with Staff's position (IEU Br. at 25). OCC also agreed and added that AEP-Ohio should be required to demonstrate in that rate proceeding that its costs related to line extensions have substantially increased, thereby justifying AEP-Ohio's proposed increase to the up-front residential line extension charges (OCEA Br. at 87).

Per SB 221, the Commission is required to adopt uniform, statewide line extension rules for nonresidential customers within six months of the effective date of the law. The Commission adopted such rules for nonresidential and residential customers on November 5, 2008.²⁸ Applications for rehearing were filed, which the Commission is still considering. Accordingly, the new line extension rules are not yet effective.

The Commission finds that AEP-Ohio has not demonstrated that its proposal to continue, in its ESP, its existing line extension policies regarding up-front payments, with modifications, is consistent with SB 221 or advances the policy of the state. Therefore, in light of the SB 221 mandate that the Commission adopt statewide line extension rules that will apply to AEP-Ohio, we do not believe that it makes sense to adopt a unique policy for AEP-Ohio at this time. As such, the Companies' ESP should be modified to eliminate the provision regarding line extensions, which would have the effect of also eliminating the alternative construction option as requested by the Companies. AEP-Ohio is, however, directed to account for all line extension expenditures, excluding premium services, in plant in service until the new line extension rules become effective, where the recovery of such will be reviewed in the context of a distribution rate case. The Companies may continue to charge customers for premium services pursuant to their existing practices.

V. TRANSMISSION

In its ESP, the Companies requested to retain the current TCRR, except the marginal loss fuel credit will now be reflected in the FAC instead of the TCRR. We concur with the Companies' request. We find the Companies' request to be consistent with our determination in the Companies' recent TCRR Case,²⁹ and thus, approve the TCRR rider as proposed by the Companies. Additionally, as contemplated by our prior order in the TCRR Case, any overrecovery of transmission loss-related costs, which has

²⁸ See *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Finding and Order (November 5, 2008), Entry on Rehearing (December 17, 2008) (06-653 Case).

²⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Each Company's Transmission Cost Recovery Rider*, Case No. 08-1202-EL-UNC, Finding and Order (December 17, 2008) (TCRR Case).

occurred due to the timing of our approval of the Companies' ESP and proposed FAC, shall be reconciled in the over/underrecovery process in the Companies' next TCRR rider update filing.

VI. OTHER ISSUES

A. Corporate Separation

1. Functional Separation

In its ESP application, AEP-Ohio requested to remain functionally separated for the term of the ESP, as was previously authorized by the Commission in the Companies' rate stabilization plan proceeding,³⁰ pursuant to Section 4928.17(C), Revised Code (Cos. App. at 14; Cos. Br. at 86). The Companies also requested to modify their corporate separation plan to allow each company to retain its distribution and, for now, transmission assets and that, upon the expiration of functional separation, the Companies would sell or transfer their generation assets to an affiliate (Id.).

Staff testified that the Companies' generating assets have not been structurally separated from the operating companies (Staff Ex. 7 at 2-3). Staff also recommended that, in accordance with the recently adopted corporate separation rules issued by the Commission in the SSO Rules Case,³¹ the Companies should file for approval of their corporate separations plan within 60 days after the rules become effective. Furthermore, Staff proposes that the Companies' corporate separation plan should be audited by an independent auditor within the first year of approval of the ESP, the audit should be funded by the Companies, but managed by Staff, and the audit should cover compliance with the Commission's rules on corporate separation (Staff Ex. 7 at 3-4). No party opposed AEP-Ohio's request to remain functionally separate.

Accordingly, the Commission finds that, while the ESP may move forward for approval, as noted by Staff, in accordance with our recently adopted rules in the SSO Rules Case, the Companies must file for approval of their corporate separation plan within 60 days after the rules become effective.

³⁰ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 04-169-EL-UNC, Opinion and Order at 35 (January 26, 2005).

³¹ *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, Finding and Order (September 17, 2008), and Entry on Rehearing (February 11, 2009) (SSO Rules Case).

2. Transfer of Generating Assets

The Companies request authorization for CSP to sell or transfer two recently acquired generating facilities (Waterford Energy Center and the Darby Electric Generating Station) that have not been included in rate base for ratemaking purposes and the costs of operating and maintaining the plants are not built into the current rates) (Cos. Ex. 2-A at 42; Cos. Ex. 2-E at 20). CSP purchased the Waterford Energy Center, a natural gas combined cycle power plant, on September 28, 2005, which has a generating capacity of 821 MW (Cos. App. at 14). On April 25, 2007, CSP purchased the Darby Electric Generating Station, a natural gas simple cycle generating facility, with a generating capacity of 480 MW and a summer capacity of approximately 450 MW (Id.). Although AEP-Ohio is requesting authority to transfer these generating assets pursuant to Section 4928.17(E), Revised Code, CSP has no immediate plans to sell or transfer the generating facilities. If AEP-Ohio obtains authorization to sell these generating assets through this proceeding, AEP-Ohio will notify the Commission prior to any such transaction (Id. at 15).

Through its application, the Companies also notify the Commission of their contractual entitlements/arrangements to the output from the Ohio Valley Electric Corporation generating facilities and the Lawrenceburg Generation Station that the Companies intend to sell or transfer in the future, but argue that any sale or transfer of those entitlements do not require Commission authorization because the entitlements do not represent generating assets wholly or partly owned by the Companies pursuant to Section 4928.17(E), Revised Code (Id.).

The Companies argue that, if the Commission does not grant authorization to transfer these plants or entitlements, then any expense related to the plants or entitlements not recovered in the FAC should be recovered in the non-FAC portion of the generation rate (Cos. Br. at 89; Cos. Ex. 2-E at 20-21). AEP-Ohio states that this rate recovery would include approximately \$50 million of carrying costs and expenses related to the Waterford Energy Center and the Darby Electric Generating Station annually, and \$70 million annually for the contract entitlements (Id.).

Staff witness Buckley testified that, while Staff does not necessarily disagree with the proposal to transfer the Waterford Energy Center and the Darby Electric Generating Station facilities, Staff believes that the transfers could have a potential financial and policy impact at the time of the transfer (Staff Ex. 7 at 3). Thus, Staff recommended that the Companies file a separation application, in accordance with the Commission's SSO rules, at the time that the transfer will occur (Id.). Several other parties agree that, in the absence of a current plan to sell or transfer, the Commission should not approve a future sale or transfer. Rather, the parties argue that the Companies should seek approval,

pursuant to Section 4928.17(E), Revised Code, at the time of the actual sale or transfer (OCEA Br. at 100; IEU Br. at 26-27; OEG Br. at 16).

The Commission agrees with Staff and the intervenors that the request to transfer the Waterford Energy Center and the Darby Electric Generating Station facilities, as well as any contractual entitlements/arrangements to the output of certain facilities, is premature. AEP-Ohio should file a separate application, in accordance with the Commission's rules, at the time that it wishes to sell or transfer these generation facilities. The Commission, however, recognizes that these generating assets have not and are not included in rate base and, thus, the Companies cannot collect any expenses related thereto, even if the facilities or contractual outputs have been used for the benefit of Ohio customers. If the Commission is going to require that the electric utilities retain these generating assets, then the Commission should also allow the Companies to recover Ohio customers' jurisdictional share of any costs associated with maintaining and operating such facilities. Accordingly, we find that while the Companies still own the generating facilities, they should be allowed to obtain recovery for the Ohio customers' jurisdictional share of any costs associated therewith. Thus, we believe that any expense related to these generating facilities and contract entitlements that are not recovered in the FAC shall be recoverable in the non-FAC portion of the generation rate as proposed by the Companies. The Commission, therefore, directs AEP-Ohio to modify its ESP consistent with our determination herein.

B. Possible Early Plant Closures

The Companies include as a part of their application in these cases a request for authority to establish a regulatory asset to defer any unanticipated net cost associated with the early closure of a generating unit or units. The Companies assert that, during the ESP period, generating units may experience failures or safety issues that would prevent the Companies from continuing to cost-effectively operate the generation unit prior to the end of the depreciation accrual (unanticipated shut down) (Cos. App. at 18-19; Cos. Ex. 2-A at 51-52). The Companies request authority to include net early closure cost in Account 182.3, Other Regulatory Assets. In the event of an unanticipated shut down, the Companies state they will timely file a request with the Commission for recovery of such prudent early closure costs via a non-bypassable rider over a relatively short period of time. The Companies are requesting that the rider include carrying cost at the WACC rate (Cos. App. at 18-19; Cos. Ex. 6 at 25-26). The Companies also request authority to come before the Commission to determine the appropriate treatment for accelerated depreciation and other net early closure costs in the event that the Companies find it necessary to close a generation plant earlier than otherwise expected (earlier than anticipated shut down) (Cos. Ex. 6 at 28).

