

Individual Electric Utilities' Rate History and Rate Plans¹

February 2013²

A Bit of Generalizing

The details in this year's edition of this summary of electric rate activity yield some general observations. Since last year's conference, wholesale electric prices have declined. This decline has been influenced by a number of things including the shale play related downward movement in natural gas prices and conditions in the economy. Also since last year's energy conference, there has been greater use of a competitive bidding process ("CBP") to set default generation supply prices for retail customers not served by a competitive supplier. Where the CBP has been used for this purpose, the trend in the default electric supply price has followed the trend of wholesale prices. So, the default supply prices for retail customers of the FirstEnergy Corp. ("FirstEnergy") electric distribution utilities ("EDU") and of Duke Energy Ohio, Inc. ("DE-Ohio") declined or remained stable accordingly. For other electric consumers in Ohio, however, electric prices and bills have gone up or stayed at levels significantly above market largely as a result of reliance on "administratively determined" prices and actions by the Public Utilities Commission of Ohio ("PUCO" or "Commission"). In the case of AEP-Ohio³ which serves customers in over 60 counties, the PUCO's actions sanctioned higher and more volatile prices accompanied by "now and later" non-bypassable barriers to the benefits otherwise available through "customer choice."

When Ohio changed the legal framework applicable to the electric utility sector to implement a "customer choice" vision, it provided an opportunity for incumbent electric utilities to obtain "transition revenue" (sometimes called "stranded costs") to help them prepare to compete based on merit. Below is an illustration from testimony presented by the PUCO to the Ohio House Public Utilities Committee on September 29, 2011.⁴ The illustration shows the transitional electric restructuring timeline established by Ohio law.

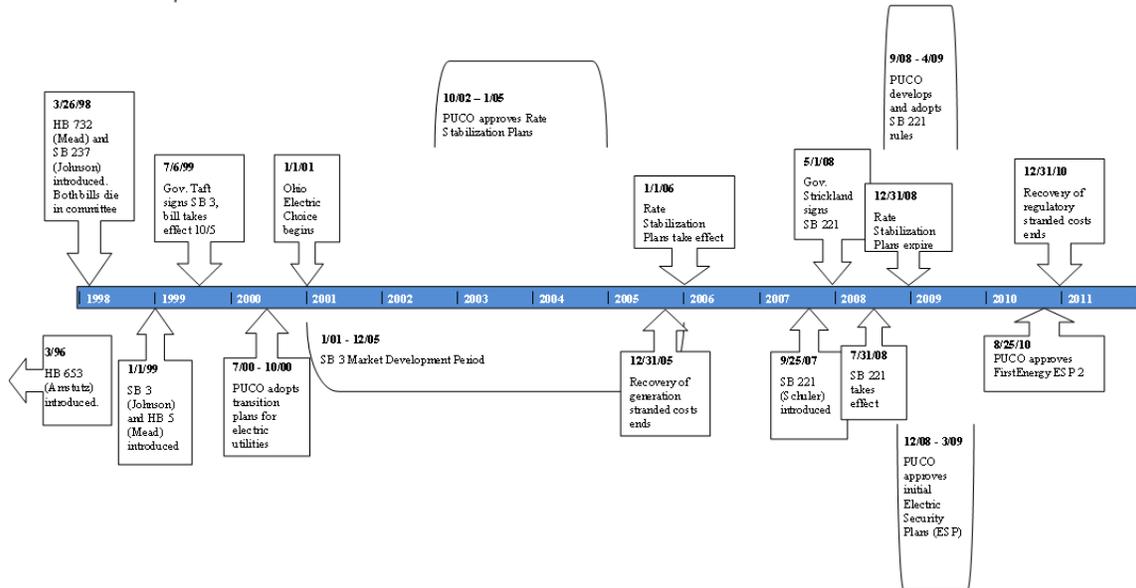
¹ The law firm of McNees Wallace & Nurick LLC ("MWN") prepared this document to chronicle the evolution of Ohio's approach to the regulation of investor-owned electric utilities. It is MWN's hope that the information assembled in this report will facilitate efforts to obtain price and service quality outcomes that are customer-driven.

² Author's Note – Information on the status of any PUCO case identified herein can be obtained *via* the PUCO's website using the menu item for the PUCO's Docketing Information System ("DIS") at <http://dis.puc.state.oh.us/> by inserting the case number in the "Case Lookup" box.

³ As used herein, AEP-Ohio refers to Ohio Power Company ("OP"), which has merged with Columbus Southern Power Company ("CSP").

⁴ The slides from the PUCO's September 29, 2011 presentation are available *via* the Internet at <http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/legislative-testimony/> (last checked February 7, 2013)

Electric Restructuring Timeline



The PUCO's timeline clearly indicates that the opportunity for incumbent utilities to recover generation "stranded costs" ended effective December 31, 2005. And, Ohio law states that once this opportunity ends, the generation business of each incumbent electric utility must be fully on its own in the competitive market.

But, neither the obvious implications of the above timeline nor the pronouncements of Ohio law have retarded the appetite of some incumbent electric utilities for yet another transition and more "transition revenue." For example, AEP-Ohio (the entity remaining from the merger of OP and CSP) has, since January 2011, prosecuted a successful campaign before the PUCO to insulate its competitive generation business from the discipline of the market and block customer access to the lower electric bills available from such market.

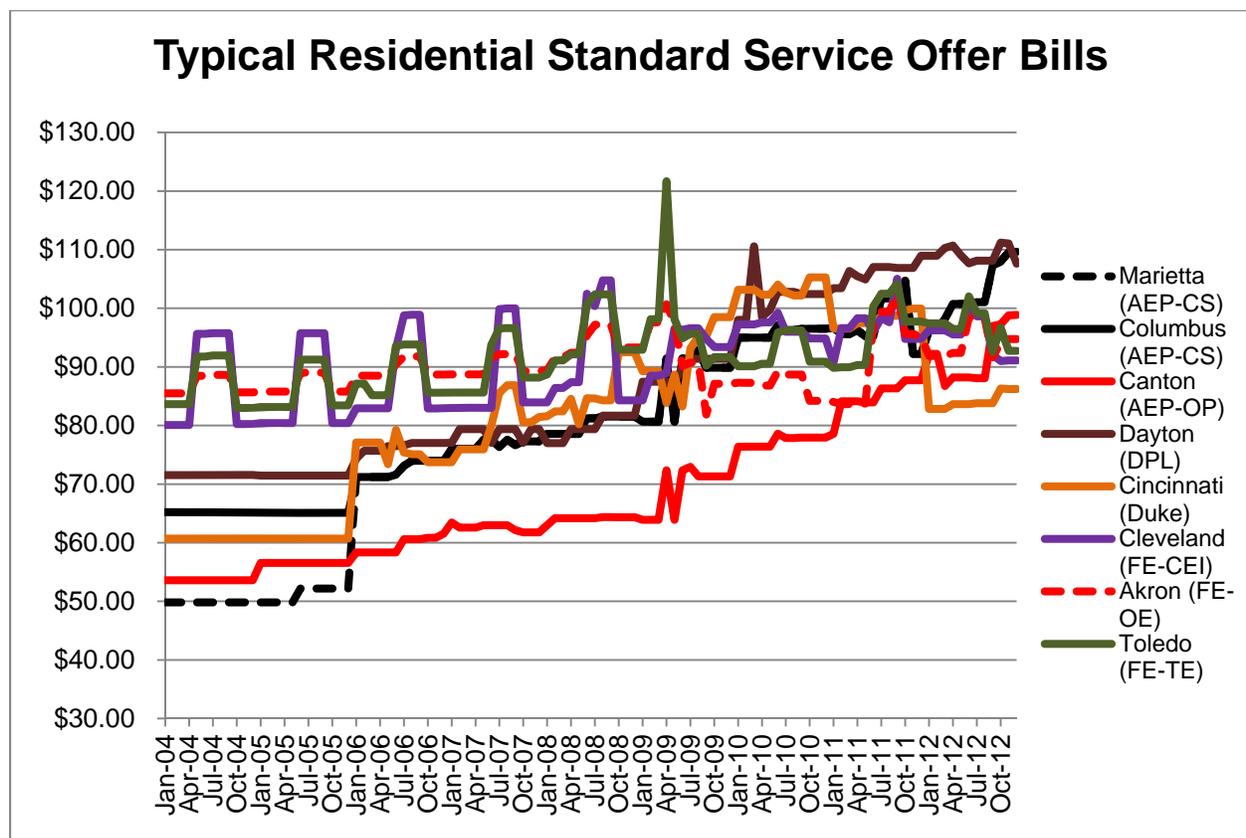
The PUCO's conceptual embrace of AEP-Ohio's proposals to raise electric bills and block shopping has also inspired The Dayton Power & Light Company ("DP&L") and DE-Ohio to ask the PUCO to give them what the PUCO has given AEP-Ohio. The actions already taken by the PUCO and their implications as they relate to the proposals by DP&L and DE-Ohio effectively result in well over \$2 billion in above-market compensation for the incumbents' competitive generation business. This above-market compensation is provided through a confusing array of non-bypassable charges that work to increase the total bill for electricity while depriving customers of the full "choice" opportunity to reduce their electric bills by turning to a competitive retail electric service ("CRES") provider.

From a customers' perspective, there is something wrong with this picture. But this picture is the current reality for most of Ohio's electric consumers.

The up/down conflicts in the default service retail electricity pricing trend lines have become more observable since last year's energy conference. These same conflicts have also caused the relative position of the default supply prices of Ohio's EDUs to change substantially.

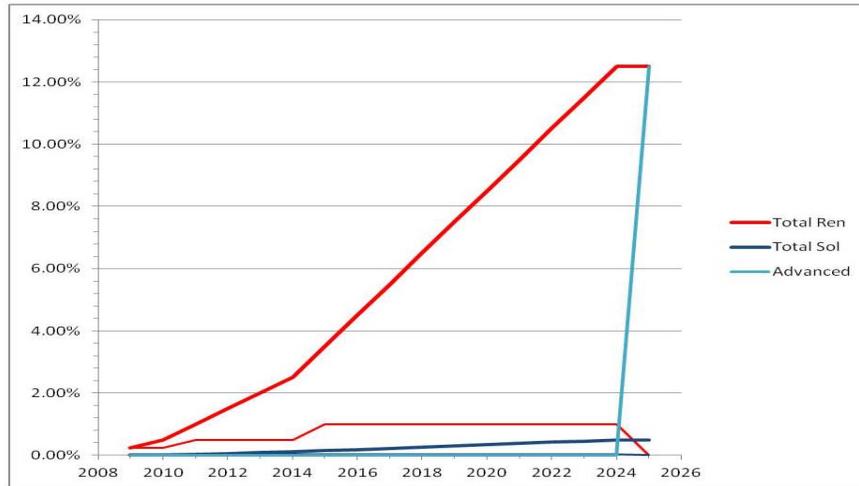
Contrary to the situation that existed when Ohio's law was changed to provide consumers with the opportunity to select their electricity supplier, customers in the distribution service area of AEP-Ohio now pay some of the highest electric bills in Ohio. The graph below shows the relative changes in the "typical" standard service offer ("SSO") electric bill for residential customers based on information published by the PUCO. And, this change in relative position of Ohio's EDUs can be traced directly to differences in the extent to which a CBP is used **or not used** to set default supply prices and the extent to which the PUCO has approved above-market, non-bypassable generation related charges.

These real-world competitive bidding results are very different than the rate shock predictions that some stakeholders and elected officials associated with "competition" in 2007 and 2008. Instead of "competition" driving up electric bills, it is lowering electric bills. Indeed, the administratively determined prices that are the byproduct of the PUCO's current version of economic regulation are the source of the rate shock that has occurred since the last energy conference and will continue to occur at an escalating level in the months ahead.

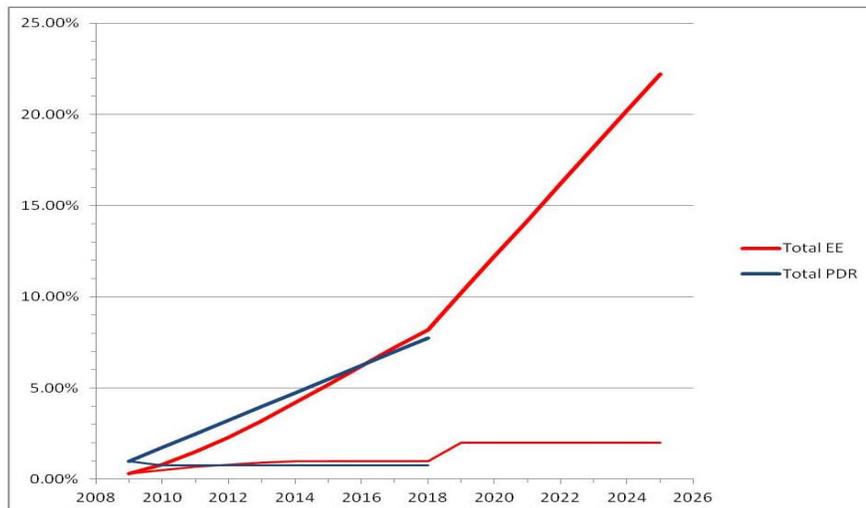


The same fundamental forces that have produced a decline in wholesale electric prices are also compelling an examination of government mandates that dictate supply-side and demand-side behavior of consumers and suppliers. Here again, 2008's expectations about what the future would bring stand in stark contrast to our current reality.

Advanced Energy Resources (including "Renewables" Mandate⁵)



Energy Efficiency and Peak Demand Reduction Mandate



When the portfolio requirements were first proposed as part of the Ohio legislative process in 2007, the beneficial supply and price effects of shale resources were not anticipated. Conventional wisdom and expert opinion at the time held that our domestic natural gas supply was in sharp decline and that the Nation would be increasingly

⁵ The two illustrations of the portfolio mandates are taken from the PUCO's materials associated with the September 29, 2011 presentation to the House Public Utilities Committee. The materials are available *via* the Internet at <http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/legislative-testimony/> (last checked February 7, 2013).

dependent on imported liquefied natural gas (“LNG”) to reliably satisfy natural gas demand. The expected natural gas supply and price consequences of this pre-shale scenario manifested itself in projections of much higher and volatile electric prices. Domestic shale resources are now responsible for about 30% of the flowing gas supply, natural gas prices have declined significantly and policymakers are looking for ways to prudently develop and utilize this abundant non-conventional energy resource.

When the portfolio mandates were adopted, the debilitating effects of the Great Recession on Ohio’s economy and its citizens were not anticipated. The conventional wisdom and expert opinions that existed in 2007 promoted the portfolio mandates as a means to help consumers by mitigating upward pressure on prices and managing reliability-related risks. Since utility charges tend to make up a larger portion of spending by lower-income consumers (a regressive effect), these risks took on added significance as the Great Recession ended many jobs and reduced incomes.

Current realities show that market forces have worked to reduce utility bills (where the PUCO has not authorized above-market “shopping taxes”). The cost of compliance with the portfolio mandates is actually either reducing the market-based advantage that would otherwise be flowing to consumers or increasing the above-market disadvantage imposed on customers by the PUCO’s actions.

When the portfolio requirements were adopted, the amount of retail customer shopping for competitive electric services had declined and there were fears that the pace of electric market development was moving too slow to effectively serve the public interest in reasonable prices and reliable service. Now, about 62 percent of Ohio’s retail customer load is “shopping” for competitive electric services and the use of competitive bidding to establish default service generation supply prices has (as discussed above) worked to significantly reduce electric bills for many more Ohio electric consumers.

When the portfolio requirements were placed into Ohio law, the owners of electric transmission assets in Ohio had effectively divided Ohio by their regional transmission organization (“RTO”) choices with some participating in the Midwest Independent Transmission System Operator (“MISO”) and some participating in PJM Interconnection, LLC (“PJM”). These different RTO choices created a commercial and reliability “seam” that ran through Ohio and complicated efforts to harness the beneficial effects of competition in the wholesale market to meet retail price and reliability objectives. Today, all of Ohio’s transmission owning entities are within PJM’s reliability control and function within PJM’s organized supply-side and demand-side regional markets. Today, PJM effectively controls reliability and dispatches supply-side and demand-side resources throughout the PJM footprint, including Ohio, to maintain real time reliability. PJM also engages in planning required to identify and address future reliability-related challenges. PJM operates the Generation Attributes Tracking System (“GATS”) to facilitate the issuance, assignment and trading of Renewable Energy Credits (“RECs”) that are available under Ohio law (Section 4928.65, Revised Code).

In 2007 and 2008, proponents of the portfolio mandates asserted that the “Advanced Energy Resource” sector would not develop on its own in Ohio without government intervention that imposed arbitrary technology preferences and their cost on to

consumers. Today the picture is very different. Since 2008, the General Assembly has authorized local government to establish a revolving loan fund to help property owners finance, among other things, alternative energy technologies, energy efficiency and demand reduction through capital markets.⁶ Investment firms are actively engaged in providing financing for solar, wind, and energy efficiency projects. Goldman Sachs has a \$40 billion target for such financing and investing.⁷ Bloomberg New Energy Finance has indicated that Internet-based “crowdfunding” options may help to raise more than \$90 billion in “clean energy” investment.⁸ Danbury, Connecticut-based FuelCell Energy raised \$34.5 million from a public stock offering in the first quarter of 2012.⁹ In 2012 alone, voluntary choices by hundreds of Ohio citizens have produced over 33 megawatts (“MW”) of new solar electricity generating capacity. On December 12, 2012, the American Wind Energy Association announced its support for a six-year phase-out of the federal tax credit, also called the production tax credit or PTC and suggested that the work ahead should focus on developing cost-saving technologies that make wind competitive without government subsidies.¹⁰ Meanwhile, Ohio’s portfolio mandates are proceeding as though we are oblivious to the opportunity for market-based approaches to let consumers and investors act on their preferences without intervention by government mandates.¹¹

In 2007 and 2008, the mercantile customer options in Ohio’s portfolio mandates were expected to help utilities satisfy compliance requirements, reduce the cost of compliance, streamline compliance and also help Ohio’s businesses reduce their energy intensity. The experience since the portfolio mandates became part of Ohio law

⁶ Section 717.25, Revised Code, became effective in June 2010.

⁷ See the information at the following link http://www.goldmansachs.com/our-thinking/focus-on/clean-technology-and-renewables/index.html?mediaIndex=video1&cid=PS_01_28_06_00_00_00 (last visited February 12, 2013).

⁸ “Crowdfunding allows early-stage companies, projects and artistic ventures in the U.S. to attract financing from the masses over the Internet and provides developing world microfinance initiatives a new avenue to secure capital.” See information at the following link <http://about.bnef.com/2012/06/18/extraordinary-popular-solution-funding-from-crowds/> (last visited February 12, 2013).

⁹ See the information at the following link <http://www.ctpost.com/news/article/FuelCell-Energy-stock-issuance-raises-34-5-3439449.php> (last visited February 12, 2013).

¹⁰ See information at the following links <http://www.greentechmedia.com/articles/read/Wind-Industry-Calls-for-6-Year-Phase-Out-of-PTC-Subsidy> and http://www.awea.org/issues/federal_policy/upload/AWEA-PTC-Letter-to-Committee-Leadership.pdf (last visited on February 12, 2013).

¹¹ See, for example, the recent report issued by the Center for Energy Policy and the Environment at the Manhattan Institute available *via* the Internet at http://www.manhattan-institute.org/pdf/eper_10.pdf (last visited February 12, 2013); *The Economic Impact of Missouri’s Renewable Energy Standard*, The Beacon Hill Institute at Suffolk University available *via* the Internet at <http://www.beaconhill.org/BHISTudies/RPS/MO-RPS-BHI-2012-1115.pdf> (last visited February 12, 2013); the Heritage Foundation’s list of failing or at-risk taxpayer energy ventures (34 companies, \$7.5 billion and counting available *via* the Internet at <http://blog.heritage.org/2012/10/18/president-obamas-taxpayer-backed-green-energy-failures/> (last visited February 12, 2013) and the Institute for Energy Research’s recent study detailing the “rebound effect” (more efficient appliances promote increased energy use) of energy efficiency requirements available *via* the Internet at http://www.instituteforenergyresearch.org/wp-content/uploads/2012/07/NJI_IER_MichaelsStudy_WEB_20120706_v5.pdf (last visited February 12, 2013).

includes: (1) repeated efforts by some stakeholders to bypass safeguards adopted by the General Assembly; (2) efforts to rewrite the law so as to increase the actual amount of compliance required; (3) audits in which the PUCO's "independent auditor" asserted that a utility should have refused to comply with the mandates because the penalty for non-compliance was less than the cost of compliance; (4) regulatory actions that have contributed to confusion regarding the amount of compliance that is required and how compliance should be measured; and, (5) an administrative burden for utilities that has essentially doubled the cost of compliance passed on to consumers. In some cases, some utilities have been permitted to charge consumers for "shared savings" and "lost revenues" and this has further increased the cost passed on to Ohio consumers.

While each of these examples of the mismatch between prior expectations and current portfolio mandate realities is significant in its own right, the year-to-year escalation of the compliance level specified by Ohio's portfolio requirements suggests that the combined effect of all these expectations/realities conflicts will, if not addressed, significantly distort the ability of the market to efficiently allocate resources and increase consumers' electric bills.¹²

Portfolios, properly formed, are a means to prudently and cost-effectively manage risk. Prudent energy portfolio designers and managers continuously evaluate their choices in light of current realities and expectations about the future to make sure that their choices are managing the right risks, avoiding unnecessary government intervention and avoiding involuntary transfers of consumers' wealth through the revenue collection capabilities of utilities.

For the reasons described above, we have previously suggested that it would be prudent for Ohio to promptly initiate a review of Ohio's mandatory portfolio requirements. The mismatch between past expectations and current realities indicates that the current portfolio mandates are not a sustainable means of advancing the public interest in reasonable prices and reliable service. And recent events indicate that this needed review is about to commence.

On February 1, 2013, Senator William J. Seitz, Chair of the Ohio Senate's Public Utilities Committee announced that a "placeholder" bill will be introduced to "...begin a meaningful review of the energy efficiency and renewable portfolio standard...".¹³

The rest of this report is located on the Manufacturers' Education Council's website at: www.mecseminars.com.

¹² In some cases, the electric bill increases that have occurred as a consequence of the portfolio mandates have come about indirectly through the interplay between the portfolio requirements and utility proposals to increase prices and erect barriers to customer choice. For example, one utility has used its discretion and control over the energy efficiency program funding to reward a stakeholder for withdrawing opposition to the utility's request for above-market compensation for default generation supply service. We doubt that the General Assembly intended that utilities would be able to use the portfolio mandates to exercise this type of power.

¹³ Chair Seitz's February 1, 2013 memorandum announcing this review effort is included with the materials located on the Manufacturers' Education Council's website (www.mecseminars.com).

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The Dayton Power & Light Company

A. Rate Stabilization Plan

On October 28, 2002, The Dayton Power & Light Company (“DP&L”) filed an application before the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to extend the end date of its market development period (“MDP”) from December 31, 2003 (the date agreed upon in its electric transition plan¹⁴ (“ETP”) proceeding) to the statutorily established date of December 31, 2005. DP&L’s application recognized that development of the wholesale market was taking longer than expected at the time Ohio’s restructuring legislation, Amended Substitute Senate Bill 3 (“SB 3”), was enacted.

During the course of the proceeding, interested stakeholders developed the rate stabilization plan (“RSP”) concept and, on September 2, 2003, the PUCO approved a contested Stipulation and Recommendation¹⁵ (“Stipulation”) that extended DP&L’s MDP through the end of 2005 and created an RSP having a term ending December 31, 2008. The RSP approved by the PUCO: (1) continued generation rates as of January 1, 2004 subject to a potential 11% increase (designated as the rate stabilization surcharge or “RSS”) upon PUCO approval of costs associated with increases in fuel, environmental and tax laws, security, and changes required by administrative agencies; (2) continued frozen distribution rates subject to changes permitted by the ETP Order; (3) permitted DP&L to incorporate changes to its transmission rates approved by the Federal Energy Regulatory Commission (“FERC”); and (4) created a Voluntary Enrollment Procedure (“VEP”) Program to facilitate customers’ evaluation of competitive suppliers.¹⁶ In approving the settlement, the PUCO held that if market prices fell during the RSP, the PUCO could terminate the RSP and allow generation rates to be set by the prescribed competitive methods in Section 4928.14, Revised Code.¹⁷ Finally, the PUCO

¹⁴ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Transition Plan Pursuant to Section 4928.31, Revised Code and for the Opportunity to Receive Transition Revenues as Authorized Under Sections 4928.31 to 4928.40, Revised Code*, PUCO Case Nos. 99-1687-EL-ETP, *et al.*, Opinion and Order at 30 (September 21, 2000).

¹⁵ *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, PUCO Case Nos. 02-2779-EL-ATA, *et al.*, Opinion and Order (September 2, 2003), Entry on Rehearing (October 22, 2003), upheld in *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767.

¹⁶ *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, PUCO Case Nos. 02-2779-EL-ATA, *et al.*, Opinion and Order (September 2, 2003). The Stipulation was filed on May 28, 2003, by DP&L, the Office of the Ohio Consumers’ Counsel (“OCC”), Staff of the PUCO (“Staff”), Industrial Energy Users-Ohio (“IEU-Ohio”), Ohio Partners for Affordable Energy (“OPAE”), and Community Action Partnership of the Greater Dayton Area (“CAP”). In each of the three years of the VEP Program, suppliers were provided an opportunity to submit supply proposals to serve customers in DP&L’s service area as part of an annual request for proposal (“RFP”) process. However, no suppliers submitted a proposal during the three-year period. See, generally, *In the Matter of the Commission’s Selection of Generation Providers for the Dayton Power and Light Company’s Voluntary Enrollment Procedure*, PUCO Case No. 05-302-EL-UNC.

¹⁷ Additionally, while the proposed Stipulation stated that non-residential shopping credits would be phased in over two years, the PUCO held that an immediate, more substantial increase in the shopping credits in 2004 was more likely to encourage diversity and competition in the electric market and, thus,

encouraged other EDUs to consider RSPs if competitive electric markets had not fully developed in their service territory by the end of the MDP.¹⁸

B. Rate Stabilization Surcharge

On March 1, 2005, DP&L announced that it intended to file an application to establish an RSS Rider and a distribution rate increase to recover costs associated with expenses for fuel, security, and environmental regulations, among others.¹⁹ The PUCO's Order in DP&L's RSP case limited DP&L to an RSS increase of 11% of its generation rate as of January 1, 2004, and DP&L requested the maximum 11% increase. A Staff Report of Investigation found that DP&L's actual cost increases were in excess of the 11% cap.²⁰

On November 3, 2005, several parties filed a Stipulation and Recommendation ("RSS Stipulation") that recommended that the PUCO allow DP&L to increase its generation rates, subject to the 11% cap, and also extend the RSP through the end of 2010.²¹ In exchange for the extended predictability and rate stability through 2010, the RSS Stipulation recommended that the PUCO approve an Environmental Investment Rider ("EIR") with annual increases of 5.4% commencing January 1, 2007, applied to rates in effect on January 1, 2004, and extending through 2010. As proposed, the EIR was avoidable by shopping customers in 2009 and 2010. The PUCO approved the RSS Stipulation, with modifications, on December 28, 2005.²²

OCC appealed the RSS Order to the Ohio Supreme Court.²³ While the appeal to the Ohio Supreme Court was pending, the PUCO approved DP&L's application to

the PUCO modified the settlement so that the credits in 2004 equaled the shopping credits proposed for 2005. *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, PUCO Case Nos. 02-2779-EL-ATA, *et al.*, Opinion and Order at 25 (September 2, 2003).

¹⁸ *Id.* at 29.

¹⁹ *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, PUCO Case No. 05-276-EL-AIR, Notice of Intent to File an Application to Increase Rates for Electric Service (March 1, 2005) (hereinafter, "*DP&L RSS Proceeding*").

²⁰ *DP&L RSS Proceeding*, Staff Report at 3 (August 26, 2005).

²¹ *DP&L RSS Proceeding*, Stipulation and Recommendation at 4-6 (November 3, 2005). The RSS Stipulation was filed by DP&L, IEU-Ohio, Honda of America Manufacturing, Inc. ("Honda") and Cargill, Inc. ("Cargill") and was not opposed by Staff.

²² *DP&L RSS Proceeding*, Opinion and Order (December 28, 2005), Entry on Rehearing (February 22, 2006), appealed in *The Office of the Ohio Consumers' Counsel v. The Public Utilities Commission of Ohio*, Supreme Court Case No. 2006-0788. The PUCO modified the RSS Stipulation by making the EIR avoidable from 2007 through 2010 instead of just 2009 and 2010. *DP&L RSS Proceeding*, Opinion and Order at 9 (December 28, 2005).

²³ *The Office of the Ohio Consumers' Counsel v. The Public Utilities Commission of Ohio*, Supreme Court Case No. 2006-0788, Notice of Appeal (April 21, 2006).

implement and set the EIR, which increased generation rates 5.4% on top of the 11% RSS increase.²⁴

On September 5, 2007, the Ohio Supreme Court affirmed the PUCO's decision in the case except in one area.²⁵ The Ohio Supreme Court ruled that the PUCO erred by allowing DP&L to include generation-related RSS charges in the rate schedules for distribution service and directed the PUCO on remand, to remove the RSS charges from DP&L's distribution rate schedules.²⁶ The Ohio Supreme Court also stated that, in light of the multiple RSP appeals, the PUCO might do well to share "... its evaluations and reports on the effectiveness of competition with the legislature ... so that it can continue to evaluate the need for further legislative action."²⁷ In response to the Ohio Supreme Court's decision, DP&L filed an application at the PUCO to move its RSS Rider to the generation portion of its tariffs, which the PUCO approved on April 30, 2008.²⁸

C. Storm Cost Recovery Riders

On September 2, 2005, DP&L filed a request for approval of a Storm Cost Recovery Rider to recover expenses and capital costs incurred in restoring service after major storms that occurred in December 2004 and January 2005.²⁹ DP&L sought to recover \$8.6 million over a two-year period through a 2.3% adder to distribution charges.³⁰ The PUCO approved DP&L's application³¹ and denied OCC's Application for Rehearing since OCC signed both DP&L's ETP and RSP Stipulations, which allowed DP&L to recover storm damage expenses through a tariff approval proceeding rather than an

²⁴ *In the Matter of the Application of The Dayton Power & Light Company for Approval of Tariff Changes Associated with Implementation of an Environmental Investment Rider*, PUCO Case No. 06-1093-EL-ATA, Finding and Order (November 1, 2006).

²⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276.

²⁶ *Id.* at ¶26.

²⁷ *Id.* at ¶41.

²⁸ *In the Matter of the Application of The Dayton Power & Light Company for Relocation of the Rate Stabilization Surcharge*, PUCO Case No. 07-1252-EL-ATA, Finding and Order (April 30, 2008).

²⁹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Tariff Changes Associated with a Request to Implement a Storm Cost Recovery Rider*, PUCO Case No. 05-1090-EL-ATA, Application (September 2, 2005) (hereinafter, "*DP&L Storm Cost Rider Proceeding*").

³⁰ DP&L cited provisions in the ETP and RSP Stipulations allowing for recovery of storm damage as its authority for an exception to the otherwise applicable distribution rate freeze. *Id.* at Exhibit C-1.

³¹ *DP&L Storm Cost Rider Proceeding*, Finding and Order at 5 (July 12, 2006). The PUCO noted that DP&L sought recovery of costs over and above the costs normally incurred to repair storm damage and that DP&L limited recovery to only those costs related to severe weather in 2004 and 2005. Commissioners Mason and Jones dissented, stating that they believed DP&L was entitled to recovery of some storm damage costs, but that DP&L had not justified recovery of the entire \$8.6 million for storm damages inasmuch as it did not demonstrate what portion of the \$8.6 million could have been avoided had DP&L not cut its line clearance expenditures in half (as compared to expenditures from 1996 through 1998) during the time that the storm damage occurred.

application for an increase in rates.³² DP&L withdrew and discontinued its Storm Cost Recovery Rider as of July 24, 2008 inasmuch as DP&L expected its storm costs to be fully recovered as of that date.³³

Similarly, DP&L filed an application for accounting authority to defer (with carrying costs) as a regulatory asset a portion of its operation and maintenance ("O&M") expenses related to storm damage from Hurricane Ike in September 2008.³⁴ Specifically, DP&L requested authority to defer O&M expenses associated with Hurricane Ike and other storms experienced in 2008 that exceeded the three-year average service restoration O&M expenses associated with major storms. DP&L noted that both its ETP and RSP permitted it to recover storm restoration costs. DP&L did not give an indication of when it would file an application for permission to actually collect the deferred costs or the total amount it would ask to collect related to storm damage expenses. The PUCO approved DP&L's application on January 14, 2009.

On August 10, 2012, DP&L filed an application seeking accounting authority to defer for future collection certain expenses associated with an extraordinary storm that passed through Ohio in June of 2012.³⁵ On December 19, 2012, the Commission granted DP&L's application.

On December 21, 2012, DP&L filed an application³⁶ requesting authorization of the Storm Cost Recovery Rider ("Rider SCRR"). The proposed rider will, if approved, recover the storm-related expenses that the PUCO had previously authorized DP&L to defer. In total, DP&L seeks recovery of \$22.3 million through the rider. DP&L's application seeking to implement Rider SCRR is still pending.

D. PJM Interconnection Cost Deferrals/Transmission Cost Recovery Rider

On December 21, 2007, DP&L filed an application for accounting authority to defer PJM Interconnection, L.L.C. ("PJM") transmission enhancement charges ("TEC") assessed to all PJM customers for the cost of planned transmission facilities or upgrades in the PJM territory of 500 kilovolts ("kV") or greater.³⁷ On August 20, 2008, the PUCO approved

³² *DP&L Storm Cost Rider Proceeding*, Entry on Rehearing at 4-5 (August 30, 2006).

³³ *DP&L Storm Cost Rider Proceeding*, Tariff Filing (July 25, 2008).

³⁴ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Restoration Costs*, PUCO Case No. 08-1332-EL-AAM, Application (December 26, 2008).

³⁵ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Service Restoration Costs*, Case No. 12-2281-EL-AAM, Application (August 10, 2012).

³⁶ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs*, Case Nos. 12-3062-EL-RDR, *et al.* Application (December 21, 2012).

³⁷ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedures*, Case No. 07-1287-EL-AAM, Application (December 21, 2007).

DP&L's application and required DP&L to file an application no later than June 1, 2009 to begin collecting the deferred TECs.³⁸

On November 7, 2008, DP&L filed an application requesting accounting authority to defer all transmission and transmission-related costs in excess of those costs recovered in its retail rates.³⁹ DP&L asserted that Amended Substitute Senate Bill 221 ("SB 221") and the PUCO's rules permitted the recovery of a broader range of costs than that authorized in the August 2008 TEC Order. DP&L indicated that it would file an application to begin collecting all of these costs (i.e., TECs as well as all other transmission and transmission-related costs) by the June 1, 2009 date set forth in the August 2008 TEC Order. Upon approval of its application to recover the deferrals, DP&L said it would withdraw its retail transmission and ancillary service rates and include those costs in its Transmission Cost Recovery Rider ("TCRR"). The PUCO approved DP&L's application on February 19, 2009.

On March 27, 2009, DP&L filed an application for approval of a TCRR and the recovery of transmission costs and other regional transmission operator ("RTO")-related costs through the TCRR, including those authorized for deferral in Case Nos. 07-1287-EL-AAM and 08-1209-EL-AAM.⁴⁰ DP&L requested authority to recover approximately \$96 million through its TCRR.⁴¹ Over the objections of IEU-Ohio, the PUCO approved DP&L's application on May 27, 2009. On rehearing, the Commission partially reversed its prior decision and agreed with IEU-Ohio that generation-related reliability pricing model ("RPM") costs are not recoverable through the TCRR inasmuch as RPM costs are not transmission or transmission-related costs.⁴² However, the Commission also noted that the Stipulation in DP&L's electric security plan ("ESP") proceeding (see Subsection E below) may permit DP&L to recover RPM costs through a separate rider inasmuch as such costs are RTO-related costs not recovered through the TCRR.

Equipped with the Commission's observation that RPM costs may be recoverable through a separate rider, on September 23, 2009, DP&L filed a Notice of Filing proposing to adjust its TCRR rates in accordance with the PUCO's Finding and Order and Entry on Rehearing (i.e. minus RPM costs) and proposing to recover its RPM costs through a separate rider. On November 18, 2009, the PUCO issued a Second Finding and Order denying an IEU-Ohio Motion to Strike DP&L's Notice of Filing, rejecting IEU-Ohio's arguments that DP&L could only recover RPM costs through a separate ESP case or that DP&L was already recovering its RPM costs through its current

³⁸ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedures*, Case No. 07-1287-EL-AAM, Finding and Order (August 20, 2008).

³⁹ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedures*, Case No. 08-1209-EL-AAM, Application (November 7, 2008).

⁴⁰ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Transmission Cost Recovery Rider*, Case No. 09-256-EL-UNC, Application at 3 (March 27, 2009). (hereinafter, "DP&L TCRR Proceeding").

⁴¹ *DP&L TCRR Proceeding*, DP&L's Notice of Filing Revised Schedules and Workpapers at Schedule B-1 (May 15, 2009).

⁴² *DP&L TCRR Proceeding*, Entry on Rehearing (September 9, 2009).

generation rates.⁴³ The Second Finding and Order also approved DP&L's revised TCRR and new RPM riders.