OCEA posits that the Companies' request for accounting treatment for early plant closure is wrong and should be rejected. OCEA reasons that the plant was included in rate base under traditional ratemaking regulation to give the Companies the opportunity to earn a return on the investment and the Companies accepted the risk that the plant might not be fully depreciated when it was removed from service. OCEA asserts it is not appropriate to guarantee the Companies recovery of their investment. If the Commission determines to allow the Companies to establish the requested accounting treatment, OCEA asks that the Commission adopt the Staff's "offset" recommendation (OCEA Br. at 102).

Staff argues that the value of the generation fleet was determined in the Companies' ETP cases,³² wherein, pursuant to the stipulation, AEP-Ohio agreed not to impose any lost generation cost on switching customers during the market development period. Staff notes that, although the economic value of the generation plants was never specifically addressed by the Commission, it is reasonable to assume that the net value of the Companies' fleet was not stranded. Accordingly, Staff opposes the Companies' requests to impose on customers the cost or risk of uneconomic plants without accounting for the offset of the positive economic value of the rest of the Companies' generation plants (Staff Ex. 1 at 8).

Based on the record in this proceeding, the Commission is not convinced that it is appropriate to approve the Companies' request for recovery of net cost associated with an unanticipated shut down. Despite the arguments of the Companies to the contrary, we are persuaded by the arguments of the Staff that there may be offsetting positive value associated with the Companies generation fleet. Accordingly, while we will grant the Companies the authority to establish the accounting mechanism to separate net early closure cost, the Companies must file an application before the Commission for recovery of such costs. Accordingly, this aspect of the Companies' ESP application is denied. As to the Companies' request for authority to file with the Commission to determine the appropriate treatment associated with an earlier-than-anticipated shut down, the Commission finds this aspect of the application to be reasonable and, accordingly, the request should be granted.

C. PJM Demand Response Programs

Through the ESP, the Companies propose to revise certain tariff provisions to prohibit customers receiving SSO from participating in the demand response programs offered by PJM, either directly or indirectly through a third-party. Under the PJM programs retail customers can receive payment for being available to curtail even if the

³² *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Opinion and Order at 15-18 (September 28, 2000).*

customer's service is not actually curtailed. AEP-Ohio argues that allowing its retail customers receiving SSO to also participate in PJM demand response programs is a no-win situation for AEP-Ohio and its other customers and inconsistent with the requirements of SB 221. The Companies contend that PJM demand response programs are intended to ensure the proper price signal to wholesale customers, not to address retail rate issues (Cos. Ex. 1 at 5-7). AEP-Ohio argues that retail customers should participate through AEP-Ohio-sponsored and Commission-approved programs. The Companies contend that FERC has granted state commissions, or- more precisely, the "relevant electric retail regulatory authority," the authority to preclude retail customer participation in wholesale demand response programs. *Wholesale Competition in Regions with Organized Electric Markets* (Docket Nos. RM07-19-000 and AD07-7-000), 125 FERC ¶ 61,071 at 18 CFR Part 35 (October 17, 2008) (Final Rule) (Cos. Br. at 119)

AEP-Ohio notes that it has consistently challenged retail customers' ability to participate in such programs and argued that the terms and conditions of its tariff prohibited such and, therefore, demand response retail participants should not be surprised by the Companies' position in this proceeding (Tr. Vol. IX at 212). AEP-Ohio argues that Ohio businesses participating in PJM's demand response programs have not invested their own capital or assets, taken any financial risk, or added any value to the services for which they are being compensated through PJM. The Companies assert, as stated by Staff witness Scheck, that the PJM demand response programs cost AEP-Ohio's other customers as the load of such PJM program participants continues to count toward the Companies' Fixed Resource Requirements (FRR) option and such cost is reflected in AEP-Ohio's retail rates (Tr. Vol. VIII at 165-166). Further, the PJM program participant/customer's ability to interrupt is of no use to AEP-Ohio, as the Companies claim that PJM's curtailment request is based on PJM's zonal load and not AEP-Ohio's peak load (Cos. Br. at 122-123).

The Companies reason that SB 221 includes a process whereby mercantile customer-sited resources can be committed to the utility to comply with the peak demand reduction benchmarks as set forth in Section 4928.66(A)(2)(d), Revised Code. Further, AEP-Ohio argues that it is unclear how the interruptible capacity of a customer participating in PJM's demand response program can count toward the Companies' benchmarks without being under the control of the Companies and "designed to achieve" peak demand reductions as required by the statute. As such, the Companies argue that, if participation in the PJM demand response program is allowed, PJM will be in direct competition with the electric distribution companies' efforts to comply with energy efficiency and peak demand reduction benchmarks and thus, render the mercantile customer commitment provisions largely ineffective. For these reasons, AEP-Ohio states that it should incorporate participation in PJM's demand response programs through AEP-Ohio and AEP-Ohio would then be in a position to pass some of the economic benefits associated with participation in PJM programs on to retail customers through

The Companies, according to Integrys and the Commercial Group, have failed to present any demonstration that the Companies' programs are more beneficial to customers than the PJM programs. On the other hand, Integrys asserts that the PJM programs are more favorable to customers than the programs offered by AEP-Ohio as to notification, the number of curtailments per year, the hours of curtailments, payments and payment options, and penalties for non-compliance (Integrys Ex. 2 at 10-12; Commercial Group Br. at 9). In addition, certain interveners note, and the Companies agree, that PJM has not curtailed any customers since AEP-Ohio joined PJM (Tr. Vol. IX at 48). Furthermore, the intervenors contend that participation in the demand response programs provides improved grid reliability and improved efficiency of the market due to competition (Integrys Ex. 2 at 8).

Integrys also notes that the Ohio customers receive significant financial benefits from load serving entities beyond Ohio (Tr. Vol. IX at 52-52, 118). Integrys argues that AEP-Ohio wishes to ban customer participation in wholesale demand response programs to facilitate the increase in OSS of capacity to the benefit of the Companies' shareholders. Integrys reasons that because AEP-Ohio can count load enrolled in its interruptible service offerings as a part of the PJM ILR demand response program, the Companies will receive credit against its FRR commitment. The Companies, according to Integrys, hope that additional load will come from the customers currently participating in PJM's demand response programs in Ohio (Tr. Vol. IX at 53-58; Integrys Br. at 20-22). Integrys proposes, as an alternative to prohibiting customer participation in wholesale demand response programs, that the Commission count participation in the programs towards AEP-Ohio's peak demand reduction goals in accordance with the requirements of Section 4928.66, Revised Code. Integrys argues that the load can be certified, as it is today with the PJM demand response programs, or the electric services company could be required to register the committed load with the Commission.

Furthermore, Integrys reasons that the Commission can not retroactively interfere with existing contracts between customers and the customer's electric service provider in relation to the commitment contracts with PJM. With that in mind and if the Commission decides to grant AEP-Ohio's request to prohibit participation in wholesale demand response programs, Integrys requests that customers currently committed to participate in PJM programs for the 2008-2009 planning period and the 2009-2010 planning period be permitted to honor their commitments (Integrys Br. at 27-28).

Integrys argues that the Companies' claim that taking SSO and participating in a wholesale demand response program is a resale of power and a violation of the terms and conditions of their tariffs is misplaced. Integrys opines that there is no actual resale of energy, but, instead, there is a reduction in the customer's consumption of energy upon a call from the regional transmission operator (in this case, PJM). The customer is not purchasing energy from AEP-Ohio, so any energy purchased by AEP-Ohio can be

transferred to another purchaser. Thus, Integrys asserts that AEP-Ohio's argument regarding participation in a wholesale demand response program is fiction and not based on FERC's interpretation of participation in such programs. Finally, Integrys contends that AEP-Ohio's proposal is a violation of Section 4928.40(D), Revised Code, as such prohibits electric utilities from prohibiting the resale of electric generation service.

The Commercial Group asserts, that because AEP-Ohio has not performed any studies or analyses, the Companies' assertion that wholesale demands response programs must be different from a demand response program offered by AEP-Ohio is unsupported by the record (Tr. Vol. IX at 47). The Commercial Group requests that the Companies be directed to design energy efficiency and demand response programs that incorporate all available programs (Commercial Group at Br. 9).

OEG argues that, to the extent there are real benefits to the Companies as well as to their retail customers in the form of improved grid reliability, AEP-Ohio should be required to offer PJM demand response programs to its large industrial customers by way of a tariff rider or through a third-party supplier (OEG Ex. 2 at 13). IEU adds that the Companies currently use the capabilities of their interruptible customers to assist the Companies in satisfying their generation capacity requirements to PJM. According to IEU, SB 221 gives mercantile customers the option of whether or not to dedicate their customer-sited capabilities to the Companies for integration into the Companies' portfolio (IEU Ex. 1 at 12).

Constellation argues that AEP-Ohio's proposal violates Section 4928.20, Revised Code, and the clear intent of SB 221. Further, Constellation argues that approving AEP-Ohio's request to prohibit Ohio businesses from conservation programs during this period of economic hardship is ill-advised, especially considering that other businesses with which Ohio businesses' must compete are able to participate in the PJM programs. As such, consistent with the Commission's decision in Duke's ESP case (Case No. 08-920-EL-SSO, et al.), Constellation encourages the Commission to reject AEP-Ohio's request to prohibit SSO customers from participating in PJM demand response programs and give Ohio's business customers all available opportunities to reduce demand, conserve energy, and invest in conservation equipment (Constellation Br. at 23). OMA supports the claims of Constellation (OMA Br. at 10).

First, we will address the claims regarding the Commission's authority, or as claimed by Integrys, the lack of authority, for the Commission to determine whether or not Ohio's retail customers are permitted to participate in wholesale demand response programs. The Commission finds that the General Assembly has vested the Commission with broad authority to address the rate, charges, and service issues of Ohio's public utilities as evidenced in Title 49 of the Revised Code. Accordingly, we consider this Commission the entity to which FERC was referring in the Final Rule when it referred to

the "relevant electric retail regulatory authority." We are not convinced by Integry's arguments that a specific act of the General Assembly is necessary to grant the Commission the authority to determine whether or not Ohio's retail customers are permitted to participate in the RTO's demand response programs.

Next, the Commission acknowledges that the PJM programs offer benefits to program participants. We are, however, concerned that the record indicates that PJM demand response programs cost AEP-Ohio's other customers as the load of AEP-Ohio's FRR and the cost of meeting that requirement is reflected in AEP-Ohio's retail rates. Finally, we are not convinced, as AEP-Ohio argues that a customer's participation in demand response programs is the resale of energy provided by AEP-Ohio. For these reasons, we find that we do not have sufficient information to consider both the potential benefits to program participants and the costs to Ohio ratepayers to determine whether this provision of the ESP will produce a significant net benefit to AEP-Ohio consumers. The Commission, therefore, concludes that this issue must be deferred and addressed in a separate proceeding, which will be established pursuant to a subsequent entry. Although we are not making a determination at this time as to the appropriateness of such a provision, we direct AEP to modify its ESP to eliminate the provision that prohibits participation in PJM demand response programs.

D. Integrated Gasification Combined Cycle (IGCC)

In Case No. 05-376-EL-UNC, the Commission concluded that it was vested with the authority to establish a mechanism for recovery of the costs related to the design, construction, and operation of an IGCC generating plant where that plant fulfills AEP-Ohio's POLR obligation and, therefore, approved the Phase I cost recovery mechanism included in the Companies' application.³³ Applications for rehearing of the Commission's IGCC Order were timely filed and by entry on rehearing issued June 28, 2006, the Commission denied each of the applications for rehearing (IGCC Rehearing Entry). Further, the IGCC Rehearing Entry conditioned the Commission's approval of the application, stating that: (a) all Phase I costs would be subject to subsequent audit(s) to determine whether such expenditures were reasonable and prudently incurred to construct the proposed IGCC facility; and (b) if the proposed IGCC facility was not constructed and in operation within five years after the date of the entry on rehearing, all Phase I charges collected must be refunded to Ohio ratepayers with interest.

In this ESP proceeding, AEP-Ohio witness Baker testified that, although the Companies have not abandoned their interest in constructing and operating an IGCC facility in Meigs County, Ohio, certain provisions of SB 221 are a barrier to construction and operation of an IGCC facility. As AEP-Ohio interprets SB 221, the Companies may be

³³ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 05-376-EL-UNC, Opinion and Order (April 10, 2006) (IGCC Order).

required to remain in an ESP to assure an opportunity for cost recovery for an IGCC facility; the construction work in process (CWIP) provision which requires the facility to be at least 75 percent complete before it can be included in rate base; the limit on CWIP as a percentage of total rate base which the witness contends causes particular uncertainties since the concept of a generation rate base has no applicability under SB 221; and the effect of "mirror CWIP" (Cos. Ex. 2-A at 52-56). The Companies assert that not only are these barriers to the construction of an IGCC facility but also to any base load generation facility in Ohio. Nonetheless, the Companies state that they are encouraged by the fact that SB 221 recognizes the need for advanced energy resources and clean coal technology, such as an IGCC. Finally, the Companies' witness notes that, since the time the Companies proposed the IGCC facility, CSP has acquired additional generating capacity. According to Company witness Baker, the Companies hope to work with the Governor's administration, the General Assembly, and other interested parties to enact legislation that will make an IGCC facility in Meigs County a reality (Cos. Ex. 2-A at 55-56).

OCEA opines that SB 221 did not eliminate the existing requirement that electric utilities must satisfy to earn a return on CWIP and, since the Companies do not ask for the Commission to make any determination in this proceeding or at any definite time in the future as to the IGCC facility, the Commission should take no action on this issue (OCEA Br. at 98-99).

The Commission notes that the Ohio Supreme Court remanded, in part, the Commission's IGCC Order, for further proceedings and, accordingly, the matter is currently pending before the Commission. Further, as OCEA asserts, there does not appear to be any request from the Companies as to the IGCC facility in this proceeding. Accordingly, we find it inappropriate to rule, at this time, on any matter regarding the Meigs County IGCC facility in this proceeding. We will address the matter as part of the pending IGCC proceeding.

E. Alternate Feed Service

As part of the ESP, the Companies propose a new alternate feed service (AFS) schedule. For customers who desire a higher level of reliability, a second distribution feed, in addition to the customer's basic service, will be offered. Existing AEP-Ohio customers that are currently paying for AFS will continue to receive the service at the same cost under the proposed tariff. Existing customers who have AFS and are not paying for the service will continue to receive such service until AEP-Ohio upgrades or otherwise makes a new investment in the facilities that provide AFS to that customer. At such time, the customer will have 6 months to decide to discontinue AFS, take partial AFS, or continue AFS and pay for the service in accordance with the effective tariff schedule (Cos. Ex. 1 at 8). While OHA supports the implementation of an AFS schedule offering with clearly defined terms and conditions, OHA takes issue with two aspects of the AFS proposal. OHA witness Solganick testified that it is his understanding that the

customer will have six months after the customer is notified by the company to make a decision (OHA Ex. 4 at 15). However, OHA witness Solgarick advocated that six months was insufficient because critical-use customers, like hospitals, require more lead time to evaluate their electric supply infrastructure and needs (Id.). As such, he argued that 24 months would be more appropriate for planning purposes (Id.). Moreover, OHA argued that, because this issue involves the overall management and cost of operating AEP-Ohio's distribution system, the Commission should defer consideration of the proposed AFS until AEP-Ohio's next distribution rate case where there will be a more deliberate treatment of the issue as opposed to this 150-day proceeding (OHA Br. at 23). OHA believes that a distribution rate proceeding would better ensure that the underlying rate structure for AFS is correct, similar to the argument for deferring decision on other distribution rate issues presented in this ESP proceeding (Id.). Staff and IEU also agree that the issue should be addressed in a distribution rate case (Staff Ex. 1 at 4; IEU Ex. 10 at 11). However, IEU further recommends that the Commission deny the Companies' request because it is not based on prudently incurred costs (IEU Br. at 25-26).

The Companies retort that, while they may have some flexibility as to the notice provided customers, such notice is limited by the Companies' planning horizon for distribution facilities and the lead time required to complete construction of upgraded AFS facilities (Cos. Reply Br. at 122). The Companies reason that, while more than 6 months may be feasible, anything more than 12 months would not be prudent and, in certain rare circumstances, would not facilitate the construction of complex facilities (Id.). Nonetheless, the Companies stated that they will commit to 12 months notice to existing AFS customers for the need to make an election of service (Id.). However, the Companies vehemently opposed deferring approval of their proposed AFS schedule to some future proceeding, stating that the proposed AFS tariff codifies existing practices currently being addressed on a customer-by-customer contract addendum basis (Id.). Further, the Companies argue that IEU has not presented any basis to support the implication that the AFS schedule will recover imprudently incurred costs (Id. at 123). Thus, AEP-Ohio contends there is no good reason to delay implementation of the AFS schedule with the understanding that the Companies will provide up to 12 months notice to existing customers (Id. at 122-123).

As previously noted in this order in regards to other distribution rate issues, the Commission believes that the establishment of various distribution riders and rates, including the proposed new AFS schedule, is best reviewed in a distribution rate case where all components of distribution rates are subject to review.