E. Electric Security Plan ("ESP")

Unlike the other EDUs, DP&L's RSP was scheduled to end on December 31, 2010 rather than on December 31, 2008. But Ohio enacted new legislation (SB 221) in 2008 that altered both the process and means that the PUCO must follow when establishing the price of default generation supply available to retail consumers not served by a CRES provider. As a result of this difference between DP&L and the other EDUs, SB 221 contained specific ESP-related provisions that addressed DP&L's somewhat unique condition. More specifically, SB 221 permitted DP&L's then-existing RSP to remain in effect for the balance of its term subject to DP&L's ability to file an ESP during that term.

DP&L filed its ESP proposal on October 10, 2008.⁴⁴ Consistent with SB 221, DP&L proposed to continue its current RSP, but make some adjustments related to providing SSO service.⁴⁵ DP&L also requested authority to recover costs related to complying with the new alternative energy portfolio standards ("AEPS") and energy efficiency and peak demand reduction ("EE/PDR") benchmarks.

A settlement was filed with the PUCO on February 24, 2009 for the purpose of resolving the issues in DP&L's ESP case and it was approved in its entirety by the Commission on June 24, 2009.⁴⁶ Among other things, the approved Stipulation extended DP&L's then-current rates through December 31, 2012 and permitted DP&L to implement an avoidable fuel recovery rider to recover fuel and purchased power costs.⁴⁷ The Stipulation permitted the then-current RSS charge to continue as an unavoidable surcharge through 2012, except that customers served under a governmental aggregation program could avoid DP&L's RSS so long as those customers agreed to return to DP&L's provider of last resort ("POLR") service at market-based rates rather than tariffed rates.⁴⁸ DP&L's distribution base rates were frozen through December 31, 2012 subject to DP&L's right to seek emergency rate relief. DP&L could also apply to the Commission to recover the costs of complying with changes in tax or

⁴³ *DP&L TCRR Proceeding*, Second Finding and Order (November 18, 2009).

⁴⁴ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, PUCO Case Nos. 08-1094-EL-SSO, *et al.*, Application (October 10, 2008) (hereinafter, "*DP&L ESP Proceeding*").

⁴⁵ See Section 4928.141(A), Revised Code.

⁴⁶ *DP&L ESP Proceeding*, Opinion and Order (June 24, 2009).

⁴⁷ In accordance with the settlement, DP&L filed and the Commission approved the creation of DP&L's fuel rider on December 16, 2009. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 09-1012-EL-FAC, Finding and Order (December 16, 2009) (hereinafter, "*DP&L FAC Proceeding*"). The initial fuel rider rate was \$0.0197 per kilowatt-hour ("kWh").

⁴⁸ The only party to oppose any portion of the settlement was Cargill. Cargill argued that all shopping customers should be able to avoid the RSC (i.e. the RSS charge described above in Subsection B) in 2011 and 2012 if they agreed to return to POLR service at market-based rates rather than tariffed rates. The Commission denied Cargill's request to amend the Stipulation. *DP&L ESP Proceeding*, Opinion and Order at 10 (June 24, 2009).

regulatory laws or regulation which took effect after the date of the Stipulation as well as for the cost of storm damage. Additionally, the Stipulation allowed DP&L to apply to the Commission for approval of separate riders to recover: (1) the cost of complying with new environmental legislation or regulations related to climate change or carbon-related emissions or storage; (2) environmental costs required to keep the Hutchings Generating Station in operation and available to customers to the extent such costs were cost effective; (3) transmission costs (through the TCRR); and (4) RTO costs not recovered in the TCRR. The settlement further dictated that the significantly excessive earnings test (“SEET”) created by SB 221 would not apply to DP&L for the years 2009 through 2011. Finally, the approved settlement required DP&L to establish a collaborative process to address energy efficiency and demand response programs.

Further, the PUCO-approved settlement required DP&L to present to the Commission independent business cases for its advanced metering infrastructure (“AMI”) and Smart Grid plans, thereby delaying implementation of DP&L’s infrastructure investment rider (“IIR”) until further approved by the Commission.⁴⁹ However, when DP&L submitted its revised business cases for Smart Grid and AMI, the PUCO Staff recommended that the PUCO not approve the plan.⁵⁰ On October 19, 2010, DP&L filed a motion to withdraw its AMI/Smart Grid business plans, and on January 5, 2011, the PUCO approved the motion. However, the Commission indicated that it expected DP&L to continue to explore the potential benefits of future investments in AMI and Smart Grid programs and that DP&L would, when appropriate, file new AMI and/or Smart Grid proposals.⁵¹

F. Energy Efficiency and Peak Demand Reduction

Under the PUCO-approved settlement approved in its ESP proceeding, DP&L was authorized to implement an Energy Efficiency Rider (“EER”) to recover the costs associated with complying with the EE/PDR requirements established in SB 221⁵² as well as an avoidable Alternative Energy Rider (“AER”) to recover the costs of complying with the AEPS contained in SB 221. DP&L established both riders,⁵³ but the EER was

⁴⁹ DP&L submitted its independent business cases for its AMI and Smart Grid plans on August 4, 2009. Initial and Reply Comments were submitted to the Commission on December 15, 2009 and January 8, 2010, respectively. Of note, the PUCO Staff recommended that the PUCO not approve the revised AMI and Smart Grid plans. *DP&L ESP Proceeding*, Comments of the Staff of the Public Utilities Commission of Ohio at 8, 15 (December 15, 2009).

⁵⁰ *DP&L ESP Proceeding*, Comments of the Staff of the Public Utilities Commission of Ohio (December 15, 2009).

⁵¹ *DP&L ESP Proceeding*, Entry at 2 (January 5, 2010).

⁵² DP&L filed an application with the PUCO requesting a determination that its EE/PDR programs approved in its ESP proceeding satisfied the requirement in Rule 4901:1-39-04, Ohio Administrative Code (“O.A.C.”), that each EDU file a three-year EE/PDR program portfolio plan for PUCO approval. *In the Matter of the Application of The Dayton Power and Light Company for a Finding that DP&L has Satisfied Program Portfolio Filing Requirements*, PUCO Case No. 09-1986-EL-POR, Application (December 23, 2009) (hereinafter, “*DP&L EE/PDR Proceeding*”) (previously docketed as Case No. 09-1986-EL-EEC).

⁵³ See *In the Matter of the Application of The Dayton Power and Light Company for Approval of an Amended Private Outdoor Lighting Tariff*, PUCO Case No. 09-1908-EL-ATA, Application (December 8, 2009).

less than originally expected due to the cancellation of its Smart Grid and AMI business plans, the costs of which would have been recovered through the EER.

On December 23, 2009, DP&L filed an application requesting a PUCO determination that its EE/PDR programs, approved as part of its ESP, satisfied its three-year EE/PDR program portfolio obligation under the PUCO's rules.⁵⁴ DP&L also asked the PUCO for a determination that the programs implemented in 2009 satisfied its 2009 EE/PDR benchmarks or, in the alternative, to set its 2009 benchmarks to zero.⁵⁵ In DP&L's ESP proceeding, DP&L envisioned using its Smart Grid/AMI plan to meet the EE/PDR benchmarks. However, as mentioned above, DP&L's Smart Grid/AMI programs were eventually scrapped. Thus, DP&L was not in a position to satisfy the EE/PDR benchmarks.

On May 19, 2010, the PUCO largely granted DP&L's request and waived the requirement that DP&L file an entire portfolio plan.⁵⁶ However, the PUCO required DP&L to comply with the independent EE/PDR program evaluator provisions of the PUCO's rules and required DP&L to file a market assessment. On July 15 and 16, 2010, DP&L filed supplements to its application. The supplemental information included the market assessment and supporting testimony.⁵⁷ A hearing was scheduled for December 14, 2010; however, the procedural schedule was significantly delayed as parties attempted to settle the matter themselves.⁵⁸

Eventually, a settlement was reached and filed with the PUCO on March 22, 2011. On April 27, 2011, the PUCO approved the settlement without modification.⁵⁹ With the approval of the settlement, the PUCO found that DP&L's application, as supplemented, complied with the EE/PDR benchmarks. DP&L also agreed to conduct a comprehensive evaluation of the cost-effectiveness and feasibility of developing several new types of programs for potential inclusion in DP&L's updated EE/PDR portfolio plan, to be filed by April 15, 2013.⁶⁰

⁵⁴ *DP&L EE/PDR Proceeding*, Application (December 23, 2009).

⁵⁵ *In the Matter of the Application of The Dayton Power and Light Company for a Finding that DP&L's Peak Demand Reduction Benchmark Has Been Met or in the Alternative, Application to Amend DP&L'S Peak Demand Reduction Benchmark*, PUCO Case No. 09-1987-EL-EEC, Application (December 23, 2009).

⁵⁶ *DP&L EE/PDR Proceeding*, Entry (May 19, 2010)

⁵⁷ *DP&L EE/PDR Proceeding*, Supplement (July 15, 2010)

⁵⁸ *DP&L EE/PDR Proceeding*, Entry (October 25, 2010).

⁵⁹ *DP&L EE/PDR Proceeding*, Opinion and Order (April 27, 2011).

⁶⁰ These areas include: (1) A joint gas and electric home performance program with Vectren Energy Delivery of Ohio, Inc. ("VEDO"); (2) a shared savings incentive structure for over-compliance with annual EE/PDR benchmarks; (3) an increase in funding for DP&L's residential appliance rebate program to make the program more attractive to third-party implementers; and (4) a direct load control program using a single-way communication system. *Id.* at 4-5.

G. Alternative Energy Portfolio Mandate Compliance

On December 23, 2009, DP&L filed a request for a “*force majeure*” determination regarding its 2009 solar energy resource (“SER”) requirement, stating there were factors outside of its control that prevented it from meeting its SER requirement.⁶¹ On March 17, 2010, the PUCO granted DP&L’s application.⁶² The PUCO found that there was an insufficient amount of Ohio-based SERs reasonably available in Ohio and lowered DP&L’s SER benchmark for 2009 to the level of solar renewable energy credits (“SREC”) DP&L was able to acquire.⁶³ However, the PUCO’s approval of the application was contingent on DP&L satisfying its revised 2010 SER benchmarks.⁶⁴ DP&L’s revised benchmark for 2010 included the statutorily set benchmark plus DP&L’s shortfall from the 2009 Ohio SER benchmark.⁶⁵

On April 15, 2010, DP&L filed an application to update its AER.⁶⁶ The AER recovers DP&L’s costs associated with renewable energy and advanced energy expenditures and is bypassable by customers who shop for electricity. On July 22, 2010, before the PUCO had taken any action on DP&L’s application, DP&L amended its application to reflect the PUCO’s approval of its *force majeure* request in Case No. 09-1989-EL-ACP and to include several changes to its methodologies and presentation.⁶⁷ The amended application replaced the April 15, 2010 application in its entirety. DP&L’s revised proposed AER was approximately three times the then-existing AER charge. DP&L filed for its second true-up to the AER on June 1, 2011. On March 21, 2012, the PUCO approved DP&L’s application as updated on June 1, 2011.

H. Fuel Rider

As mentioned above, the PUCO allowed DP&L to establish an avoidable fuel rider when it approved the settlement in DP&L’s ESP proceeding. This rider is updated quarterly and reconciled annually. On November 10, 2010, the PUCO selected Energy Venture Analysis, Inc. (“EVA”) to conduct a review of the management/performance (“m/p”) and financial aspects of DP&L’s fuel costs, and its fuel recovery mechanism.⁶⁸

On November 9, 2011, the Commission approved a Stipulation and Recommendation filed by DP&L, Staff, IEU-Ohio and OCC, which resolved all of the issues of the fuel

⁶¹ *In the Matter of the Application of The Dayton Power and Light Company for an Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code*, PUCO Case No. 09-1989-EL-ACP, Application (December 23, 2009) (hereinafter, “*DP&L AEC Proceeding*”).

⁶² *DP&L AEC Proceeding*, Finding and Order (March 17, 2010).

⁶³ *DP&L AEC Proceeding*, Finding and Order at 4 (March 17, 2010).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *In the Matter of the Application of the Dayton Power and Light Company to Update its Alternative Energy Rider*, PUCO Case No. 10-89-EL-RDR, Application (April 15, 2010) (hereinafter, “*DP&L AER Proceeding*”).

⁶⁷ *DP&L AER Proceeding*, Amended Application (July 22, 2010).

⁶⁸ *DP&L FAC Proceeding*, Entry (November 10, 2010).

audit.⁶⁹ The Stipulation required DP&L to credit its fuel rider by \$3.4 million to reverse the effect of DP&L's inclusion of impermissible costs in the rider. DP&L was also required to flow back any impermissible costs collected in 2011. In addition, DP&L was required to revise its existing coal and limestone procurement standard operating procedure. DP&L also agreed in the Stipulation to incorporate its best estimate of the impacts of ongoing customer supplier switching into its fuel rider kWh sales forecasts for the 2011 audit period and to prepare explanations of differences between forecast and actual fuel rider revenues and costs. Finally, the Stipulation resolved DP&L's undercollection of emission fees collected as a non-bypassable charge. DP&L's undercollection since 1993 led to a deferred balance of \$6 million. Pursuant to the Stipulation, this balance and ongoing emission fees is amortized through the fuel rider, allocated on a percentage of a customer's distribution-related charges.

I. Transmission Cost Recovery Rider (TCRR) and Reliability Pricing Model Rider

On February 19, 2010, DP&L filed an application to adjust its TCRR and RPM Rider. DP&L requested an increase to both riders due to previous undercollection and also to include certain deferred costs. The TCRR had an undercollection of \$6.1 million from June 2009 through December 31, 2009, and unrecovered deferred costs of \$2.2 million. The RPM Rider had an undercollection of approximately \$8.7 million from the prior reporting period and \$9.7 million in unrecovered deferred costs. On April 28, 2010, the PUCO approved DP&L's TCRR and RPM Rider updates.⁷⁰ The amount to be collected from May 2010 through April 2011 was \$77 million under the TCRR and \$68 million under the RPM Rider.

On October 15, 2010, DP&L filed an interim application which sought to decrease the RPM Rider and increase the TCRR by an amount equal to the RPM Rider decrease. DP&L alleged that the increase in the TCRR was needed to reflect a higher level of line loss associated with hotter-than-anticipated weather.⁷¹ During the summer, DP&L also claimed to have experienced higher than expected sales which accelerated recovery of the RPM costs under-recovered from the previous period.⁷² On October 27, 2010, the PUCO approved the revenue neutral update to the combined riders and the changes went into effect on November 1, 2010.⁷³

DP&L filed its 2011 annual report on its TCRR and RPM Rider on February 15, 2011.⁷⁴ The PUCO's Staff reviewed DP&L's filing and found that DP&L's proposed rates were

⁶⁹ *DP&L FAC Proceeding*, Opinion and Order (November 9, 2011).

⁷⁰ *In the Matter of the Application of Dayton Power and Light Company to Update its Transmission Cost Recovery Rider and PJM RPM Rider*, PUCO Case No.10-88-EL-RDR, Finding and Order (April 28, 2010) (hereinafter, "*DP&L 2010 TCRR Proceeding*").

⁷¹ *DP&L 2010 TCRR Proceeding*, Finding and Order (October 27, 2010).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *In the Matter of the Application of The Dayton Power and Light Company to Update its Transmission Cost Recovery Rider and PJM RPM Rider*, PUCO Case No. 11-547-EL-RDR, Finding and Order at 1 (April 27, 2011).

\$13 million less than the previous 12-month period's rates. The total TCRR revenue to be collected during the May 2011 through April 2012 timeframe was approximately \$58.4 million, which included a \$13.3 million under-recovery for the previous 12-month period. The total RPM Rider revenue to be collected during the May 2011 through April 2012 timeframe was approximately \$12.7 million.⁷⁵ Staff also found that DP&L had modified its allocation methodology to better align the various costs and credits with the classes and customers responsible for creating those costs.⁷⁶ On April 27, 2011, the Commission approved DP&L's proposed rates.⁷⁷

On February 16, 2012, DP&L filed an application to update its TCRR and RPM Rider rates.⁷⁸ The application sought to collect a total of \$3.5 million through the RPM Rider, and a total of \$45.9 million through the TCRR. On a combined basis, the revenue requirement for these riders was a \$10.3 million decrease from the previous 12-month period. On April 25, 2012, the PUCO approved DP&L's proposed rates, effective May 1, 2012.

J. DP&L's Reasonable Arrangements

I. Airgas, Inc.'s and Appleton Papers, Inc.'s Reasonable Arrangements

On August 9, 2009, DP&L filed a joint application with Airgas, Inc. ("Airgas") to establish a reasonable arrangement,⁷⁹ and on December 19, 2009, DP&L filed a joint application with Appleton Papers, Inc. ("Appleton") to establish a reasonable arrangement.⁸⁰ Under the reasonable arrangements, Airgas and Appleton agreed to commit their demand response capabilities toward DP&L's efforts to comply with the peak demand reduction portfolio mandate. The Airgas application proposed a one-time incentive payment for Airgas' commitment and Appleton's application provided for an indefinite exemption from DP&L's EER Rider. The PUCO's Staff filed their report on September 20, 2012 (more than three years after the applications were filed) recommending approval of the applications. However, the Commission has not acted on this recommendation.

II. Caterpillar, Inc.'s Unique Arrangement

DP&L filed an application on June 30, 2010 for approval of a unique arrangement with Caterpillar, Inc. ("Caterpillar"). The application proposed a 15% discount in overall tariff

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.* at 2-3.

⁷⁸ *In the Matter of the Application of The Dayton Power and Light Company to Update Its Transmission Cost Recovery Rider and PJM RPM Rider*, Case No. 12-524-EL-RDR, Application (February 16, 2012).

⁷⁹ *In the Matter of the Joint Application of The Dayton Power and Light Company and Airgas, Inc. for Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Programs into DP&L's Demand Reduction Program*, PUCO Case No. 09-702-EL-AEC.

⁸⁰ *In the Matter of the Joint Application of The Dayton Power and Light Company and Appleton Papers, Inc. for Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Programs into DP&L's Demand Reduction Program*, PUCO Case No. 09-1701-EL-EEC.

rates for Caterpillar, in conjunction with its location of a new facility in DP&L's service territory. On January 28, 2011, a settlement was filed between DP&L, Staff, and OCC resolving all of the issues in the case.⁸¹ The settlement proposed a 15% discount of Caterpillar's otherwise applicable rates for 60 months capped at a total discount of \$410,000 over the term of the arrangement.⁸² DP&L also agreed to credit \$30,000 a year, for the five years of the arrangement, to its economic development rider ("EDR"). On April 5, 2011, the Commission approved the settlement without modification.⁸³

III. Wright-Patterson Air Force Base

On March 4, 2011, DP&L and Wright-Patterson Air Force Base ("WPAFB") filed a joint application seeking approval of a unique arrangement.⁸⁴ The application sought a 10% discount off WPAFB's existing load and a 20% discount off of any new load. The application extended the arrangement through December 2011 and gave WPAFB the right to extend the arrangement at its sole discretion, for a total duration of up to 42 months.⁸⁵ The application also proposed authorizing DP&L to recover all revenue foregone as a result of the arrangement, including its POLR charge. DP&L proposed collecting the "lost revenue" through its EDR.⁸⁶ On June 8, 2011, the Commission approved the application without modification.

K. Economic Development Rider (EDR)

On August 12, 2011, DP&L filed an application to update its non-bypassable EDR.⁸⁷ The EDR was established in 2009 as part of DP&L's ESP.⁸⁸ The settlement approved by the PUCO in that proceeding authorized DP&L to implement the EDR on April 1, 2009, but the rider amount was initially set at zero. As a result of the approval of DP&L's unique arrangements with Caterpillar and WPAFB, DP&L began incurring lost revenue (referred to as "delta revenue") in conjunction with these arrangements. The August 12, 2011 application sought to update DP&L's EDR and establish a positive charge to begin recovering the delta revenue. The proposed EDR charge recovered approximately \$5.5 million over a 12-month period beginning November 2011⁸⁹ With the

⁸¹ *In the Matter of the Application of the Dayton Power and Light Company for Approval of a Unique Arrangement with Caterpillar Inc.*, PUCO Case No. 10-734-EL-AEC, Opinion and Order at 2-3 (April 5, 2011).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *In the Matter of the Joint Application of The Dayton Power and Light Company and Wright-Patterson Air Force Base for Approval of a Unique Arrangement*, PUCO Case No. 11-1163-EL-AEC, Opinion and Order at 1 (June 8, 2011).

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 2-3.

⁸⁷ *In the Matter of the Application of the Dayton Power and Light Company to Update its Economic Development Rider*, PUCO Case Nos. 11-4503-EL-RDR, *et al.*, Application (August 12, 2011) (hereinafter, "*DP&L 2011 EDR Proceeding*").

⁸⁸ *DP&L ESP Proceeding*, settlement at 7 (February 24, 2009).

⁸⁹ *DP&L 2011 EDR Proceeding*, Staff Review and Recommendation at 2 (October 12, 2011).

EDR updated and reconciled semi-annually. The proposed EDR charge was approved by the Commission on October 26, 2011.⁹⁰

L. Merger with the AES Corporation

On May 18, 2011, The AES Corporation (“AES”), its subsidiary Dolphin Sub, Inc. (“Dolphin”), along with DPL Inc. (“DPL”), and its subsidiary, DP&L, jointly filed an application seeking the PUCO’s approval of a merger between Dolphin and DPL.⁹¹ Following the proposed merger, Dolphin would cease to exist and DPL would become a wholly-owned subsidiary of AES. As part of the merger, AES agreed to pay a large premium for DP&L which AES financed through a highly leveraged transaction.

Three separate Stipulation and Recommendations (settlements) were filed in the proceeding by AES, Dolphin, DPL, DP&L, OPAE, the Ohio Hospital Association (“OHA”), the City of Dayton (“Dayton”), OMA Energy Group (“OMAEG”), and the PUCO Staff.⁹²

The first Stipulation was filed on September 2, 2011 between AES, DPL, Dolphin, DP&L, and Dayton.⁹³ In this Stipulation, Dayton agreed to not oppose the merger and to withdraw its request for a hearing based on several promises made by the applicants. First, AES agreed to maintain DP&L’s operating headquarters and name for five years from the date the merger became effective. Second, for three years following the effective date of the merger, DP&L agreed to not implement an involuntary reduction in workforce that would result in DP&L employing less than 90% of the individuals who were employed the day before the merger closed. Third, DP&L promised to maintain Dayton’s annual payroll tax at \$3 million through December 31, 2016. Fourth, negotiation, approval, and closing costs of the merger would not be recovered from ratepayers or through regulated rates. Fifth, through December 31, 2017, AES agreed to discuss with Dayton any plan to move DP&L’s operating headquarters at least 180 days before any move is to occur. Sixth, if DP&L’s operating headquarters are moved from the current facility before December 31, 2017, Dayton is to be given an option to purchase the headquarters facility, subject to several conditions. Finally, DP&L agreed to make an economic development payment to Dayton in the amount of \$700,000 by December 31, 2014, with half due by December 31, 2013.

A second Stipulation was signed by AES, DPL, Dolphin, DP&L, OHA, and OPAE on September 19, 2011. In addition to the terms in the first Stipulation, the second Stipulation provided funding in the amount of \$75,000 for OHA to assist its member hospitals in participating in EE/PDR programs and funding in the amount of \$400,000 to

⁹⁰ *DP&L 2011 EDR Proceeding*, Finding and Order at 2-3 (October 26, 2011).

⁹¹ *In the Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company for Consent and Approval for a Change of Control of The Dayton Power and Light Company*, PUCO Case No. 11-3002-EL-MER, Application (May 18, 2011) (hereinafter, “*DP&L Merger Proceeding*”).

⁹² *DP&L Merger Proceeding*, Finding and Order at 6-11 (November 22, 2011).

⁹³ *DP&L Merger Proceeding*, Stipulation (September 2, 2011).

OPAE to benefit electric consumers at or below 200% of the federal poverty line or customers who demonstrate they are at-risk of losing electric service.⁹⁴

On October 26, 2011, a third Stipulation was filed, signed by AES, DPL, Dolphin, DP&L, OMAEG, and Staff. Along with the commitments the companies made in the first two Stipulations, they pledged several more significant commitments. First, DP&L agreed to maintain a capital structure that included an equity ratio of at least 50%. Second, DP&L agreed to not have a negative retained earnings balance. Third, DP&L agreed to add a consolidated billing capability to its existing billing system within six months of the Commission order approving the merger. Fourth, DP&L agreed to modify its procedures to make it easier for DP&L customers to shop for generation through competitive retail electric service (“CRES”) providers.⁹⁵ On November 22, 2011, the Commission approved the three Stipulations without modification.

During the course of this merger proceeding, AES, DPL and DP&L actively resisted addressing questions related to the December 2012 termination of its ESP and to insulate DP&L’s regulated distribution business from the business and financial risks associated with DP&L’s and affiliates’ competitive lines of business. AES, DPL and DP&L maintained that the merger would improve DPL’s financial strength and give it access to benefits of being part of a much larger corporation (AES). As discussed below, it now appears that the representations made by DPL, DP&L and AES at the time of the merger and about the benefits of the merger have been replaced by very different claims which DP&L is advancing in its current ESP proceeding.

M. DP&L’s Market Rate Offer (“MRO”) Application⁹⁶

Pursuant to merger-related commitments and on March 30, 2012, DP&L filed an application to establish an SSO in the form of an MRO to be effective January 1, 2013. As required by Section 4928.142, Revised Code, DP&L proposed to establish the price of the SSO through a CBP, blending a portion of its legacy generation supply prices with the results produced from the CBP for the first five years. After this blending period and beginning June 1, 2018, DP&L proposed to use a CBP to fully establish the default generation supply price.

I. Electric Service Stability Charge (“ESSC”)

In its MRO application, DP&L requested authorization to continue its non-bypassable rate stabilization charge (“RSC”) but change its name to the Electric Service Stability Charge or the ESSC. DP&L claimed that it was permitted to establish the ESSC because the MRO was an extension of the rate plan in effect at the time the MRO was approved.

⁹⁴ *DP&L Merger Proceeding*, Opinion and Order at 7-8 (November 22, 2011).

⁹⁵ *Id.* at 8-11.

⁹⁶ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer*, PUCO Case Nos. 12-426-EL-SSO *et al* (March 30, 2012).

II. Continuation of Riders

DP&L requested authorization to continue several riders, including the AER, RPM Rider, TCRR, Fuel Rider, and Energy Efficiency Rider. DP&L requested that the AER be modified to collect costs of compliance with renewable energy benchmarks on a forward-looking basis. DP&L requested that the TCRR be bifurcated into non-bypassable and bypassable portions depending on whether the portion is market-based or not. The non-bypassable portion would include PJM regional transmission expansion planning costs, black start, expansion cost recovery charges, North American Reliability Corporation (“NERC”)/ReliabilityFirst Corporation (“RFC”) costs, reactive supply, transmission owner scheduling, PJM scheduling, load response charge allocation, and generation deactivation. CBP winners would not have to supply these items and CRES providers would no longer have to provide these items.

III. New Riders

DP&L requested authorization to establish several new riders, including the Competitive Bidding (“CB”) Rider, Competitive Bid True-up (“CBT”) Rider, and the Reconciliation Rider (“RR”). The CB Rider would be used to combine the results of the CBP and the legacy generation rate. The CBT Rider would be a true-up mechanism intended to recover the difference between amounts paid to suppliers for the delivery of SSO supply, as a result of the CBP, and amounts billed to customers through the CBP rate. Regarding corporate separation, DP&L requested that it be permitted to continue to operate under a functional corporate separation plan.

IV. MRO Withdrawal

Following the PUCO’s decisions in AEP-Ohio’s capacity charge and ESP cases (discussed below), DP&L withdrew its MRO application, with prejudice, on September 7, 2012. This withdrawal was preceded by claims by DP&L and AES that the PUCO’s decisions in the AEP-Ohio cases provided DP&L with the right to obtain generation-related compensation through non-bypassable charges in an amount sufficient to protect DP&L’s competitive generation business against the business and financial risks related associated with such completion.

V. Joint Motion to Terminate the RSC

The timing of DP&L’s MRO withdrawal made it highly unlikely that a successor SSO would be approved prior to the expiration of DP&L’s ESP on December 31, 2012. At the same time, PUCO-approved settlements called for the non-bypassable RSC to terminate on December 31, 2012. Accordingly, a number of parties (“Joint Movants”) filed a joint motion with the PUCO requesting that it enforce the prior PUCO-approved settlement agreements by directing DP&L to terminate the non-bypassable RSC on December 31, 2012. On December 19, 2012, the Commission denied the joint motion and permitted DP&L to continue its ESP, as well as the RSC, until a successor SSO is approved. The practical effect of this PUCO order is to deprive shopping customers of the full benefit of the lower electric bills that would otherwise be available to shopping customers and to continue the above-market default generation supply prices imposed

on customers not served by a CRES provider. On January 18, 2013, Joint Movants filed an Application for Rehearing to contest the PUCO's Entry denying the joint motion to terminate the RSC. As of the time this report was submitted, the PUCO had not issued a determination on the Application for Rehearing.

N. DP&L's Application for Approval of an ESP

On October 5, 2012 and following its withdrawal of its proposed MRO, DP&L filed an application containing a proposed ESP with a request that the Commission approve its proposed ESP for the term beginning January 1, 2013 and ending December 31, 2017. Although DP&L filed its application as an ESP, DP&L proposed to structure the ESP such that an increasing portion of the SSO's default generation supply price would be established through a CBP. The significant aspects of DP&L's proposed ESP are discussed below. An evidentiary hearing regarding this ESP proposal is currently scheduled to begin on March 11, 2013.

I. Service Stability Rider ("SSR")

The ESP application requested approval of several new riders not included in DP&L's MRO application. The application requested a new nonbypassable charge, the SSR, in place of the proposed ESSC and the expiring RSC. The SSR, as initially proposed, would collect \$120 million annually for five and one-half years (the term of the proposed ESP). Citing the PUCO's decisions in the AEP-Ohio cases mentioned above, DP&L claimed that the larger non-bypassable charge was necessary to permit DP&L to maintain its "financial integrity" and to give DP&L an opportunity to earn a reasonable return on equity, calculated based upon total company equity (including the investment in non-utility and competitive businesses). The effect of DP&L's use of its total company common equity balance for purposes of computing the required return on common equity operates to transfer the business and financial risks of DP&L's and DPL competitive and non-utility businesses from AES, their shareholder, to DP&L's retail distribution customers (similar to the transfer approved by the PUCO in the AEP-Ohio cases).

II. Switching Tracker

DP&L's proposed ESP also requested approval of a Switching Tracker or rider that is triggered in the event that customer shopping exceeds 62% of retail load. The Switching Tracker account "would defer for later recovery from customers the difference between the current level of switching (62% of retail load) and the actual level of switching." "Each month, DP&L will calculate the percentage of switching that has occurred since August 30, 2012 by tariff class. The difference, multiplied by distribution load equals the quantity subject to the switching tracker. The cost subject to the switching tracker will equal the difference between the Blended SSO rate and the CB rate in effect based on tariff class. That difference (in \$/MWh) multiplied by the quantity (in MWh) equals the dollars to be added to the switching tracker for the month." DP&L's Switching Tracker would, if approved, recover the accumulated deferred Switching Tracker balance from shopping and non-shopping customers beginning January 1, 2014 until the deferral balance plus carrying costs (at a long-term debt rate) are

recovered/amortized. The proposed Switching Tracker is essentially a true-up mechanism designed to compensate DP&L for lost revenue related to additional customer switching and it further transfers the business and financial risks associated with DP&L's competitive lines of business to DP&L's retail distribution customers. DP&L proposed that the tracker would begin with the start of the proposed ESP and end on June 1, 2016, when DP&L would procure 100% of its generation supply needs through a CBP.

III. Alternative Energy Rider ("AER-N" and AER-B")

DP&L's proposed ESP asked the PUCO to reauthorize its AER and split the rider into a bypassable ("AER-B") and non-bypassable ("AER-N") component. The bypassable AER-B would continue to collect the costs being recovered through the AER. The proposed AER-N would recover costs related to DP&L's Yankee Solar generation facility (a proposal similar to that made by AEP-Ohio for the Turning Point solar project). DP&L's proposed ESP would, if approved, result in an AER-N charge that is initially set at zero and provide DP&L with an opportunity to file a separate application (within six months of a Commission order on the proposed ESP) to establish the level of the AER-N charge.

Unlike its MRO proposal, which would have required winning bidders to supply RECs to satisfy Ohio's renewable portfolio mandates, DP&L's proposed ESP calls for DP&L to acquire RECs itself and recover that cost through its AER. DP&L also proposed a 3% cap on the AER-B (Alternative Energy Rider Bypassable). Thus, DP&L has proposed that its AER not exceed a rate of 0.128¢/kWh; however, DP&L stated that it does not believe the 3% cap will be reached.

IV. TCRR and Fuel Rider

DP&L proposed to bifurcate the TCRR into non-bypassable and bypassable portions depending on whether the transmission service component is subject to market-based pricing. DP&L has stated that this will cause most of the TCRR to become non-bypassable. DP&L's proposal would produce a structure that is similar to the structure that is currently in place in the Duke and FirstEnergy service areas. DP&L proposed ESP also seeks approval of a new allocation method for its Fuel Rider based upon a system-average methodology (rather than a least-cost method).

V. Corporate Separation

DP&L's proposed ESP calls for DP&L to file a separate application pursuant to Section 4928.17(E), Revised Code, and Rule 4901:1-37-09, O.A.C., no later than December 31, 2013, to accomplish the transfer of its generation assets in accordance with corporate separation requirements which went into effect in 2001 but have not been enforced by the PUCO. In a subsequent application, DP&L modified its corporate separation proposal by indicating that it will complete the transfer of its generation assets by no later than December 31, 2017.

O. Amended ESP Application

After discovering a significant mathematical error in its ESP application, DP&L filed an amended ESP application on December 12, 2012. More specifically, DP&L requested that the Commission increase the size of the SSR to collect \$137.5 million per year over the course of its proposed ESP (rather than the \$120 million previously proposed).

As of the time this report was submitted, DP&L's Amended ESP application remains pending at the PUCO.

Duke Energy Ohio, Inc.⁹⁷

A. Rate Stabilization Plan

On January 10, 2003, Duke Energy Ohio, Inc., (“DE-Ohio”) filed an application with the PUCO⁹⁸ for approval of an SSO pricing formula, which had to be established before it could accelerate the end of its MDP for non-residential customers ahead of the statutory MDP end date of December 31, 2005. DE-Ohio also made three additional filings seeking accounting authorizations associated with higher levels of transmission and distribution costs that DE-Ohio claimed were not reflected in its then-current rates.⁹⁹ In December 2003, the PUCO consolidated the DE-Ohio cases, directed DE-Ohio to file an alternative RSP, and set a hearing schedule to consider the consolidated proceeding. On January 26, 2004, in response to the PUCO’s invitation to file an RSP, DE-Ohio filed another application seeking approval of SSO prices.¹⁰⁰

On May 19, 2004, several parties filed a Stipulation to resolve the issues raised in DE-Ohio’s consolidated SSO-related proceedings. On September 29, 2004,¹⁰¹ the PUCO issued an Opinion and Order that operated to substantially modify the plan proposed in the Stipulation. Among other things, the PUCO’s Order included: a requirement that it approve changes in rates for certain cost components; more avoidability of certain charges by shopping customers; and full corporate separation by DE-Ohio if it failed to accept the PUCO’s Order.¹⁰² DE-Ohio filed an Application for Rehearing on October

⁹⁷ DE-Ohio was formerly Cincinnati Gas & Electric Company (“CG&E”). CG&E became Duke Energy Ohio or DE-Ohio after a merger with Deer Holding Corporation, a subsidiary of Duke Energy Corporation (“Duke”). While many of the proceedings referenced herein were filed prior to the merger, CG&E is referred to as DE-Ohio in all case references because of the merger.

⁹⁸ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitively-Bid Service Rate Option Subsequent to the Market Development Period*, PUCO Case No. 03-93-EL-ATA, Application (January 10, 2003) (hereinafter, “*DE-Ohio RSP Proceeding*”). OCC, IEU-Ohio, OP&E, and AK Steel Corp. (“AK Steel”) filed motions requesting that the PUCO dismiss DE-Ohio’s application because, among other things, the application was filed prior to the PUCO completing its SSO rules. The PUCO denied the Motions to Dismiss, but set a procedural schedule including a hearing to address issues raised by the motions about DE-Ohio’s application.

⁹⁹ *See In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with the Midwest Independent Transmission System Operator*, PUCO Case No. 03-2079-EL-AAM, Application (October 8, 2003), as well as *In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System and to Establish a Capital Investment Reliability Rider to be Effective after the Market Development Period*, PUCO Case Nos. 03-2080-EL-ATA and 03-2081-EL-AAM, Application (October 8, 2003).

¹⁰⁰ *DE-Ohio RSP Proceeding*, The Cincinnati Gas & Electric Company’s Filing in Response to the Request of the Public Utilities Commission of Ohio to File a Rate Stabilization Plan (January 26, 2004).

¹⁰¹ *DE-Ohio RSP Proceeding*, Opinion and Order (September 29, 2004).