F. Net Energy Metering Service

The Companies' ESP application includes several tariff revisions. More specifically, the Companies propose to eliminate the one percent limitation on the total rated generation capacity for customer-generators on the Companies' Net Energy

Metering Service (NEMS) and add a new Net Energy Metering Service for Hospitals (NEMS-H). The Companies note that, at the time the ESP application was filed, they had filed a proposed tariff modification to the NEMS and Minimum Requirements for Distribution System Interconnection and Standby Service in Case No. 05-1500-EL-COI.³⁴ The Companies state that upon approval of the modifications filed in 05-1500, the approved modifications will be incorporated into the tariffs filed in the ESP case (Cos. Ex. 1 at 8-9).

OHA identifies two issues with the Companies' proposed NEMS-H schedule. First, OHA asserts the conditions of service are unduly restrictive to the extent that NEMS-H requires the hospital customer-generator's facility must be owned and operated by the customer and located on the customer-generator's premises. OHA asserts that this requirement prevents hospitals from benefiting from economies of scale by utilizing the expertise of distributed generation or cogeneration companies, centralized operation and maintenance of such facilities, and shared expertise and expenses. Further, OHA asserts that the requirement that the facility be located on the hospital's premises is a barrier because space limitations and legal and/or financing requirements may suggest that a generation facility be located on property not owned by the hospital. OHA argues that the Companies do not cite any regulatory, operational, financial, or other reason why the ownership requirement is necessary. Therefore, OHA requests that the Commission delete this condition of service and require only that the hospital contract for service and comply with the Companies' interconnection requirements (OHA Ex. 4 at 8-10).

AEP-Ohio responds that the requirement that the generation facility be on-site and owned and operated by the customer is a provision of the currently effective NEMS schedule. Further, the Companies argue that economies of scale may be accomplished with multiple hospitals contracting with a third-party to operate and maintain the generation facilities of each hospital. Further, AEP-Ohio argues that there is no support for the claim that efficiencies can not be had if the hospital, rather than a third-party developer, is the ultimate owner of such facilities (Cos. Br. at 128). As to OHA's opposition to the requirement that the hospital own and operate the generation facility on its premises, AEP-Ohio contends that such is required based on the language in the definitions of a customer-generator, net metering system, and self-generator at Section 4928.02(A)(29) to (32), Revised Code (Cos. Reply Br. at 124-125).

Second, OHA argues that the payment for net deliveries of energy should include credits for transmission costs that are avoided and energy losses on the subtransmission and distribution systems that are avoided or reduced. Further, OHA requests that such payments for net deliveries should be made monthly without a requirement for the

³⁴ *In the Matter of the Application of the Commission's Review to Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering, Demand Response, Cogeneration, and Power Production, Case No. 05-1500-EL-COI (05-1500).*

customer-generator to request any net payment. The Companies propose to make such payment annually upon the customer's request (OHA Ex. 4 at 11-12). The Companies assert that OHA assumes that the customer-generator's activities will reduce transmission, subtransmission, and distribution line losses and there is no support for OHA's contention. Further, AEP-Ohio argues that annual payment is in compliance with Rule 4901:1-10-28(E)(3), Ohio Administrative Code (O.A.C.) (Cos. Reply Br. at 124). OHA witness Solganick conceded that the annual payment requirement is in compliance with the Commission's rule (Tr. Vol. X at 118-119).

Staff submits that the Companies' proposed NEMS-H tariff is premature given that requirements for hospital net metering are currently pending rehearing before the Commission in the 06-653 Case. Thus, Staff proposes, and OHA supports, that the Companies withdraw their proposed NEMS-H and refile the tariff once the new requirements are effective or with the Companies' next base rate proceeding, whichever occurs first (Staff Ex. 5 at 9; OHA Reply Br. at 9). AEP-Ohio argues that the status of the 06-653 Case should not postpone the implementation of one of the objectives of SB 221 and notes that, if the final requirements adopted in the 06-653 Case impact the Companies' NEMS-H, the adopted requirements can be incorporated into the NEMS-H schedule at that time.

As the Commission is in the process of determining the net energy meter service requirements pursuant to SB 221 in the 06-653 Case, the Commission finds AEP-Ohio's revisions to its net energy metering service schedules premature. Therefore, the Commission finds, as proposed by Staff and supported by OHA, the Companies should refile their net metering tariffs to be consistent with the requirements adopted by the Commission in the 06-653 Case or with the Companies' next base rate proceeding.

G. Green Pricing and Renewable Energy Credit Purchase Programs

OCEA proposes that the Commission order AEP-Ohio to continue, with the input of the DSM collaborative, the Companies' Green Pricing Program and to require the Companies to develop a separate residential and small commercial net-metering customer renewable energy credit (REC) purchase program. OCC witness Gonzalez recommended a market-based pricing for RECs. On brief, OCEA proposes an Ohio mandatory market-based rate for in-state solar electric application and a different rate for in-state wind and other renewable resources. OCEA asserts that the programs will assist customers with the cost of owning and using renewable energy and assist the Companies in meeting the renewable energy requirements (OCC Ex. 5 at 10-11; Tr. Vol. IV at 232-234; OCEA Br. at 97-98).

The Companies argue that, pursuant to the stipulation agreement approved by the Commission in Case No. 06-1153-EL-UNC,³⁵ the Green Pricing Program expired December 31, 2008. Further, the Companies note that the Commission approved the expiration of the Green Pricing Program by the Finding and Order issued in Case No. 08-1302-EL-ATA.³⁶ However, the Companies state that they intend to offer a new green tariff option during the ESP term (Cos. Ex. 3 at 13). Accordingly, the Companies request that the Commission OCEA's request to detail or adopt a new green tariff option at this time. In regards to OCEA's REC proposal, the Companies assert that the prescriptive pricing recommendation presented on brief is at odds with the testimony of OCC's witness. Further, the Companies note that OCC's witness acknowledged the administrative and cost-effective issues associated with the proposal. Thus, the Companies note that, as OCC's witness acknowledged, the proposal requires further study before being implemented.

While the Commission believes there is merit to green pricing and REC programs and, therefore, encourages the Companies to evaluate the feasibility and benefits to implementing such programs as soon as practicable, we decline to order the Companies to initiate such programs as part of this ESP proceeding, as it is not necessary that these optional requests be pursued by the Companies at this time. Accordingly, we find that it is unnecessary to modify AEP-Ohio's ESP to include any green pricing and REC programs, and we decline to do such modification at this time.

H. Gavin Scrubber Lease

The Companies note that in the Gavin Scrubber Case,³⁷ the Commission authorized OP to enter into a lease agreement with JMG Funding, L.P. (JMG) for a scrubber/solid waste disposal facilities (scrubber) at the Gavin Power Plant. Under the terms of the lease agreement, the agreement may not be cancelled for the initial 15-year term. After the initial 15-year period, under the Gavin lease agreement, OP has the option to renew or extend the lease for an additional 19 years. OP entered into the lease on January 25, 1995. Therefore, the initial lease period ends in 2010, and at that time, OP will have the option of renewing the Gavin scrubber lease for an additional 19 years, until 2029. On April 4, 2008, OP filed an application for authority to assume the obligations of JMG and restructure the financing for certain JMG obligations in the OP and JMG case.³⁸ In the OP and JMG case, the Commission approved OP's request subject to two conditions: OP must seek Commission approval to exercise the option to purchase the

³⁵ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 06-1153-EL-UNC (May 2, 2007).

³⁶ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-1302-EL-ATA (December 19, 2008).

³⁷ *In re Ohio Power Company*, Case No. 93-793-EL-AIS, Opinion and Order (December 9, 1993).

³⁸ *In re Ohio Power Company*, Case No. 08-498-EL-AIS, Finding and Order (June 4, 2008).

Gavin scrubbers or terminate the lease agreement; and OP must provide the Commission with details of how the company intends to incorporate the project into its ESP (Cos. Ex. 2-A at 56-58).

As part of the Companies' ESP application, OP requests authority to return to the Commission to recover any increased costs associated with the Gavin lease (Cos. Ex. 2-A at 56-58). The Companies state that a decision on the Gavin scrubber lease has not been made because the market value of the scrubbers and the analysis to determine the least cost option is not available at this time.

The Commission recognizes that additional information is necessary for the Companies to evaluate the options of the Gavin lease agreement and, to that end, we believe that AEP-Ohio should be permitted to file an application to request recognition of the Gavin lease at the time that it makes its decision as to purchasing or terminating the lease. Once the Companies have made their election, they should conduct a cost-benefit analysis and file it with the Commission prior to seeking recovery of any incremental costs associated with the Gavin scrubber lease.

I. Section V.E (Interim Plan)

The Companies assert that this provision is part of the total ESP package and should be adopted. The Companies requested that the Commission authorize a rider to collect the difference between the ESP approved rates and the rates under the Companies' current SSO for the length of time between the end of the December 2008 billing month and the effective date of the new ESP rates.

We find Section I.E of the proposed ESP to be moot with this opinion and order. The Commission issued finding and orders on December 19, 2008, and February 25, 2009, interpreting the statutory provision in Section 4928.14(C)(1), Revised Code, and approving rates for an interim period until such time as the Commission issues its order on AEP's proposed ESP.³⁹ Those rates have been in effect with the first billing cycle in January 2009. Consistent with Section 4928.141, Revised Code, which requires an electric utility to provide consumers, beginning on January 1, 2009, a SSO established in accordance with Section 4928.142 or 4928.143, Revised Code, and given that AEP-Ohio's proposed ESP term begins on January 1, 2009, and continues through December 31, 2011, we are authorizing the approval of AEP's ESP, as modified herein, effective January 1, 2009. However, any revenues collected from customers during the interim period must be recognized and offset by the new rates and charges approved by this opinion and order.

³⁹ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-1302-EL-ATA, Finding and Order at 2-3 (December 19, 2008) and Finding and Order at 2 (February 25, 2009).

VII. SIGNIFICANTLY EXCESSIVE EARNINGS TEST (SEET)

Section 4928.143(F), Revised Code, requires that, at the end of each year of the ESP, the Commission shall consider if any adjustments provided for in the ESP:

...resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate.

AEP-Ohio's proposed ESP SEET process may be summarized as follows: The book measure of earnings for CSP and OP is determined by calculating net income divided by beginning book equity. The Companies then propose that the ROE for CSP and OP should be blended as the book equity amounts for AEP-Ohio is more meaningful since CSP and OP are supported by AEP Corporation. To develop a comparable risk peer group, including public utilities, with similar business and financial risk, AEP-Ohio's process includes evaluating all publicly traded U.S. firms. By using data from both Value Line and Compustat, AEP-Ohio applies the standard decile portfolio technique, to divide the firms into 10 different business risk groups and 10 different financial risk groups (lowest to highest). AEP-Ohio would then select the cell which includes AEP Corporation. To account for the fact that the business and financial risks of CSP and OP may differ from AEP Corporation, this aspect of the process is repeated for CSP and OP and taken into consideration in determining whether CSP's or OP's ROEs are excessive. The ESP evaluates business risk by using unlevered Capital Asset Pricing Model betas (or asset betas) and the financial risk by evaluating the book equity ratio. The Companies assert that the book equity ratio is more stable from year to year and, therefore, is considered by fixed-income investors and credit rating agencies. The ESP utilized two standard deviations (which is equivalent to the traditional 95 percent confidence level) about the mean ROEs of the comparable risk peer group and the utility peer group to determine the starting point for which CSP's or OP's ROE may be considered excessive (Cos. Ex. 5 at 13-42). Finally, AEP-Ohio advocates that the earnings for each year the SEET is applied should be adjusted to exclude the margins associated with OSS and accounting earnings for fuel adjustment clause deferrals for which the Companies will not have collected revenues (Cos. Ex. 2-A at 37-38; Cos. Ex. 6 at 16-17; Cos. Ex. 2 at 39-40).

OCC, OEG, and the Commercial Group each take issue with the development of the comparable firms and the threshold of significantly excessive earnings. Kroger and OCEA argue that the Companies' statistical process for determining when CSP and OP

have earned significantly excessive earnings improperly shifts the burden of proof set forth in the statute from the company to other parties.

OCC witness Woolridge developed a proxy group of electric utilities to establish the business and financial risk indicators, then uses Value Line to develop a data base of companies with business and financial risk indicators within the range of the electric utility proxy group. Woolridge suggests computing the benchmark ROE for the comparable companies and adjusting the benchmark ROE for the capital structure of Ohio's electric utility companies and adjusting the benchmark by the FERC 150 basis points ROE adder to determine significantly excessive earnings (OCC Ex. 2 at 5-6, 20). AEP-Ohio argues that OCC's process is contrary to the language and spirit of Section 4928.143(F), Revised Code, as the statute requires the comparable firms include non-utility firms. The SEET proposed by OCC witness Woolridge results in the same comparable list of firms for each Ohio electric utility evaluated (Cos. Ex. 5-A at 5-6).

OEG proposes a method to establish the comparable group of firms by utilizing the entire list of publicly traded electric utilities in Value Line's Datafile,⁴⁰ and one group of non-utility firms. The comparable non-utility group is composed of Companies' with gross plant to revenue between 1.2 and 5.0, gross plant in excess of \$1 billion and companies for which Value Line has a beta (OEG Ex. 4 at 4-6). OEG then calculates the difference in the average beta of electric utility group and the non-utility group and adjust it by the average historical risk premium for the period 1926 to 2008, which equals 7.0 percent to determine the adjustment to account for the reduced risk associated with utilities. Thus, for example, for the year 2007 OEG determined that the average non-utility earned return of 14.14 percent yields a risk-adjusted return of 12.82 percent. OEG then applies an adjustment to recognize the financial risk differences of AEP-Ohio to the utility and non-utility comparison groups. Finally, to determine the level at which earnings are "significantly excessive," OEG suggests an adder of the 200 basis points to encourage investments (OEG Ex. 4 at 7-9). OEG argues that the use of statistical confidence ranges as proposed by AEP-Ohio would severely limit any finding of excessive earnings as a two-tailed 95 percent confidence interval would mean that only 2.5 percent of all observations of all the sample company groups would be deemed to have excessive earnings. Further, OEG argues that as a statistical analysis the AEP-Ohio-proposed method eliminates most, if not all, of the Commission's flexibility to adjust to economic circumstances and determine whether the utility company's earnings are significantly excessive (OEG Ex. 4 at 9-10).

AEP-Ohio contends that OEG's SEET method fails to comply with the statutory requirements for the SEET, fails to control for financial risk of the comparable sample groups, fails to account for business risk and will, like the process proposed by OCC,

⁴⁰ OEG would eliminate one company with a significant negative return on equity for 2007.

produce the same comparable non-utility and utility group for each of the Ohio electric utilities (Cos. Ex. 5-A at 8-9).

The Commercial Group asserts that AEP-Ohio's proposed SEET methodology will produce volatile earned return on equity thresholds and, therefore, does not meet the primary objective of an ESP which is to stabilize rates and support the economic development of the state. Further, AEP-Ohio's SEET method, according to the Commercial Group, fails to compose a comparable proxy group with business risk similar to CSP and OP, including unregulated nuclear subsidiaries and deregulated generation subsidiaries. Thus, Commercial Group recommends a comparable group consist of publicly traded regulated utility companies as determined by the Edison Electric Institute (EEI). Commercial Group witness Gorman notes that using EEI's designated group of regulated entities and Value Lines earned return on common equity shows that the regulated companies had an average return on equity of approximately 9 percent for the period 2005 through 2008. Witness Gorman contends that over the period 2005 through 2008 and projected over the next 3 to 5 years, approximately 85 percent of the earned return on equity observations for the designated regulated electric utility companies will be at 12.5 percent return on equity or less. Therefore, Commercial Group recommends that the SEET test be based on the Commission-approved return on equity plus a spread of 200 basis points. Commercial Group witness Gorman reasons that the average risk, extreme risk and beta spread over AEP-Ohio's proxy group suggest that a 2 percent/200 basis points is a conservative determination of the excessive earnings threshold (Commercial Group Ex. 1 at 3, 12-17).

AEP-Ohio argues that the Commercial Group's proposed SEET fails to develop a comparable group as required by the SEET and ignores the fact that the rate of return is a forward-looking analysis and the SEET is retrospective. Thus, AEP-Ohio concludes that this method does not address the measurement of financial and business risk (Cos. Ex. 5-A at 9-10).

OCC opposes the exclusion of accounting earnings for fuel adjustment clause deferrals and the deduction of revenues associated with OSS, as OSS are not one-time write-offs or non-recurring items (OCC Ex. 2 at 21). OCC contends that revenues associated with the deferrals are reported during the same period with the Companies fuel-related expenses and to eliminate the deferrals, as AEP-Ohio proposes, would reduce the revenues for the period without deducting for the underlying expense (OCC Reply Br. 69-70). Similarly, Kroger proposes that AEP-Ohio credit the fuel adjustment clause for the margin generated by OSS and notes that AEP Corporation's West Virginia and Virginia electric distribution subsidiaries currently do so despite AEP-Ohio's assertion that such is in violation of federal law (Kroger Ex. 1 at 9).