¹⁰² Specifically, the PUCO modified the annually adjusted component (“AAC”) (see Section B.III. below for further discussion of the AAC) by removing a provision that provided for automatic annual increases of 6% (with additional 8% increases permitted upon PUCO approval), and instead removed the cap on PUCO approved increases. For 2005, the PUCO approved an AAC charge of \$53,757,267, but made it 100% avoidable for shopping customers. Further, while DE-Ohio would be allowed to seek, no more

29, 2004, requesting that the PUCO adopt the original Stipulation without modification or a new alternative proposal included in its Application for Rehearing.¹⁰³ On November 23, 2004, the PUCO issued an Entry on Rehearing generally adopting DE-Ohio's alternative plan with yet more modifications.¹⁰⁴

OCC appealed the PUCO's RSP determinations for DE-Ohio to the Ohio Supreme Court.¹⁰⁵ OCC's appeal was mainly focused on its general campaign to promote the use of an auction process to set default generation supply prices and to require electric utilities to divest their generating assets. The Ohio Supreme Court subsequently issued a decision that affirmed in part and reversed in part the PUCO's decision.¹⁰⁶

The Ohio Supreme Court rejected OCC's claims that the PUCO failed to adhere to the procedural steps required before approving an increase in rates and accepted the

often than annually, unrestricted changes in the AAC charge that are applied as part of shopping customers' avoidable costs, the PUCO directed DE-Ohio to file quarterly reports detailing all fuel and economy purchased power ("FPP") costs. The PUCO also increased the percentage of nonresidential shopping customers that could avoid the rate RSC from 25% to 50%. The PUCO denied the extension of regulatory transition charge ("RTC") collection from residential consumers beyond 2008 and stated that, while it could not require the extension of the residential discount past 2005, the discount must continue through December 31, 2005. Further, the PUCO determined that the SSO rate under the Stipulation amounted to a "market-based" rate and approved provisions allowing the PUCO to order a CBP to test the ongoing reasonableness of the RSP under certain circumstances, but did not mandate that DE-Ohio conduct a CBP as requested by some parties. DE-Ohio was not required to divest its generation assets during the RSP. The PUCO also kept the Stipulation provision allowing DE-Ohio to defer for future recovery certain distribution costs incurred for non-residential customers between July 1, 2004 and December 31, 2005. *Id.*

¹⁰³ *DE-Ohio RSP Proceeding*, DE-Ohio Application for Rehearing (October 29, 2004).

¹⁰⁴ *DE-Ohio RSP Proceeding*, Entry on Rehearing (November 23, 2004). The PUCO's modifications required further evaluations of the reasonableness of the FPP component of the price to compare, the system reliability tracker ("SRT"), and the AAC; required DE-Ohio to annually file an application by September 1 to establish the FPP, SRT, and AAC levels for the following year (except for the AAC for 2005 and 2006 which were otherwise established in the alternative plan); and set baselines for the includable costs of the SRT, AAC and FPP. Additionally, DE-Ohio's alternative plan was changed to provide that: the level of avoidability of future SRTs was to be determined in a proceeding commenced by DE-Ohio within 60 days of the implementation of Midwest Independent Transmission System Operator ("MISO") Day 2 or July 1, 2005, whichever was earlier; the costs of environmental compliance, security and tax law changes in the AAC were to be based on changes in costs since 2000; the amounts recoverable for fuel, economy purchased power and emission allowances in the FPP were those in excess of amounts authorized in DE-Ohio's last electric fuel component ("EFC") proceeding; customers had a 60-day notice period to establish eligibility to avoid the RSC and the AAC; the cost of SSO for non-residential customers that return to DE-Ohio from a CRES provider would be based on the highest hourly cost of power that DE-Ohio incurred for that hour; and, for 2005, the RSC, AAC, and SRT could be avoided by current, non-residential shopping customers.

¹⁰⁵ The PUCO's final decisions are directly appealable to the Ohio Supreme Court, Ohio's highest court. See Sections 4903.10 through 4903.13, Revised Code.

¹⁰⁶ In order to ensure that its Notices of Appeal of the PUCO's approval of DE-Ohio's RSP were timely, OCC filed two Notices of Appeal with the Court – on March 18, 2005, and May 23, 2005. *Consumers' Counsel v. Pub. Util. Comm.*, Court Case Nos. 2005-0518 and 2005-0946. The Court granted a joint motion to consolidate the appeals on October 5, 2005 and held oral arguments on the consolidated cases on April 25, 2006. The Court issued its decision on November 22, 2006. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

PUCO's finding that the SSO price set forth in the RSP was a "market-based" offer (unlike the Ohio Supreme Court's holdings in the FirstEnergy and AEP-Ohio RSPs). However, the Ohio Supreme Court held that the PUCO failed to show, in sufficient detail, the facts in the record upon which the Commission's Entry on Rehearing was based and the reasoning followed by the PUCO in reaching its conclusion. Additionally, while the Ohio Supreme Court affirmed its previous holding that "side agreements" were irrelevant to the PUCO's consideration of the second and third prongs of the PUCO's test for settlements, it held that the PUCO erred in denying discovery of "side agreements" requested by OCC inasmuch as they may be relevant to the first prong of the PUCO's test – whether the settlement was the product of serious bargaining among capable, knowledgeable parties. However, the Ohio Supreme Court left open to the PUCO's discretion whether or not the side agreements would be admissible. The Ohio Supreme Court remanded the case to the PUCO with directions to: compel disclosure of the requested "side agreements"; thoroughly explain its conclusion that the modifications on rehearing were reasonable; and identify the evidence it considered to support its findings.¹⁰⁷

On November 29, 2006, the PUCO ordered a hearing to be held in the remanded RSP proceeding to obtain record evidence to sufficiently explain its rationale, as directed by the Ohio Supreme Court.¹⁰⁸ The PUCO later clarified that the remanded hearing would be limited to testimony and evidence regarding the modifications made in the Entry on Rehearing and side agreements to the extent that they may have impacted the seriousness of the bargaining that led to the May 19, 2004 Stipulation that was rejected by the first Opinion and Order.¹⁰⁹ In the meantime, DE-Ohio sought to extend its then-current AAC charges into 2007 and to implement the 2007 SRT subject to a reconciling true-up. On December 20, 2006, the PUCO issued an Entry that permitted DE-Ohio to largely retain its then-current rates subject to such reconciliation as the PUCO might determine necessary when it resolved pending issues.¹¹⁰

On February 1, 2007, the Attorney Examiner issued an Entry establishing two separate procedural paths to address the Ohio Supreme Court's rulings and to set DE-Ohio's RSP-related rider rates. A hearing to consider the Ohio Supreme Court's evidentiary rulings ("Phase I") commenced in March 2007 and a hearing regarding adjustments to DE-Ohio's individual riders ("Phase II") occurred in April 2007.

On October 24, 2007, the PUCO issued its Order on Remand on the Phase I issues.¹¹¹ The PUCO's Order on Remand made it clear that the PUCO rejected the May 19, 2004

¹⁰⁷ *Id.* at ¶¶36, 94.

¹⁰⁸ *DE-Ohio RSP Remand Proceeding*, Entry at 3 (November 29, 2006). The "*DE-Ohio RSP Proceeding*" citation will change to "*DE-Ohio RSP Remand Proceeding*" to denote the PUCO's post-remand proceedings.

¹⁰⁹ *DE-Ohio RSP Remand Proceeding*, Entry (January 3, 2007).

¹¹⁰ *DE-Ohio RSP Remand Proceeding*, Entry (December 20, 2006). Thus, the PUCO, for the interim, allowed DE-Ohio to continue its AAC into 2007 at the level as of December 2006, permitted DE-Ohio to continue its quarterly adjustment of the FPP, allowed the infrastructure maintenance fee ("IMF") to be adjusted in 2007 as previously approved, and let the SRT expire at the end of 2006.

¹¹¹ *DE-Ohio RSP Remand Proceeding*, Order on Remand (October 24, 2007).

Stipulation. It also approved an RSP consisting of generation and POLR components which, as a general proposition, tracked the charges then contained within DE-Ohio's RSP.¹¹² Further, the Order on Remand amended DE-Ohio's corporate separation plan to require DE-Ohio to retain its generating assets during the RSP and also required DE-Ohio to file tariffs that implemented the PUCO's Order on Remand.

The PUCO also considered certain side agreements entered into before the PUCO issued its initial Opinion and Order (on September 29, 2004) to determine whether the May 19, 2004 Stipulation (now rejected by the PUCO) was the product of serious bargaining among capable and knowledgeable parties. The PUCO found that the side agreements provided reason to question whether serious bargaining did occur in conjunction with the May 19, 2004 Stipulation. Because the side agreements contained trade secret and other customer-specific information (including account numbers), the PUCO also wrestled with issues related to how much of the side agreements should be placed in the public portion of the record in the case. After extensive litigation about which materials and to what extent those materials should be protected from public disclosure, the PUCO ultimately issued an Entry ordering the public disclosure of much of the information it previously protected inasmuch as that information was publicly made available through a Cincinnati newspaper as part of the records of a wrongful termination lawsuit in the Hamilton County Court of Common Pleas.¹¹³

Among other things, the Order on Remand further found that: (1) terminating the previously established RTC and the 5% residential discount at the end of 2008 would encourage the development of competition; (2) the generation price approved was market-based and complied with Ohio law; and, (3) Ohio law afforded the PUCO flexibility in approving methods for determining market-based rates for SSO.¹¹⁴

With specific regard to the PUCO's legal authority to establish a "market-based" price for competitive services (including generation supply) available from an EDU to customers not served by a CRES provider, the PUCO's Order on Remand interpreted then-current Ohio law to provide the PUCO with considerable flexibility and discretion on how to establish a "market-based" price. The PUCO explained, "a market-based standard service offer price is not the same as a deregulated price. ... Thus, while a

¹¹² *Id.* at 29-37. The PUCO authorized the collection of the following generation charges, all of which were avoidable by shopping customers: a tracker analogous to the currently existing FPP Rider, which would parallel the FPP costs previously approved in a recent FPP case; a generation charge equal to 100% of DE-Ohio's unbundled generation rates; and a mechanism (similar to the AAC) to collect the incremental costs associated with homeland security, environmental compliance, and taxes. Regarding POLR charges, the Order on Remand approved charges to maintain a reserve margin (using the methodology of the SRT currently in place) as well as an unavoidable risk recovery rider in order to compensate DE-Ohio for the pricing risk of providing POLR service. However, the PUCO made both POLR charges avoidable for non-residential customers who agreed to remain off of DE-Ohio's RSP through 2008.

¹¹³ *DE-Ohio RSP Remand Proceeding*, Second Entry on Rehearing (October 1, 2008). Practically speaking, the PUCO's ruling suggested that confidential information is not subject to its protection if the information finds its way into a newspaper regardless of how or why the newspaper came to obtain the information.

¹¹⁴ *DE-Ohio RSP Remand Proceeding*, Order on Remand at 36-41 (October 24, 2007).

standard service offer price need not reflect the sum of specific cost components, the result must produce reasonably priced retail electric service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services, be consistent with protecting consumers from market deficiencies and market power, and meet other statutory requirements.”¹¹⁵

Several Applications for Rehearing were filed and the PUCO denied all of them, except to make changes requested by DE-Ohio and IEU-Ohio.¹¹⁶ The DE-Ohio application for Rehearing was granted in order to clarify the applicability of DE-Ohio riders during certain shopping situations as well as to take under further advisement the PUCO’s edict that DE-Ohio not transfer any of its generating assets to an exempt wholesale generator (“EWG”). IEU-Ohio’s Application for Rehearing was granted in order to extend protective treatment of certain customer information (including account numbers) for five years instead of 18 months.

Both DE-Ohio and OCC filed appeals of the PUCO’s Order on Remand.¹¹⁷ The Ohio Supreme Court granted DE-Ohio’s request to withdraw its appeal on April 2, 2008. On February 19, 2009, the Court affirmed the PUCO’s decisions related to the trade secret challenges and found that issues related to RSP prices/charges were moot because there was no effective remedy to the problems cited by OCC and OPAE—the RSP had expired so there was no prospective relief the PUCO could provide and Court precedent does not permit retroactive refunds.¹¹⁸ As to the trade secrets issue, the Court held that the PUCO’s decision to protect certain categories of information from public disclosure was reasonable and the information met the test in Ohio law for protecting the information. The Court also acknowledged the weakness and the “volatility and competitiveness” of the electric industry and asserted that exposing a competitor’s business strategies and pricing points would likely have a negative impact on that electric provider’s viability.

The PUCO’s decision as to Phase II of the RSP Remand proceeding, the rider adjustment phase, is discussed in the sections below that relate to DE-Ohio’s individual riders.

B. Proceedings Related to Riders Established in DE-Ohio’s RSP

I. System Reliability Tracker

The SRT was established in DE-Ohio’s RSP to compensate DE-Ohio for the costs of purchasing power to provide reliable POLR service, including an adequate reserve margin. On December 3, 2004, DE-Ohio filed an application to modify the SRT in

¹¹⁵ *Id.* at 37.

¹¹⁶ *DE-Ohio RSP Remand Proceeding*, Entry on Rehearing (December 19, 2007).

¹¹⁷ *Office of the Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2008-0367.

¹¹⁸ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604.

accordance with the PUCO's Entry on Rehearing in the RSP proceeding.¹¹⁹ Unlike in the case of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP"), DE-Ohio's incremental charge for this POLR function was set based on actual costs incurred to provide this function. For CSP and OP (now combined due to a subsequent merger), the PUCO authorized the use of a hypothetical valuation model to develop a separate POLR charge (the model was the same model that fueled much of the speculation in home mortgages). On February 9, 2005, the PUCO approved the SRT charges for 2005 and reaffirmed its requirement that DE-Ohio file an application by September 1 of each year to establish the SRT for the following calendar year (hereinafter, "SRT Order").¹²⁰

On March 11, 2005, OCC filed an Application for Rehearing contesting the PUCO's SRT Order and argued that: (1) the SRT was a rate increase and, thus, a hearing was required prior to approval; (2) the SRT violated Section 4928.14(A), Revised Code, which requires an SSO to be market-based; and, (3) DE-Ohio failed to demonstrate that the SRT was necessary because it did not show that the costs of its POLR obligation increased since the MDP. The PUCO denied OCC's Application for Rehearing on April 6, 2005. The SRT charges for 2006 were established by a Stipulation that all parties either signed or did not oppose, which was approved by the PUCO on November 22, 2005.¹²¹

As a result of the RSP Remand proceeding, the PUCO allowed the SRT to expire in 2006 and initially did not authorize an SRT charge for 2007.¹²² However, a Stipulation and Recommendation ("Phase II Stipulation") approved by the PUCO addressed outstanding issues regarding DE-Ohio's rider adjustments, including the 2007 SRT. In particular, the Phase II Stipulation adopted many of the recommendations made by the m/p auditor that related to the SRT, allowed DE-Ohio to recover its 2007 planning reserve purchases by year's end (with quarterly reconciliation filings), and permitted DE-Ohio to recover capacity purchases made from former Duke Energy North America ("DENA") assets under certain conditions.¹²³ Regarding the DENA assets, the PUCO

¹¹⁹ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its System Reliability Tracker Component of its Market-Based Standard Service Offer*, PUCO Case No. 04-1820-EL-ATA, Application (December 3, 2004). DE-Ohio stated that its filing was not an acceptance of the PUCO's revision to DE-Ohio's alternative plan, but that it expected to proceed with implementing the plan, pursuant to the PUCO's Entry on Rehearing. *Id.* at 4.

¹²⁰ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its System Reliability Tracker Component of its Market-Based Standard Service Offer*, PUCO Case No. 04-1820-EL-ATA, Finding and Order at 4 (February 9, 2005).

¹²¹ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Adjust and Set its System Reliability Tracker Market Price*, PUCO Case No. 05-724-EL-UNC, Stipulation and Recommendation at 5-6 (October 27, 2005). The Stipulation provided, among other things, that: non-residential customers may avoid the SRT upon certain conditions but the SRT was unavoidable for residential customers; DE-Ohio must maintain a 15% planning reserve margin; the 2006 SRT would be adjusted and reconciled quarterly; and, SRT costs would be allocated among certain classes of customers.

¹²² *DE-Ohio RSP Remand Proceeding*, Entry at 5-6 (December 20, 2006).

¹²³ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Adjust and Set its System Reliability Tracker Market Price*, PUCO Case Nos. 05-724-EL-UNC, *et al.*, Opinion and Order at 11-12, 16-21 (November 20, 2007). The market pricing methodology for capacity from the DENA assets is:

highlighted its belief that the “market for capacity is not mature,” but approved the methodology for determining a market price for purchases from DENA assets in light of the different mechanisms available for setting a market price and the fact that DE-Ohio would likely be unable to obtain timely PUCO approval of a DENA purchase in an emergency circumstance.¹²⁴ OCC and OP&E filed Applications for Rehearing of the PUCO’s Order; the PUCO denied the Applications for Rehearing in their entirety.

On September 4, 2007, DE-Ohio filed its application for approval of the SRT charge for 2008.¹²⁵ The PUCO’s Attorney Examiner set a joint hearing to consider the 2008 SRT and AAC applications, as well as the PUCO’s review of DE-Ohio’s July 1, 2006 through June 30, 2007 FPP and SRT costs. A Stipulation (“SRT/FPP Cost Review Stipulation”) proposing to resolve contested issues regarding DE-Ohio’s 2008 SRT and FPP charges was filed at the PUCO on December 13, 2007.¹²⁶ With regard to the SRT, the SRT/FPP Cost Review Stipulation permitted DE-Ohio to implement the 2008 SRT as initially filed with the PUCO, allowing DE-Ohio to recover \$16.8 million in planning reserve capacity purchases as well as \$11.3 million related to prior years’ underrecovery of SRT Rider purchases. Also, the PUCO required DE-Ohio to continue making quarterly filings to reconcile the SRT. Initial and reply briefs were filed on January 8, 2008 and January 15, 2008, respectively, and the Commission adopted the SRT/FPP Cost Review Stipulation in its entirety on February 27, 2008.¹²⁷

In January 2009, the PUCO selected an auditor to undertake a review of DE-Ohio’s SRT and FPP for the July 1, 2007 through December 31, 2008 time period. An unopposed Stipulation resolving issues identified in the audit was submitted on August 28, 2009 and the PUCO approved the Stipulation on September 30, 2009. The Stipulation largely dealt with operational issues related to DE-Ohio’s generation assets, including DE-Ohio’s coal contracts, DE-Ohio’s coal supply management, and the development of better internal asset management policies.¹²⁸

(1) the midpoint of broker quotes received; or (2) the average price of third-party purchases transacted; or (3) an alternative agreed to by DE-Ohio and Staff.

¹²⁴ *Id.* at 20-21.

¹²⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish its 2008 System Reliability Tracker of its Market-Based Standard Service Offer*, PUCO Case No. 07-975-EL-UNC, Application (September 4, 2007). The PUCO, in connection with DE-Ohio’s annual SRT filings, also procured audits of DE-Ohio’s previous four quarters’ SRT and FPP charges in order to allow the PUCO to make the appropriate adjustments to the SRT and FPP charges. See *In the Matter of the Commission’s Review and Adjustment of the Fuel and Purchased Power and the System Reliability Tracker Components of Duke Energy Ohio, Inc., and Related Matters*, PUCO Case No. 07-723-EL-UNC, Entry (July 25, 2007).

¹²⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its 2008 System Reliability Tracker*, PUCO Case Nos. 07-975-EL-UNC, *et al.*, Stipulation and Recommendation (December 13, 2007).

¹²⁷ *In the Matter of the Commission’s Review and Adjustment of the Fuel and Purchased Power and the System Reliability Tracker Components of Duke Energy Ohio, Inc., and Related Matters*, PUCO Case Nos. 07-723-EL-UNC, *et al.*, Opinion and Order (February 27, 2008).

¹²⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for the Period of July 1, 2007, through December 31, 2008*, Opinion and Order (September 30, 2009).

In March 2008, OCC and OPAE filed appeals with the Ohio Supreme Court contesting the PUCO's approval of the Phase II Stipulation.¹²⁹ As noted above, on February 19, 2009, the Court found that issues related to RSP prices/charges were moot because there was no effective remedy to the problems cited by OCC and OPAE—the RSP had expired so there was no prospective relief the PUCO could provide and Court precedent does not permit retroactive refunds.¹³⁰

On November 18, 2009, the Commission instructed its Staff to issue an RFP for a consultant to audit DE-Ohio's SRT Rider and on January 7, 2010 the Commission chose the consultant to perform the auditing work of DE-Ohio's SRT and FPP Riders for calendar year 2009 rates.¹³¹ The audit was performed by Schumaker and Company and was filed with the Commission on May 14 2010.¹³² A Stipulation was reached by DE-Ohio, OCC, OPAE, and PUCO Staff and was filed with the PUCO on September 3, 2010.

The audit report recommended that DE-Ohio review its fuel procurement practices, specifically in the area of spot market purchases and coal inventory levels.¹³³ Additionally, the auditor recommended that DE-Ohio implement plans: to achieve its mandated alternative energy portfolio benchmarks for 2010 and beyond; to demonstrate the effectiveness of DE-Ohio's active management; and, for conducting physical coal inventories.¹³⁴ Finally, the audit report recommended that DE-Ohio implement financial procedures to verify rate information in its billing system and develop a manual governing the processes involved in filing Rider PTC-FPP and Rider SRA-SRT.¹³⁵

The Stipulation adopted all of the audit report recommendations and worked to credit Rider PTC-FPP in the amount of \$865,365, allocated evenly between residential and nonresidential customers. On September 22, 2010, the PUCO adopted the Stipulation without modification.¹³⁶

II. Fuel and Economy Purchased Power

The FPP Rider consisted of fuel and purchased power expenses, a reconciliation adjustment, a system loss adjustment, emission allowances, and environmental reagents. As required by DE-Ohio's RSP case, on a quarterly basis DE-Ohio filed the

¹²⁹ *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, Court Case No. 2008-0466.

¹³⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604.

¹³¹ *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for 2009*, PUCO Case Nos. 09-974-EL-FAC, et al., Entry (January 7, 2010) (hereinafter, "DE-Ohio FPP Proceeding").

¹³² *DE-Ohio FPP Proceeding*, Audit Report (May 14, 2010).

¹³³ *DE-Ohio FPP Proceeding*, Opinion and Order at 3-4 (September 22, 2010).

¹³⁴ *Id.* at 3-7.

¹³⁵ *Id.* at 8.

¹³⁶ *See Id.* at 11.

proposed FPP rate for the following quarter. Additionally, a backward-looking audit was conducted annually to verify the reasonableness of the FPP.

As required by its approved RSP, DE-Ohio filed a renewed application for recovery of FPP costs on June 1, 2005.¹³⁷ After an audit conducted by EVA of the FPP costs incurred from January 1, 2005 through June 30, 2005, DE-Ohio and Staff filed a Stipulation (“FPP Stipulation”) on January 18, 2006 resolving the issues identified by EVA and the parties to this case. The FPP Stipulation delineated how DE-Ohio must report its coal contracts going forward; directed DE-Ohio to develop a methodology for allocating fuel costs or fuel contracts to an affiliate following the transfer of its generating units; provided that DE-Ohio shall not allocate any part of its December 31, 2004 sulfur dioxide (“SO₂”) emission allowance (“EA”) bank to FPP customers; and made certain allocations for Environmental Protection Agency (“EPA”)-allotted zero-cost SO₂ EAs.¹³⁸ On February 6, 2006, the PUCO issued an Opinion and Order approving the Stipulation in its entirety.¹³⁹

DE-Ohio filed its application for approval of the 2006 FPP component of its SSO on September 1, 2006, pursuant to the RSP Entry on Rehearing.¹⁴⁰ EVA and Larkin & Associates (“Larkin”) filed their m/p audit of the fuel procurement activities recovered by the FPP Rider (for the previous four quarters, from July 1, 2005 through June 30, 2006) on October 12, 2006. EVA and Larkin recommended, among other things, that DE-Ohio cease its “active management” of its fuel procurement and adopt traditional utility procurement strategies, and also suggested that DE-Ohio should not be permitted to purchase reserve capacity from its DENA assets. This FPP approval proceeding was put on hold by the November 29, 2006 Attorney Examiner Entry addressing the Ohio Supreme Court’s remand of the RSP to the PUCO. A subsequent PUCO Entry addressing the RSP remand allowed DE-Ohio to continue adjusting the FPP quarterly in 2007, but did not address or approve the July 1, 2005 through June 30, 2006 FPP charges.

The PUCO, in approving the Phase II Stipulation, resolved outstanding issues regarding the FPP. The Phase II Stipulation: provided customers an FPP credit, as a result of the settlement of coal contracts; moved the recovery of congestion costs to DE-Ohio’s FPP; and allowed DE-Ohio to continue its active management of its coal, EA, and purchased

¹³⁷ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer*, PUCO Case Nos. 05-806-EL-UNC, et al., Application at 3-4 (June 1, 2005).

¹³⁸ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer*, PUCO Case No. 05-806-EL-UNC, Stipulation and Recommendation (January 18, 2006).

¹³⁹ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer*, PUCO Case No. 05-806-EL-UNC, Opinion and Order (February 6, 2006).

¹⁴⁰ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer*, PUCO Case Nos. 05-725-EL-UNC, et al., Application (September 1, 2006).

power portfolio.¹⁴¹ The PUCO also gave its blessing to a Phase II Stipulation provision requiring DE-Ohio to commence talks to discuss the terms and conditions under which DE-Ohio could actively manage its coal, EA, and purchased power portfolio, including addressing the m/p auditor's recommendation that DE-Ohio procure fuel and EAs beyond the end of the RSP period (December 31, 2008).

On September 4, 2007, DE-Ohio filed its application for approval of the FPP charge for 2008.¹⁴² As discussed in the SRT section, a Stipulation was filed proposing to resolve issues related to DE-Ohio's SRT and FPP for the July 1, 2006 through June 30, 2007 time period.¹⁴³ The SRT/FPP Cost Review Stipulation required DE-Ohio to take certain steps with regard to its fuel procurement active management program, temporarily foreclosed the possibility of a disallowance of costs due to an outage at DE-Ohio's Zimmer plant, and required DE-Ohio to make certain changes with regard to the operations of its coal plants. Finally, the SRT/FPP Cost Review Stipulation committed DE-Ohio to make a true-up filing in the first quarter of 2009 for the SRT and FPP Riders as well as for AAC Rider reagent costs. As noted above, Initial and Reply Briefs were filed on January 8, 2008 and January 15, 2008, respectively, and the Commission adopted the Stipulation in its entirety on February 27, 2008.

As also noted above, OCC and OPAE filed appeals with the Ohio Supreme Court contesting the PUCO's approval of the Phase II Stipulation in March 2008.¹⁴⁴ Briefing of this case proceeded through the summer of 2008 and oral arguments were held on November 18, 2008. Again, as discussed above, on February 19, 2009, the Court affirmed the PUCO's decision and found that issues related to RSP prices/charges were moot because there was no effective remedy to the problems cited by OCC and OPAE.

III. Annually Adjusted Component

The AAC was created in DE-Ohio's RSP to compensate DE-Ohio for actual expenses related to increases in the cost of environmental compliance, security, and taxes above December 31, 2000 levels. The initial AAC Rider for calendar years 2005 and 2006 was set by the PUCO in its RSP Entry on Rehearing. DE-Ohio filed its first update to its

¹⁴¹ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Adjust and Set its System Reliability Tracker Market Price*, PUCO Case Nos. 05-724-EL-UNC, *et al.*, Opinion and Order at 13-16 (November 20, 2007).

¹⁴² *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish its Fuel, Economy Purchased Power Component of its Market-Based Standard Service Offer for the Period of July 1, 2007 through December 31, 2008*, Case No. 07-974-EL-UNC, Application (September 4, 2007).

¹⁴³ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its 2008 System Reliability Tracker*, PUCO Case Nos. 07-975-EL-UNC, *et al.*, Stipulation and Recommendation (December 13, 2007). As noted above, the PUCO also approved a Stipulation regarding the FPP Rider for the July 1, 2007 through December 31, 2008 period. See *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for the Period of July 1, 2007, through December 31, 2008*, Opinion and Order (September 30, 2009).

¹⁴⁴ *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, Court Case No. 2008-0466.

AAC Rider on September 5, 2006 in order to set AAC levels for 2007 bills.¹⁴⁵ A hearing on the update was continued indefinitely as a result of the RSP Remand proceeding and the AAC charge was continued into 2007 at 2006 levels.¹⁴⁶ However, pursuant to the Phase II Stipulation, the PUCO permitted DE-Ohio to: adjust its AAC to collect \$74 million;¹⁴⁷ collect an AAC true-up to January 1, 2007; and recoup construction work in progress (“CWIP”) costs through the AAC.¹⁴⁸

On September 4, 2007, DE-Ohio filed its application for approval of its 2008 AAC Rider.¹⁴⁹ A hearing on the 2008 AAC application was held on December 13-14, 2007 and Briefs were filed on December 21, 2007. On January 16, 2008, the PUCO approved DE-Ohio’s Application, permitting DE-Ohio to collect 2008 AAC charges of approximately \$111 million.¹⁵⁰

On August 28, 2008, DE-Ohio filed an application to modify its AAC, effective December 1, 2008, and the PUCO approved DE-Ohio’s application on November 25, 2008.¹⁵¹ The PUCO also reserved the right to reconsider its AAC approval if it made a material modification to the Stipulation filed in DE-Ohio’s ESP that resulted in provisions related to the AAC being ineffective.¹⁵²

DE-Ohio filed an application to update its AAC on September 1, 2009 and an unopposed Stipulation was filed on November 19, 2009. The Commission approved the stipulated AAC adjustment on December 16, 2009, which included a \$156.7 million revenue requirement for Rider AAC.¹⁵³

¹⁴⁵ *In the Matter of The Application of Duke Energy Ohio, Inc. to Adjust and Set the Annually Adjusted Component of its Market Based Standard Service Offer (“MBSSO”),* PUCO Case No. 06-1085-EL-UNC, Application (September 5, 2006).

¹⁴⁶ *DE-Ohio RSP Remand Proceeding*, Entry at 4-5 (December 20, 2006).

¹⁴⁷ *DE-Ohio RSP Remand Proceeding*, Phase II Stipulation at Attachment 2 (page 1 of 8) (April 4, 2007).

¹⁴⁸ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Adjust and Set its System Reliability Tracker Market Price*, PUCO Case Nos. 05-724-EL-UNC, *et al.*, Opinion and Order at 11, 21-24 (November 20, 2007).

¹⁴⁹ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the 2008 Annually Adjusted Component of its Market-Based Standard Service Offer*, PUCO Case No. 07-973-EL-UNC, Application (September 4, 2007).

¹⁵⁰ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the 2008 Annually Adjusted Component of its Market-Based Standard Service Offer*, PUCO Case No. 07-973-EL-UNC, Opinion and Order (January 16, 2008). The PUCO re-emphasized that the stage of completion of CWIP should not be a bar to DE-Ohio earning a return on CWIP, and also denied OCC’s request that the PUCO require an m/p audit of DE-Ohio’s AAC Rider.

¹⁵¹ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer*, PUCO Case No. 08-1025-EL-UNC, Finding and Order (November 25, 2008).

¹⁵² *Id.* at 4.

¹⁵³ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer*, PUCO Case No. 09-770-EL-RDR, Finding and Order (December 16, 2009).

IV. RSP Extension

On August 2, 2006, DE-Ohio filed a proposal to modify its market-based standard service offer (“MBSSO”), beginning January 1, 2009, and continuing for an indefinite time.¹⁵⁴ DE-Ohio withdrew its application on November 30, 2007, citing the likely effect of then-pending energy restructuring legislation on Ohio law as the reason for its withdrawal.¹⁵⁵

V. Transmission Cost Recovery Rider

At the same time that DE-Ohio was establishing and implementing the various riders approved in its RSP, it also filed an application to levy a TCRR (which was also created and approved in the RSP proceeding) to recover costs associated with transmission service provided by MISO.¹⁵⁶ The PUCO approved most aspects of the application as submitted. However, the PUCO rejected DE-Ohio’s proposal to recover “other incremental costs” (i.e., internal costs) that were not specifically addressed in DE-Ohio’s RSP.¹⁵⁷ Additionally, the PUCO mandated that FERC-ordered reductions in DE-Ohio’s transmission rate should flow back through the TCRR and required semi-annual filings to modify and true-up the TCRR.

In accordance with the PUCO’s Finding and Order approving the TCRR, DE-Ohio submitted proposed TCRR rates in May 2006 for billing cycles beginning June 2006. On June 14, 2006, the PUCO suspended the TCRR update and ordered DE-Ohio’s then-current TCRR rates to remain in effect (subject to true-up) until Staff completed its review of costs included in the TCRR.¹⁵⁸ DE-Ohio submitted its semi-annual amendment to its TCRR (for rates effective on December 1, 2006) on October 15, 2006 and subsequently modified the filing on November 3, 2006. Staff filed its report on DE-Ohio’s TCRR on November 16, 2006, finding that the costs included in the proposed rider for December 2006 through May 2007 were appropriately included and also proposed that, on a biennial basis, DE-Ohio should provide a detailed report of each of the costs Staff identified as within DE-Ohio’s control and a description of all actions taken by DE-Ohio to minimize these costs. Staff also recommended that it should be authorized to audit the costs included in the TCRR to determine if DE-Ohio had minimized controllable costs.¹⁵⁹ On November 28, 2006, the PUCO accepted DE-Ohio’s proposed TCRR for December 2006 through May 2007 and also adopted Staff’s

¹⁵⁴ *In the Matter of the Application of Duke Energy Ohio to Modify its Market-Based Standard Service Offer*, PUCO Case No. 06-986-EL-UNC, Application (August 2, 2006).

¹⁵⁵ *In the Matter of the Application of Duke Energy Ohio to Modify its Market-Based Standard Service Offer*, PUCO Case No. 06-986-EL-UNC, Notice of Withdrawal (November 30, 2007).

¹⁵⁶ *In the Matter of the Transmission Rates Contained in the Rate Schedules of The Cincinnati Gas & Electric Company and Related Matters*, PUCO Case Nos. 05-727-EL-UNC, *et al.*, Application at 2 (June 3, 2005) (hereinafter, “*DE-Ohio TCRR Proceeding*”).

¹⁵⁷ *DE-Ohio TCRR Proceeding*, Finding and Order at 7 (October 5, 2005).

¹⁵⁸ *DE-Ohio TCRR Proceeding*, Entry at 3 (June 14, 2006).

¹⁵⁹ *DE-Ohio TCRR Proceeding*, Staff Report at 1-2 (November 16, 2006).

recommendation regarding the biennial review of DE-Ohio's TCRR.¹⁶⁰ A subsequent Staff review concluded that DE-Ohio properly included and calculated the controllable RTO-related costs/credits in its TCR Rider rates.¹⁶¹ Pursuant to its RSP, DE-Ohio's TCRR rates since May 2007 have been adjusted semi-annually. Finally, in May 2008, the PUCO adopted suggestions contained within Staff's biennial review of controllable costs in DE-Ohio's TCRR. These suggestions included requiring DE-Ohio to: (1) continue to monitor and report on its load deviations between day-ahead and real-time; (2) collect data on all events that result in generation deviations and an allocation of revenue sufficiency guarantee costs; and, (3) collect data on all events that result in generation deviations and allocation of uninstructed deviation charges.¹⁶²

On July 17, 2009 (as updated on July 31, 2009), DE-Ohio filed an application to adjust its TCRR and for a waiver of the Commission's rules in order to recover MISO costs for net congestion and losses, including net revenue received from financial transmission rights and auction revenue rights, through DE-Ohio's FPP Rider instead of through its TCRR.¹⁶³ After Staff filed a report recommending approval of DE-Ohio's proposal to reduce its TCRR by approximately \$24.4 million, the Commission approved the TCRR update as well as DE-Ohio's waiver request on September 23, 2009.¹⁶⁴

C. Distribution Rate Increases

DE-Ohio filed an application to increase its distribution rates and to change its accounting procedures on February 17, 2005.¹⁶⁵ On December 6, 2005, an unopposed Stipulation and Recommendation ("Distribution Rate Case Stipulation") was filed that was subsequently adopted by the PUCO in its entirety on December 21, 2005.¹⁶⁶ Among other things, the adopted Distribution Rate Case Stipulation authorized DE-Ohio to increase distribution rates by \$51.5 million (which resulted in an average 4.4% increase in most residential customers' bills). DE-Ohio was also required to: (1) withdraw its request for a capital investment reliability rider and refrain from making a capital investment reliability rider request until 2007; (2) withdraw its proposed modification to its line extension policy; continue to fund its weatherization and energy

¹⁶⁰ *DE-Ohio TCRR Proceeding*, Entry (November 28, 2006).

¹⁶¹ *DE-Ohio TCRR Proceeding*, Staff's Biennial Review of Controllable RTO Costs for Duke Energy-Ohio (November 27, 2007).

¹⁶² *DE-Ohio TCRR Proceeding*, Entry at 3 (May 28, 2008).

¹⁶³ *In the Matter of the Application of Duke Energy Ohio, Inc. to Update its Transmission Cost Recovery Rider*, PUCO Case No. 09-601-EL-UNC, Application (July 17, 2009).

¹⁶⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. to Update its Transmission Cost Recovery Rider*, PUCO Case No. 09-601-EL-UNC, Finding and Order (September 23, 2009).

¹⁶⁵ *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, PUCO Case Nos. 05-59-EL-AIR, *et al.*, Application (February 17, 2005).