Staff advocates a single SEET methodology for all electric distribution utilities as to the selection of comparable firms and, further, proposes a workshop or technical conference to develop the process to determine the "comparable group earnings" for the SEET. Staff witness Cahaan reasons that the SEET proposed by AEP-Ohio as a technical, statistical analysis, if incorrectly formulated shifts the burden of proof from the company to the other parties. Staff also contends that the Companies' SEET proposal is based upon a definition of significance which would create internal inconsistencies if applied to the statute. Further, Staff believes the "zone of reasonable" earnings can be framed by a return on equity with an adder in the range of 200 to 400 basis points. Further, Staff recognizes that if, as AEP-Ohio suggests, revenues from OSS are excluded from SEET, other adjustments would be required. Staff believes it would be unreasonable to predetermine those other adjustments as this time. Thus, Staff proposes that this proceeding determine the method of establishing the comparable group and specify the basis points that will be used to determine "significantly excessive earnings." Staff claims that under its proposed process, at the end of the year, the ROE of the comparable group could be compared to the electric utility's 10-K or FERC-1 and, if the electric utility's ROE is less than that of the sum of the comparable group's ROE plus the adder, it will be presumed that the electric utility's earnings were not significantly excessive. Further, Staff asserts that any party that wishes to challenge the presumption would be required to demonstrate otherwise. If, however, the electric utility's earned ROE is greater than the average of the comparable group plus the adder, the electric utility would be required to demonstrate that its earnings are not significantly excessive (Staff Ex. 10 at 8, 16, 19, 21-24, 26-27; Staff Br. at 27).

OCEA, OMA, and the Commercial Group recommend that the comparable firm process for the SEET be determined, as Staff proposes, as part of a workshop (OCEA Br. at 110; OMA Br. at 13; Commercial Group Br. at 9).

The Commission believes that the determination of the appropriate methodology for the SEET is extremely important. As evidenced by the extensive testimony in this case concerning the test, there are many different views concerning what is intended by the statute and what methodology should be utilized. However, as pointed out by several parties, whatever the ultimate determination of what the methodology should be for the test, the test itself will not be actually applied until 2010 and, as proposed by the Companies, will not commence until August 2010, after Compustat information is made publicly available (Cos. Ex. 5 at 11-12). Therefore, consistent with our opinion and order issued in the FirstEnergy ESP Case,⁴¹ the Commission agrees with Staff that it would be wise to examine the methodology for the excessive earnings test set forth in the statute within the framework of a workshop. This is consistent with the Commission's finding that the goal of the workshop will be for Staff to develop a common methodology for the

⁴¹ *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 08-935-EL-SSO, Opinion and Order (December 19, 2008).

excessive earnings test that should be adopted for all of the electric utilities and then for Staff to report back to the Commission on its findings. Despite AEP-Ohio's assertions that FirstEnergy's ESP is no longer applicable since the FirstEnergy companies rejected the modified ESP, the Commission finds that a common methodology for significantly excessive earnings continues to be appropriate given that other ESP applications are currently pending and, even under AEP-Ohio's ESP application, the SEET information is not available until the July of the following year. Accordingly, the Commission finds that Staff should convene a workshop consistent with this determination. However, notwithstanding the Commission's conclusion that a workshop process is the method by which the SEET will be developed, we recognize that AEP-Ohio must evaluate and determine whether to accept the ESP as modified herein or reject the modified ESP and, therefore, require clarification of our decision as to OSS and deferrals (Cos. Reply Br. at 134). We find that a determination of the Companies' earnings as "significantly excessive" in accordance with Section 4928.143(F), Revised Code, necessarily excludes OSS and deferrals, as well as the related expenses associated with the deferrals, consistent with our decision regarding an offset to fuel costs for any OSS margins in Section III.A.1.b of this order. The Commission believes that deferrals should not have an impact on the SEET until the revenues associated with deferrals are received. Further, although we conclude that it is appropriate to exclude off-system sales from the SEET calculation, we do not wish to discourage the efficient use of OP's generation facilities and, to the extent that the Companies' earnings result from wholesale sources, they should not be considered in the SEET calculation.

VIII. MRO V. ESP

The Companies argue that "[t]he public interest is served if the ESP is more favorable in the aggregate than the expected results of an MRO" (Cos. Br. at 15). The Companies' further argue that the state policy set forth in Section 4928.02(A), Revised Code, is satisfied if the price for electric service, as part of the ESP as a whole, is more favorable than the expected results of an MRO (Id.). The Companies aver that not only is the SSO proposed under the ESP more attractive than the SSO resulting from an MRO, other non-SSO factors exist adding to the favorability of the ESP over the MRO (Cos. Ex. 2-A at 4, 8; Cos. Ex. 3 at 14-19). Specifically, AEP calculated the market price competitive benchmark for the expected cost of electricity supply for retail electric generation SSO customers in the Companies' service territories for the next three years as \$88.15 per MWH for CSP and \$85.32 per MWH for OP for full requirements service (Cos. Ex. 2-A at 5). These competitive benchmark prices were calculated by AEP using market data from the first five days of each of the first three quarters of 2008, and averaging the data (Id. at 15).

AEP-Ohio witness Baker then compared the ESP-based SSO with the MRO-based SSO, analyzing the following components: market prices for 2009 through 2011; the

phase-in of the MRO over a period of time pursuant to Section 4928.142, Revised Code, at 10 percent, 20 percent, and 30 percent; the full requirements pricing components of the states of Delaware and Maryland; PJM costs; incremental environmental costs, POLR costs, and other non-market portions of an MRO-based SSO (Cos. Ex. 2-A at 3-17). AEP-Ohio witness Baker also considered non-SSO costs in the comparison, such as the distribution-related costs of \$150 million for CSP and \$133 million for OP (Id. at 16-17). AEP-Ohio concluded that the cost of the ESP is \$1.2 billion and the cost of the MRO is \$1.5 billion for CSP, while the cost of the ESP is \$1.4 billion and the cost of the MRO is \$1.7 billion for OP (Cos. Ex. 2-B, Revised Exhibit JCB-2). Therefore, AEP-Ohio states that the ESP for the Companies in the aggregate and for each individual company is clearly more favorable for customers, and would result in a net benefit to the customers under the ESP as compared to the MRO of \$ 292 million for CSP and \$262 million for OP (Id.; Cos. Br. at 135).

The Companies state that, in addition to the generation component, the ESP has other elements that, when taken in the aggregate, make the ESP considerably more favorable to customers than an MRO alternative (Cos. Ex. 2-A at 17-18). AEP-Ohio explains that the benefits in the ESP that are not available in an MRO, include: a shareholder-funded commitment focused on economic development and low-income customer assistance programs; price certainty and stability for generation service for a specified three-year period; and gridSMART and enhanced distribution reliability initiatives (Cos. Ex. 2-A at 17-18; Cos. Ex. 3 at 16-18; Cos. Br. at 135-137).

The Companies contend that once the Commission determines that the ESP is more favorable in the aggregate, then the Commission is required to approve the ESP. If the Commission determines that the ESP is not more favorable in the aggregate, then the Commission may modify the ESP to make it more favorable or it may disapprove the ESP application.

Staff states that, as a general principle, Staff believes that the Companies' proposed ESP is more favorable than what would be expected under an MRO (Staff Br. at 2). However, Staff explains that modifications to the proposed ESP are necessary to make the ESP reasonable (Id.). With Staff's proposed adjustments to the ESP rates, Staff witness Hess testified that the Companies' proposed ESP "results in very reasonable rates" (Staff Ex. 1 at 10). Furthermore, Staff witness Hess demonstrated, utilizing Staff witness Johnson's estimated market rates, that the ESP is more favorable in the aggregate as compared to the expected results of an MRO (Staff Ex. 1-A, Revised Exhibit JEH-1; Staff Br. at 26).

Several intervenors are critical of various components of AEP-Ohio's proposed ESP and thus conclude that the ESP, as proposed, is not more favorable in the aggregate and should be rejected or substantially modified, or that AEP-Ohio has failed to meet its

burden of proof under the statute that the proposed ESP, in the aggregate, is more favorable than an MRO (OPAE Br. at 3, 22-23; OMA Br. at 3; Kroger Br. at 4; OHA Br. at 11; Commercial Group Br. at 2-3; OEG Br. at 2-3; Constellation Br. at 16-18). More specifically, OHA contends that the Commission must take into account all terms and conditions of the proposed ESP, not just pricing (OHA Br. at 8-9). OHA further explains that the Commission must weigh the totality of the circumstances presented in the proposed ESP with the totality of the expected results of an MRO (Id. at 9). OHA also states that the proposed ESP fails to mitigate the harmful effects of new regulatory assets, proposed deferrals, and rate increases on hospitals and, therefore, the ESP does not provide benefits that make it more favorable than a simple MRO (Id. at 11). IEU asserts that both the Companies' and Staff's comparison of the ESP to an MRO are flawed because the comparisons fail to reflect the projected costs of deferrals, assume the maximum blending percentages allowed under 4928.142, Revised Code, and fail to demonstrate the incremental effects of the maximum blending percentages on the FAC costs (IEU Br. at 33, citing Cos. Ex. 2-A, Staff Ex. 1, Exhibit JEH-1, Tr. Vol. XI at 78-82, and Tr. Vol. XIII at 87-88).