¹⁶⁶ *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, PUCO Case Nos. 05-59-EL-AIR, *et al.*, Opinion and Order at 7 (December 21, 2005).

assistance programs until 2009; and, (3) implement a non-residential demand-side management (“DSM”) tracker.¹⁶⁷

In June 2008, DE-Ohio filed another application with the PUCO to increase its distribution rates.¹⁶⁸ On July 8, 2009, the Commission approved an unopposed Stipulation which permitted DE-Ohio to increase its distribution revenues by \$55.3 million annually.¹⁶⁹ The PUCO-approved Stipulation also set new depreciation rates for DE-Ohio, established pole attachment rates, initiated a mechanism by which DE-Ohio could recoup storm damage costs related to Hurricane Ike,¹⁷⁰ and resolved issues related to DE-Ohio’s rider governing back-up delivery point capacity.¹⁷¹

On July 9, 2012, DE-Ohio filed an application to increase its distribution rates.¹⁷² DE-Ohio’s application sought an \$86.1 million increase in annual revenues, which DE-Ohio claims is roughly a 5.1% increase over current rates.¹⁷³ DE-Ohio also sought to establish a Facilities Relocation and Transportation Tariff (“Rider FRT”). The proposed Rider FRT, if approved, will allow DE-Ohio to recover the cost of relocations associated with mass transportation projects initiated by governmental subdivisions. DE-Ohio also requested authority to defer storm expenses relative to a baseline established in the case. DE-Ohio then requested authorization to amortize the deferral balance (positive or negative) as part of DE-Ohio’s next distribution rate case.

On January 4, 2013, the Staff filed its Staff Report of Investigation. Staff noted that DE-Ohio’s application would increase its distribution revenue by 24%.¹⁷⁴ Notably, the Staff Report recommended several revisions to DE-Ohio’s application. First, The Staff Report noted that DE-Ohio had requested \$46 million in working capital but had failed to prepare a lead-lag study and therefore Staff recommended that the PUCO disallow the \$46 million in working capital. The Staff Report also excluded \$75,000 in rate case expense associated with *DE-Ohio’s 2008 Distribution Rate Increase Proceeding*. The

¹⁶⁷ *Id.* at 4-8. In 2007, the PUCO also approved a DE-Ohio application to implement electric and natural gas DSM programs for residential, commercial, and industrial customers as well as a research DSM program. *In the Matter of the Application for Recovery of Costs, Lost Margin, and Performance Incentive Associated with the Implementation of Electric Residential Demand Side Management Programs by The Cincinnati Gas & Electric Company*, PUCO Case Nos. 06-91-EL-UNC, *et al.*, Finding and Order (July 11, 2007).

¹⁶⁸ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case Nos. 08-709-EL-AIR, *et al.*, Application (June 25, 2008) (hereinafter, “*DE-Ohio 2008 Distribution Rate Increase Proceeding*”).

¹⁶⁹ *DE-Ohio 2008 Distribution Rate Increase Proceeding*, Opinion and Order at 8 (July 8, 2009).

¹⁷⁰ During the rate case, DE-Ohio filed a motion for accounting authority to create a regulatory asset for storm restoration costs related to Hurricane Ike. The accounting authority requested by DE-Ohio was approved by the PUCO on January 14, 2009.

¹⁷¹ *Id.* at 9-10.

¹⁷² *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, PUCO Case Nos. 12-1682-EL-AIR, *et al.* Application (July 9, 2012) (hereinafter “*DE-Ohio 2012 Distribution Rate Increase Proceeding*”).

¹⁷³ *Id.* at 3.

¹⁷⁴ *DE-Ohio 2012 Distribution Rate Increase Proceeding*, Staff Report at 2 (January 4, 2013).

Staff Report also adjusted DE-Ohio's budgeted expense for the test year after determining that "the adjustment was necessary due to the significant variance with the account actuals in both the test year and in prior years."¹⁷⁵ The Staff Report also recommended a rate of return in the range of 7.19% to 7.73%; DE-Ohio requested a rate of return of 8.13%.¹⁷⁶ The Staff Report also opposed Rider FRT, claiming that it was not well-defined and too open-ended.¹⁷⁷ In total, the Staff Report recommended a rate increase of between \$37 million and \$46 million based upon the range of its recommended rate of return listed above.

D. Electric Security Plan

On July 31, 2008 (the date that SB 221 became effective), DE-Ohio filed its initial ESP application¹⁷⁸ and on October 27, 2008 a Stipulation was filed resolving most of the issues in the case.¹⁷⁹ Although the Stipulation resolved most issues, it left open for litigation the issue of bypassability of charges and shopping credits for residential governmental aggregation customers.¹⁸⁰ Additionally, IEU-Ohio opposed the Stipulation on the grounds that it contained illegal restrictions on the opportunity for mercantile customers to seek and obtain an exemption (permitted by SB 221) from DE-Ohio charges associated with meeting the EE/PDR requirements contained within SB 221.

On December 17, 2008, the PUCO modified and approved the Stipulation.¹⁸¹ Under the terms of the modified Stipulation, base generation rates increased approximately 2% in 2009, and a similar level of increase was set in place for establishing the 2010 and 2011 default service prices for non-residential customers. Similar increases applied to residential customers in 2009 and 2010 (but not 2011). Additionally, the PUCO approved numerous riders that were subject to periodic adjustments, up or down, to recover additional generation,¹⁸² transmission, ancillary service and distribution-related costs. Because DE-Ohio also had a distribution rate case pending before the PUCO, DE-Ohio's distribution rates were not recognized or addressed in the Stipulation.¹⁸³

¹⁷⁵ *Id.* at 13.

¹⁷⁶ *Id.* at 16.

¹⁷⁷ *Id.* at 21.

¹⁷⁸ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO, *et al.*, Application (July 31, 2008) (hereinafter, "*DE-Ohio ESP Proceeding*").

¹⁷⁹ *DE-Ohio ESP Proceeding*, Stipulation and Recommendation (October 27, 2008).

¹⁸⁰ *DE-Ohio ESP Proceeding*, Stipulation and Recommendation at 32, FN 11 (October 27, 2008).

¹⁸¹ *DE-Ohio ESP Proceeding*, Opinion and Order (December 17, 2008).

¹⁸² Many of the generation-related riders were the same as or recovered similar costs as the riders contained within DE-Ohio's RSP.

¹⁸³ On December 15, 2008, DE-Ohio filed a letter indicating that implementation of the Stipulation would effectuate a total bill rate decrease of approximately 3.8% for residential customers, 4.4% for commercial customers, and 5.0% for industrial customers. The decrease was the result of an adjustment (reduction) in DE-Ohio's rider to recover its fuel and purchased power costs.

The PUCO modified the Stipulation to allow residential customers participating in a governmental aggregation program to avoid paying DE-Ohio's SRT Rider, which was otherwise non-bypassable, if they elected to participate in a governmental aggregation program, but upon such election those customers that returned during the term of the ESP to DE-Ohio's SSO were charged a "market-based" price for default generation supply instead of ESP-stabilized rates.¹⁸⁴ Additionally, the PUCO accepted IEU-Ohio's primary argument that the provision of the Stipulation preventing any "mercantile customer"¹⁸⁵ with demand of 3 megawatts ("MW") or less from seeking or obtaining an exemption from the rider recovering EE/PDR benchmark compliance costs¹⁸⁶ was illegal and modified the Stipulation accordingly.¹⁸⁷

OCC and the Ohio Chapter of the Sierra Club jointly filed an Application for Rehearing while the Ohio Environmental Council ("OEC") also filed an Application for Rehearing. The PUCO denied the Applications for Rehearing on February 11, 2009. OCC appealed the Commission's decision on April 13, 2009, contesting the Commission's refusal to permit customers in residential aggregation programs who commit to returning at a market price (instead of the SSO price) to also avoid paying DE-Ohio's capacity dedication rider ("SRA-CD").¹⁸⁸ On January 20, 2010, after the case had been fully briefed, the Ohio Supreme Court, citing Section 4928.20(J), Revised Code, asked the parties in the appeal to file memoranda addressing three questions: (1) were there any legislative authorities that formed or were forming governmental aggregation that were providing electric aggregation service in DE-Ohio's geographic service area?; (2) if the answer to question one is yes, had any such legislative authority elected not to receive standby service?; and (3) should this cause be dismissed for failure to present a justifiable cause or controversy?¹⁸⁹ Several parties filed Briefs addressing these issues

¹⁸⁴ *DE-Ohio ESP Proceeding*, Opinion and Order at 26-28 (December 17, 2008). Rider SRT compensates DE-Ohio for the purchase of capacity to maintain service to switched customers.

¹⁸⁵ A "mercantile customer" is any non-residential customer that "consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states." Section 4928.01(A)(19), Revised Code.

¹⁸⁶ DE-Ohio's program to meet the EE/PDR mandates is called Save-a-Watt. On December 29, 2009, DE-Ohio filed an application essentially re-filing an updated Save-a-Watt program as its required three-year EE/PDR program portfolio plan under Rule 4901:1-39-04, O.A.C. *In the Matter of the Report of Duke Energy Ohio, Inc., Concerning its Energy Efficiency and Peak Demand Reduction Programs and Portfolio Planning*, PUCO Case No. 09-1999-EL-POR, Report (December 29, 2009) (hereinafter, "*DE-Ohio EE/PDR Proceeding*").

¹⁸⁷ *DE-Ohio ESP Proceeding*, Opinion and Order at 36-37 (December 17, 2008).

¹⁸⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-0669, Notice of Appeal (April 13, 2009). Rider SRA-CD compensated DE-Ohio for providing customers with a first call on its capacity, foregoing the opportunity to sell capacity that was currently dedicated to its SSO, permitting customers to switch to competitive suppliers, and assuming the risk associated with maintaining a reasonably stable price during the ESP period. *DE-Ohio ESP Proceeding*, Opinion and Order at 27 (December 17, 2008).

¹⁸⁹ The questions that the Court asked the parties to address suggested that the Court was concerned that the parties that filed this appeal were asking the Court to rule on abstract or hypothetical questions. Generally, courts will not use their authority to resolve contested cases until and unless there is a real controversy.

and on May 26, 2010, the Ohio Supreme Court dismissed the appeal *sua sponte* for failing to present a justifiable case or controversy.¹⁹⁰

E. Proceedings Related to Riders Established in DE-Ohio's ESP

I. Annually Adjusted Component

On April 16, 2010, DE-Ohio filed an application to true-up and adjust Rider PTC-AAC, a component of its SSO. This rider was designed to collect costs of environmental compliance, and expenditures related to homeland security and taxes, and was originally established as part of DE-Ohio's initial ESP. The application was the result of a Stipulation that was reached and approved in December of 2009 that moved DE-Ohio's budgeted costs incurred as a result of environmental reagents from Rider PTC-AAC to Rider PTC-FPP.¹⁹¹ The Stipulation further required DE-Ohio to true-up projected versus actual environmental reagent expenses and any difference would be reconciled during the period of April through December of 2010.

DE-Ohio's April 16 application indicated that the total 2009 estimated environmental reagent expense approved in the DE-Ohio 2008 AAC Case was \$20,212,000, and the actual environmental reagent expense for 2009 was \$19,553,221, resulting in a refund to customers of \$658,789.¹⁹²

II. Fuel and Economy Purchased Power

On October 24, 2007, the PUCO ordered DE-Ohio (then CG&E) to establish an FPP component of its SSO.¹⁹³ This rider was carried over from DE-Ohio's RSP to its initial ESP.¹⁹⁴ The FPP consists of fuel and purchased power expenses, a reconciliation adjustment, a system loss adjustment, and emission allowances. The PTC-FPP was subject to audit by the PUCO and on January 7, 2010, the PUCO selected Schumaker and Company to conduct an audit for the calendar year 2009.¹⁹⁵ On May 14, 2010, Schumaker and Company issued its m/p and financial audit of the PTC-FPP.¹⁹⁶ As a result of the audit and a subsequent Stipulation, a credit of \$865,365 was credited

¹⁹⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-0669, Judgment Entry (May 26, 2010).

¹⁹¹ *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer*, Case No. 09-770-EL-RDR (hereinafter, "DE-Ohio 2009 AAC Proceeding")

¹⁹² *In the Matter of the Application of Duke Energy Ohio to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer*, PUCO Case No.10-518-EL-RDR, Application (April 16, 2010).

¹⁹³ DE-Ohio 2009 AAC Proceeding, Opinion and Order (December 16, 2009).

¹⁹⁴ The FPP Rider under the RSP is explained in Section B.II. above. The FPP under the ESP is detailed in this Section.

¹⁹⁵ DE-Ohio FPP Proceeding, Entry (January 7, 2010).

¹⁹⁶ DE-Ohio FPP Proceeding, Audit Report (May 14, 2010).

against the costs included for recovery in Rider PTC-FPP.¹⁹⁷ The credit was allocated evenly between residential and nonresidential customers. The audit report also recommended DE-Ohio establish an accounting and procedures manual governing the process involved in filing Rider PTC-FPP.¹⁹⁸ The parties in the case subsequently stipulated to the creation of the manual and it was approved in the PUCO's September 22, 2010 Opinion and Order.¹⁹⁹

III. System Reliability Tracker

Carried over from DE-Ohio's RSP, this rider permitted DE-Ohio to apply annually to the PUCO to purchase power to cover peak and reserve capacity requirements and to flow through those actual costs on a dollar-for-dollar basis.²⁰⁰ On January 7, 2010, the Commission selected Schumaker and Company to conduct an audit of the SRA-SRT Rider.²⁰¹ An audit of this rider was conducted by Schumaker and Company simultaneously with the PTC-FPP Rider. As was the case with the PTC-FPP Rider, the audit report recommended that DE-Ohio develop an accounting and procedures manual governing the process involved in filing the SRA-SRT Rider.²⁰² The audit report recommendations were agreed to and approved in the PUCO's September 22 Opinion and Order.²⁰³

IV. Transmission Cost Recovery Rider

On June 15, 2010, DE-Ohio filed an application to update its TCRR.²⁰⁴ OCC objected to the application, commenting that DE-Ohio's application did not provide enough information to determine whether DE-Ohio was making sufficient efforts to reduce any of the costs of its TCRR over which it had control.²⁰⁵ Addressing OCC's comments, DE-Ohio revised its application and supplemented it with the information contained in its revised application. Staff recommended that DE-Ohio's application, as revised and supplemented, be approved with an effective date of September 30, 2010.²⁰⁶ On September 29, 2010, the Commission adopted Staff's recommendations and approved DE-Ohio's application as revised and supplemented.²⁰⁷

¹⁹⁷ *DE-Ohio FPP Proceeding*, Opinion and Order (September 22, 2010).

¹⁹⁸ *DE-Ohio FPP Proceeding*, Audit Report at 8 (May 14, 2010).

¹⁹⁹ *DE-Ohio FPP Proceeding*, Opinion and Order (September 22, 2010).

²⁰⁰ *DE-Ohio FPP Proceeding*, Opinion and Order (September 22, 2010).

²⁰¹ *DE-Ohio FPP Proceeding*, Entry (January 7, 2010).

²⁰² *DE-Ohio FPP Proceeding*, Audit Report at 8 (May 14, 2010).

²⁰³ *DE-Ohio FPP Proceeding*, Opinion and Order (September 22, 2010).

²⁰⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. to Update its Transmission Cost Recovery Rider*, PUCO Case No. 10-981-EL-RDR, Application (July 16, 2010) (hereinafter, "*DE-Ohio TCRR Proceeding*").

²⁰⁵ *DE-Ohio TCRR Proceeding*, Comments of OCC (August 25, 2010).

²⁰⁶ *DE-Ohio TCRR Proceeding*, Staff's Review and Recommendation (September 20, 2010).

²⁰⁷ *DE-Ohio TCRR Proceeding*, Finding and Order (September 29, 2010).

F. Energy Efficiency and Peak Demand Reduction

SB 221 requires, among other things, that beginning in 2009, each EDU must “implement energy efficiency programs”. In addition, SB 221 created a baseline from which to measure energy efficiency as well as yearly benchmarks for the EDUs to meet.²⁰⁸ The Commission, pursuant to Section 4928.66, Revised Code, promulgated rules, which among other things required each EDU to file its initial EE/PDR portfolio plan prior to January 1, 2010.²⁰⁹ On December 29, 2009, DE-Ohio filed its portfolio plan.²¹⁰ Though DE-Ohio had already established a comprehensive EE/PDR portfolio plan in its ESP, which the Commission had approved on December 17, 2008, it believed that the report needed to be filed to comply with the Commission rules.²¹¹

A hearing was held in this case on June 3, 2010.²¹² As Staff noted in its Post-Hearing Brief, the only legitimate issue in the case was related to a program added by DE-Ohio after the Commission approved its initial ESP, and its comprehensive EE/PDR portfolio plan approved therein.²¹³ No parties in this case objected to this program, termed the “Home Energy Comparison Report,”²¹⁴ which Staff recommended be approved.²¹⁵ However, several parties objected to other portions of DE-Ohio’s EE/PDR portfolio plan.

Staff identified two main issues of concern of the objecting parties: cost recovery and the structure of DE-Ohio’s EE/PDR programs.²¹⁶ Staff readily dismissed the latter objection, stating that the proper place to have objected to the structure of DE-Ohio’s EE/PDR plans would have been in DE-Ohio’s initial ESP case.²¹⁷ Staff also claimed that the first objection was without merit since DE-Ohio had not sought cost recovery in this case.²¹⁸ However, Staff did note that OCC raised a legitimate concern regarding cost recovery that would need to be addressed in the future once cost recovery was sought.²¹⁹ That concern was that the EE/PDR programs approved in DE-Ohio’s initial ESP allowed for recovery of lost generation revenue; however, subsequent rules promulgated by the Commission did not contemplate this type of recovery.

²⁰⁸ Section 4928.66, Revised Code.

²⁰⁹ Rule 4901:1-39-04, O.A.C.

²¹⁰ *DE-Ohio EE/PDR Proceeding*, Report (December 29, 2009).

²¹¹ *DE-Ohio ESP Proceeding*, Opinion and Order (December 17, 2008).

²¹² Rule 4901:1-39-04(E), O.A.C.

²¹³ *DE-Ohio EE/PDR Proceeding*, PUCO Staff Post-Hearing Brief at 2 (July 9, 2010).

²¹⁴ *See Id.* at 2.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 3.

²¹⁸ *Id.* Staff believed the issue of cost recovery should be addressed in a future proceeding, if and when DE-Ohio sought cost recovery for its EE/PDR programs.

²¹⁹ *Id.*

On December 15, 2010, the PUCO issued its decision on DE-Ohio's portfolio plan.²²⁰ The Commission agreed with Staff that the Home Energy Comparison Report pilot program should be approved, however; the Commission also agreed with some of the objections regarding programs that had previously been approved in DE-Ohio's initial ESP proceeding. Specifically, the Commission rejected approval of DE-Ohio's Prepaid Billing Services Plan, mainly due to a lack of information. The Commission left open the possibility for DE-Ohio to file a new application seeking to implement the plan that contained additional information. The PUCO also reminded DE-Ohio that it would bear the burden of measuring, quantifying, and justifying any savings that it claimed as a result of its programs. Additionally, the PUCO indicated that if any mercantile customers participated in any of the applicable programs the Commission was approving, that participation would be "deemed a request by that mercantile customer to commit its demand reduction, demand response, or energy efficiency programs for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, pursuant to Rule 4901:1-39-05, O.A.C."²²¹

The Commission also rejected the recommendation of several parties to limit DE-Ohio's ability to reallocate funding between its projects. These parties suggested that DE-Ohio should seek Commission approval before it could reallocate 25% or more of a specific program's funding. In rejecting the recommendation, the Commission noted that it believed that DE-Ohio should be permitted a reasonable level of flexibility in order to allow DE-Ohio to optimize the various programs' results.²²²

In regard to recovery of lost generation revenue, the PUCO ordered DE-Ohio to remove the recovery of lost generation revenue, collected as part of DE-Ohio's lost margin revenue, from its distribution rider—Save-a-Watt ("DR-SAW") rider beginning on December 10, 2009, the effective date of Chapter 4901:1-39, O.A.C. The Commission found that DE-Ohio failed to comply with the Stipulation approved in DE-Ohio's initial ESP proceeding, which among other things, stated the DE-Ohio would comply with the Commission's rules set forth in PUCO Case Nos. 08-777-EL-ORD and 08-888-EL-ORD.²²³ The Commission also stated that it did not intend its Opinion and Order to bar DE-Ohio's recovery of a percentage of the shared savings of avoided generation costs should DE-Ohio meet or exceed its benchmarks.²²⁴ Finally, the PUCO directed DE-Ohio to file its next updated portfolio plan by April 15, 2013.

On July 20, 2011, DE-Ohio filed an application to replace Rider DR-SAW, which was set to expire on December 31, 2011, with Rider EE/PDR.²²⁵ Rider EE/PDR recovers the same costs that were being recovered through Rider DR-SAW, plus the costs of three

²²⁰ *DE-Ohio EE/PDR Proceeding*, Opinion and Order (December 15, 2010).

²²¹ *Id.* at 10.

²²² *Id.* at 12.

²²³ *Id.* at 13-15.

²²⁴ *Id.* at 15.

²²⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Application (July 20, 2011) (hereinafter "*DE-Ohio Interim EE/PDR Proceeding*").

new EE/PDR programs that DE-Ohio proposed in its July 20, 2011 application. On November 18, 2011, a Stipulation was submitted to the Commission by DE-Ohio, Staff, OCC, ELPC, NRDC, People Working Cooperatively (“PWC”), Vectren Retail, the Sierra Club, and OPAE; the Ohio Energy Group (“OEG”) opposed the stipulation.

The Stipulation recommended that DE-Ohio continue to recover the costs of its EE/PDR portfolio programs plus an incentive mechanism beneficial to DE-Ohio. The proposed incentive mechanism, referred to as a shared-savings mechanism, provided DE-Ohio with incentives for exceeding the statutory benchmarks based upon the following formula.

<u>Percent Achievement of Annual Target</u>	<u>After Tax Shared Savings</u>
<100	0.0%
>100-105	5.0%
>105-110	7.5%
>110-115	10.0%
>115	13.0% ²²⁶

The maximum benefit DE-Ohio could receive under the shared-savings incentive mechanism is roughly \$4.5 million. The shared-savings incentive works to add to the increases in customers’ electric bills that stem from Ohio’s portfolio mandates.

On August 15, 2012, the Commission approved the Stipulation without modification. The Commission noted that although its rules only contemplate the creation of a rider to collect costs associated with an EDU’s EE/PDR programs in the context of a proceeding to establish a three-year portfolio program or in the context of an ESP, it was granting DE-Ohio a one-time waiver to allow DE-Ohio to synchronize its rider that collects EE/PDR costs with the EE/PDR programs creating such costs. To this end, the Commission directed DE-Ohio to include in the EE/PDR portfolio program filing due by April 2013 an updated request for a cost recovery mechanism and directed DE-Ohio to ensure that the cost recovery mechanism would extend through the end of its next portfolio plan. The Commission, however, held that parties could not re-litigate issues covered by the Stipulation.

G. Advanced Energy Resource Mandate²²⁷ Compliance

On April 15, 2010, DE-Ohio filed an application that identified its baseline and renewable energy credit (“REC”) and SREC benchmarks and sought an adjustment of its baseline for 2009.²²⁸ DE-Ohio claimed the adjustment was necessary to appropriately reflect the dramatic increase in the level of shopping that occurred within the service territory of DE-Ohio during 2009.²²⁹ DE-Ohio claimed that four factors

²²⁶ *DE-Ohio Interim EE/PDR Proceeding*, Opinion and Order at 8 (Aug. 15, 2012).

²²⁷ Section 4928.64, Revised Code.

²²⁸ *In the Matter of the Report of the Duke Energy Ohio, Inc. Concerning Its Advanced and Renewable Energy Baseline and Benchmarks*, PUCO Case No. 10-511-EL-ACP, Application (April 15, 2010).

²²⁹ *Id.* at 2.

impacted its inability to meet its benchmark for 2009: (1) customer switching in its service territory; (2) a lack of availability of SRECs in Ohio; (3) regulatory uncertainty regarding the PUCO's rules for acquisition, registering and metering of RECs and SRECs; and (4) SB 221's failure to include specific mechanisms for utility cost recovery, which in turn impeded its ability to enter into long-term contracts and investments in renewable energy.²³⁰

In seeking the adjustment, DE-Ohio claimed its previous three-year rolling average of megawatt hour ("MWh") sales incorrectly reflected DE-Ohio's baseline.²³¹ DE-Ohio claimed that its three-year rolling average produced a baseline of 20,713,297 MWh sales; however, DE-Ohio's actual MWh sales for 2009 were 17,187,784.²³² DE-Ohio claimed that if its actual sales for 2009 were used as its baseline, it would satisfy SB 221's mandate of 0.25% of renewable and solar energy but it would still fail to meet SB 221's requirement that .004% of MWh sales be produced from solar energy.²³³

DE-Ohio claimed it could meet a substantial amount of the .004% benchmark if the PUCO allowed it to count certain in-state solar projects that DE-Ohio was part of but that failed to comply with the Commission rules for counting solar projects towards its benchmarks.²³⁴ Specifically, these projects did not utilize "utility-grade" meters when they went into service, a requirement under Commission rules,²³⁵ but had since been retrofitted with "utility-grade" meters.²³⁶ However, DE-Ohio indicated that these projects were undertaken before the PUCO had issued its rules requiring "utility-grade" metering and if the verified SRECs from these projects were counted DE-Ohio would be able to satisfy a significant portion of its adjusted benchmark as proposed in the application.²³⁷

DE-Ohio also indicated that even if these projects were counted, it would still be 80 SRECs short of its proposed adjusted benchmark. However, DE-Ohio claimed that it had utilized all in-state SRECs available.²³⁸ To meet the remaining shortfall, DE-Ohio requested that the PUCO allow DE-Ohio to count 80 Pennsylvania SRECs toward its in-state solar compliance, or in the alternative, a *force majeure* determination waiving DE-Ohio's shortfall of 80 SRECs.²³⁹

²³⁰ *Id.* at 3-4.

²³¹ *Id.* at 5.

²³² *Id.*

²³³ *Id.* at 8-9.

²³⁴ *Id.* SB 221 requires at least half of the renewable energy and solar energy be produced in Ohio, while the remaining 50% may be from sources outside Ohio.

²³⁵ *Id.* at 9. The utility-grade meters were installed in 2010; therefore, under PUCO rules these solar facilities did not generate SRECs during 2009. DE-Ohio had an independent third party verify the MWh of solar energy produced at these facilities and sought to apply these SRECs toward its 2009 benchmarks.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 9-10.

On January 13, 2012, a Stipulation was reached that recommended that the PUCO adopt DE-Ohio's unadjusted baseline for the compliance calculation. The stipulation also recommended the PUCO find DE-Ohio was short 93 SRECs for its 2009 compliance and roll this under-compliance into DE-Ohio's 2010 compliance requirement. On February 14, 2012, the PUCO adopted the Stipulation without modification.

H. Significantly Excessive Earnings Test

Pursuant to Section 4928.143(F), Revised Code, the PUCO must determine on an annual basis, whether the earnings of an EDU operating under an ESP are "significantly excessive." In response to this command, the PUCO promulgated Rule 4901:135-10, O.A.C., which requires that each electric utility make a filing by May 15 of each year demonstrating whether or not that electric utility's earnings are significantly excessive.²⁴⁰ As part of DE-Ohio's Stipulation in its initial ESP proceeding, DE-Ohio will be deemed to not have earned significantly excessive earnings if its actual annual return on ending common equity is below 15%.

I. 2009 Earnings Review Under the SEET

DE-Ohio made its first annual SEET filing on May 14, 2010,²⁴¹ and on October 19, 2010, a Stipulation was reached between DE-Ohio, Staff, OP&E, and OEG.²⁴² The Stipulation adopted DE-Ohio's calculation of earnings for 2009, which produced a 9.46% return of common equity (8.83% excluding expenses deferred pursuant to PUCO authorization).²⁴³ The Stipulation found that this rate of return was not significantly excessive and recommended that the Commission find the same.²⁴⁴ On November 22, 2010, the PUCO approved the Stipulation.

²⁴⁰ Rule 4901:1-35-10, O.A.C.

²⁴¹ *In the Matter of the Application of Duke Energy Ohio for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, PUCO Case No. 10-656-EL-UNC, Application (May 14, 2010) (hereinafter, "*DE-Ohio 2009 SEET Proceeding*").

²⁴² *DE-Ohio 2009 SEET Proceeding*, Stipulation (October 19, 2010).

²⁴³ *Id.* at 2. In the past, the PUCO limited the ability of utilities to defer expenses to those situations where not permitting the deferral would have caused some financial distress for the utility. In recent times, this discipline has been missing and utilities have accumulated significant amounts of deferred expenses ("regulatory assets") on their books. The earned return calculations with and without the deferred expenses provide a measure of the financial effects of the deferred expenses.

²⁴⁴ *Id.* Of note, the PUCO approved a Stipulation in DE-Ohio's ESP Proceeding that stated that DE-Ohio's earning would not be significantly excessive if its actual annual return on ending common equity was 15% or less.

II. 2010 Earnings Review Under the SEET

On May 16, 2011, DE-Ohio filed an application for review of its 2010 earnings under the SEET.²⁴⁵ DE-Ohio indicated that its return on common equity for 2010 was 7.14%, well below the 15% threshold established as part of the Stipulation approved in its first ESP proceeding.²⁴⁶ As with DE-Ohio's 2009 SEET review, DE-Ohio also reflected in its return on common equity the exclusion of ESP-related deferrals. With the deferrals excluded, DE-Ohio indicated that its 2010 return would be increased to 7.47%.²⁴⁷ On July 19 2011, a Stipulation was signed by DE-Ohio, Staff, OP&E, the Kroger Company, and OEG recommending that the PUCO find DE-Ohio's earnings were not significantly excessive.²⁴⁸ On October 12, 2011, the PUCO adopted the Stipulation.

III. 2011 Earnings Review Under the SEET

On May 7, 2012, DE-Ohio filed an application to begin the review of its 2011 earnings under the SEET.²⁴⁹ DE-Ohio indicated that, including the effects of its deferrals, its return on common equity was 5.8% and if the effects of its deferrals were excluded its return on common equity was 6.2%. A Stipulation was submitted between DE-Ohio and Staff recommending that the PUCO find that DE-Ohio did not have significantly excessive earnings because DE-Ohio's earnings were under the 15% SEET threshold. The PUCO approved the Stipulation on August 22, 2012.

I. Additional Riders

I. Hurricane Ike & Rider-DR

On December 11, 2009, DE-Ohio filed an application to establish its Distribution Reliability Rider ("Rider-DR").²⁵⁰ Rider-DR had been proposed in DE-Ohio's last distribution rate case for the sole purpose of recouping the costs associated with the Hurricane Ike windstorm that swept through much of the Midwest in 2008.²⁵¹ After

²⁴⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, PUCO Case No. 11-2954-EL-UNC, Application (May 16, 2011) (hereinafter, "DE-Ohio 2010 SEET Proceeding").

²⁴⁶ *DE-Ohio 2010 SEET Proceeding*, Opinion and Order at 2 (October 12, 2011).

²⁴⁷ *Id.* at 3.

²⁴⁸ *Id.*

²⁴⁹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 12-1280-EL-UNC, Opinion and Order at 1 (August 22, 2012).

²⁵⁰ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, PUCO Case No. 09-1946-EL-RDR, Application (December 11, 2009).

²⁵¹ See *In the Matter of the Application of Duke Energy Ohio for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR, *et.al.*; *DE-Ohio 2008 Distribution Rate Increase Proceeding*, Duke Energy Ohio's Motion For Approval To Change Accounting Methods To Defer And Create A Regulatory Asset For Storm Restoration Costs Incurred During The Test Year And Recovery Mechanism For Storm Restoration Costs (December 22, 2008). On January 14, 2009, the PUCO approved DE-Ohio's request to defer the

discovery and a hearing in the case, Staff recommended a reduction of approximately \$1 million from the amount DE-Ohio sought to recoup to account for: (1) straight time labor charges that had already been accounted for in DE-Ohio's distribution rate case; (2) contractor invoices that reflected work done in Indiana and Kentucky, rather than Ohio; and (3) time-sheets that reflected a lower amount of hours than what DE-Ohio had included in its application to establish Rider-DR.²⁵² DE-Ohio agreed to adjust its proposed recovery according to these recommendations as well further reduce its proposed recovery by approximately \$1 million.²⁵³ The additional reduction reflected charges DE-Ohio determined should not have been included in recovery on Rider-DR and was comprised of: (1) expenses associated with supervisory and service company labor; (2) certain fringe benefits; and (3) other miscellaneous charges.²⁵⁴ The total revised rider recovery sought was \$28,473,244.²⁵⁵ Staff recommended approval of this amount subject to DE-Ohio providing Staff with year-end balance sheets regarding recovery and a true-up of Rider-DR at the end of three years if there was a material over- or under-recovery.²⁵⁶

On January 11, 2011, the PUCO issued its Opinion and Order in the case,²⁵⁷ denying a large portion of DE-Ohio's request. The PUCO reduced DE-Ohio's overall labor request of \$27,698,234 to \$14,368,667 noting that the Stipulation establishing Rider DR-IKE permitted the future recovery of "prudently incurred" storm restoration costs associated with the 2008 storm.²⁵⁸ The reduction reflected an exclusion of: (1) discretionary supplemental pay (a \$3,279,446 reduction);²⁵⁹ (2) certain affiliate-related costs (a \$1,371,657 reduction);²⁶⁰ (3) contract labor expenses associated with a DE-Ohio affiliate (a \$2,748,442 reduction);²⁶¹ and allocating evenly the remaining \$10,455,169 of

Hurricane Ike cost recovery with carrying costs and to recoup those costs through Rider-DR. *DE-Ohio 2008 Distribution Rate Increase Proceeding*, Finding and Order at 3 (January 14, 2008).

²⁵² *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of Rider DR*, PUCO Case No. 09-1946-EL-RDR, PUCO Staff Post-Hearing Brief at 4-5 (June 15, 2010) (hereinafter, "*DE-Ohio Hurricane Ike Proceeding*").

²⁵³ *Id.* at 5.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *DE-Ohio Hurricane Ike Proceeding*, Opinion and Order (January 11, 2011).

²⁵⁸ *Id.* at 7.

²⁵⁹ DE-Ohio acknowledged that paying salaried employees overtime was not its regular practice and that awarding supplemental pay was entirely in its own discretion. *Id.* at 13.

²⁶⁰ OCC called into question whether DE-Indiana and DE-Kentucky, affiliates of DE-Ohio, had compensated DE-Ohio for help it provided to Indiana and Kentucky. OCC pointed to a data request in Kentucky which attributed \$307,872 of costs incurred by DE-Kentucky to compensation paid to employees of DE-Ohio for assistance with restoration services. OCC estimated that DE-Indiana contributed \$1,063,785 to DE-Ohio by comparison to the data available from Kentucky. *Id.* at 13-14.

²⁶¹ OCC again reviewed DE-Ohio's recovery request and identified numerous contractor invoices that called into question whether the invoices were for work performed in Ohio and whether it was associated with the 2008 storm. *Id.* at 14-15. OCC requested that DE-Ohio's recovery be reduced by \$2,748,442 to account for invoices that referenced a DE-Ohio affiliate as the responsible utility. *Id.* at 15.

contract labor expenses between Indiana, Kentucky, and Ohio (a \$6,970,112 reduction). The Commission also altered the rate design of Rider DR-IKE from a per-bill charge to a per-kW hour charge. Lastly, the PUCO approved DE-Ohio's material and supply costs of \$775,010 as well as carrying costs starting on January 14, 2009.

On May 6, 2011, DE-Ohio appealed the PUCO's decision to the Ohio Supreme Court. DE-Ohio alleged the PUCO erred on five grounds: (1) in precluding recovery of supplemental compensation for salaried employees; (2) by unreasonably reducing recovery by \$371,196 (based on the conclusion that the amount reflected additional sums paid to salaried employees); (3) by unreasonably reducing recovery by \$2,052,454 (for labor loaders and supervision costs allegedly associated with the supplemental compensation and regular pay to salaried employees); (4) by reducing its request by an amount equal to the costs charged by DE-Ohio's affiliates; and (5) and the PUCO's exclusion of \$9,717,564 (costs associated with contractor labor).

On April 5, 2012, the Supreme Court issued its decision and upheld the PUCO's decision. In upholding the PUCO's decision, the Supreme Court held that DE-Ohio had failed to meet its burden of proof, which required DE-Ohio to demonstrate that the costs it sought to recover were prudently incurred and reasonable.

As mentioned above, DE-Ohio has proposed to address any future storm expenses as part of a distribution rate case. In *DE-Ohio's 2012 Distribution Rate Increase Proceeding*, DE-Ohio requested authority to defer for future amortization its storm expenses relative to a certain baseline (yet to be determined) and to amortize that balance (positive or negative) as part of a future distribution rate case.

II. Peak-Time Rebate Rate

On April 7, 2010, DE-Ohio filed an application proposing to offer a peak-time rebate rate ("Rate PTR") as a pilot program for generation service, which was available to 500 residential customers on a voluntary basis.²⁶² In order to be eligible for this rebate, a customer must have had an advanced meter installed on his or her premises that was commissioned, certified, and able to provide billable quality data.²⁶³ Rate PTR provided for critical peak pricing events, was limited to eight hours per day from noon to eight p.m., and was limited to ten days per year, excluding weekends and holidays during June, July, August, and September.²⁶⁴ In exchange for reducing their demand from their historical levels, customers participating in the program received a credit of \$0.28 kWh of reduction.²⁶⁵ The PUCO approved Rate PTR on June 23, 2010.²⁶⁶

²⁶² *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Tariff for Rate PTR*, PUCO Case No. 10-455-EL-ATA, Application (April 7, 2010) (hereinafter, "*DE-Ohio Rate PTR Proceeding*").

²⁶³ *DE-Ohio Rate PTR Proceeding*, Finding and Order at 1 (June 23, 2010).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1-2.

²⁶⁶ *Id.* at 3-4.

J. Customer Shopping

DE-Ohio has experienced a high volume of customer shopping in terms of MWh of electric load supplied. At the end of the 3rd quarter of 2012, 71% of DE-Ohio's MWh of electric load was shopping. Broken down by MWh shopping by class, the 71% consists of: 46% residential, 82% commercial, and 90% industrial.²⁶⁷

K. DE-Ohio's 2010 MRO Proposal

On November 15, 2010, DE-Ohio filed an application with the PUCO for approval of an MRO to secure an SSO for retail customers through a "blended" CBP.²⁶⁸ As proposed, the MRO would have started on January 1, 2012, as DE-Ohio's initial ESP ran through December 31, 2011.²⁶⁹ DE-Ohio's application proposed a transition to a market-based structure over the period January 1, 2012 to May 31, 2014 ("the blend period").²⁷⁰ Had the MRO been approved by the PUCO, the structure would have been permanent and DE-Ohio would not have been able to go back to an ESP structure.²⁷¹ DE-Ohio had also intended to transfer (to an affiliated company) its legacy generation assets previously used to serve "native load" retail customers in Ohio and to do so no later than the end of the blending period.²⁷² DE-Ohio stated that the request to transfer generation assets was independent of the MRO application.²⁷³

On February 23, 2011, the PUCO issued an order finding DE-Ohio's MRO application non-compliant with statutory requirements.²⁷⁴ As a result, the PUCO concluded it could not process DE-Ohio's application and directed DE-Ohio to pursue one of three alternatives discussed below. The Commission determined that DE-

²⁶⁷ More information on customer shopping can be found at: <http://www.puco.ohio.gov/emplibrary/files/util/MktMonitoringElecCustSwitchRates%5CSWITCH%20RATE%20SALES%5C2012%5C3Q2012.pdf>.

²⁶⁸ *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, PUCO Case No. 10-2586-EL-SSO, Application (November 15, 2010) (hereinafter, "DE-Ohio MRO Proceeding").

²⁶⁹ *Id.* at 1.

²⁷⁰ *Id.* at 36.

²⁷¹ Section 4928.142(F), Revised Code.

²⁷² *DE-Ohio MRO Proceeding*, Application at 5 (November 15, 2010).

²⁷³ *Id.* DE-Ohio, and its predecessor, have periodically announced intentions to transfer generating assets and, at one point, obtained PUCO approval to do so. See *In the Matter of the Cincinnati Gas & Electric Company for approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer Generating Assets to an Exempt Wholesale Generator*, PUCO Case Nos. 99-1658-EL-ETP, *et al.*, Opinion and Order (August 31, 1999). When SB 221 was enacted in 2008, it included a new statutory provision (Section 4928.17(E), Revised Code) that requires an EDU to secure PUCO approval prior to transferring generating assets. Shortly before SB 221 became effective, DE-Ohio attempted to avoid this PUCO approval requirement by filing an application with FERC seeking authority to transfer certain generating assets. See FERC Docket No. EC08-78.

²⁷⁴ *DE-Ohio MRO Proceeding*, Opinion and Order at 77 (February 23, 2011).

Ohio's application failed to comply with the statutory requirements and the Commission's rules because the application did not provide for a five-year blending of the existing rates and the competitively bid rate. Ohio law requires that a portion of the SSO under an initial MRO must be competitively bid for the first five years (10% in year one, 20% in year two, 30% in year three, 40% in year four, and 50% in year five) with the balance of the SSO pricing tied to the EDU's legacy rates.²⁷⁵ DE-Ohio's application requested that the Commission approve a blending period with 100% competitively bid in the third year of the plan.

DE-Ohio unsuccessfully argued that Section 4928.142(E), Revised Code, permitted the Commission to reduce the blending period to three years and was appropriate because market prices and the ESP price would converge in year three. That Section allows the Commission to make certain adjustments to the blending period "beginning in the second year" of an MRO.²⁷⁶ In rejecting DE-Ohio's argument, the Commission stated, "[c]ontrary to [DE-Ohio's] assertions, the Commission does not believe that the Commission was given authority under Section 4928.142(E), Revised Code, in order to alter the blending proportions solely for the purpose of moving the company expeditiously to a fully competitive market."²⁷⁷ The Commission found that it could only exert its power to modify the blending percentages and period under Section 4928.142(E), Revised Code, based upon actual evidence that exists at some future point.²⁷⁸ The Commission also noted that the statutory blending period was designed to safeguard ratepayers from the risk of abrupt or significant increases in prices, and any upfront modification of the blending period would be contrary to that policy.²⁷⁹

In dismissing DE-Ohio's application, the Commission found that DE-Ohio had failed to set forth all of the information required by Section 4928.142, Revised Code, and therefore the application was "not an application within the meaning of Section 4928.142, Revised Code."²⁸⁰ The Commission concluded that it could not "consider this filing to be an MRO filing under the statute" and therefore had "no choice other than to

²⁷⁵ *Id.* at 8-9.

²⁷⁶ "Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division." Section 4928.142(E), Revised Code.

²⁷⁷ *DE-Ohio MRO Proceeding*, Opinion and Order at 24 (February 23, 2011).

²⁷⁸ *Id.* at 17.

²⁷⁹ *Id.* at 24.

²⁸⁰ *Id.* at 26.

find that [DE-Ohio's] application does not meet the requirements of the statute."²⁸¹ After noting that the Commission was left with no option other than to dismiss the application, it nevertheless devoted significant attention to addressing other issues that had been presented in the case to "provide guidance" to DE-Ohio if it chose to file another MRO application.²⁸²

Ohio law²⁸³ requires that the CBP established as part of an MRO be an open, fair, and transparent competitive solicitation, which is buttressed by state policy objectives which include the promotion of demand-side management, time differentiated pricing ("TDP"), and implementation of AMI.²⁸⁴ To address the interplay of these issues, Commission rules²⁸⁵ specifically require utilities to provide, as part of an MRO application, "information regarding its customer loads, TDP, dynamic pricing, alternative retail rate options, and price elasticity."²⁸⁶ The Commission noted that DE-Ohio's "TDP and dynamic pricing options are almost nonexistent" and DE-Ohio failed to demonstrate "on the record" how its proposed MRO application addressed State policy promoting these options:

An MRO solicitation should be open, fair, and transparent from the perspectives of both potential suppliers and consumers. From the consumer's perspective, the process should seek to facilitate transparent pricing that enables consumers to control their energy bills by managing their usage, reduce unfair cross-subsidies among consumers with different load shapes, and be open by not distorting incentives for customer-sited distributed generation. Duke has proposed procuring generation at a single price covering all hours, all SSO customers, and a number of different generation products. Duke did not even consider soliciting some or all of its SSO energy requirements through RTO-operated competitive markets and reflecting the results in TDP or dynamic pricing.²⁸⁷

DE-Ohio explained that it believed it was only obligated to "discuss the options it considered and explain its rationale;" however, the Commission determined that DE-Ohio's failure in this respect translated to an MRO application that was not consistent with State policy.²⁸⁸ The Commission then directed DE-Ohio to include information regarding DSM, TDP, and AMI in any future MRO applications.²⁸⁹

²⁸¹ *Id.*

²⁸² *Id. at 27.*

²⁸³ Section 4928.142(A)(l)(a), Revised Code.

²⁸⁴ Section 4928.02, Revised Code.

²⁸⁵ Rules 4901:I-35-03(B)(2)(e) and (i), O.A.C.

²⁸⁶ *DE-Ohio MRO Proceeding*, Opinion and Order at 35 (February 23, 2011).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id. at 36.*

Also in regard to an open, fair, and transparent CBP, the Commission noted its concern that DE-Ohio had failed to propose to place a load cap on the number of tranches an individual bidder could obtain.²⁹⁰ The Commission noted that a load cap encourages “the participation of bidders and assure[s] diversity of supply in the auction” and “[a]bsent a reasonable load cap, the CBP may not elicit an open and fair solicitation in keeping with the statutory policy.”²⁹¹

A further issue with DE-Ohio’s proposed MRO regarded ongoing reporting requirements and Commission review of the CBP. Section 4928.142(C), Revised Code, and Rule 4901:1-35-11, O.A.C., provide that utilities filing an MRO are subject to ongoing Commission review, including quarterly²⁹² and annual reporting requirements.²⁹³ DE-Ohio’s MRO application and supporting testimony indicated that DE-Ohio believed that the CBP rules were not subject to oversight from the Commission once approved. The Commission directed DE-Ohio to include language in a future MRO application that clearly reflected that “the MRO and CBP are subject to ongoing Commission review, including quarterly and annual reporting requirements, in accordance with Section 4928.142(C), Revised Code, and Rule 4901:1-35-11, O.A.C.”²⁹⁴ In conclusion, the Commission determined that the CBP portion of DE-Ohio’s proposed MRO failed to provide sufficient detail to ensure that the MRO would comply with statutory requirements.

The Commission also expressed its concern about the expense of a descending-block auction to serve DE-Ohio’s SSO load for the first two years of the MRO where the bidders would only be bidding on 10% and 20% of the load. The Commission held that alternative procurement methods should be considered, such as a sealed RFP, in any future MRO filing.

Finally, the Commission found that DE-Ohio’s request to recover transmission costs and RTO-realignment costs were not properly included in an MRO application. Rather, the Commission found that DE-Ohio should file an application pursuant to Section 4928.05, Revised Code, to recover such costs. The Commission noted, however, that the purpose of Section 4928.05, Revised Code, was to allow recovery of ordinary FERC

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Rule 4901:1-35-11(B), O.A.C., provides “[o]nce a competitive bidding process (CBP) plan subject to a price blending period is approved by the commission pursuant to section 4928.142 of the Revised Code, the electric utility shall file its proposed adjustments to the standard service offer (SSO) portion of the blended rates of its CBP in a filing to the commission on a quarterly basis (quarterly filing) for the duration of the price blending period of the CBP plan, on specific dates to be determined by the commission.”

²⁹³ Rule 4901:1-35-11(B)(5), O.A.C., “provides “[o]n an annual basis, or other basis as determined by the commission, the prudence of the costs incurred and recovered through quarterly adjustments to the electric utility’s SSO portion of the blended rates shall be reviewed. The commission shall determine the frequency of the review and shall establish a schedule for the review process. The commission may order that consultants be hired, with the cost to be billed to the company, to conduct prudence and/or financial reviews of the costs incurred and recovered through the quarterly adjustments. The cost to the electric utility of the commission’s use of such consultants may be included by the electric utility in its quarterly rate adjustment filing.”

²⁹⁴ *DE-Ohio MRO Proceeding*, Opinion and Order at 50 (February 23, 2011).

approved tariff costs, not extraordinary costs. Thus, DE-Ohio would have to demonstrate in a future proceeding that its costs associated with migration from MISO to PJM were not extraordinary, and were reasonably and prudently incurred before it could recover any of the costs from customers.

Applications for Rehearing were filed by DE-Ohio as well as FirstEnergy Solutions Corp. (“FES”). The applications were denied by the Commission on May 4, 2011. On June 20, 2011, DE-Ohio filed an ESP application to set its SSO rather than continue to pursue setting its SSO through an MRO.

L. DE-Ohio’s Second ESP Application

Following the failed effort to secure approval of its proposed MRO, DE-Ohio filed an application to set its SSO rates through an ESP.²⁹⁵ In its application, DE-Ohio proposed a 9.5 year ESP with a bifurcated approach to supplying energy and capacity to its customers.²⁹⁶ DE-Ohio proposed supplying capacity to all customers (both SSO customers and shopping customers) from its legacy generating assets and then conducting competitive auctions to acquire the generation component for its customers.²⁹⁷ DE-Ohio proposed establishing a non-bypassable capacity charge to recover its costs to supply capacity. The proposed charge would have been adjusted annually and would recover DE-Ohio’s costs as well as a return (income).²⁹⁸ DE-Ohio then proposed to offset its ESP capacity costs by selling the “excess” energy produced from its legacy generation assets and sharing 76% of the proceeds with customers as an offset to capacity charges, dedicating 10% of the proceeds to support economic development in DE-Ohio’s territory, and keeping the remaining 14%.²⁹⁹

On October 24, 2011, a non-opposed Stipulation was filed in the proceeding supported by over 30 parties. The PUCO approved the Stipulation, without modification, on November 22, 2011.³⁰⁰ The ESP recommended in the Stipulation was vastly different than DE-Ohio’s proposed ESP. The Stipulation recommended a three and one-half year ESP where capacity, energy, and transmission services would be supplied to DE-Ohio’s non-shopping customers through competitive auctions. DE-Ohio also agreed to forgo participating in its own auctions for the first three years of the ESP while it was receiving an ESSC.³⁰¹ DE-Ohio will instead participate in the wholesale PJM day-ahead and real-time energy markets for the first three years of the ESP. Another significant aspect of the Stipulation was FES’ commitment to serve all of DE-Ohio’s customers

²⁹⁵ *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, PUCO Case Nos. 11-3549-EL-SSO, *et al.* (hereinafter, “*DE-Ohio Second ESP Proceeding*”).

²⁹⁶ *DE-Ohio Second ESP Proceeding*, Opinion and Order at 8 (November 22, 2011).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 52.

³⁰¹ *Id.* at 13.

enrolled in the Percentage of Income Payment Plan (“PIPP”) program at a 5% discount to DE-Ohio’s residential price-to-compare rate. This discount reduced the electric bills of PIPP customers (customers who cannot shop on their own) and the amount of bill payment assistance funding that is collected through charges for the Universal Service Fund (“USF”) balance that are paid for by all customers.

The Stipulation further provided for DE-Ohio’s satisfaction of its corporate separation obligation through a transfer of its generation assets. Pursuant to the Stipulation, DE-Ohio was obligated to transfer its generating assets, at net book value, by December 31, 2014.³⁰² DE-Ohio will recover the costs associated with corporate separation and generation divestiture through its Supplier Cost Reconciliation Rider (“Rider SCR”), discussed in more detail below.³⁰³ In addition to these significant provisions, the following riders were established.

I. Riders Established Pursuant to DE-Ohio’s Second ESP

Pursuant to the Stipulation approved by the PUCO on November 22, 2011, DE-Ohio established eight new riders with an effective date of January 1, 2012. The Retail Capacity Rider (“Rider RC”) recovers DE-Ohio’s capacity costs associated with serving its SSO load based on PJM’s organized market-based mechanism for valuing and pricing capacity resources. The Retail Energy Rider (“Rider RE”) recovers DE-Ohio’s non-capacity related costs associated with serving its SSO load. These non-capacity related costs include energy as well as market-based transmission and market-based transmission ancillary services.³⁰⁴ Together, Rider RC and Rider RE equal the competitive auction clearing prices.³⁰⁵ These two riders are bypassable by shopping customers.

Rider SCR recovers the difference between payments made to suppliers for SSO service and amounts collected from Riders RC and RE.³⁰⁶ Rider SCR also recovers DE-Ohio’s prudently incurred costs associated with conducting the competitive auctions as well as any costs associated with a supplier’s default, should one occur.³⁰⁷ Any under-accrual or over-accrual of Rider SCR includes a carrying charge equal to DE-Ohio’s overall cost of long-term debt and is reconciled in the quarterly updates. Rider SCR is subject to annual audit by the Commission. Rider SCR is bypassable by shopping customers as long as the overall balance is less than 10% of DE-Ohio’s overall actual SSO revenue.

The Load Factor Adjustment Rider (“Rider LFA”) applies to non-residential demand-metered rates and establishes a non-bypassable demand charge, and a non-

³⁰² *DE-Ohio Second ESP Proceeding*, Stipulation at 25 (October 24, 2011).

³⁰³ *Id.*

³⁰⁴ *DE-Ohio Second ESP Proceeding*, Opinion and Order at 12 (November 22, 2011).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

bypassable energy credit.³⁰⁸ The rider is designed to reward high load-factor customers for efficiently using energy and mitigate the impact of volumetric energy charges on energy intensive industries. The benefit which this Rider provides to some customers is paid for by other customers and it has therefore created controversy since it went into effect.

The Reconciliation Rider (“Rider RECON”) will be limited in duration and its sole purpose is to conduct a final true-up of DE-Ohio’s price-to-compare fuel and purchased power (“Rider PTC-FPP”) and its system reliability tracker rider (“Rider PTC-SRT”) that expired on December 31, 2011.³⁰⁹

The Alternative Energy Resource Rider (“Rider AER-R”) recovers DE-Ohio’s reasonable and prudently incurred costs of complying with Ohio’s advanced energy resources portfolio requirements.³¹⁰ The rider will be updated quarterly and will be subject to annual audits.

The uncollectable expense generation service rider (“Rider UE-GEN”) recovers DE-Ohio’s bad debt expenses associated with generation service.³¹¹ Rider UE-GEN is generally non-bypassable except for shopping customers with dual-billed customer accounts identified by their CRES provider as not being part of DE-Ohio’s purchase of accounts receivable program.³¹² Finally, the Stipulation allowed DE-Ohio to establish the Electric Service Stability Charge Rider (“Rider ESSC”). Rider ESSC will allow DE-Ohio to collect \$110 annually for three years beginning January 1, 2012.

II. Revenue Decoupling

As part of the PUCO-approved Stipulation in DE-Ohio’s Second ESP proceeding, DE-Ohio agreed to implement distribution revenue decoupling.³¹³ Revenue decoupling assures that a utility is made whole for its distribution fixed cost recovery, when it experiences reductions in sales (energy kWh and demand kW) as a result of energy efficiency programs that the utility is required by law to implement. In recent years, decoupling has become a larger issue in Ohio as utilities have sought to recover lost distribution revenue that results from reductions in kWh sales due to the energy efficiency programs. To establish the decoupling mechanism, a revenue requirement sufficient for the utility to recover its distribution-related fixed costs was determined and then used to set distribution rates based on kWh charges. In subsequent years, the decoupling mechanism is used to reconcile the actual distribution revenue collected with the approved distribution revenue requirement. DE-Ohio’s decoupling mechanism does not apply to customers on Rate Schedules TS, DS, or DP.

³⁰⁸ *Id.* at 17.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 18.

³¹² *Id.* at 32.

³¹³ *Id.* at 34.

III. DE-Ohio's CBP Auctions to Establish SSO Prices

On December 14, 2011, DE-Ohio conducted its first auction to establish its SSO price under its ESP.³¹⁴ The CBP auction included tranches³¹⁵ for three delivery periods: (1) 33 tranches for January 1, 2012 through May 31, 2013; (2) 33 tranches for January, 1 2012 through May 31, 2014; and (3) 34 tranches January 1, 2012 through May 31, 2015. Thus, the auction established 100% of the SSO price for the first 17 months of the ESP, 66% for the next 12 months, and 34% for the final 12 months. The clearing prices for these three time periods were \$49.72/MWh, \$51.10/MWh, and \$57.08/MWh, respectively,³¹⁶ resulting in a blended price of \$52.68/MWh for the period January 2012 through May 2013.

On December 15, 2011, the PUCO approved the results of the first of the five auctions that determined DE-Ohio's default electric supply generation prices through May 2015. Based on the results of the auction and the previously approved ESP that set up the use of competitive bidding, a residential customer using 1,000 kWh of electricity received a total monthly electric bill decrease of approximately 17.5 percent in 2012. The press release issued by the PUCO in conjunction with its approval of the auction results stated:

'[DE-Ohio's] first generation supply auction has secured significantly lower electric prices for customers' PUCO Chairman Todd A. Snitchler stated. 'As we have seen with similar auctions in other parts of Ohio, market forces have consistently led to lower rates. Ultimately Ohio's emerging competitive marketplace will provide families, business and industry alike with new and innovative supplier options to meet their electricity needs.'

In view of the consumer-friendly positive pricing outcomes of the competitive bidding process results in the DE-Ohio proceeding and the universal stakeholder support or non-opposition for the DE-Ohio ESP approved by the Commission, one might have expected the PUCO to favor the use of competitive bidding to establish the default generation supply prices in other areas of Ohio. Indeed and as Chairman Snitchler observed in the above press release, the results of the DE-Ohio auction tracked the auction results elsewhere in Ohio and they worked to reduce consumers' bills. Yet, as discussed below, the PUCO reverted to the use of substantially higher "administratively determined" prices in the subsequently decided ESP cases to establish default generation supply prices for the now merged Columbus Southern Power and Ohio Power Company.

³¹⁴ *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, PUCO Case No. 11-6000-EL-UNC, Auction Report at 1 (December 15, 2011) (hereinafter, "DE-Ohio CBP Auction Proceeding").

³¹⁵ "Tranche means a fixed percentage share of the SSO Load, excluding Capacity, as determined for the purposed [sic] of the Solicitation conducted to procure SSO Supply for the SSO load." *DE-Ohio Second ESP Proceeding*, Stipulation at 10 of Attachment G (October 24, 2011).

³¹⁶ *DE-Ohio CBP Auction Proceeding*, Auction Report at 3 (December 15, 2011).

On November 15, 2012, DE-Ohio's second CBP auction was held to establish the SSO price for DE-Ohio's ESP. The CBP auction included 16 tranches for the June 2013 through May 2015 delivery period and cleared at a price of \$50.56/MWh.³¹⁷ The results of this CBP auction will be blended with the results of other CBP auctions to determine the ultimate price of the ESP.

M. Migration From MISO to PJM

On June 25, 2010, DE-Ohio filed an application with FERC requesting permission to withdraw from MISO and become a transmission-owning member of PJM.³¹⁸ On October 21, 2010, FERC approved, subject to minor conditions, DE-Ohio's withdrawal from MISO, its participation in PJM's 2011 Base Residual Auction, and accepted DE-Ohio's Fixed Resource Requirement ("FRR") Integration Plan.³¹⁹ In its MRO proposal (discussed above), DE-Ohio had proposed recovery of MISO exit fees and PJM entrance costs claiming that recovery is mandated by federal law. There were also indications (some provided by documents DE-Ohio or its affiliates filed at FERC) that the move to PJM was designed to enhance DE-Ohio generation-related revenue.

DE-Ohio's initial request to recover its MISO exit fees and PJM entrance fees were rejected along with DE-Ohio's MRO application; however, DE-Ohio filed another application in a separate proceeding seeking recovery.³²⁰ In the latter proceeding, DE-Ohio proposed a non-bypassable Base Transmission Rider ("Rider BTR") to recover its Network Integration Transmission Services ("NITS") costs, its Midwest Transmission Expansion Planning ("MTEP") costs, and all other costs billed to DE-Ohio under FERC-approved tariffs.³²¹ The FERC-approved costs would include fees associated with its realignment of RTO membership, such as exit and entrance fees and integration costs, as well as Regional Transmission Expansion Planning ("RTEP") costs assessed by PJM. These FERC-approved costs would include all transmission expansion project costs allocated, directly or indirectly, to DE-Ohio by MISO or PJM. Rider BTR would also include all exit and entrance fees required by MISO and PJM, as well as all internal and external integration costs.³²² DE-Ohio also proposed Rider RTO to recover amounts that DE-Ohio was charged by a FERC-approved RTO that would apply only to non-shopping customers and therefore would be bypassable by shopping customers.

³¹⁷ The winning bidders in the November 15, 2012 CBP auction included: FES with 10 tranches, DTE Energy Trading, Inc. with 4 tranches, and Buckeye Power, Inc. and Exelon Generation Company, LLC with one tranche each.

³¹⁸ FERC Docket No. ER10-1562-000.

³¹⁹ Filed under FERC Docket No. ER10-2254-000.

³²⁰ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariff Approval*, PUCO Case Nos. 11-2641-EL-RDR, *et al.*, Application at 3 (April 26, 2011) (hereinafter, "*DE-Ohio Rider BTR/RTO Proceeding*").

³²¹ *DE-Ohio Rider BTR/RTO Proceeding*, Opinion and Order at 4 (May 25, 2011).

³²² *Id.*

Filed simultaneously with the application was a Stipulation signed by DE-Ohio, Staff, OCC, and OEG.³²³ Pursuant to the Stipulation, DE-Ohio agreed to not seek recovery of MISO exit fees, PJM integration fees incurred under DE-Ohio's June 11, 2010 agreement with PJM, and internal RTO realignment costs. The Stipulation recommended that DE-Ohio be able to recover all MTEP costs through Rider BTR; however, DE-Ohio would forgo recovery of the first \$121 million of RTEP costs.³²⁴ DE-Ohio also agreed to pursue its challenge of a FERC order which allows MISO to charge DE-Ohio for multi-value project ("MVP") costs even after DE-Ohio withdrew from MISO.³²⁵ On May 25, 2011, the PUCO approved the Stipulation without modification. On July 15, 2011, the PUCO denied OPAE's Application for Rehearing.

N. Capacity Charge Case

In reliance on the PUCO's decisions regarding AEP-Ohio's proposal to establish above-market and non-bypassable capacity charges and the PUCO's approvals in the AEP-Ohio Modified ESP,³²⁶ DE-Ohio filed an application on August 29, 2012 seeking to increase its compensation for "wholesale" generation-related capacity services by deferring and collecting \$257 million annually through non-bypassable retail charges.³²⁷ According to DE-Ohio, the PUCO "has an obligation to ensure that an FRR entity receives just and reasonable compensation for the services it renders" and has "adopted a methodology, in reliance upon traditional rate-making principles, to establish a just and reasonable cost for the provision of capacity by an FRR entity."³²⁸

The application seeks three categories of relief. First, citing to Sections 4905.04, 4905.05, 4905.06, and 4909.18, Revised Code, the application asserts that the PUCO may authorize a cost-based "charge" (rather than a market-based charge) for the provision of capacity services throughout its service territory.³²⁹ Second, citing Section 4905.13, Revised Code, the application asserts that the PUCO may authorize DE-Ohio to modify its accounting practices so as to defer, for future collection and financial reporting purposes, the difference between what DE-Ohio is already collecting for the provision of capacity services and its "cost of providing capacity services as such cost is established pursuant to Ohio's newly adopted state compensation mechanism."³³⁰ Third, citing Section 4909.18, Revised Code, the application seeks an order approving a new non-bypassable tariff for the future recovery of the deferred amounts.³³¹

³²³ *Id.*

³²⁴ *Id.* at 6.

³²⁵ *Id.* at 5.

³²⁶ The PUCO's decisions regarding these items are discussed in the section addressing AEP-Ohio's regulatory activities.

³²⁷ *In the Matter of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Revised Code Section 4909.18*, Case No. 12-2400-EL-UNC, Application (August 29, 2012).

³²⁸ *Id.* at 3.

³²⁹ *Id.* at 2.

³³⁰ *Id.*

³³¹ *Id.* at 4

Applying “the formulaic methodology recently approved by the PUCO for establishing a cost-based compensation mechanism” for AEP, DE-Ohio alleges that the total generation capacity service revenue requirement to achieve, including an 11.15% return on common equity, is \$364.9 million annually.³³² Netting the revenue DE-Ohio is already collecting for generation capacity service, the application asserts that the PUCO must authorize DE-Ohio to collect \$257 million in additional annual compensation for such service.³³³ On a net basis, DE-Ohio is seeking PUCO authority to defer the difference (\$257 million) between the current capacity compensation and \$364.9 million beginning on the date it filed its application, August 29, 2012. DE-Ohio also proposes to add a carrying charge to the deferred balance at a long-term debt rate.³³⁴ The application seeks authority to amortize the deferred portion of its capacity compensation (including the carrying charge) through a non-bypassable charge that will be imposed on shopping and non-shopping customers beginning sometime after March 1, 2013. DE-Ohio committed to filing an application by March 1, 2013 to establish the initial rate of the non-bypassable charge. Under DE-Ohio’s proposal, the non-bypassable charge would last for three years.³³⁵ DE-Ohio also states that it expects that “the portion of the recovery attributable to an affiliate [after generation assets have been transferred as approved by the PUCO] should then be passed through to such affiliate.”³³⁶

The PUCO set the application for comments. Customers and CRES providers filed initial comments on January 2, 2013 and uniformly opposed DE-Ohio’s application. Reply comments were filed on February 1, 2013. The PUCO has set the matter for hearing beginning in April 2013.

³³² *Id.* at 7, 8.

³³³ *Id.* at 8.

³³⁴ *Id.* at 10.

³³⁵ *Id.* at 9.

³³⁶ *Id.* at 10.

FirstEnergy Corp.

The Ohio Edison Company (“OE”), the Cleveland Electric Illuminating Company (“CEI”), and the Toledo Edison Company (“TE”)

A. Rate Stabilization Plan

On October 21, 2003, FirstEnergy filed an application with the PUCO for approval of a CBP (sometimes referred to as an auction process) to establish “market-based” default generation supply rates effective January 1, 2006, or, in the alternative, to adopt an RSP for the period beginning January 1, 2006 through December 31, 2008.³³⁷ On February 11, 2004, an evidentiary hearing began and several parties submitted a partial Stipulation (“RSP Stipulation”).³³⁸

On June 9, 2004, the PUCO issued its Opinion and Order adopting the RSP Stipulation with the following significant modifications: the PUCO limited adjustments to generation charges during the RSP to cost increases related to material changes in tax regulations or laws; the PUCO denied FirstEnergy’s proposed adjustment to the annual increases in shopping credits for 2005 and limited the shopping credit values to those in the ETP Stipulation but used the 2005 shopping credit level, separated by class, as the avoided cost cap for the RSP; the PUCO limited distribution rate increases, consistent with those in the ETP Stipulation; the PUCO held that \$10 million of additional funding for energy efficiency programs should be divided equally between energy efficiency programs and economic development activities; the PUCO scheduled a meeting of the parties to determine the best approach to bill shopping customers for retail transmission, net congestion, and ancillary services once the MDP ends, and directed FirstEnergy to meet with Staff to recalculate new sales target levels for recovery of RTCs; and the PUCO directed FirstEnergy to submit a pricing plan for POLR prices for returning customers, as well as its methodology for the supply of market support generation (“MSG”), within 90 days of the PUCO’s Order. Additionally, the PUCO directed FirstEnergy to conduct a CBP, as modified by the PUCO, which encompassed FirstEnergy’s total load (including certain special contracts) to cover its risk of providing POLR service for the entire 2006-2008 period. On August 4, 2004, the PUCO issued an Entry on Rehearing that gave FirstEnergy the ability to file an application to adjust generation charges during 2006-2008, required FirstEnergy to supply MSG to maintain minimum levels of shopping, made transmission and ancillary charges avoidable by shopping customers, and changed the 2005 shopping credit cap from a rate class basis to a rate schedule basis. On September 29, 2004, the PUCO issued a Second Entry on Rehearing that clarified that the deadline for calculating the MSG requirements should be the latter of December 31, 2004, or 45 days after the PUCO ruled on the CBP results

³³⁷ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, PUCO Case No. 03-2144-EL-ATA, Application (October 21, 2003) (hereinafter, “*FirstEnergy RSP Proceeding*”).

³³⁸ *FirstEnergy RSP Proceeding*, Stipulation and Recommendation (February 11, 2004). The Stipulation was signed by FirstEnergy, OEG, OHA, OPAE, Cargill, and IEU-Ohio.

and OPAE and other low-income agencies could receive funding for low-income energy efficiency projects from the \$5 million reallocated by the PUCO.

Pursuant to the PUCO's finding that a CBP should be conducted to determine whether the RSP generation charges would exceed market prices as such prices were determined through a CBP, on September 1, 2004, FirstEnergy designed its proposed CBP based on a New Jersey basic generation service ("BGS") supply procurement model.³³⁹ FirstEnergy also employed National Economic Research Associates Inc. ("NERA") as the independent auction manager as required by the PUCO's Order.

The CBP was conducted on December 8, 2004, by NERA, and was also observed by Charles River Associates, a consultant employed by the Staff to review and provide oversight of the auction. On December 9, 2004, NERA, Charles River Associates, and the Staff filed reports and recommendations to the PUCO. On the same day, the PUCO responded by issuing its Finding and Order that held that the final auction price of 5.45¢/kWh should be rejected inasmuch as the probability modeling determined that there was a 100% probability that the closing bid price was higher than the adjusted RSP price even before taking into account other factors that would have a downward influence on the adjusted RSP price.³⁴⁰

Pursuant to another PUCO mandate, on July 22, 2005, FirstEnergy submitted its plan for a second CBP for 2007, which essentially mirrored the original CBP.³⁴¹ On September 28, 2005, the PUCO issued an Entry in which it, among other things, deferred the CBP until the end of March 2006 due to FirstEnergy's rate certainty plan ("RCP") filing (discussed below) as well as disruptions in energy supplies and pricing caused by Hurricane Katrina.³⁴² On January 25, 2006, the PUCO issued an Entry setting the starting price for the auction at 5.1¢/kWh, which it indicated was the upper bound of the PUCO's evaluation range.³⁴³ On February 23, 2006, NERA informed the PUCO that insufficient supplier interest had been expressed in participating in the CBP process to warrant moving forward with the CBP process (no potential bidding party submitted an application to participate by the deadline). Accordingly, the PUCO closed the docket on September 6, 2006.³⁴⁴

³³⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load*, PUCO Case No. 04-1371-EL-ATA, Application at 2 (September 1, 2004).

³⁴⁰ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load*, PUCO Case No. 04-1371-EL-ATA, Finding and Order at 3-4 (December 9, 2004).

³⁴¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Competitive Bidding Process for Retail Electric Load*, PUCO Case No. 05-936-EL-ATA, Application (July 22, 2005) (hereinafter, "FirstEnergy 2005 CBP Proceeding").

³⁴² *FirstEnergy 2005 CBP Proceeding*, Entry at 2 (September 28, 2005).

³⁴³ *FirstEnergy 2005 CBP Proceeding*, Entry at 9 (January 25, 2006).

³⁴⁴ *FirstEnergy 2005 CBP Proceeding*, Entry at 3 (September 6, 2006).

OCC and the Cities of Maumee, Northwood, Oregon, Perrysburg, Sylvania, Toledo, the Village of Holland and the Board of County Commissioners of Lucas County (collectively, the “Cities”) appealed the PUCO’s FirstEnergy RSP Order to the Ohio Supreme Court.³⁴⁵ On May 3, 2006, the Ohio Supreme Court upheld the PUCO’s approval of most aspects of FirstEnergy’s RSP but remanded the case to the PUCO asserting that it failed to comply with a statutory requirement that gave customers an alternative means of securing generation supply. The statutory alternative required the PUCO to give customers the option to elect to receive service at prices established through competitive bids or other means providing similar opportunities.³⁴⁶

The PUCO, responded (eventually) to the Ohio Supreme Court’s ruling by opening a docket to conduct a CBP and FirstEnergy filed a CBP plan on September 29, 2006.³⁴⁷ Interested parties filed Initial and Reply Comments regarding FirstEnergy’s proposed CBP and a Stipulation and Recommendation (“CBP Stipulation”) was ultimately submitted for the PUCO’s consideration. The CBP Stipulation recommended that the PUCO permit FirstEnergy to move forward with the CBP that it originally proposed (including agreed-upon modifications), but also required FirstEnergy to offer a green product tariff allowing customers to voluntarily choose to purchase generation supply produced from “renewable sources” by buying RECs.³⁴⁸ Participating customers were required to purchase a minimum of two 100 kWh blocks per month, up to a maximum of fifty 100 kWh blocks per month. The CBP Stipulation also recommended that the PUCO permit FirstEnergy to create a regulatory asset or liability for recovery or refund in its next distribution rate case if the amounts collected from customers under the program were less than or more than the amounts incurred by FirstEnergy for payments to winning bidders for RECs and allow FirstEnergy to recover the administrative costs of running the program. The PUCO approved the CBP Stipulation in its entirety on August 15, 2007.³⁴⁹ FirstEnergy subsequently filed tariffs indicating that the REC for each 100 kWh block could be purchased for 50¢/month.

³⁴⁵ See *The Office of the Consumers’ Counsel v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2004-1993; affirmed in part and reversed in part by *Consumers’ Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110. The Court granted an OCC motion to consolidate two other appeals with the 2004-1993 appeal, joining *City of Maumee, City of Northwood, City of Oregon, City of Perrysburg, City of Sylvania, City of Toledo, Village of Holland, Board of County Commissioners of Lucas County v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2005-0118 and *The Office of the Ohio Consumers’ Counsel v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2005-0766, July 5, 2005, *Case Announcements*, 2005-Ohio-3437.

³⁴⁶ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, at ¶19.

³⁴⁷ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Competitive Bid Process to Supply Market-Based Generation*, PUCO Case No. 06-1112-EL-UNC, Application (September 29, 2006) (hereinafter “*FirstEnergy 2006 CBP Proceeding*”).

³⁴⁸ *FirstEnergy 2006 CBP Proceeding*, Stipulation and Recommendation at 3 (May 29, 2007). FirstEnergy, Staff, and OCC signed the Stipulation.