OCEA disputes the Companies' comparison of the ESP to the MRO, stating that the Companies have overstated the competitive benchmark prices (OCC Ex. 10 at 15; OCEA Br. at 19-24). Based on data from the fourth quarter 2008, and taking in consideration adjustments for load shaping and distribution losses, OCC calculates that the updated competitive benchmark prices should be \$73.94 for CSP and \$71.07 for OP (OCC Ex. 10 at 15-24). OCEA also questioned other underlying components of AEP witness Baker's comparison of the MRO to the ESP regarding the proposed ESP, as well as the exclusion of certain costs in the MRO calculation (Id. at 37-40). Nonetheless, OCEA ultimately concludes that AEP's ESP, if appropriately modified, is more favorable than an MRO (OCEA Br. at 19-24; OCC Ex. 10 at 39). Constellation also submits that the forward market prices for energy have fallen significantly since the Companies' filed their application and submitted their supporting testimony (Constellation Ex. 2 at 16).

Contrary to the position taken by Constellation and OCEA,⁴² AEP-Ohio contends that the market price analysis supplied in support of the ESP does not need to be updated in order for the Commission to determine whether the ESP is more favorable than the expected result of the MRO. Furthermore, AEP-Ohio responds that the appropriate method is to look over a longer period of time, and not just focus on the recent decline in forward market prices. (Cos. Reply Br. at 130-131).

Contrary to arguments raised by various intervenors, AEP-Ohio avers that the legal standard to approve the ESP is not whether the Commission can make the ESP even more favorable, whether the rates are just and reasonable, whether the costs are prudently

⁴² Constellation Br. at 17; OCEA Br. at 19-24.

incurred, whether the plan provisions are cost-based, or whether each provision of the plan is more favorable than an MRO (Cos. Reply Br. at 1-6). The Companies contend that the Commission only has authority to modify a proposed ESP if the Commission determines that the ESP is not more favorable than the expected results of an MRO (Id. at 4). As some intervenors have recognized,⁴³ the Commission does not agree that our authority to make modifications is limited to an after-the-fact determination of whether the proposed ESP is more favorable in the aggregate. Rather, the Commission finds that our statutory authority includes the authority to make modifications supported by the evidence in the record in this case. Based upon our opinion and order and using Staff witness Hess' methodology of the quantification of the ESP v. MRO comparison, as modified herein, we believe that the cost of the ESP is \$673 million for CSP and \$747 million for OP, and the cost of the MRO is \$1.3 billion for CSP and \$1.6 billion for OP.

Accordingly, upon consideration of the application in this case and the provisions of Section 4928.143(C)(1), Revised Code, the Commission finds that the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, as modified by this order, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

IX. CONCLUSION

The Commission believes that it is essential that the plan we approve be one that provides rate stability for the Companies, provides future revenue certainty for the Companies, and affords rate predictability for the customers. Upon consideration of the application in this case and the provisions of Section 4928.143(C)(1), Revised Code, the Commission finds that the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, as modified by this order, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. Therefore, the Commission finds that the proposed three-year ESP should be approved with the modifications set forth in this order. To the extent that intervenors have proposed modifications to the Companies' ESP that have not been addressed by this opinion and order, the Commission concludes that the requests for such modifications are denied.

Furthermore, the Commission finds that the Companies' should file revised tariffs consistent with this order, to be effective with bills rendered January 1, 2009. In light of the timing of the effective date of the tariffs, the Commission finds that the revised tariffs shall be approved upon filing, effective January 1, 2009, as set forth herein, and contingent upon final review by the Commission.

⁴³ OEG Br. at 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) CSP and OP are public utilities as defined in Section 4905.02, Revised Code, and, as such, the companies are subject to the jurisdiction of this Commission.
- (2) On July 31, 2008, CSP and OP filed applications for an SSO in accordance with Section 4928.141, Revised Code.
- (3) On August 19, 2008, a technical conference was held regarding AEP-Ohio's applications and on November 10, 2008, a prehearing conference was held in these matters.
- (4) On September 19, 2008, and October 29, 2008, intervention was granted to: OEG; OCC; Kroger; OEC; IEU-Ohio; OP&E; APAC; OHA; Constellation; Dominion; NRDC; Sierra; NEMA; Integrys; Direct Energy; OMA; OFBF; Wind Energy; OASBO/OSBA/BASA; Ornet; Consumer Powerline; Morgan Stanley Capital Group Inc.; Commercial Group; EnerNoc, Inc.; and AICUO.
- (5) The hearing in these proceedings commenced on November 17, 2008, and concluded on December 10, 2008. Eleven witnesses testified on behalf of AEP-Ohio, 22 witnesses testified on behalf of various intervenors, and 10 witnesses testified on behalf of the Commission Staff.
- (6) Five local hearings were held in these matters at which a total of 124 witnesses testified.
- (7) Briefs and reply briefs were filed on December 30, 2008, and January 14, 2009, respectively.
- (8) AEP-Ohio's applications were filed pursuant to Section 4928.143, Revised Code, which authorizes the electric utilities to file an ESP as their SSO.
- (9) The proposed ESP, as modified by this opinion and order, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

ORDER:

It is, therefore,

ORDERED, That the Companies' application for approval of an ESP, pursuant to Sections 4928.141 and 4928.143, Revised Code, be modified and approved, to the extent set forth herein. It is, further,

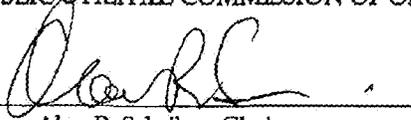
ORDERED, That the Companies file their revised tariffs consistent with this opinion and order and that the revised tariffs be approved effective January 1, 2009, on a bills-rendered basis, contingent upon final review and approval by the Commission. It is further,

ORDERED, That each company is authorized to file in final form four complete, printed copies of its tariffs consistent with this opinion and order, and to cancel and withdraw its superseded tariffs. The Companies shall file one copy in this case docket and one copy in each Company's TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to Staff. It is, further,

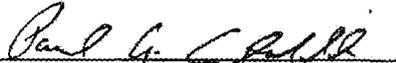
ORDERED, That the Companies notify all affected customers of the changes to the tariff via bill message or bill insert within 45 days of the effective date of the tariffs. A copy of this customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability and Service Analysis Division at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



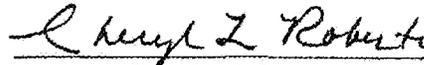
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

KWB/GNS:vrn/ct

Entered in the Journal

MAR 18 2009



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company for)
Approval of its Electric Security Plan; an) Case No. 08-917-EL-SSO
Amendment to its Corporate Separation)
Plan; and the Sale or Transfer of Certain)
Generating Assets.)

In the Matter of the Application of)
Ohio Power Company for Approval of)
its Electric Security Plan; and an) Case No. 08-918-EL-SSO
Amendment to its Corporate Separation)
Plan.)

CONCURRING OPINION OF CHAIRMAN ALAN R. SCHRIEBER

AND COMMISSIONER PAUL A. CENTOLELLA

We agree with the Commission's decision and write this concurring opinion to express additional rationales supporting the Commission's decision in two areas.

gridSMART Rider

The Order sets the initial amount to be recovered through the gridSMART rider based on the availability of federal matching funds for smart grid demonstrations and deployments under the American Recovery and Reinvestment Act of 2009. AEP-Ohio should promptly take the necessary steps to apply for available federal funding. Additionally, AEP-Ohio should work with staff and the collaborative established under the Order to refine its Phase 1 plan and initiate deployments in a timely and reasonable manner.

The foundation of a smart grid is an open-architecture communications system which, first, provides a common platform for implementing distribution automation, advanced metering, time-differentiated and dynamic pricing, home area networks, and other applications and, second, integrates these applications with existing systems to improve reliability, reduce costs, and enable consumers to better control their electric bills.

These capabilities can provide significant consumer and societal benefits. In the near term, participating consumers will have new capabilities for managing their energy usage to take advantage of lower power costs and reduce their electric bills. AEP-Ohio will be able to provide consumers feedback regarding their electric usage patterns and improved customer service. And, the combination of distribution automation and advanced metering should enable AEP-Ohio to rapidly locate damaged and degraded

distribution equipment, reduce outages, and minimize the duration of any service interruptions. We expect that consumers will experience a material improvement in service and reliability.

SB 221 made it state policy to encourage time-differentiated pricing, implementation of advanced metering infrastructure, development of performance standards and targets for service quality for all consumers, and implementation of distributed generation. Section 4928.02 of the Revised Code. The Commission's Order advances these policies.