³⁴⁹ *FirstEnergy 2006 CBP Proceeding*, Order on Remand (August 15, 2007). On a separate but related note, the PUCO also gave certain customers an alternative method to receive market-based generation service from FirstEnergy in 2008, approving a FirstEnergy application to extend its experimental market-based tariff (“MBT”) until the end of 2008. *In the Matter of the Application of The Cleveland Electric Illuminating Company for Extension of the Existing Experimental Market-Based Tariff*, PUCO Case Nos. 07-227-EL-ATA, *et al.*, Finding and Order (November 28, 2007). The MBT afforded qualifying

B. Rate Certainty Plan

On May 27, 2005, FirstEnergy filed an application for approval of a Generation Charge Adjustment Factor (“GCAF”) Rider (“GCAF Application”), pursuant to its RSP, in which it sought to recover the estimated amount of fuel cost increases over the 2002 base year during 2006.³⁵⁰ Additionally, on September 9, 2005, FirstEnergy filed a series of applications that collectively represented FirstEnergy’s RCP proposal (“RCP Application”).³⁵¹ Along with its RCP Application, FirstEnergy filed a Stipulation signed by multiple parties supporting the proposed RCP. The proposed RCP created a fuel cost recovery mechanism and set forth a recovery methodology for new regulatory assets, and also focused on certain other accounting modifications. FirstEnergy also incorporated the previously filed GCAF Application into the proposed RCP Stipulation and addressed rising fuel costs, variability in rates, and the manner in which the FirstEnergy companies would mitigate the impacts of increased fuel costs on customers’ bills.³⁵² The RCP Stipulation provided that base distribution rates would not increase for OE and TE customers until January 1, 2009 and would remain frozen for CEI customers until May 1, 2009, with the exception that the FirstEnergy companies were permitted to apply for increases related to incremental taxes or in the event of an emergency. The FirstEnergy RCP Stipulation also reduced the deferred shopping incentive balances created as a result of prior PUCO-approved mechanism for each of the FirstEnergy companies and proposed that the companies’ increased fuel costs of up to \$75 million, \$77 million, and \$79 million in 2006, 2007, and 2008, respectively, would be recovered from all OE and TE distribution and transmission customers through a fuel recovery mechanism (“FRM”). FirstEnergy proposed that fuel costs above the set amounts recovered through the FRM would be deferred for recovery in a future FirstEnergy distribution rate case.

The PUCO modified and approved the proposed RCP Stipulation on January 4, 2006. The Stipulation was modified to require the PUCO’s consultant in the next CBP auction (March 2006) to impute the anticipated fuel cost deferral into FirstEnergy’s “price to beat” (the reference price used to evaluate the results of the CBP), thereby increasing the price to beat and providing a more level playing field for the CBP. Additionally, the PUCO altered the Stipulation to require FirstEnergy to demonstrate to Staff, on a monthly basis, actual fuel cost increases so that Staff could verify the proper amount of fuel costs to be deferred (capitalized as a regulatory asset) and also mandated that the deferred distribution expenses yield necessary improvements in a shorter time frame

general service customers the opportunity to subject a limited percentage of their usage to hourly, market-based pricing. *Id.* at 1.

³⁵⁰ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Generation Charge Adjustment Rider*, PUCO Case No. 05-704-EL-ATA, Application (May 27, 2005).

³⁵¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, PUCO Case Nos. 05-1125-EL-ATA, *et al.*, Application (September 9, 2005) (hereinafter, “*FirstEnergy RCP Proceeding*”).

³⁵² *Id.* at 3. FirstEnergy also filed, and the PUCO approved, a Motion to Consolidate the GCAF case with the RCP Application inasmuch as approval of the RCP would render the GCAF Application moot.

than usual to compensate for the special accounting treatment given to such expenditures.³⁵³

On January 10, 2006, FirstEnergy filed a Motion for Clarification, seeking to further refine the review process of the distribution deferrals, as mandated in the PUCO's Opinion and Order.³⁵⁴ In particular, FirstEnergy sought permission to record deferrals prior to the annual staff review and clarification of the types of costs and the related amounts allowed to be deferred. On January 25, 2006, the PUCO issued an Entry on Rehearing that allowed FirstEnergy to book fuel and distribution deferrals on a monthly basis (after January 1, 2006) instead of waiting until after the Staff's annual review of the deferrals, revised the categories of costs that may be subject to deferral to parallel the categories recommended in the Stipulation, and changed the methodology by which the PUCO would limit the expenses deferred to the amount in excess of the expense levels included in the current rates.³⁵⁵

Elyria Foundry and WPS Energy Services ("WPS") appealed the PUCO's approval of FirstEnergy's RCP to the Ohio Supreme Court after the PUCO denied their Applications for Rehearing.³⁵⁶ Oral arguments were held on February 27, 2007. In August 2007, the Ohio Supreme Court affirmed in part and reversed in part the PUCO's approval of the RCP.³⁵⁷ The Ohio Supreme Court upheld all aspects of the RCP except one, finding that the PUCO violated Ohio's State policy to avoid anti-competitive subsidies when it permitted FirstEnergy to defer generation-related fuel costs for collection from all customers (including shopping customers) through distribution rates.³⁵⁸

In response to the Ohio Supreme Court's decision, FirstEnergy filed an application on Remand at the PUCO to recover the fuel costs addressed by the Ohio Supreme Court.³⁵⁹ FirstEnergy's application proposed two separate riders, one to recover the fuel costs deferred since the inception of the fuel deferral [called the Deferred Fuel Rider ("DFR")] under the RCP until September 30, 2007 and a second rider [called the "Fuel Rider" ("FR")] to recover ongoing fuel costs from September 30, 2007 through December 31, 2008.³⁶⁰ FirstEnergy's application requested recovery of both the

³⁵³ *FirstEnergy RCP Proceeding*, Opinion and Order (January 4, 2006).

³⁵⁴ *FirstEnergy RCP Proceeding*, Motion for Clarification of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (January 10, 2006).

³⁵⁵ *FirstEnergy RCP Proceeding*, Entry on Rehearing (January 25, 2006).

³⁵⁶ *Elyria Foundry Company v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2006-0830; affirmed in part and reversed in part by *Elyria Foundry Co. v Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164.

³⁵⁷ *Elyria Foundry Co. v Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164.

³⁵⁸ *Id.* at 57-58. The Court subsequently denied FirstEnergy's Motion for Reconsideration of its decision. *November 21, 2007 Case Announcements*, 2007-Ohio-6140. Prior to this decision, and despite the mandatory requirement to do so, the PUCO had not explicitly considered the policy directives in Section 4928.02, Revised Code.

³⁵⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, PUCO Case Nos. 07-1003-EL-ATA, *et al.*, Application (September 10, 2007).

³⁶⁰ *Id.* at 5.

deferred and ongoing fuel charges (beginning in October 2007 and running through the first quarter of 2009), as well as permission to recover the fuel costs on a kWh basis.³⁶¹

On January 9, 2008, and several months following the Court's decision and FirstEnergy's related application, the PUCO denied in part and granted in part FirstEnergy's application.³⁶² The PUCO denied FirstEnergy's request to collect the fuel costs deferred during 2006-2007 in calendar year 2008, ruling that collecting these fuel costs (plus carrying costs) in a single year would be unreasonable as it would cause rates to rise substantially. Instead, the PUCO directed FirstEnergy to file within 30 days a separate application with an alternative recovery mechanism to collect the 2006-2007 deferred fuel costs and carrying costs. However, the PUCO did approve FirstEnergy's request to recover ongoing fuel costs (those incurred beginning on January 1, 2008), reasoning that it was in consumers' best interests to pay the charges at that point rather than defer the costs and incur carrying charges on those costs for future recovery. The PUCO also noted the FR would be adjusted and reconciled quarterly and further ordered an audit of the FR at the end of 2008 to ensure that the fuel costs were just and reasonable as well as to reconcile the fuel costs. FirstEnergy was ordered to make quarterly submissions, at least 30 days before the start of each quarter, so that Staff could review FirstEnergy's proposed FR charge for the upcoming quarter.

As ordered by the PUCO, on February 8, 2008 FirstEnergy filed an application proposing an alternative mechanism to recover the 2006-2007 fuel costs.³⁶³ FirstEnergy proposed to recover the applicable fuel cost deferrals beginning with the first billing cycle in June 2008, but no later than the first billing cycle in January 2009, through a separate generation rider for each of its operating companies based on an annual revenue requirement associated with each of the operating companies' deferred fuel cost, including carrying charges and an annual amortization expense based upon a recovery period set by the Commission. FirstEnergy left open the time period for recovery to the Commission's discretion (although it suggested that the recovery period be established between 5 and 25 years) and proposed that the approved charges allow the operating companies to also fully recover the deferred fuel costs, all associated carrying charges, applicable uncollectible expense and Commercial Activity Tax ("CAT") expense. FirstEnergy also suggested that if the Commission rejected its proposal that FirstEnergy be permitted to collect the projected balance over the time period between June 2008 and the last billing period in December 2008.

³⁶¹ FirstEnergy's proposed timeframe for collection of the fuel costs (17 months) was significant inasmuch as FirstEnergy proposed in its distribution rate case to spread the recovery of the fuel costs over a 25-year period. See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approval*, PUCO Case Nos. 07-551-EL-AIR, *et al.*, Application (June 7, 2007).

³⁶² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, PUCO Case Nos. 07-1003-EL-ATA, *et al.*, Finding and Order (January 9, 2008).

³⁶³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, PUCO Case Nos. 08-124-EL-ATA, *et al.*, Application (February 8, 2008).

On June 4, 2008, Staff filed a Staff Report regarding FirstEnergy's deferred fuel costs, recommending recovery of \$197 million rather than FirstEnergy's requested \$207 million, but Staff did not take into account carrying costs and CAT implications. The hearing in this proceeding was ultimately continued (without a firm hearing date) in light of the resources needed to focus on FirstEnergy's ESP and MRO proceedings (see Section D).³⁶⁴

C. 2007 Auction Proceeding

On July 10, 2007, FirstEnergy filed an application to set its SSO generation price, beginning January 1, 2009, through an auction process.³⁶⁵ FirstEnergy proposed two alternatives, suggesting the solicitation of bids to serve customers on either a load class or "slice-of-system" basis. FirstEnergy also advocated for a descending clock auction and the procurement of generation over multiple solicitations throughout the year, with prices being blended to arrive at a single price in order to smooth out potentially volatile market prices. FirstEnergy proposed limiting suppliers to providing a maximum of 75% of the SSO supply and further suggested that the auction plan include PUCO authority to phase-in rates for residential customers in order to limit price increases to no more than 15% per year (including changes in distribution charges resulting from the pending distribution rate case). Additionally, FirstEnergy included a reconciliation mechanism to adjust generation pricing to retail customers to ensure that billed amounts did not exceed the costs FirstEnergy incurred and to ensure that FirstEnergy collected adequate amounts to pay SSO suppliers in full for SSO generation service. FirstEnergy also: proffered a generation service rate design and tariffs based solely on kWh charges instead of the demand charges and declining block structure included in FirstEnergy's current tariffs; incorporated demand response and conservation components into its proposal; and continued its "green power" program.

After a technical conference, the PUCO requested stakeholders file both Initial and Reply Comments, with its Staff's Comments filed in between the due dates for the Initial and Reply Comments. In the Initial Comments, various parties: criticized the pricing implications of an auction; questioned the existence of an effectively competitive market; lamented the market power held by FES, FirstEnergy's unregulated affiliate; and favored the "load class" approach for allocating the results of a CBP and establishing SSO generation-related prices. Marketers and AEP-Ohio were supportive of FirstEnergy's proposal, with AEP-Ohio urging the PUCO to conduct a statewide auction.³⁶⁶ The PUCO's Staff then filed Comments expressing the view that a competitive market had not yet developed and urged the PUCO to reject FirstEnergy's

³⁶⁴ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, PUCO Case Nos. 08-124-EL-ATA, et al., Entry at 1 (August 25, 2008).

³⁶⁵ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism and Phase in, and Tariffs for Generation Service*, PUCO Case Nos. 07-796-EL-ATA, et al., Application (July 10, 2007) (hereinafter, "*FirstEnergy Auction Proceeding*").

³⁶⁶ See *FirstEnergy Auction Proceeding*, AEP Comments at 1-3 (September 5, 2007).

filing.³⁶⁷ Reply commenters then focused on whether a competitive market existed and whether an auction could produce reasonable prices. It is worth noting that during the period of time that these issues were being considered by the PUCO, the legislative process that ultimately produced SB 221 in 2008 was gaining traction. Accordingly, the advocacy of stakeholders in the PUCO venue was affected by the positioning that was part of the legislative process. On August 1, 2008, after SB 221 became effective, FirstEnergy filed a Motion to Withdraw its Application and close this proceeding inasmuch as SB 221 removed the PUCO's authority to approve FirstEnergy's application.

D. Recovery of Regional Transmission Organization Costs

Pursuant to its RSP, FirstEnergy filed an application with the PUCO to change its tariffs to incorporate transmission and ancillary service-related costs under MISO's Open Access Transmission Tariff and Transmission Energy Market Tariff ("MISO Tariffs") and for permission to modify accounting procedures.³⁶⁸ Multiple parties submitted a Stipulation and Recommendation ("RTO Cost Stipulation")³⁶⁹ to the PUCO that recommended, among other things, that the PUCO permit FirstEnergy to recover – on a dollar-for-dollar basis – the MISO Tariff charges through a cost recovery mechanism in effect from January 1, 2006 through December 31, 2008 and authorize FirstEnergy to remove these costs from base rates and include them in a TCRR. The PUCO approved the Stipulation without any material alterations on August 31, 2005.

However, OCC filed a motion to reject the RTO cost recovery tariffs FirstEnergy filed on November 1, 2005, claiming that FirstEnergy included costs not approved in the PUCO's Opinion and Order. In a December 21, 2005 Finding and Order, the PUCO denied OCC's motion and accepted the filed tariffs. OCC appealed the PUCO's decision to the Ohio Supreme Court. OCC subsequently withdrew its appeal on December 14, 2006.³⁷⁰

³⁶⁷ *FirstEnergy Auction Proceeding*, Staff Comments on the FirstEnergy Companies' Proposed Competitive Bidding Process (September 21, 2007). Among other things, Staff cited the failure of wholesale markets to discipline prices to reasonable levels, pointing to the dramatic price increases caused by market-based rates in Maryland and Illinois, and further noted its belief that FirstEnergy's customers would be "plagued by dramatic price increases such as those that have resulted in states where competitive procurements relying on wholesale markets have been used" if the PUCO were to approve FirstEnergy's auction proposal. *Id.* at 7.

³⁶⁸ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Rider for the Collection of RTO Costs and Transmission and Ancillary Service Costs and for Authority to Modify Their Accounting Procedures*, PUCO Case No. 04-1932-EL-ATA, Application (December 30, 2004).

³⁶⁹ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Rider for the Collection of RTO Costs and Transmission and Ancillary Service Costs and for Authority to Modify Their Accounting Procedures*, PUCO Case No. 04-1932-EL-ATA, Stipulation and Recommendation (July 22, 2005). The signatory parties to the Stipulation included FirstEnergy, IEU-Ohio, OCC, OP&E, and PUCO Staff. Dominion Retail signed the Stipulation as a non-opposing party.

³⁷⁰ *See The Office of Ohio Consumers' Counsel v. The Public Utilities Commission of Ohio*, Court Case No. 2006-0600. *December 19, 2006 Case Announcements*, 2006-Ohio-6709. In a related appeal by OCC regarding recovery of RTO costs, the Court upheld the PUCO's decision allowing FirstEnergy and

On April 27, 2006, FirstEnergy filed an application with revised Transmission and Ancillary Service (“TAS”) Riders, to be effective July 1, 2006. On February 1, 2007, FirstEnergy filed a Stipulation signed by OCC and OPAE that: urged the PUCO to approve FirstEnergy’s April 27, 2006 filing; recognized that MISO charges associated with revenue sufficiency guarantees (“RSG”) were the type of charges that could be collected through the transmission and ancillary service riders; resolved concerns (through the funding and implementation of DSM programs) regarding the effectiveness and implementation of the RCP Stipulation agreed to by the PUCO; asked the PUCO to open a new docket to consider transmission and ancillary service rider issues in the future; and required OCC to not participate in the Elyria Foundry appeal of FirstEnergy’s RCP plan.³⁷¹ The PUCO approved the Stipulation in its entirety and also ordered a biennial review (per Staff’s request) of the TAS Riders to determine if FirstEnergy’s management and operating processes were minimizing controllable TAS costs.³⁷²

On June 2, 2008, Staff filed its biennial review on controllable RTO costs included in FirstEnergy’s TAS Riders.³⁷³ Staff generally found that FirstEnergy should be authorized to include the presented costs/credits in its transmission rider update and recommended that FirstEnergy continue to monitor and provide updates on net congestion costs/revenues, net transmission losses, revenue sufficiency guarantee costs, and revenue neutrality uplift charges. Staff also made some specific recommendations: (1) FirstEnergy should provide updated details on issues identified by the PUCO’s Staff with each of its update filings, including a discussion of any actions taken by FirstEnergy or MISO to minimize these costs; and, (2) FirstEnergy should provide a breakdown of revenue neutrality uplift (“RNU”) costs it proposed to include in the rider with each rider update filing so that the amount of RNU related to RSG can be determined.³⁷⁴

DP&L to defer collection of RTO charges until after the MDP ends. See *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853.

³⁷¹ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Rider for the Collection of RTO Costs and Transmission and Ancillary Service Costs and for Authority to Modify Their Accounting Procedures*, PUCO Case Nos. 04-1932-EL-ATA and 07-128-EL-ATA, Finding and Order at 3-6 (February 14, 2007).

³⁷² *Id.* at 8.

³⁷³ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Rider for the Collection of RTO Costs and Transmission and Ancillary Service Costs and for Authority to Modify Their Accounting Procedures*, PUCO Case Nos. 04-1932-EL-ATA and 07-128-EL-ATA, Staff’s Biennial Review of Controllable RTO Costs (June 2, 2008).

³⁷⁴ TAS Rider rates were set to zero following an application by FirstEnergy and a subsequent review by PUCO Staff. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company’s Revised Transmission and Ancillary Services Riders*, PUCO Case No. 09-968-EL-ATA, Staff Report (December 8, 2009). The adjustment resulted from a change in rules regarding FirstEnergy’s generation procurement, which required winning bidders to be responsible for all transmission and ancillary service costs beginning June 2009. *Id.* The application and Staff review also noted that FirstEnergy had an over-recovery under Rider TAS and proposed Rider TAS2 be established to credit the over-recovery back to customers. *Id.*

On October 17, 2008, FirstEnergy filed proposed revisions to its transmission rates, for recovery beginning January 1, 2009, or the effective date on which distribution rates approved in its distribution rate case (see below) became effective.³⁷⁵ FirstEnergy proposed to decrease its transmission rates currently in effect, with average decreases of 10% for OE, 17% for CEI, and 6% for TE. FirstEnergy explained the decreased rates resulted mainly from lower projected costs in 2009, as well as a net over-collection for 2008 cost recoveries made through September 2008. The PUCO approved FirstEnergy's application on December 19, 2008, but extended FirstEnergy's current transmission and ancillary services tariffs until the distribution rate design and tariff structure was determined in FirstEnergy's pending distribution rate case, at which time the rider would become effective. The PUCO also modified the application to incorporate recommended changes from Staff.

On October 16, 2009, FirstEnergy filed an application to revise its TAS Rider pursuant to Section 4928.05(A)(2), Revised Code, and Chapter 4901:1-36, O.A.C.³⁷⁶ FirstEnergy filed an amended application on December 3, 2009, revising its request to credit all customers, on an unavoidable basis, an over-collection of \$68.9 million. The PUCO approved FirstEnergy's application on December 16, 2009 and required FirstEnergy to provide PUCO Staff with ongoing monthly cost and revenue data in order to ensure that the proposed TAS rates were terminated, if necessary, prior to December 31, 2010.³⁷⁷

E. Distribution Rate Case

On June 7, 2007, FirstEnergy filed an application for permission to increase its distribution rates.³⁷⁸ A partial Stipulation was submitted by multiple parties settling revenue distribution and non-residential rate design issues, but the remainder of the case was litigated. On January 21, 2009, and well outside the period specified by Ohio law, the PUCO issued an Opinion and Order modifying and approving FirstEnergy's application.³⁷⁹ The PUCO authorized a rate of return of 8.48% for each of FirstEnergy's

³⁷⁵ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Transmission Cost Recovery Rider*, PUCO Case Nos. 08-1172-EL-ATA, et al., Application (October 17, 2008).

³⁷⁶ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Revise its Transmission and Ancillary Services Rider*, PUCO Case No. 09-968-EL-ATA, Application (October 16, 2009).

³⁷⁷ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Revise its Transmission and Ancillary Services Rider*, PUCO Case No. 09-968-EL-ATA, Finding and Order (December 16, 2009).

³⁷⁸ See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approval*, PUCO Case Nos. 07-551-EL-AIR, et al., Application (June 7, 2007) (hereinafter, "*FirstEnergy Distribution Rate Increase Proceeding*").

³⁷⁹ *FirstEnergy Distribution Rate Increase Proceeding*, Opinion and Order (December 21, 2007). This was the first distribution rate increase for OE since 1990 and the first distribution rate increase for TE and CEI since 1996. The PUCO's failure to issue a decision in this proceeding within the time period mandated by the General Assembly complicated the issues in the ESP and MRO proceedings initiated by FirstEnergy in July, 2008 (discussed below).

operating companies, which resulted in a revenue increase of \$69.9 million for OE, \$29.2 million for CEI, and \$38.5 million for TE.

The PUCO modified the partial settlement to require FirstEnergy to provide a discount to schools through a rider. The PUCO also ordered FirstEnergy to continue existing DSM programs at current program levels and to increase funding for the Community Connections Program to \$5 million per year. Additionally, the PUCO approved the tariff consolidation proposed by FirstEnergy that combined all of the existing distribution service schedules into a total of eight distribution service rate schedules. Two riders designed to mitigate the drastic impact that the rate schedule consolidation had on some customers on certain rate schedules was also approved.³⁸⁰

The PUCO rejected OCC's recommendation for a separate proceeding to investigate FirstEnergy's service quality and reliability. Further, the PUCO declined to adopt FirstEnergy's proposal to continue its up-front payment concept for line extensions, noting that a rulemaking was pending on this topic, and directing FirstEnergy to include all line extension expenditures in rate base until new line extension rules were effective. Finally, the PUCO established and set at zero a rider related to AMI and Modern Grid projects, but directed FirstEnergy to conduct a study on AMI and Modern Grid deployment options.

Commissioners Roberto³⁸¹ and Centolella³⁸² filed a Concurring and Dissenting Opinion, concurring with the entire Order but objecting to the baseline from which a deferral amount (stemming from the RCP case) related to certain distribution expenses was calculated. Chairman Schriber³⁸³ filed a Concurring Opinion supporting the Commission's decision on the chosen baseline. In February 2009, FirstEnergy and OCC filed Applications for Rehearing of the Commission's Order. The Commission denied the Applications for Rehearing on February 2, 2011.

F. Electric Security Plan and Market Rate Option Cases

I. FirstEnergy's Initial ESP and MRO Applications

On July 31, 2008 (the effective date of SB 221), FirstEnergy simultaneously filed an ESP and an MRO for the PUCO's consideration in order to establish its new SSO pursuant to SB 221. FirstEnergy proposed an ESP with a three-year term from 2009 through 2011, indicating that if the Commission so chose, it could terminate the final

³⁸⁰ The riders are called the Residential Distribution Credit Rider ("Rider RDC") and the Business Distribution Credit Rider ("Rider BDC").

³⁸¹ Commissioner Roberto was appointed to the PUCO by Governor Strickland and her five-year term is scheduled to end in April, 2013.

³⁸² Commissioner Centolella was appointed to the PUCO by Governor Strickland and his five-year term is scheduled to end in April, 2012.

³⁸³ Dr. Alan Schriber was reappointed to the PUCO and made Chairman by Governor Strickland. Dr. Schriber resigned from the PUCO effective December 31, 2010.

year of the ESP.³⁸⁴ FirstEnergy also filed an MRO that would serve as the default option should the PUCO modify or deny its ESP or if FirstEnergy did not accept changes made by the PUCO to its ESP.³⁸⁵ Finally, within the ESP, FirstEnergy proposed a four-month short-term ESP that required PUCO approval by November 14, 2008 to become effective on January 1, 2009 through April 31, 2009 in order to provide the PUCO with additional time to review the ESP or work through a CBP as part of FirstEnergy's MRO. FirstEnergy's short-term ESP was the byproduct of a rather common recognition that the Commission was not likely to satisfy the statutory requirement requiring the PUCO to issue orders in response to these applications within a specified amount of time.

FirstEnergy's ESP defined the SSO price during the three-year period and also included provisions for transmission service, economic development, alternative energy resources and energy efficiency. The proposed ESP would have also resolved the pending distribution rate case³⁸⁶ and the deferred fuel cost recovery case, among other features. FirstEnergy proposed an increase in base SSO rates each year, as well as additional increases that were to be collected through rider mechanisms.

FirstEnergy's MRO included a proposal for an initial bid process in which one-third of the total SSO load of all three companies would be bid out for the period from January 1, 2009 through May 31, 2010; one-third of the total SSO load for all three companies for the period from the January 1, 2009 through May 31, 2011 would be bid out; and one-third of the total SSO load for all three companies for the period from January 1, 2009 through May 31, 2012 would be put out for bid. After the initial CBP, in each calendar year starting in 2009, FirstEnergy would hold two CBPs, in October and January, to obtain one-third of the power requirements of all three companies' POLR load for a three-year period. FirstEnergy proposed this approach to smooth out the pricing effects of potentially volatile market prices. The CBP proposal utilized a "slice-of-system" approach (bidders bid on tranches of total SSO customer load) and also featured a reconciliation mechanism.

On November 25, 2008, the PUCO issued an Order denying FirstEnergy's MRO Application.³⁸⁷ The PUCO determined that FirstEnergy did not prove that it had met the requirements contained within SB 221 to proceed to a CBP to serve its load. FirstEnergy filed an Application for Rehearing of the PUCO's Opinion and Order on

³⁸⁴ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, PUCO Case No. 08-935-EL-SSO, Application (July 31, 2008) (hereinafter "*FirstEnergy ESP Proceeding*").

³⁸⁵ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariff for Generation Service*, PUCO Case No. 08-936-EL-SSO, Application (July 31, 2008) (hereinafter, "*FirstEnergy MRO Proceeding*").

³⁸⁶ As discussed above, the PUCO had failed to issue a decision on FirstEnergy's distribution rate increase application within the time period mandated by the General Assembly.

³⁸⁷ *FirstEnergy MRO Proceeding*, Opinion and Order (November 25, 2008).

December 22, 2008 and parties to the case filed Memoranda Contra FirstEnergy's Application for Rehearing on January 2, 2009. The PUCO granted FirstEnergy's Application for Rehearing to further consider the matters raised by FirstEnergy. But, the statutory decisional clock that the PUCO was obligated to follow had expired, setting the stage for the chaos that followed.³⁸⁸

On December 19, 2008, the PUCO issued its Opinion and Order in FirstEnergy's ESP proceeding, significantly modifying FirstEnergy's proposed ESP.³⁸⁹ On December 22, 2008, FirstEnergy exercised its statutorily-granted right and filed a letter at the PUCO withdrawing and terminating its ESP. On that same day, FirstEnergy also made a tariff filing to continue, in most cases,³⁹⁰ its current rates until an ESP or MRO was properly authorized and put in place. Additionally, FirstEnergy announced that it would issue an RFP to serve its SSO customers from January 5, 2009 through March 31, 2009.

After permitting a very brief comment opportunity for intervenors and a reply comment opportunity for FirstEnergy on FirstEnergy's proposal to continue its current rate plan, the PUCO issued an Order on January 7, 2008 to continue FirstEnergy's rate plan pursuant to Section 4928.143, Revised Code.³⁹¹ The PUCO determined that, except for CEI,³⁹² FirstEnergy's RTC charges should end as of December 31, 2008 inasmuch as there was a specific end date of December 31, 2008 established in their most recent rate plan and the full RTC amounts had been collected. The Commission also eliminated the FRM and the RTC Offset Rider ("RTCO") for all three companies. The Commission found that FirstEnergy could continue its RSC and shopping credits inasmuch as there was no specific end date established other than the point at which the rate plan itself ended. The PUCO also permitted FirstEnergy to continue its fuel rider for the limited purpose of collecting the remaining 2008 actual fuel costs. Finally, the PUCO explained that, pursuant to Section 4928.143, Revised Code, FirstEnergy could apply for fuel cost recovery. The PUCO required FirstEnergy to file its compliance tariffs by January 12, 2009.

On January 9, 2009, FirstEnergy filed an Application for Rehearing and a Motion to Stay the PUCO's January 7, 2009 Order continuing its current rate plan. The Attorney Examiner granted FirstEnergy's request to delay filing its compliance tariffs. However, on January 14, 2009, the PUCO issued a subsequent order that, in light of the PUCO

³⁸⁸ The resulting chaos was most profound in the case of FirstEnergy's interruptible or non-firm customers.

³⁸⁹ *FirstEnergy ESP Proceeding*, Opinion and Order (December 19, 2008).

³⁹⁰ On or about December 22, 2008, FirstEnergy began notifying customers with interruptible service components that there would be significant changes to the protocols used by FirstEnergy to call interruptions as well as the pricing of buy-through service. FirstEnergy implemented these changes on or about January 1, 2009 over the protests of affected customers.

³⁹¹ *FirstEnergy ESP Proceeding*, Finding and Order (January 7, 2009). After receiving comments regarding whether Section 4928.143 or Section 4928.141, Revised Code, applied in this circumstance, the PUCO determined that Section 4928.143, Revised Code, controlled for purposes of continuing FirstEnergy's current rate plan.

³⁹² The RTC charges for CEI continued because they were not slated to expire until December 31, 2010.

approving a rider to recover FirstEnergy's purchased power costs (see below), required FirstEnergy to file tariffs consistent with its January 7, 2009 Order.

As noted above, in the midst of its PUCO proceedings, FirstEnergy also announced that it had conducted a successful RFP for generation supply from January 5, 2009 through March 31, 2009. The auction price settled at a price "consistent with" 6.98¢ per kWh. FirstEnergy subsequently filed an application at the PUCO for approval of Rider FUEL to recover its purchased power costs.³⁹³ The Rider FUEL applied a retail surcharge to all SSO retail electric customers (beginning January 1, 2009) for the difference in all costs incurred by FirstEnergy to purchase power for SSO customers and the unbundled generation revenue received for each of the customer classes (as set out in the current rate plan). FirstEnergy proposed to update the charge, the reconciliation, and the forecasted costs and revenues on a quarterly basis.

The PUCO approved FirstEnergy's Rider FUEL application on January 14, 2009. The PUCO directed FirstEnergy to make a filing by February 2, 2009 that included testimony and provided information sufficient for the PUCO to conduct a prudence review of the costs incurred and to determine whether the recovery of such costs was necessary to avoid a confiscatory result. The Commission noted that the PUCO was approving the request to comply with its Constitutional requirements³⁹⁴ and the PUCO would examine whether the costs were prudent at a later date. Finally, the PUCO permitted CEI to defer its Rider FUEL costs for future recovery.³⁹⁵ FirstEnergy filed its Rider FUEL tariff schedules on January 16, 2009.

On January 23, 2009, FirstEnergy filed a motion for an extension of time to file its testimony and a suspension of the requirement that FirstEnergy make any filing with respect to the "confiscatory result" issue pending resolution of this issue on rehearing. FirstEnergy also requested a procedural schedule that recognized the rebuttable presumption of management prudence in utility decisions, contending that it should not be required to file evidence that its purchased power costs were prudent unless and until the PUCO first determined that the evidence presented by intervenors and Staff overcame the presumption of prudence. FirstEnergy's motion was granted in part and denied in part. The Attorney Examiner required FirstEnergy to file on February 2, 2009 information such as the final post-RFP report and other information that was available to bidders, but permitted FirstEnergy an extension of time to file testimony and supporting evidence pertaining to prudence issues until the PUCO ordered otherwise. As required

³⁹³ *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority*, PUCO Case Nos. 09-21-EL-ATA,, *et al.*, Application (January 9, 2009).

³⁹⁴ The prices that FirstEnergy paid for the wholesale supply purchased to meet the needs of its SSO or non-shopping customers were and are subject to the regulatory jurisdiction of FERC. Under a doctrine known as the "filed rate doctrine" and by the force of the Supremacy Clause of the United States Constitution, a state regulator may not block retail recovery of wholesale prices that FERC has determined to be "just and reasonable". Notwithstanding these legal concepts, a state regulator may disallow recovery in cases where the state regulator finds that the costs were imprudently incurred (where a lower cost option was available, for example).

³⁹⁵ CEI was the only operating company whose RTC charge continued past December 31, 2008.

by the Attorney Examiner, FirstEnergy timely filed the final post-RFP report on February 2, 2009.

II. ESP Settlement

On January 29, 2009, the PUCO issued an Entry directing its Staff to develop a proposal to establish an ESP for FirstEnergy and circulate the proposal among the parties in the ESP case.³⁹⁶ The Entry also requested FirstEnergy and others to seriously consider Staff's proposal and asked FirstEnergy to reconsider its decision to withdraw its ESP. The Entry ordered Staff to conduct a conference with the parties in the ESP case on February 5, 2009, to discuss Staff's proposal and the possibility of an agreement on that proposal. After extensive settlement discussions, on February 19, 2009, FirstEnergy filed an amended application in its ESP Case and a Stipulation signed by many of the intervening parties. On February 26, 2009, a Supplemental Stipulation was filed that contained refinements to the original Stipulation (largely dealing with governmental aggregation) that was joined by additional signatory parties. The Stipulation, as supplemented, was not opposed by the non-signatory parties in the ESP case.

The as-supplemented Stipulation contained an interim term ESP that resolved issues related to the procurement of power to serve FirstEnergy's retail SSO customers from April 1, 2009 through May 31, 2009, as well as a long-term ESP for the SSO from June 1, 2009 through May 31, 2011. The stipulating parties recommended that the PUCO act by March 4, 2009 on the limited term ESP and recommended that the Commission act by March 25, 2009 on the remaining long-term ESP provisions of the Stipulation.

The PUCO approved the portion of the Stipulation regarding the limited term ESP on March 4, 2009.³⁹⁷ The limited term ESP provided that, for the April 1, 2009 through May 31, 2009 period, FirstEnergy would obtain from FES the necessary energy, capacity, and resource adequacy requirements to serve FirstEnergy's retail SSO load and the load for special contracts at the rate of \$66.68/MWh. The \$66.68/MWh wholesale rate was adjusted for distribution line losses and the interim term ESP specified that FirstEnergy would recover MISO charges for the SSO load and special contract load through FirstEnergy's transmission rider. The Stipulation also requested the PUCO find that the procurement process used to acquire power from January through March 2009 period was not imprudent and the stipulating parties agreed that they would not challenge the recovery or amount of supply costs for the January through March 2009 period.

The Stipulation also permitted FirstEnergy to continue deferring purchased power costs for CEI for the April through May 2009 period and set the interest rate on the deferrals. Additionally, the Stipulation addressed issues related to interruptions and buy-through arrangements for interruptible customers for the period prior to June 1, 2009 and

³⁹⁶ *FirstEnergy ESP Proceeding*, Entry (January 29, 2009).

³⁹⁷ *FirstEnergy ESP Proceeding*, Second Finding and Order (March 4, 2009).

required the withdrawal of (as well as the future filing of) complaint cases pending at the PUCO related to FirstEnergy's buy-through policy if the PUCO approved the Stipulation. Finally, the Stipulation also called for the PUCO to find that all special contracts terminate on the dates specified in the RCP Stipulation approved in the FirstEnergy RCP case as well as set a generation price of \$0.05 per kWh for April 2009 and May 2009 for domestic automaker facilities that use more than 50 million kWh annually.

On March 25, 2009, the PUCO approved the remaining provisions of the Stipulation regarding FirstEnergy's SSO generation price for the June 1, 2009 through May 31, 2011 period.³⁹⁸ Under the approved Stipulation, retail generation rates for June 1, 2009 through May 31, 2011 were determined by a descending-clock format CBP and FirstEnergy procured, on a slice-of-system basis, 100% of the aggregate wholesale "full requirements" SSO supply. The Stipulation also explicitly indicated bidding would be for a single two-year product and there would not be a load cap for bidders (*i.e.* FES may participate without limitation).³⁹⁹ The Stipulation also contemplated a possible phase-in of generation prices resulting from the CBP in an amount not to exceed, in the aggregate for all three companies, \$300 million in 2009, \$500 million in 2010, and \$200 million in 2011, provided FirstEnergy had the ability to finance the additional funds. As it turned out, the phase-in was not needed because of the results of the CBP process that followed (the CBP process produced a lower default generation supply price than the price that would have triggered the phase-in). The Stipulation also prohibited minimum stay provisions for residential and small commercial non-aggregation customers, eliminated RSC charges effective June 1, 2009, explicitly noted that all generation rates for the Stipulated ESP period were avoidable, and prohibited shopping credit caps

The Stipulation also blessed FirstEnergy's modified Economic Load Response Program Rider ("Rider ELR") and Optional Load Response Program Rider ("Rider OLR"), discounted rates for certain qualifying schools, and required that any revenue shortfall resulting from the application of a \$1.95 per kW interruptible credit in Rider ELR and Rider OLR would be recovered as part of an unavoidable Demand-Side Management and Energy Efficiency Rider ("Rider DSE"). Further, the Stipulation established a Generation Service Uncollectible Rider, instituted a distribution rate freeze until December 31, 2011 (subject to the SEET and certain other factors), and approved a Delivery Service Improvement Rider ("Rider DSI") for April 1, 2009 through December 31, 2011 for the purpose of improving the overall performance of the distribution system, including reliability of the distribution systems.

The Stipulation further provided for the creation of riders to recover distribution uncollectible expenses, deferred distribution costs, deferred transmission costs,

³⁹⁸ *FirstEnergy ESP Proceeding*, Second Opinion and Order (March 25, 2009).

³⁹⁹ Two separate Concurring Opinions as well as one Concurring and Dissenting Opinion were filed by the Commissioners. All of the separate opinions addressed whether a cap should be placed on the amount of load that a single supplier may bid on and acquire through the CBP. Chairman Schriber and Commissioner Fergus (Commissioner Fergus' term expired in April, 2010) joined an opinion that concluded that it is unknown whether a load cap is beneficial. Commissioners Centolella and Lemmie (Commissioner Lemmie's term expired in April, 2011) joined an opinion that expressed a preference for a 65% bid cap. Commissioner Roberto filed a Dissenting Opinion, dissenting on the grounds that a bid cap of 50% should be imposed by the Commission.

demand side management and energy efficiency program costs, and PIPP uncollectible costs. FirstEnergy also wrote off 50% of CEI's extended RTC balance (approximately \$215 million) with the remaining RTC balance recoverable, with any additional amounts collected through the RTC used to reduce the purchased power deferral that arose for CEI for the January 1, 2009 through May 31, 2009 period (the period for the chaos that took place after the PUCO modified FirstEnergy's ESP -- after the statutory clock had run -- and FirstEnergy exercised its statutory right to reject the PUCO's as-modified ESP).

Additionally, the Stipulation noted that there would be no company-funded energy efficiency and AMI programs as part of the Stipulation, but obligated FirstEnergy to develop a proposal to pursue federal funds available under the American Recovery and Reinvestment Act that may be available for Smart Grid investment.⁴⁰⁰

The Stipulation further required FirstEnergy to develop an EE/PDR program for the period 2009 through 2011, including conducting a market study to identify EE/PDR opportunities. The costs associated with the EE/PDR program were made subject to recovery through Rider DSE. Customers that committed their demand response or other customer-sited capabilities for integration into FirstEnergy's program were also given the opportunity to be exempted, with Commission approval, from FirstEnergy's portfolio compliance cost recovery mechanism.

Further, FirstEnergy committed to contribute \$25 million to support economic development and job retention. The Stipulation also created a Reasonable Arrangements Rider and a Delta Revenue Recovery Rider to recover delta revenue⁴⁰¹ associated with reasonable arrangements approved by the Commission with a separate unavoidable rider for existing CEI reasonable arrangements that continued past December 31, 2008.

⁴⁰⁰ FirstEnergy filed its proposed AMI/Smart Grid proposal on November 18, 2009. *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Ohio Site Deployment of the Smart Grid Modernization Initiative and Timely Recovery of Associated Costs*, PUCO Case Nos. 09-1820-EL-ATA, *et al.*, Application (November 18, 2009) (hereinafter, "*FirstEnergy Smart Grid Proceeding*"). FirstEnergy proposed to recover approximately \$36 million in AMI/Smart Grid costs from Ohio jurisdictional customers inasmuch as the other half of the AMI/Smart Grid costs associated with the planned Ohio site deployment were covered by a federal stimulus funds grant. IEU-Ohio objected to the volumetric rate design of the proposed rider to recover these costs and PUCO Staff suggested a fixed, per customer charge to recover FirstEnergy's AMI/Smart Grid initiative costs. By letter dated June 15, 2010 and filed in this docket, FirstEnergy agreed to change Rider AMI to a fixed monthly charge. *FirstEnergy Smart Grid Proceeding*, Correspondence of FirstEnergy at 3 (June 15, 2010). The PUCO approved FirstEnergy's application as modified by the June 15 letter (which adopted seven other Staff recommendations besides the one stated above). The PUCO largely denied the Applications for Rehearing that were filed but clarified that the Commission approved recovery of actual costs incurred by FirstEnergy that were not reimbursed by the Department of Energy subject only to the specific cost recovery mechanisms pending in FirstEnergy's Second ESP Proceeding (discussed below in Section G).

⁴⁰¹ Delta revenue is defined by the PUCO as "the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission." Rule 4901:1-38-01(C), O.A.C.

III. Auction to Set June 1, 2009 through May 31, 2011 SSO Generation Price

The descending clock auction required by the Supplemental Stipulation was conducted on May 13, 2009 and May 14, 2009.⁴⁰² The CBP produced a final wholesale auction load-weighted average price of \$61.50/MWh for FirstEnergy customers for the June 1, 2009 through May 31, 2011 period. The PUCO accepted the results of the CBP on May 14, 2009. The CBP results produced prices less than anticipated when SB 221 was enacted.

IV. Accelerated Recovery of Deferred Distribution Costs Due to Auction Results

On July 27, 2009, FirstEnergy filed two separate applications (one for non-residential customers and another for residential customers) requesting permission to recover deferred distribution costs (RCP distribution deferrals, line extension deferrals, and transition tax deferrals) from customers more rapidly than that authorized in its distribution rate case.⁴⁰³ FirstEnergy reasoned that the lower-than-expected generation price stemming from the auction in its ESP case created an opportunity to collect the deferrals at the present time instead of over a longer period of time, thus generating savings of approximately \$142 million for non-residential customers and \$178 million for residential customers in carrying costs on deferred balances that otherwise would accrue if collected over the original time frames established in the distribution rate case. FirstEnergy's application proposed to recover the deferred balances over the 18 winter months between September 2009 and May 2011 (the rider would be zero during June, July, and August of 2010) instead of over 25 years for the RCP distribution deferrals and five years for the line extension and transition tax deferrals. FirstEnergy proposed to update the rider three times between September 2009 and May 2011. Finally, FirstEnergy explained that the recovery period for CEI customers would be the same as OE and TE customers, but that the rider charge would be set at a higher level from January 2011 through May 2011 as compared to the September 2009 through December 2010 period to coincide with the termination of RTC charges for CEI customers. On July 28, 2009, FirstEnergy filed a letter indicating that a coalition of consumer and environmental groups (including the OCC) called the Ohio Consumer and Environmental Advocates ("OCEA") supported FirstEnergy's request and that they had agreed to terms of the Fuel Fund Grant ("FFG") Program contemplated by the Supplemental Stipulation approved by the Commission in the ESP proceeding.⁴⁰⁴ Specifically, FirstEnergy agreed to make an additional \$2.5 million available to the FFG Program, which provides electric bill assistance to eligible residential customers, and

⁴⁰² *FirstEnergy ESP Proceeding*, Finding and Order (May 14, 2009).

⁴⁰³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Residential Distribution Deferral Rider*, PUCO Case Nos. 09-641-EL-ATA, et al., Application (July 27, 2009) (hereinafter, "*FirstEnergy Rider RDD Proceeding*").

⁴⁰⁴ Specifically, OCEA agreed to support the application pertaining to residential customers and to not oppose the application pertaining to non-residential customers.

not seek recovery of such amount from customers. The Commission approved FirstEnergy's application on August 19, 2009.

V. MRO Application to Set SSO Generation Price Beginning June 1, 2011

On October 20, 2009, FirstEnergy filed an application pursuant to Sections 4928.141 and 4928.142, Revised Code, and Rule 4901:1-35, O.A.C., for approval of an MRO plan to secure SSO generation supply when the ESP expired on May 31, 2009. Approval of the MRO Application would have permitted FirstEnergy to conduct a CBP, outside of an ESP, to obtain generation supply for SSO service beginning on June 1, 2011. Pursuant to the Commission's November 12, 2009 Entry in this case, the PUCO Staff filed Comments recommending FirstEnergy reconsider its MRO Application and instead consider filing a new ESP application.⁴⁰⁵ The November 12 Entry also set forth a procedural schedule for the case and an evidentiary hearing was held in December of 2009. Parties filed Initial and Reply Briefs on January 8, 2010 and January 15, 2010, respectively.

As a result of Staff's recommendation, FirstEnergy and numerous parties entered into discussions regarding a potential ESP.⁴⁰⁶ These discussions culminated in FirstEnergy's Application and Stipulation for an ESP, which was filed on March 23, 2010 in PUCO Case No. 10-388-EL-SSO.⁴⁰⁷ The ESP Application replaced the MRO Application in its entirety.

G. FirstEnergy's Second ESP

As mentioned above, FirstEnergy filed an application and Stipulation for an ESP on March 23, 2010.⁴⁰⁸ In addition, FirstEnergy requested the PUCO take administrative notice of the record in the MRO case. The Commission granted this request, noting that no memoranda contra had been filed, and admitted all testimony and exhibits in the MRO case into evidence in the ESP case.⁴⁰⁹ Several parties then filed Applications for Rehearing alleging this violated their due process rights and was unlawful and unreasonable. The Commission denied the Applications for Rehearing on May 13, 2010.⁴¹⁰

⁴⁰⁵ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, PUCO Case No. 09-906-EL-SSO, Entry (November 12, 2009).

⁴⁰⁶ See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, PUCO Case No. 10-388-EL-SSO, Opinion and Order (August 25, 2010) (hereinafter, "*FirstEnergy Second ESP Proceeding*").

⁴⁰⁷ *Id.*

⁴⁰⁸ *FirstEnergy Second ESP Proceeding*, Application and Stipulation (March 23, 2010).

⁴⁰⁹ *FirstEnergy Second ESP Proceeding*, Entry (April 6, 2010).

⁴¹⁰ *FirstEnergy Second ESP Proceeding*, Entry (May 13, 2010).

An evidentiary hearing in the Second ESP case commenced on April 20, 2010 and continued through April 23. Subsequently, a Supplemental Stipulation was filed on May 13, 2010. On June 21, 2010, another hearing was held, which resulted in a Second Supplemental Stipulation. On August 25, 2010, the PUCO approved the Stipulation, as modified by the two Supplemental Stipulations (collectively, “Combined Stipulation”), and also made several modifications of its own.⁴¹¹

On September 8, 2010, FirstEnergy accepted the PUCO’s modifications to the Combined Stipulation.⁴¹² The approved ESP succeeded FirstEnergy’s then-current ESP which ended on May 31, 2011; the new ESP became effective on June 1, 2011 and was scheduled to continue through May 31, 2014 (as discussed below, FirstEnergy filed an application to establish an ESP before the Second ESP expired). On September 24, 2010, OCC, together with several other parties, jointly filed an Application for Rehearing alleging the Combined Stipulation as approved was unreasonable and unlawful on twelve separate grounds. On February 9, 2011, the PUCO denied the Application for Rehearing. The provisions of FirstEnergy’s Second ESP are summarized below.

I. Competitive Bidding Process

For the period between June 1, 2011, through May 31, 2014 (the proposed term of the Second ESP), retail default generation rates for the SSO are determined by a descending-clock format CBP.⁴¹³ Through the CBP, FirstEnergy procured, on a slice-of-system basis, 100% of the aggregate wholesale full requirements SSO supply.⁴¹⁴ The CBP auctions were conducted by an independent bid manager, CRA International.⁴¹⁵ The bidding occurred initially using three products of varying lengths and multiple bidding processes will be held over the term of the ESP.⁴¹⁶

Initially, the auctions were to take place in July 2010, October 2010, July 2011 and July 2012; however, the Commission modified the Combined Stipulation because the first scheduled auction timeframe had passed when the PUCO got around to acting on the Combined Stipulation. The PUCO rescheduled the first two auctions to October 2010 and January 2011, respectively.⁴¹⁷ The precise dates were set by the independent auction manager.⁴¹⁸ Additionally, the July 2011 and July 2012 auctions were rescheduled to October 2011, January 2012, October 2012, and January 2013 in order

⁴¹¹ *Id.* at 47.

⁴¹² *FirstEnergy Second ESP Proceeding*, Notice of FirstEnergy (September 8, 2010).

⁴¹³ *FirstEnergy Second ESP Proceeding*, Opinion and Order at 8 (August 25, 2010).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 33.

⁴¹⁸ *Id.*

to alleviate concerns about having auctions during peak months.⁴¹⁹ Finally, the PUCO imposed an 80% load cap and precluded the assignment of tranches to any party that would cause a bidder to exceed the load cap.⁴²⁰ The PUCO also reserved its right to review future auctions and the auction process, including the right to carve out from future auctions supply procurements for consumers who take service on dynamic and time-differentiated rates.⁴²¹ The first CBP auction (for 50% of the SSO supply) was held on October 20, 2010.⁴²² Ten bidders registered for the auction and 4 bidders submitted winning bids during the CBP auction for a clearing price of \$54.55/MWh for the June 1, 2011 to May 31, 2012 delivery period; \$54.10/MWh for the June 1, 2011 to May 31, 2013 delivery period; and \$56.58/MWh for the June 1, 2011 to May 31, 2014 delivery period. The independent bid manager, CRA International, and an independent contractor hired by the PUCO, Boston Pacific, reported to the Commission that the auction was competitive with multiple bids coming in within 5% of the clearing price.

On January 25, 2011, the second CBP auction took place.⁴²³ Ten bidders registered for the second CBP auction with seven bidders submitting winning bids. The auction consisted of twelve rounds and resulted in tranches clearing at a price of: \$56.13/MWh for the June 1, 2011 to May 31, 2012 delivery period; \$54.92/MWh for the June 1, 2011 to May 31, 2013 delivery period; and \$57.47/MWh for the June 1, 2011 to May 31, 2014 delivery period.⁴²⁴ CRA International and Boston Pacific again reported that the CBP auction was competitive.

On October 25, 2011, FirstEnergy conducted its third CBP auction.⁴²⁵ Thirteen bidders registered for the auction with five bidders, including American Electric Power Service Corporation, submitting winning bids. The auction consisted of fourteen rounds and resulted in a clearing price of \$52.83/MWh for the June 1, 2012 to May 31, 2014 delivery period.⁴²⁶ CRA and Boston Pacific each recommended that the Commission find that the CBP auction had sufficient competitive attributes and resulted in winning prices that were reasonable. The PUCO accepted the auction results on October 26, 2011.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² See *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, PUCO Case No. 10-1284-UNC, Finding and Order (October 22, 2010) (hereinafter, “*FirstEnergy CBP Auction Proceeding*”).

⁴²³ *FirstEnergy CBP Auction Proceeding*, Finding and Order at 2 (January 27, 2011).

⁴²⁴ *Id.* All of the tranches for the June 1, 2011 through May 31, 2012 delivery period have been secured and the weighted average price is \$55.60/MWh for that delivery period (the average wholesale price is still subject to a further conversion to establish retail rates to account for distribution losses and seasonal rates for specific rate schedules).

⁴²⁵ *FirstEnergy CBP Auction Proceeding*, Finding and Order at 2 (October 26, 2011).

⁴²⁶ *Id.* at 3.

FirstEnergy's fourth CBP auction was conducted on January 24, 2012 for the delivery period of June 1, 2012 through May 31, 2014. The CBP auction resulted in a clearing price of \$44.76/MWh. The PUCO accepted the auction results on January 26, 2012.

The PUCO accepted the results of FirstEnergy's fifth CBP auction (held on October 23, 2012) on October 24, 2012. The auction, consisting of 11 rounds, resulted in a clearing price of \$60.89/MWh. Five bidders submitted winning bids for the delivery period of June 1, 2013 through May 31, 2016.

On January 22, 2013, FirstEnergy's sixth wholesale auction was held. The CBP consisted of 17 rounds and resulted in a clearing price of \$59.17/MWh for the delivery period of June 1, 2013 through May 31, 2016. Four suppliers submitted winning bids. The PUCO accepted the results of the auction on January 23, 2013.

As in the case of CBP results for DE-Ohio discussed above, the use of a CBP in the services areas of the FirstEnergy utilities has allowed the price of default generation supply to track the price trend in the wholesale market. As a result of the effect of shale play development on natural gas prices and the condition of the general economy, wholesale electric prices and the retail prices that track wholesale prices through a CBP process or otherwise have trended down and reduced electric bills for many Ohio consumers.

II. Rate Design

FirstEnergy's Second ESP continued the rate design that was in effect during its first ESP with a few modifications.⁴²⁷ First, there was a cap on the overall average total rate increases on customers taking electricity under schedules: GT, Private Outdoor Lighting, Traffic Lighting, and Street Lighting.⁴²⁸ The cap remained in place for the first year of the Second ESP and was measured by reference to the system average rate increase.⁴²⁹ Second, any revenue shortfall that resulted from the application of the interruptible credits in Rider OLR and Rider ELR were recovered from all non-interruptible customers through Rider DSE.⁴³⁰

The Combined Stipulation rate design also adopted the seasonality factors proposed by FirstEnergy in PUCO Case No. 09-906-EL-SSO.⁴³¹ Capacity costs that result from the PJM capacity auctions were used to develop capacity costs for Rider GEN.⁴³² The PUCO also modified the Combined Stipulation so that in the event of an overall average percent decrease in FirstEnergy's customers' bills, all lighting schedules (Rate

⁴²⁷ *FirstEnergy Second ESP Proceeding*, Opinion and Order at 8 (August 25, 2010).

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* at 9. The seasonality factors are used to convert the winning wholesale bids for generation, which reflect a single price for entire delivery year, into retail rates that vary by summer and winter. The seasonal factor results in higher retail summer rates and lower retail winter rates.

⁴³² *Id.*

Schedules STL, POL, and TRF) will not be increased.⁴³³ Finally, pursuant to the Combined Stipulation, Rate Schedule RS was changed to a flat-rate structure.⁴³⁴

III. Renewable Energy Resource Requirements

Renewable energy resource requirements for the term of FirstEnergy's Second ESP were met using a separate RFP process to obtain RECs.⁴³⁵ If there was a deficiency of RECs after the RFP process, FirstEnergy was authorized to acquire additional RECs through bilateral contracts.⁴³⁶ The costs related to procuring the RECs, including administration costs, are included in Rider AER.⁴³⁷

Additionally, FirstEnergy agreed to work with any interested Signatory Party or non-opposing party to the Combined Stipulation to develop four RFPs to purchase RECs, including solar RECs, through 10-year contracts.⁴³⁸ The PUCO has approved FirstEnergy's first two applications to issue RFPs to secure both solar and non-solar RECs.⁴³⁹

IV. Energy Efficiency

The Combined Stipulation allowed FirstEnergy to count the demand response capabilities of customers taking service under Riders ELR and OLR towards its PDR benchmarks. The Combined Stipulation further allowed FirstEnergy to recover lost distribution revenue for all EE/PDR programs, excluding historical mercantile customer self-directed projects.⁴⁴⁰ Under FirstEnergy's Second ESP, an AICUO⁴⁴¹ college or university member could elect to be treated as a mercantile customer for the purposes of Section 4928.66, Revised Code.⁴⁴² Mercantile customer status applied provided that the AICUO college or university's aggregate load of facilities owned and operated by them would qualify it as a mercantile customer and, additionally, would make a mercantile customer eligible for any incentive, program, or benefit provided pursuant to

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 8-9.

⁴³⁷ *Id.* at 9.

⁴³⁸ *Id.* at 10.

⁴³⁹ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Request for Proposal to Purchase Renewable Energy Credits Through Ten-Year Contracts*, PUCO Case No. 10-2891-EL-ACP; *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Request for Proposal to Purchase Renewable Energy Credits Through Ten-Year Contracts*; PUCO Case No. 11-4625-EL-ACP.

⁴⁴⁰ *Id.* at 14.

⁴⁴¹ AICUO stands for the Association of Independent Colleges and Universities of Ohio.

⁴⁴² *FirstEnergy Second ESP Proceeding*, Opinion and Order at 15 (August 25, 2010).

Section 4928.66, Revised Code.⁴⁴³ Additionally, under FirstEnergy's Second ESP, FirstEnergy provided energy efficiency funding to the City of Cleveland, the City of Akron, and Lucas County.⁴⁴⁴ Each was scheduled to receive \$300,000 over the term of the Second ESP. FirstEnergy was authorized to recoup the funding through Rider DSE over the term of the Second ESP.⁴⁴⁵

Under FirstEnergy's Second ESP, customers in CEI's operating area incurred charges relating to the Cleveland Clinic's Main Campus expansion plan, which implemented energy efficiency measures in the new facilities.⁴⁴⁶ The first \$70 million of the original cost of the plant and facilities installed to enable the Clinic's expansion at its main campus are included on a non-bypassable distribution rider for distribution customers, except those taking service under Rate Schedules STL, TRF, or POL.⁴⁴⁷

Under the Combined Stipulation, FirstEnergy provided funding (ranging from \$25,000 to \$100,000 a year for 2011, 2012, and 2013) to the following groups: Council of Smaller Enterprises ("COSE"), AICUO, OHA, and the Ohio Manufacturers' Association ("OMA").⁴⁴⁸ The funding was in lieu of the fixed monthly compensation approved in PUCO Case No. 09-553-EL-EEC for energy efficiency project administrators.⁴⁴⁹

V. Smart Grid

Pursuant to the Combined Stipulation in its Second ESP proceeding, FirstEnergy agreed to implement its Smart Grid project initially filed in PUCO Case No. 09-1820-EL-ATA.⁴⁵⁰ Costs of the Smart Grid project were recovered from all of FirstEnergy's customers except those taking service under Rate GT. All costs were

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 16.

⁴⁴⁷ *Id.* On August 3, 2010, the Cleveland Clinic filed a Joint Application with FirstEnergy to establish a reasonable arrangement. *In the Matter of the Joint Application of The Cleveland Clinic Foundation and Ohio Edison Company for Approval of a Reasonable Arrangement*, PUCO Case No. 10-2025-EL-EEC; *In the Matter of the Joint Application of The Cleveland Clinic Foundation and The Cleveland Electric Illuminating Company for Approval of a Reasonable Arrangement*, PUCO Case No. 10-1956-EL-EEC. Under the arrangement, the Cleveland Clinic would be exempt from FirstEnergy's EE/PDR Rider (the DSE2 component of Rider DSE) through December 31, 2018 for the Clinic's facilities served by CEI and through December 31, 2019 for the Clinic's facilities served by OE. In return for the rider exemption, the Cleveland Clinic agreed to commit its very substantial customer-sited energy-efficiency capabilities to CEI and OE (the Clinic's annual energy savings through December 31, 2009 were 39,648,619 kWh for sites served by CEI and 513,919 kWh for sites served by OE).

⁴⁴⁸ *FirstEnergy Second ESP Proceeding*, Opinion and Order at 14.

⁴⁴⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Administrator Agreements and Statements of Work*, PUCO Case No. 09-553-EL-EEC (hereinafter, "*FirstEnergy EE/PDR Administrator Agreements Proceeding*").

⁴⁵⁰ *FirstEnergy Second ESP Proceeding*, Opinion and Order at 13 (August 25, 2010).

considered incremental and recovered through Rider AMI.⁴⁵¹ Included in the recovery were all reasonably incurred operating expenses. Recovery of Smart Grid costs will occur over a 10-year period. FirstEnergy's return on investment was approved at the same rate of return set in their distribution rate case (8.48%).⁴⁵² Finally, the PUCO noted that while the Combined Stipulation stated that FirstEnergy does not have to complete any part of its Smart Grid initiative for which the federal Department of Energy ("DOE") does not match funding, FirstEnergy must seek guidance from the PUCO as to completion of the Smart Grid project and related cost recovery if the DOE does not provide matching funding.⁴⁵³

VI. Generation

FirstEnergy's Second ESP did not have a minimum default service rider, standby charges, or rate stabilization charges. Additionally, there was no credit caps for shopping customers. FirstEnergy's Second ESP also continued the Generation Service Uncollectable Rider ("Rider NDU").⁴⁵⁴ Rider NDU recovered non-distribution-related uncollectable costs associated with supply costs from the CBP arising from SSO customers.⁴⁵⁵ The rider was avoidable. FirstEnergy's Second ESP also continued the Generation Cost Reconciliation Rider ("Rider GCR"). Rider GCR was a reconciliation of seasonal generation cost recovery as well as the difference between amounts recovered from customers and amounts paid to suppliers. The Rider was avoidable for customers that took service from a CRES provider unless the allowed balance of Rider GCR reached 5% of the generation expense in two consecutive quarters.⁴⁵⁶ The PUCO modified the Combined Stipulation to require FirstEnergy to first obtain PUCO approval before FirstEnergy can modify Rider GCR.⁴⁵⁷

VII. Distribution

Under the Combined Stipulation, FirstEnergy agreed to not seek to increase its distribution rates through June 1, 2014 except as modified by riders, other charges provided for in the tariffs, changes initiated as a result of a SEET proceeding, and in the case of an emergency situation under the provisions of Section 4909.16, Revised Code.⁴⁵⁸ In its Opinion and Order approving the Combined Stipulation, the PUCO modified a provision relating to revenue neutral distribution rate changes.⁴⁵⁹ The PUCO noted that it would consult with FirstEnergy before implementing any revenue neutral change in distribution rate design, but that rate design remains within the PUCO's

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.* at 36.

⁴⁵⁴ *Id.* at 10.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 35.

⁴⁵⁸ *Id.* at 11.

⁴⁵⁹ *Id.* at 35.

discretion.⁴⁶⁰ The Combined Stipulation stated that any change in rate design had to be revenue neutral and agreed to by FirstEnergy.

VIII. Low-Income Assistance and Other Discounts

FirstEnergy customers enrolled in the PIPP program were provided a 6% discount off their otherwise applicable price during the term of FirstEnergy's Second ESP.⁴⁶¹ FirstEnergy agreed to commit, during the Second ESP, \$4 million towards a fuel fund to assist low-income customers.⁴⁶² The fuel fund was to be spent over the term of the current ESP.⁴⁶³ FirstEnergy also agreed to contribute \$3 million to support economic development and job retention programs within its service area. FirstEnergy agreed to not seek recovery of this amount.

Under FirstEnergy's Second ESP, domestic automaker facilities were eligible for a discount. To be eligible, the automaker must have used more than 45 million kWh at a single site in 2009. The discount was applied to eligible automaker facilities which exceeded their 2009 monthly average energy consumption by more than ten percent.⁴⁶⁴ Any discount provided was authorized for collection under Rider EDR from customers under Rate Schedules RS, GS, CP, and GSU.⁴⁶⁵

IX. RTO Related Provisions

FirstEnergy's NITS charges as well as other non-market based FERC/RTO charges were recovered through the Non-Market-Based Services ("NMB") Rider (which was non-bypassable), and not included in the CBP process that applies to generation supply.⁴⁶⁶ Winning SSO bidders remained responsible for all other FERC/RTO imposed charges.⁴⁶⁷ Additionally, all costs under the MTEP that were charged to FirstEnergy were to be recovered through Rider NMB.⁴⁶⁸

FirstEnergy agreed to not seek recovery through retail rates of any MISO exit fees or PJM integration costs.⁴⁶⁹ FirstEnergy also agreed to not seek recovery through retail rates of legacy RTEP costs for the longer of: (1) the period from June 1, 2011 through

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 8.

⁴⁶² *Id.* at 17.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 12.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 13.

⁴⁶⁹ *Id.* The exit fees and integration costs are a result of FirstEnergy's migration from MISO to PJM which is discussed later.

May 31, 2016; or (2) the time it takes FirstEnergy to pay out a total of \$360 million of unrecovered legacy RTEP costs.⁴⁷⁰

The Combined Stipulation also recommended that the PUCO close its case related to FirstEnergy's RTO migration from MISO to PJM.⁴⁷¹ While the PUCO agreed to the provision, it put all parties on notice that, in the absence of an expeditious resolution of issues related to price responsive demand and scarcity pricing, the PUCO will open a new proceeding if it determines one is needed.⁴⁷²

Finally, the PUCO modified the Combined Stipulation to make Rate Schedule TRF completely responsible for the allocation of PJM capacity costs associated with the lighting schedules' contribution to coincident peaks in June through September.⁴⁷³

X. Delivery Capital Recovery Rider

The Combined Stipulation also created a new rider, the Delivery Capital Recovery ("DCR") Rider.⁴⁷⁴ Rider DCR allowed FirstEnergy to recover costs associated with property taxes, commercial activity taxes, and income taxes related to distribution, subtransmission, and general and intangible plant. The rider was limited to costs that were not otherwise included for recovery in FirstEnergy's base distribution rates established in its distribution rate case. Rider DCR took effect on January 1, 2012 and the revenue collected through this rider was capped for the first 12 months at \$150 million, \$165 million for the next 12 months, and \$75 million for the following 5 months.

The PUCO also noted that the inclusion of net capital additions for plant in service for general plant in Rider DCR would be allowed so long as there are no net job losses at FirstEnergy as a result of involuntary attrition resulting from the merger between FirstEnergy and Allegheny Energy.⁴⁷⁵ Specifically, the PUCO included employees of FirstEnergy's service company providing support for distribution services and who are located within Ohio within the meaning of "no net job losses" in the Combined Stipulation.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 34.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 11.

⁴⁷⁵ *Id.* On February 11, 2010, FirstEnergy and Allegheny Energy, Inc. announced that both companies' board of directors approved a definitive agreement in which the companies would combine in a stock-for-stock transaction subject to receipt of approvals by various regulatory agencies. The combination involves the regulated distribution companies providing service to more than 6 million customers in Pennsylvania, Ohio, Maryland, New Jersey, New York, Virginia, and West Virginia.

H. FirstEnergy's Third ESP

On April 13, 2012, FirstEnergy filed an application⁴⁷⁶ and simultaneously a Stipulation and Recommendation⁴⁷⁷ to establish a Third ESP. The Third ESP was characterized as a two-year extension of the Second ESP, with certain additional features to capture additional customer benefits. As was the case under the Second ESP, the Third ESP proposed to obtain all generation supply necessary to provide the SSO through a CBP.

The Third ESP was proposed soon after PJM announced that it would model the American Transmission Systems, Inc. ("ATSI") zone, which includes OE, CEI, TE and Penn Power Company, as a separate local delivery area ("LDA") for the 2015-2016 Base Residual Auction ("BRA") scheduled to occur in May 2012. Modeling a delivery zone as a separate LDA creates the potential for capacity prices in that zone to separate from the capacity price for the balance of the RTO zone when the BRA capacity auction occurs.

The Third ESP was proposed in part to: (1) potentially enable FirstEnergy to bid demand response resources and energy efficiency resources into the PJM 2015-2016 BRA, thereby adding to supply in that auction, which could, in turn, increase low-cost capacity supply in that auction; (2) modify the bid schedule previously approved in FirstEnergy's Second ESP so that the bids to occur in October 2012 and January 2013 would be for a three-year period rather than a one-year period in an attempt to capture the current historically lower generation prices and blend them with potentially higher prices occurring over the life of FirstEnergy's Third ESP, thereby smoothing out generation prices and mitigating volatility in generation pricing for customers through May 31, 2016; (3) extend the recovery period for REC costs over the life of the Third ESP in order to lower the rider charge that otherwise would have been in place for customers related to compliance with the statutory benchmarks for renewable energy resources; and (4) maintain the benefits gained and currently being realized from the 2010 ESP Stipulation for an additional two years, thus enhancing the stability and predictability of rate levels and tariff provisions for customers.

FirstEnergy requested that the PUCO consider the Third ESP on an expedited basis and act on the application by May 2, 2012. The PUCO declined to do so and, instead, commenced an evidentiary hearing on June 4, 2012 to consider the Stipulation and Recommendation.

Following the evidentiary hearing, the PUCO issued a Finding and Order approving the Stipulation and Recommendation with modifications.⁴⁷⁸ The PUCO issued an Entry on Rehearing tolling several Applications for Rehearing of FirstEnergy's Third ESP

⁴⁷⁶ *In the Matter of the Application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, PUCO Case No. 12-1230-EL-SSO (April 13, 2012) (hereinafter, "*FirstEnergy Third ESP Proceeding*").

⁴⁷⁷ *FirstEnergy Third ESP Proceeding*, Stipulation and Recommendation (April 13, 2012).

⁴⁷⁸ *FirstEnergy Third ESP Proceeding*, Finding and Order (July 18, 2012).

Order.⁴⁷⁹ On January 30, 2013, the PUCO issued its Second Entry on Rehearing denying the Applications for Rehearing.

I. Competitive Bidding Process

Under the Third ESP, for the period beginning June 1, 2013 and ending May 31, 2016, retail generation rates will be determined pursuant to the results of a descending-clock format CBP. The CBP procures, on a slice-of-system basis, the aggregate wholesale “full requirements” SSO supply, which includes energy and capacity, resource adequacy requirements, market-based transmission service and market-based transmission ancillaries, to serve retail SSO load and special contract load for the period June 1, 2013 through May 31, 2016. The CBP, including its associated contingency process, is conducted by an independent bid manager.

The first CBP was held on October 23, 2012. In the 11-round auction, five competitive suppliers submitted winning bids to provide electricity to FirstEnergy SSO customers. The auction resulted in an average clearing price of \$60.89/MWh for the delivery period June 1, 2013 through May 31, 2016.⁴⁸⁰ The results will be blended with four previous auctions and five upcoming auctions to establish retail generation rates from June 1, 2013 through May 31, 2016.

On January 22, 2013, another CBP auction was held which resulted in a clearing price of \$59.17/MWh for the delivery period of June 1, 2013 through May 31, 2016. The auction consisted of 17 rounds in a descending-clock phase, with four winning bidders.

II. Rate Design

The Third ESP continues the rate design in effect during the Second ESP, as modified below. The average total rate overall percentage increase projected for the 12-month period ending May 2015 (rates to be effective commencing June 1, 2014) compared to 12 months ending May 2014, resulting from the rates derived from the CBP for customers on Private Outdoor Lighting (“POL”), Traffic Lighting (“TL”), Street Lighting (“STL”), and Rate GT, shall not exceed a percentage in excess of one and one-half times the system average overall percentage rate increase (the “cap”), by operating company. If the average percent change by operating company is negative, all lighting schedules (Rate Schedules STL, POL and TRF) shall be limited to a maximum increase of zero percent and then no cap shall be applied to Rate GT customers. This cap calculation is to be performed prior to June 1st of each year. Recovery of any revenue over the cap stated above shall occur through Rider EDR.

Any revenue shortfall resulting from the application of the interruptible credits in Rider OLR and Rider ELR will be recovered from all non-interruptible customers as part of the non-bypassable DSM and energy efficiency rider (Rider DSE).⁴⁸¹

⁴⁷⁹ *FirstEnergy Third ESP Proceeding*, Entry on Rehearing (September 12, 2012)

⁴⁸⁰ *FirstEnergy CBP Auction Proceeding*, Finding and Order at 2 (October 24, 2012).

⁴⁸¹ *FirstEnergy Third ESP Proceeding*, Finding and Order at 8 (July 18, 2012).

The seasonality factors adopted in the Second ESP were continued.⁴⁸² Capacity costs that result from the PJM capacity auctions will now be used to develop capacity costs for Rider GEN.⁴⁸³

III. Renewable Energy Resource Requirements

Renewable energy resource requirements for the period June 1, 2014 through May 31, 2016 (including, where reasonable, overpurchasing RECs in one year for banking into a future year) may be met using a separate RFP process to obtain RECs. If there is still a deficiency of RECs after the RFP process, FirstEnergy may acquire additional RECs through bilateral contracts.⁴⁸⁴

IV. Energy Efficiency

The demand response capabilities of customers taking services under Riders ELR and OLR shall count toward FirstEnergy's compliance with PDR benchmarks as set forth in Section 4928.66, Revised Code.⁴⁸⁵

Under the Stipulation and Recommendation, FirstEnergy is to provide funding (ranging from \$25,000 to \$100,000 a year for 2014, 2015, and 2016) to the following groups: COSE, AICUO, OHA, and OMA.⁴⁸⁶ The funding is in lieu of the fixed monthly compensation approved in PUCO Case No. 09-553-EL-EEC for energy efficiency project administrators.⁴⁸⁷

V. Generation

The Third ESP continues Rider NDU and Rider GCR without any changes.⁴⁸⁸

VI. Distribution

During the third ESP, no proceeding will be commenced seeking an increase to the base distribution rates of the operating companies that would go into effect prior to June 1, 2016, subject to riders and other charges provided in the tariffs and subject to the SEET, except in the case of an emergency, pursuant to the provisions of Section 4909.16, Revised Code.⁴⁸⁹

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at 7.

⁴⁸⁵ *Id.* at 11.

⁴⁸⁶ *Id.* at 13.

⁴⁸⁷ *Id.* .

⁴⁸⁸ *Id.* at 8-9.

⁴⁸⁹ *Id.* at 9.

The Delivery Capital Recovery Rider (“Rider DCR”) will continue to be in effect and will allow the operating companies to earn a return on and return of incremental distribution plant in service. For the 12-month period from June 1, 2014 through May 31, 2015 that Rider DCR is in effect, the revenue collected by FirstEnergy is capped at \$195 million; for the following 12-month period, the revenue collected under Rider DCR is capped at \$210 million.⁴⁹⁰

VII. Smart Grid

The Third ESP continues the Second ESP’s provisions regarding Smart Grid.