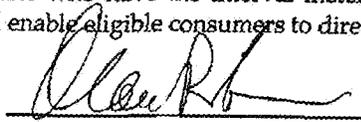
AEP-Ohio and its customers are likely to face significant challenges over the next decade from rising costs, requirements for improved reliability, and environmental constraints. Our Order will enable AEP-Ohio to take a first step in developing a modern grid capable of providing affordable, reliable, and environmentally sustainable electric service into the future.

PJM Demand Response Program

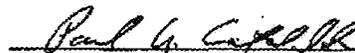
First, we wish to emphasize that the Commission supports demand response initiatives.

Second, it is essential that consumers benefit from demand response in terms of a reduction in the capacity for which AEP-Ohio customers are responsible. We encourage AEP-Ohio to work with PJM, the Commission, and interested stakeholders to ensure that predictable consumer demand response is recognized as a reduction in capacity that it must carry under PJM market rules.

Finally, consumers should have the opportunity to see and respond to changes in the cost of the power that they use. While an ESP may set the overall level of prices, consumers should have additional opportunities to benefit by reducing consumption when wholesale power prices are high. We would encourage the companies to work with staff to develop additional dynamic pricing options for commercial and industrial SSO customers who have the interval metering needed to support such rates. Such options should enable eligible consumers to directly manage risk and optimize their energy usage.



Alan R. Schriber



Paul A. Centolella

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-346-EL-SSO
Ohio Power Company for Authority to)	Case No. 11-348-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)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

**OHIO POWER COMPANY'S MEMORANDUM CONTRA
INTERVENORS' APPLICATIONS FOR REHEARING**

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On behalf of Ohio Power Company

be “extremely beneficial.” FES’s final bid to squeeze more value out of the auction schedule is unfounded and raises no new issue for rehearing.

Next, OEG suggests that the energy auctions should be held on a separate rate zone basis, because the “price to beat” for energy is different in each rate zone. Otherwise, OEG maintains that the auction may result in unreasonably high energy charges to OP customers. (OEG AFR at 6.) As a related matter, OEG also recommends that the Commission should clarify that it will not accept energy-only auction results if they lead to rate increases for a particular zone. (OEG AFR at 6.) AEP Ohio submits that details involving the Competitive Bidding Process related to the energy auctions need not be determined at this time and are more appropriately discussed as part of the auction stakeholder process that was recently initiated pursuant to the Opinion and Order, which will lead up to the Company’s CBP filing by the end of 2012. Regarding the larger role of conducting the energy auctions and whether the results should be accepted based on their relationship to legacy SSO rates, AEP Ohio disagrees with that condition. It is very similar to the position maintained by OCC in testimony and argued on brief, which the Commission soundly rejected:

[T]his Commission understands the importance of customers being able to take advantage of market-based prices and the benefits of developing a healthy competitive market, thus we reject OCC’s arguments, as slowing the movement to competitive auctions would ultimately harm residential customers by precluding them from enjoying any benefits from competition.

(Opinion and Order at 39.) The Commission and AEP Ohio are fulfilling the General Assembly’s plan for transitioning to a fully competitive SSO environment and that path is not conditioned on temporary or short-term market results – it is a permanent goal. The Commission should again reject the position that auction results will only be accepted if they beat a certain price; that approach does not constitute true market pricing.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum in Opposition of Ohio Power Company* was served by electronic mail upon counsel for all other parties of record in this case on this 17th day of September, 2012.

/s/ Steven T. Nourse
Steven T. Nourse

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ORIGINAL

In The
SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	:	
	:	Case No. 09-2022
and	:	
	:	Appeal from the Public Utilities Commission of Ohio, <i>In re Columbus Southern Power Company</i> , Case No. 08-917-EL-SSO, and <i>In re Ohio Power Company</i> , Case No. 08-918-EL-SSO.
Industrial Energy Users-Ohio,	:	
Appellants,	:	
v.	:	
	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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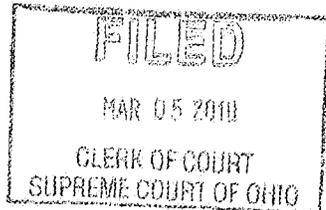
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B. OCC's argument that R.C. 4928.38 excludes from rates any carrying charges for environmental investments made during the market development period of the Companies' previous rate structure is being raised, for the first time.

OCC failed to raise this R.C. 4928.39 argument as part of its assignment of error regarding capital carrying charges in OCC's "Application for Rehearing by the Office of the Ohio Consumers' Counsel," which was filed in the record below on April 17, 2009. Thus, the Commission did not have an opportunity to address the argument. OCC also failed to raise this argument as part of its "Notice of Appeal by The Office of the Ohio Consumers' Counsel" that triggered the Court's jurisdiction over this appeal on November 5, 2009.

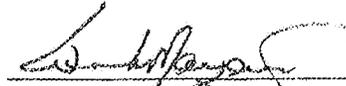
OCC waived this argument by not including it in its application for rehearing and notice of appeal. *See, e.g., Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 872 N.E.2d 269 (2007) (OCC waived the issue of test for reviewing settlement stipulations by not including it in application for rehearing or in notice of appeal from Commission's decision approving stipulation involving electric utility). As a result of OCC raising this argument for the first time, on brief, the Court has no jurisdiction to review this argument.

C. OCC's argument that the Commission violated statutory prohibitions against retroactive ratemaking by authorizing the collection of carrying charges on environmental investments made from 2001 through 2008 is a new issue that was not raised below.

In its Application for Rehearing below, OCC raised an argument on the capital carrying cost issue that was limited in scope to R.C. 4928.143(B)(2) and its subsections. The argument against the recovery of capital costs appears on pages 37-39 of OCC's Application for Rehearing, which was filed on April 17, 2009. OCC's Application for Rehearing argument is straightforward. It disputes the Commission's authority to grant the Companies recovery of cap-

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage pre-paid, or hand-delivered, upon the following parties of record, this 5th day of March, 2010.



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ORIGINAL

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, : Supreme Court Case No. 09-2022
and Industrial Energy Users-Ohio :
Appellants, : Appeal From the Public
: Utilities Commission of Ohio
v. :
: Public Utilities
The Public Utilities Commission of Ohio, : Commission of Ohio
: Case Nos. 08-917-EL-SSO
Appellee, : 08-918-EL-SSO

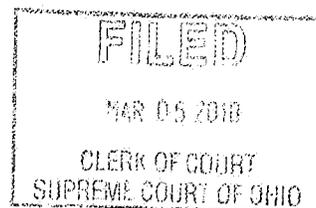
MERIT BRIEF AND APPENDIX OF
INTERVENING APPELLEES
COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

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another example of inviting the Court to second-guess the Commission's appraisal of the record evidence and merely reveals that IEU disagrees with this aspect of the Commission's decision.

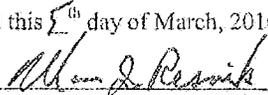
PROPOSITION OF LAW NO. 9 (Response to IEU Proposition of Law No. II)

Neither R.C. 4928.141 nor R.C. 4928.143 prevent the Public Utilities Commission of Ohio from approving rates for an Electric Security Plan merely because the Electric Distribution Utility involved has exercised its statutory rights to pursue rehearing and appeal.

IEU argues that during the statutory rehearing and appeal process the Companies could not reserve the right to withdraw their ESP applications under R.C. 4928.143(C)(2)(a) where the Commission has approved rates under a modified ESP. (IEU Brief at 12-15.) The right to withdraw from ESP modifications not consented to by the utility makes sense given that the ESP under R.C. 4928.143 is a voluntary filing and a utility could instead choose to establish its SSO by filing a Market Rate Offer under R.C. 4928.142. IEU complains that the Companies could not simultaneously reserve the right to withdraw and collect the new rates authorized under the modified ESP during the statutory rehearing and appeal process. In reaching this conclusion, IEU relies primarily upon R.C. 4928.141, which provides that a utility's existing rate plan will stay in place until an SSO is first authorized by the Commission under either R.C. 4928.142 (Market Rate Offer) or R.C. 4928.143 (Electric Security Plan). IEU's arguments are misguided and should be rejected. The right to withdraw an ESP application under R.C. 4928.143 (C) (2) contains no time restriction. And it is only logical that an affected utility would want to wait "until the dust settles" through the rehearing and appeal process, which could result in further changes to the ESP, before permanently deciding not to withdraw.

PROOF OF SERVICE

I certify that Intervening Appellees Columbus Southern Power Company's and Ohio Power Company's Merit Brief and Appendix was served by First Class U.S. Mail upon counsel identified below for all parties of record this 5th day of March, 2010.


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