VIII. Low-Income Assistance and other Discounts

FirstEnergy will provide its PIPP customers with a six percent discount off the otherwise applicable price-to-compare during the Third ESP.⁴⁹¹

FirstEnergy will make available \$1 million to OP&E for its fuel fund program, allocated as \$500,000 in 2015 and \$500,000 in 2016.⁴⁹² In order to assist low-income customers in paying their electric bills, the fuel fund provided by FirstEnergy is to be continued, consisting of \$4 million to be spent in each calendar year from 2015 through 2016.⁴⁹³

I. EE/PDR Portfolio Plans

On December 15, 2009, FirstEnergy filed a three-year EE/PDR program portfolio plan for PUCO approval in accordance with Rule 4901:1-39-04, O.A.C. FirstEnergy’s plan collected costs (through Rider DSE) of \$76.5 million in 2010, \$65.3 million in 2011, and \$72.6 million in 2012 associated with meeting the EE/PDR benchmarks.⁴⁹⁴ Part of FirstEnergy’s plan included an attempt to fast track several programs and put off the question of cost recovery until a later time in order to meet its 2010 compliance obligations. Several groups opposed FirstEnergy’s plan to use historical mercantile customer programs to meet its EE/PDR benchmarks. These groups favored the use of new programs, rather than existing programs, to meet EE/PDR benchmarks.

In a separate case filed in 2009, FirstEnergy requested the PUCO modify FirstEnergy’s 2009 EE/PDR benchmarks and set them to zero.⁴⁹⁵ On January 7, 2010, the PUCO

⁴⁹⁰ *Id.* at 10.

⁴⁹¹ *Id.* at 7.

⁴⁹² *Id.* at 16.

⁴⁹³ *Id.*

⁴⁹⁴ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism*, PUCO Case Nos. 09-1947-EL-POR, *et al.*, Program Portfolio and Initial Benchmark Report at 3 (December 15, 2009) (hereinafter, “*FirstEnergy EE/PDR Portfolio Plan Proceeding*”).

⁴⁹⁵ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Amend Their Energy Efficiency Benchmark*, PUCO Case No. 09-

approved FirstEnergy's request due to regulatory and economic reasons beyond FirstEnergy's reasonable control, but conditioned its approval on FirstEnergy meeting revised benchmarks that would be set in FirstEnergy's portfolio plan proceeding.⁴⁹⁶

On March 23, 2011, the PUCO approved FirstEnergy's portfolio plan with some reservations regarding a proposal to implement a shared savings mechanism.⁴⁹⁷ The PUCO rejected implementing FirstEnergy's shared savings mechanism as proposed.⁴⁹⁸ Under FirstEnergy's proposal, it would have been eligible to share in 15% of any energy savings achieved in excess of the statutory portfolio benchmarks, as calculated under the utility cost test ("UCT"), net of tax. The PUCO found that several key distinctions existed between FirstEnergy's proposal and shared savings mechanisms approved for other utilities and therefore deferred approving the proposal until additional information could be considered in a future proceeding.

The PUCO approved the use FirstEnergy's interruptible tariffs, Riders ELR and OLR, as a part of meeting peak load reduction. The PUCO noted that a prior stipulation provided for the continuation of these programs through May 2014 and provided that the demand response capabilities of customers taking service under Riders ELR and OLR would count toward the companies' compliance with peak demand reduction requirements.

Without resolving FirstEnergy's pending mercantile applications, the PUCO approved FirstEnergy's use of "historical mercantile programs" for compliance with energy efficiency requirements. Although some parties challenged the heavy reliance that FirstEnergy placed on these programs to establish compliance, the PUCO found that in the next several years that reliance as a percentage of total compliance will diminish as new energy efficiency programs are started.

The portfolio plan also provided: (1) a commercial and industrial equipment rebate program, providing rebates for high efficiency electric equipment and building shell-related measures; (2) a program for encouraging the upgrading of motors and installation of variable speed drives; and (3) facility energy audits. For smaller commercial and industrial customers, FirstEnergy proposed a compact fluorescent light ("CFL") lighting program, energy audits, and equipment rebates.

An issue was raised regarding the rate design for recovering program costs from industrial and commercial customers. FirstEnergy proposed assigning costs on medium and large industrial and commercial customers collectively, rather than by separate customer classes. Several intervening parties argued that costs should be separated by rate class and FirstEnergy's allocation proposal incorrectly assumed that large business customers would use the EE/PDR program in proportion to their energy usage, resulting in very large industrial customers served under Rate GT being over-

1004-EL-EEC, Application (October 27, 2009) (hereinafter, "*FirstEnergy EE/PDR Benchmark Proceeding*").

⁴⁹⁶ *FirstEnergy EE/PDR Benchmark Proceeding*, Finding and Order (January 7, 2010).

⁴⁹⁷ *FirstEnergy EE/PDR Portfolio Plan Proceeding*, Opinion and Order (March 23, 2011).

⁴⁹⁸ *Id.* at 15.

assigned cost responsibility.⁴⁹⁹ The PUCO rejected this argument and instead accepted FirstEnergy's proposed approach for allocating costs.

Several customer groups also challenged the companies' recovery of 2012 lost distribution revenue resulting from the implementation of the EE/PDR programs. The Commission found that the stipulation approved in FirstEnergy's new ESP provided for recovery of 2012 lost distribution revenue. The new Chairman of the PUCO,⁵⁰⁰ however, expressed concern in a Concurring Opinion that continuing to recover lost distribution revenue threatened to weaken support for energy efficiency programs and urged that efforts be made to correct the underlying rate design to encourage efficiency and rate stability.

FirstEnergy and Nucor Steel Marion, Inc. ("Nucor") filed Applications for Rehearing. FirstEnergy challenged the PUCO's rejection of its request to use annualized accounting for calculating energy efficiency savings. The PUCO found that it had previously rejected annualized accounting and FirstEnergy had not demonstrated any reason why it could not continue current accounting practices.⁵⁰¹ FirstEnergy also challenged the PUCO's determination that its plan was not designed to meet the 2010 statutory benchmarks. The PUCO reversed course on this issue, and amended FirstEnergy's 2010 benchmarks; however, the amendment to the benchmarks was contingent on FirstEnergy reaching the total cumulative savings required by statute for 2012.⁵⁰² The PUCO also denied rehearing on FirstEnergy's request to include its street lighting program and energy efficient products program in its portfolio plan finding that these programs were not cost-effective. Nucor again raised its claim that FirstEnergy's cost allocation methodology would disproportionately impact the large commercial and industrial customers.⁵⁰³ The PUCO denied Nucor's Application for Rehearing, finding it had already addressed Nucor's concerns in its Opinion and Order.

On October 7, 2011, IEU-Ohio filed an Application for Rehearing of the PUCO's September 7, 2011 Entry on Rehearing.⁵⁰⁴ IEU-Ohio argued that the PUCO's directive to pursue "all" cost-effective opportunities, regardless of whether FirstEnergy was complying with portfolio requirements, ignored the General Assembly's intent when it drafted the annual benchmark requirements into law.⁵⁰⁵ OEG also filed an Application for Rehearing of the PUCO's September 7, 2011 Entry on Rehearing challenging the PUCO's "all-out" requirement. OEG noted that the cost of FirstEnergy's three-year portfolio plan was estimated to be \$241 million, and requiring FirstEnergy to implement additional programs could potentially cause rate shock to customers.

⁴⁹⁹ *Id.* at 16.

⁵⁰⁰ Chairman Snitchler was appointed to a five-year term on the Commission by Governor Kasich. Chairman Snitchler's term will expire on April 10, 2014.

⁵⁰¹ *FirstEnergy EE/PDR Portfolio Plan Proceeding*, Entry on Rehearing at 5-6 (September 7, 2011).

⁵⁰² *Id.* at 8.

⁵⁰³ *Id.* at 10.

⁵⁰⁴ *FirstEnergy EE/PDR Portfolio Plan Proceeding*, IEU-Ohio's Application for Rehearing (October 7, 2011).

⁵⁰⁵ See *Id.* at 5-6; see also Section 4928.66, Revised Code.

FirstEnergy also challenged the PUCO's "all-out" requirement, filing an Application for Rehearing on October 7, 2011.⁵⁰⁶ Along with arguing that the requirement was beyond the scope of the PUCO's authority and the directive was unconstitutionally vague, FirstEnergy noted that the requirement was impractical and would lead to absurd results.⁵⁰⁷ FirstEnergy noted that it was cost-effective, under the PUCO's total resource cost ("TRC") test, to give away energy efficient appliances to customers for free.⁵⁰⁸ FirstEnergy estimated that the total cost of giving away energy efficient refrigerators to FirstEnergy's 2.1 million customers would be in the range of \$2.1 billion. IEU-Ohio's, OEG's, and FirstEnergy's Applications for Rehearing of the Commission's September 7, 2011 Entry on Rehearing were deemed denied as a matter of law when the Commission failed to take any action on them within 30 days.⁵⁰⁹

Although the PUCO had directed Staff to review and file a proposal addressing the shared savings mechanism, on January 31, 2012 FirstEnergy filed a motion to stay any further action on the shared savings mechanism. FirstEnergy noted that it had already begun the process of developing its next EE/PDR portfolio plan to take effect on January 1, 2013. Further, FirstEnergy noted that by the time any resolution regarding the shared savings mechanism could occur in this proceeding its current EE/PDR plan would be close to expiring. The PUCO granted FirstEnergy's motion on February 7, 2012.

On July 31, 2012, FirstEnergy submitted an application on behalf of CEI, OE and TE for approval of new three-year EE/PDR portfolio plans.⁵¹⁰ Each of the proposed plans includes virtually all of the components reflected in previously approved plans. However, many of the plans' components have been modified in an effort to provide customers with more opportunities for energy and related cost savings and FirstEnergy with more implementation flexibility. For example, many of the programs include new measures and additional end-uses, which expand the program offerings to FirstEnergy's customers and reflect advancements in technology. The plans reflect continuation of rebate programs available to all customers as well as options for mercantile customers to complete self-directed EE/PDR measures and receive a DSE2 rider exemption in exchange for committing the EE/PDR savings towards FirstEnergy's portfolio obligation, or in the alternative receive a cash refund.

The proposed three-year budget for the EE/PDR portfolio plans is \$121.0 million for Ohio Edison Company, \$77.9 million for CEI, OE and TE. FirstEnergy has proposed to

⁵⁰⁶ *FirstEnergy EE/PDR Portfolio Plan Proceeding*, FirstEnergy's Application for Rehearing at 2 (October 7, 2011).

⁵⁰⁷ *Id.* at 12-18.

⁵⁰⁸ *Id.* at 17.

⁵⁰⁹ Section 4903.10, Revised Code.

⁵¹⁰ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, PUCO Case Nos. 12-2190-EL-POR, et al., Application (July 31, 2012) (hereinafter, "*FirstEnergy EE/PDR Proceeding*").

net any revenue received from PJM from bidding interruptible resources into PJM's periodic capacity auctions against the portfolio plans' cost.

Beginning on October 23, 2012, and concluding on October 30, 2012, the PUCO held an evidentiary hearing to consider the proposed three-year portfolio plans. On December 7, 2012, FirstEnergy filed a motion to extend its existing EE/PDR portfolio plans into 2013, pending issuance of a PUCO order addressing the proposed portfolio plans. On December 12, 2012, the PUCO issued an Order approving FirstEnergy's request to extend the current portfolio plans.⁵¹¹ Parties have completed briefing in this proceeding and are awaiting a PUCO decision on FirstEnergy's proposed portfolio plan.

J. EE/PDR Administrator Agreements

Under the Stipulation approved in FirstEnergy's initial ESP proceeding, FirstEnergy was required to start a collaborative to develop EE/PDR programs to meet its benchmarks.⁵¹² The collaborative developed the "administrator" concept (which was included in the initial ESP settlement approved by the PUCO) whereby mercantile customer organizations could act as an aggregator of projects from their membership for purposes of compliance with Ohio's portfolio requirements. FirstEnergy adopted this approach so that it could meet the EE/PDR benchmarks, thereby allowing FirstEnergy to meet its compliance obligation without having to add internal staff or hire outside consultants. Initially, the PUCO disapproved of the compensation scheme for program administrators which included a 1¢/kWh fee to the administrator for existing or historic projects aggregated by the administrator and counted by FirstEnergy.⁵¹³ On rehearing in this case, the PUCO reversed its previous stance and approved the 1¢/kWh fee.⁵¹⁴ However, the Commission noted that it was still concerned with administrators receiving the same fee for existing projects as new projects, believing this did not create enough incentive to develop new programs.⁵¹⁵

On September 17, 2010, FirstEnergy filed an application addressing two new fee structures for administrators.⁵¹⁶ The first was a variable fee structure for existing or historical mercantile customer projects committed to FirstEnergy to meet its EE/PDR benchmarks and the second was a fee for administrators that obtain customers for participation in FirstEnergy's utility-sponsored commercial and industrial ("C&I") EE/PDR programs.⁵¹⁷ In its application, FirstEnergy noted that the PUCO had already approved a variable fee, which replaced the fixed 1¢/kWh fee, for administrators of new projects in the amount of 1¢/kWh for the first 2 million kWh committed and \$.0025/kWh for any remaining efficiency that is committed to FirstEnergy towards meeting its

⁵¹¹ *FirstEnergy EE/PDR Portfolio Plan Proceeding*, Finding and Order (December 12, 2012).

⁵¹² *FirstEnergy EE/PDR Administrator Agreements Proceeding*, Application at 1-3 (June 30, 2009).

⁵¹³ *FirstEnergy EE/PDR Administrator Agreements Proceeding*, Finding and Order (December 2, 2009).

⁵¹⁴ *FirstEnergy EE/PDR Administrator Agreements Proceeding*, Entry on Rehearing (February 11, 2010).

⁵¹⁵ *Id.* at 4.

⁵¹⁶ *FirstEnergy EE/PDR Administrator Agreements Proceeding*, Application (September 17, 2010).

⁵¹⁷ *Id.* at 3-5.

EE/PDR benchmarks.⁵¹⁸ FirstEnergy's application sought to set the fee for existing or historical projects at \$.0050/kWh for the first 2 million kWh committed and \$.0025/kWh for any remaining efficiency that is committed to FirstEnergy.⁵¹⁹

FirstEnergy's application proposed that the C&I fee for utility-sponsored programs be the same as the fee administrators receive for new mercantile projects committed to FirstEnergy (\$.01/kWh and \$.0025/kWh). FirstEnergy indicated that this would provide administrators with equal incentive to pursue either mercantile customer projects or utility-sponsored C&I projects.⁵²⁰ On March 16, 2011 the PUCO approved FirstEnergy's Application.

K. All-Electric Discount

FirstEnergy previously had 117 rate schedules which, over the past few years, have been consolidated into eight (8) rate schedules as a result of their initial ESP and the distribution rate cases. This transition included a gradual elimination of rate schedules for residential customers on rates commonly called "all-electric" rates. These customers used electricity for home heating and other applications that could likely otherwise rely on natural gas or other fuels. The level of the discount received by the all-electric customers had been reduced over a period of years prior to the initial ESP and the distribution rate cases. Following the implementation of the initial ESP and new distribution rates, the all-electric customers began protesting their electric bills and the protest gained momentum as a result of the efforts of elected officials, including Governor Strickland.

In response, FirstEnergy filed an application on February 12, 2010 to provide relief to these customers through generation credits and asked the PUCO to recover the costs of credits from other customers.⁵²¹ On March 3, 2010, the PUCO approved FirstEnergy's application, but deferred much of the recovery associated with the credits. (FirstEnergy estimated the deferral to be roughly \$80 million a year.) The current discount is applied through the Residential Generation Credit Rider ("Rider RGC") at an amount of 2.1¢/kWh for each kWh in excess of 1,250 kWh. Numerous parties filed Applications for Rehearing in the case. On November 10, 2010, the PUCO issued a substantive Entry on Rehearing.

The November 10, 2010 Entry on Rehearing postponed the issue of carrying costs on amounts that were being deferred until it issued a decision regarding the deferred amounts it authorized in its March 3 Order. The November 10 Entry on Rehearing also clarified that the PUCO had jurisdiction to hear complaints about FirstEnergy's

⁵¹⁸ *Id.* at 4.

⁵¹⁹ *Id.*

⁵²⁰ *Id.* at 5.

⁵²¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, PUCO Case No. 10-176-EL-ATA, Application (February 12, 2010) (hereinafter, "*FirstEnergy All-Electric Discount Proceeding*").

marketing practices which had been alleged to have induced customers to build all-electric homes in its service territory.⁵²² With this clarification, the PUCO noted that parties could conduct discovery regarding FirstEnergy's past marketing practices.

On May 25, 2011, the Commission issued its Opinion and Order and extended the all-electric discount for eight years.⁵²³ For the first two years (June 2011 through May 2013), the all-electric discount will remain the same. Starting June 1, 2013, the discount will start being phased out. The "phase out" will occur through six equal annual reductions.⁵²⁴ The Commission also held that the discount should only apply to customers who use electricity for heating purposes and only in the winter months (November through March). The cost of the discount will be spread across all residential customers. Of note, the Commission held that although it had stated in its November 10 Entry on Rehearing that it had jurisdiction to consider FirstEnergy's marketing practices, it found that no evidence of unfair practices was presented.⁵²⁵

In conjunction with pursuing the all-electric discount and claims of unfair practices at the PUCO, individuals affected by the all-electric discount filed a complaint against FirstEnergy with the Geauga County Court of Common Pleas.⁵²⁶ The complaint alleged that FirstEnergy had promised customers that the discount would remain in effect as long as they continued to maintain all-electric appliances, regardless of whether or not the PUCO eliminated the discount. FirstEnergy moved to dismiss the complaint, which the court granted. The plaintiffs appealed to the Court of Appeals of Ohio, Eleventh District, which reversed.

The Court of Appeals found that the PUCO did not have exclusive jurisdiction over the plaintiffs' fraud claim; however, regarding the contract claims the Court found that they were within the exclusive jurisdiction of the PUCO.⁵²⁷ The Ohio Supreme Court ultimately reversed the Court of Appeals and held that the PUCO has exclusive jurisdiction over all of the claims raised in the civil complaint filed with the Geauga County Court of Common Pleas.

The rest of the story following the PUCO's May 25, 2011 decision regarding the all-electric rate controversy offers some irony. It turns out that the person who organized all-electric residential customers to get the PUCO to reverse its course on the all-electric rate found a competitive electricity supplier that was able to provide the all-electric customers with a better rate and she actively encouraged customers to switch to this competitive supplier. This opportunity materialized as a result of the same fundamental forces that have reduced electric prices in general at least in those cases where consumers' access to the market has not been restricted. Also gas utilities have

⁵²² *FirstEnergy All-Electric Discount Proceeding*, Fifth Entry on Rehearing (November 10, 2010).

⁵²³ *FirstEnergy All-Electric Discount Proceeding*, Opinion and Order (May 25, 2011).

⁵²⁴ *Id.* at 20.

⁵²⁵ *Id.* at 19-20.

⁵²⁶ See *DiFranco v. First Energy*, 2011-Ohio-5434 ¶ 1 (Ohio Ct. App. 11th Dist. October 21, 2011).

⁵²⁷ *Id.* at ¶ 59.

indicated an interest in extending lines to serve all-electric customers that convert to natural gas to meet their heating needs.

L. Accelerated Recovery of Deferred Distribution Regulatory Assets

On July 27, 2009, FirstEnergy filed an application with the PUCO to modify the recovery of certain deferred costs. The deferred items included: (1) post-date certain distribution deferrals in its RCP; (2) line extension deferrals, and (3) transition tax deferrals.⁵²⁸ Under a prior PUCO decision, FirstEnergy was set to recover \$282 million, with carrying costs, over a 25-year period through Rider DDC. FirstEnergy's application sought to eliminate Rider DDC and establish two new riders with a recovery period from September 2009 through December 2011. One rider would recover the deferred costs attributable to residential customers (Rider RDD) while the other would recover the costs attributable to non-residential customers (Rider NDD). FirstEnergy claimed that reducing the timeframe for recovery would save residential and non-residential customers \$178 million and \$142 million, respectively.⁵²⁹ On August 19, 2009, the PUCO approved FirstEnergy's application.

M. Reasonable Arrangements ("Special Contracts")

Between 1990 and 1997, TE entered into electric service contracts with Martin Marietta Magnesia Specialties, L.L.C., the Calphalon Corporation, Kraft Foods Global, Inc., Worthington Industries, and Brush Wellman, Inc. (collectively, "the Customers"), which became valid after approval by the Commission pursuant to Section 4905.31, Revised Code.⁵³⁰ According to the terms of those contracts, the Customers received discounted pricing for electric service below the standard tariff rates charged by TE to other large industrial customers. In an attempt to ease the transition from a regulated rate structure to a market rate structure, the Customers were offered a one-time opportunity to extend their special contracts, through TE ETP case.⁵³¹ The Customers each accepted the opportunity and their contracts were modified to expire on the date that TE stopped collecting its regulatory-transition charges.⁵³²

Meanwhile, in a separate case stemming from SB 3, TE's RSP,⁵³³ the PUCO approved another extension for TE's customers under a special contract.⁵³⁴ However, in that

⁵²⁸ *FirstEnergy Rider RDD Proceeding, Finding and Order* (August 19, 2010).

⁵²⁹ *Id.* at 2.

⁵³⁰ See *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St. 3d 485, 2011-Ohio-4189.

⁵³¹ *Id.* at 3; *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, *et al.*

⁵³² *Id.*

⁵³³ *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish*

case, none of the Customers received separate and direct notice of the opportunity to extend, nor did TE provide notice to any of its customers under a special contract that weren't a party to the case.⁵³⁵ Despite the lack of such direct notice, several other customers of TE opted for an extension.⁵³⁶

In TE's third case stemming from SB 3, its RCP case,⁵³⁷ a Stipulation was approved by the PUCO that extended the special contracts entered into during the second case through December 31, 2008. However, special contracts extended under the first case, including those of the Customers, were to expire in February 2008. February 2008 was selected based on Toledo Edison hitting some kWh targets set forth in the SB 3 cases that underlined the RTCs. That Stipulation, however, allowed TE to collect its RTCs through December 31, 2008. Again, the Customers were not a party to TE's RCP case either and, thus, were not notified that the PUCO was entertaining the possibility of modifying their contracts.⁵³⁸ Following the Stipulation in Toledo Edison's RCP, the Customers' special contracts had two different end dates; the date specified in their contracts (when TE stopped collecting RTCs), and February 2008.⁵³⁹

On February 19, 2009, the PUCO ruled that the Customers' special contracts in fact ended in February 2008 pursuant to its Order approving TE's Stipulation in the RCP case.⁵⁴⁰ The Customers timely appealed to the Ohio Supreme Court. On August 25, 2011, the Ohio Supreme Court issued its decision in favor of the Customers. The Court held that the Customers' special contracts were unambiguous; the termination provision provided that the contracts "shall terminate with the bill rendered for the electric usage through the date which [the regulatory-transition charge] ceases for the [Toledo Edison] Company."⁵⁴¹ The Court, therefore, held that the Customers' special contracts should have extended through December 31, 2008 when TE stopped collecting the RTC.

The Court also held that while the PUCO possessed authority under Section 4905.31, Revised Code, to modify the reasonable arrangements (often referred to as "special contracts"), it had failed to invoke that power. On appeal, the PUCO and TE both argued that even if the PUCO's orders in the three SB 3 cases didn't give context to or modify the end date of the contracts, the PUCO had independent authority under Section 4905.31, Revised Code, to modify the special contracts. The Ohio Supreme

Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period, PUCO Case No. 03-2144-EL-ATA.

⁵³⁴ *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 2011-Ohio-4189, at 4.

⁵³⁵ *Id.*

⁵³⁶ *Id.*

⁵³⁷ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, PUCO Case No. 05-1125-EL-ATA.

⁵³⁸ *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 2011-Ohio-4189, at 5.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 6.

⁵⁴¹ *Id.* at 9.

Court agreed, but noted that although possessed with the authority to modify the Customers' special contracts, nowhere in the PUCO's orders did it claim to be using Section 4905.31, Revised Code, to modify the agreements.

In a similar case appealed to the Ohio Supreme Court,⁵⁴² Sunoco, Inc. ("Sunoco") also appealed the early termination of a reasonable arrangement it had with TE. Sunoco was faced with the same situation as the Customers mentioned above; however, Sunoco's special contract contained a "most-favored nation" clause that allowed it to obtain benefits (arrangements, rates, or charges) given to other similarly situated facilities, namely a BP facility located adjacent to the Sunoco facility.⁵⁴³ As mentioned above, in TE's RCP case, the reasonable arrangement customers were given an opportunity to extend their contracts through December 31, 2008 rather than the February expiration date approved by the PUCO. BP was one of the entities that opted to extend its special contracts through the RCP proceeding.

On November 17, 2007, Sunoco invoked its most-favored nation provision to obtain the same treatment as BP, that is, to extend its special contract through December 31, 2008. On February, 19, 2009, the PUCO dismissed Sunoco's complaint which tried to enforce the provision against TE and an appeal was taken. The Ohio Supreme Court found the plain language of the most-favored nation provision to support Sunoco's ability to invoke the clause to extend its contract for the duration of BP's contract.⁵⁴⁴ As such, the Court held that Sunoco's special contract should have extended through December 31, 2008, saving Sunoco roughly \$13 million.⁵⁴⁵

N. Securitization of Deferred Generation-Related Expenses

House Bill 364 ("HB 364"), which went into effect in March 2012, allows EDUs (such as FirstEnergy) to apply to the PUCO for approval to securitize previously authorized deferrals. Securitization is a financial method that allows a utility to accelerate cash recovery for deferred assets, among other things, by having a third party issue bonds for the value of the deferred balance. Repayment of the bonds occurs through the use of a non-bypassable charge levied against customers through the utility's billing process. Securitization has the effect of reducing the interest or carrying cost component of the deferral by having the State of Ohio make a pledge to not interfere with the cost recovery mechanism.

HB 364 requires that securitization will result in cost savings to customers before being approved by the PUCO. Furthermore, HB 364 mandates that securitization cannot be approved by the PUCO unless the PUCO finds that customer savings would be measurably enhanced through this process. HB 364 also requires that the securitization can only be approved after the PUCO issues a final order and all judicial appeals are exhausted concerning the deferral subject to securitization. Finally, HB 364

⁵⁴² *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720.

⁵⁴³ *Id.* at 2-3.

⁵⁴⁴ *Id.* at 10.

⁵⁴⁵ *Id.* at 2.

exempts governmental aggregation customers from the non-bypassable charges that will be used to fund the bonds approved in a PUCO securitization order.

On May 3, 2012, FirstEnergy filed an application to securitize regulatory assets on its books that the Commission had previously authorized for deferral.⁵⁴⁶ The deferrals related to: (1) fuel costs in the 2006-2007 timeframe that were being recovered through the Deferred Fuel Cost Recovery Rider (“Rider DFC”); and (2) purchased power costs for the timeframe January 1, 2009 through May 31, 2009 that were being recovered through the Deferred Generation Cost Recovery Rider (“Rider DGC”). Both riders had extended shelf lives; Rider DFC would have extended through 2035, and Rider DGC would have extended through 2021.

On October 10, 2012, the PUCO modified and approved FirstEnergy’s application (the first approval under HB 364). The PUCO’s first modification was to limit the overall financing costs related to debt retirement that FirstEnergy could recover. The PUCO held that FirstEnergy cannot collect more than 15% of the estimated costs included in FirstEnergy’s application. The next modification was to limit FirstEnergy’s ability to allow a third party to bill or collect the phase-in recovery (“PIR”) charges. The PUCO noted that its rules do not currently allow for third party billing, but if they were revised in the future third party billing would only be permitted to the extent that it did not increase costs. The PUCO also directed FirstEnergy to retain an independent financial advisor, selected by the Staff, to review the terms of the PIR Bonds to ensure that they are in conformance with the PUCO’s order.

The PUCO noted that it expects securitization to save FirstEnergy’s customers roughly \$104 million.

⁵⁴⁶ *In the Matter of the Joint Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Issue Phase-In-Recovery Bonds and Impose, Charge and Collect Phase-In-Recovery Charges and for Approval of Tariff and Bill Format Changes*, PUCO Case No. 12-1465-EL-ATS, Opinion and Order at 1 (October 10, 2012).

American Electric Power

Ohio Power Company (“OP”) and Columbus Southern Power Company (“CSP”)

A. Rate Stabilization Plan

OP and CSP (collectively referred to as “AEP-Ohio”)⁵⁴⁷ filed their proposed RSPs on February 9, 2004⁵⁴⁸ and on January 26, 2005; the PUCO approved AEP-Ohio’s RSP. It was the only RSP that did not include a settlement supported by a majority of the parties and did not include a market-based SSO or a CBP even to test AEP-Ohio’s proposed SSO default generation supply prices.⁵⁴⁹ The PUCO approved AEP-Ohio’s requested 3% and 7% automatic annual increases in generation prices for the years 2006, 2007, and 2008 for CSP and OP, respectively, and the additional annual generation rate increases, capped at 4% above the 3% and 7% automatic increases.⁵⁵⁰ The PUCO indicated that the rate increases would be avoidable by shopping customers but practically no shopping had occurred in AEP-Ohio’s service territory and the market that might have provided a shopping opportunity was, at the time, a “no show.”⁵⁵¹ The PUCO also approved AEP-Ohio’s proposal to freeze distribution rates through 2008 at the level in effect on December 31, 2005, subject to adjustment for: emergencies; changes in transmission/distribution allocations under FERC’s seven-factor test; and, increased distribution expenses due to changes in environmental requirements, security, taxes, O&M requirements imposed by federal or state legislative and regulatory bodies, and major storm damage restoration.⁵⁵²

⁵⁴⁷ OP and CSP have since merged with Ohio Power Company being the surviving entity.

⁵⁴⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, PUCO Case No. 04-169-EL-UNC, Application (February 9, 2004).

⁵⁴⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, PUCO Case No. 04-169-EL-UNC, Opinion and Order (January 26, 2005).

⁵⁵⁰ *Id.* at 18, 21. The additional generation increases subject to the 4% annual cap were for increased expenditures for complying with changes in laws, rules or regulations related to environmental requirements, taxes, and security; or for customer load switches that materially jeopardized AEP-Ohio’s ability to recover the anticipated generation revenues.

⁵⁵¹ *Id.* at 18.

⁵⁵² *Id.* at 22-23. The PUCO concluded without explanation that a distribution rate case before 2008 would run counter to its ultimate goals of rate and financial stability. Additionally, the PUCO denied AEP-Ohio’s request to defer RTO administrative charges and CWIP for recovery after the RSP, but then directed AEP-Ohio to recover those same amounts through a non-bypassable POLR Rider applicable to all distribution customers. The PUCO approved requested deferrals for consumer education, choice implementation, transition plan and RSP filing costs. The PUCO authorized AEP-Ohio to adjust transmission charges to reflect FERC-approved rates and charges during the RSP, including RTO administrative charges, amortization of RTO start-up costs, and recovery of lost transmission revenues, but changed the requested expedited PUCO approval process for the pass-through from 30-days to 60-days. The PUCO approved AEP-Ohio’s proposal to not charge the regulatory asset charge rider to the first 20% of OP residential customer load that switches, until January 1, 2008. The PUCO directed AEP-Ohio to use \$14 million in unused shopping incentives for the benefit of CSP and OP low-income customers and economic development during the RSP. Finally, the PUCO also encouraged AEP-Ohio to

On March 23, 2005, the PUCO denied all Applications for Rehearing.⁵⁵³ On April 29, 2005, OCC filed an appeal to the Ohio Supreme Court.⁵⁵⁴ Consistent with its remand of FirstEnergy's RSP, the Ohio Supreme Court remanded the case to the PUCO with instructions for the PUCO to conduct a CBP.⁵⁵⁵ The Ohio Supreme Court's decision also explicitly permitted OCC to bring another appeal on any of the other assignments of error that the Ohio Supreme Court did not address.

In response to the Ohio Supreme Court's remand, the PUCO required AEP-Ohio to file a proposal for a CBP, which AEP-Ohio submitted to the PUCO on September 22, 2006.⁵⁵⁶ After a technical conference to discuss AEP-Ohio's proposal, interested parties filed Initial and Reply Comments regarding AEP-Ohio's proposed CBP. A Stipulation and Recommendation ("AEP-Ohio CBP Stipulation") was submitted for the PUCO's consideration.⁵⁵⁷ The AEP-Ohio CBP Stipulation proposed a voluntary Green Pricing Option through which customers would pay an additional rider (on top of the standard service rates and riders) in return for AEP-Ohio procuring power from renewable sources by buying RECs at prices determined through a competitive bid. Participating customers were required to purchase a minimum of two 100 kWh blocks per month, up to a maximum of fifty 100 kWh blocks per month.⁵⁵⁸ The AEP-Ohio CBP Stipulation also permitted AEP-Ohio to create a regulatory asset or liability, to the extent that the amounts collected from customers did not match the payments to winning bidders, for recovery or refund in its next distribution rate case. AEP-Ohio was also

move forward with a plan to construct an integrated gasification combined-cycle ("IGCC") generating facility in Ohio and noted that it was exploring regulatory mechanisms by which utilities might recover the costs of new IGCC facilities.

⁵⁵³ Applications for Rehearing were filed by OCC, OEG, IEU-Ohio, and the Ohio Gas Marketers Group ("OGMG"), in conjunction with PSEG Energy Resources & Trade, LLC and Constellation Energy Commodities Group, Inc.; and the Low Income Associates ("LIA") [consisting of the Appalachian People's Action Coalition ("APAC"), Lima/Allen Council on Community Affairs, OPAE, and WSOS Community Action].

⁵⁵⁴ *The Office of the Ohio Consumers' Counsel v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2005-0767, Notice of Appeal (April 29, 2005); reversed in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 511, 2006-Ohio-3054.

⁵⁵⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 511, 2006-Ohio-3054, at ¶1.

⁵⁵⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Plan to Provide Additional Options for Customer Participation in the Electric Market*, PUCO Case No. 06-1153-EL-UNC, Columbus Southern Power Company's and Ohio Power Company's Plan to Provide Additional Options for Customer Participation in the Electric Market (September 22, 2006).

⁵⁵⁷ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Plan to Provide Additional Options for Customer Participation in the Electric Market*, PUCO Case No. 06-1153-EL-UNC, Stipulation and Recommendation (March 23, 2007).

⁵⁵⁸ The cost of each block was 70¢ per 100 kWh block. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Plan to Provide Additional Options for Customer Participation in the Electric Market*, PUCO Case No. 06-1153-EL-UNC, Tariff Filing (August 27, 2007).

allowed to recover the administrative costs of running the program. The PUCO approved the CBP Stipulation in its entirety on May 2, 2007.⁵⁵⁹

B. Discretionary Generation Increase Applications Permitted by Rate Stabilization Plan

I. 2007 Increase

As permitted by its RSP, on January 23, 2007, AEP-Ohio filed for PUCO approval of a discretionary increase in its generation rates, asking for \$24.5 million from CSP customers and \$8.2 million from OP customers.⁵⁶⁰ AEP-Ohio proposed to collect the monies through a Generation Cost Recovery Rider (“GCRR”) from May 2007 through December 2007 in order to recover costs associated with environmental compliance, generation-related Sarbanes-Oxley (“SOX”) requirements, and compliance with North American Electric Reliability Corporation (“NERC”) security requirements for generating units. Pursuant to the RSP, and after PUCO’s rejection of requests to delay implementation, the proposed discretionary generation increase went into effect in May 2007 on an interim basis and subject to true-up.

On October 3, 2007 (more than nine months later), the PUCO issued its Opinion and Order approving AEP-Ohio’s application for a discretionary generation increase, subject to the PUCO’s modifications.⁵⁶¹ The PUCO authorized AEP-Ohio to recover \$19.9 million and \$3.9 million from CSP and OP customers, respectively, including carrying costs for expenditures incurred through February 2007 on environmental compliance costs. The PUCO found that discretionary generation increases would only be permitted for expenses: (1) incurred (*not projected*) at the time of the discretionary generation increase application; (2) that represented an increase in expenditures in excess of the baseline approved in AEP-Ohio’s RSP; and (3) that had been the result of AEP-Ohio complying with changes in laws, rules, or regulations since the RSP. Additionally, the approved amounts were reduced to reflect the applicability of a federal tax statute that affected AEP-Ohio’s taxable income as well as to factor in AEP-Ohio’s off-system sales. In accordance with its decision to only allow recovery for costs actually incurred, the PUCO denied AEP-Ohio’s request to recover amounts anticipated for compliance with SOX as well as O&M costs for NERC Critical Infrastructure Protection security requirements. AEP-Ohio was permitted to recover the carrying costs through the end of December 2008 (spreading out the payments over an extra year) and directed to apply the GCRR as a percentage increase to base generation rates before the application of any other riders. In light of the PUCO’s modifications, AEP-Ohio was directed to review the interim GCRRs and file revised tariffs within 30 days

⁵⁵⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Plan to Provide Additional Options for Customer Participation in the Electric Market*, PUCO Case No. 06-1153-EL-UNC, Order on Remand (May 2, 2007).

⁵⁶⁰ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Additional Generation Service Rate Increase Pursuant to Their Post-Market Development Period Rate Stabilization Plans*, PUCO Case No. 07-63-EL-UNC, Application (January 23, 2007) (hereinafter “*AEP-Ohio 2007 Discretionary Generation Increase Proceeding*”).

⁵⁶¹ *AEP-Ohio 2007 Discretionary Generation Increase Proceeding*, Opinion and Order (October 3, 2007).

that take into account the PUCO's decision. Further, the PUCO clarified that AEP-Ohio could apply for discretionary generation increases of no greater than an average of 4% per year, which may include a carryover from one-year to the next, and that AEP-Ohio was not limited to a 4% ceiling in each filing. Finally, the PUCO ordered AEP-Ohio to utilize the revised revenue requirements to recalculate whether the revised revenue requirements were below the average 4% cap and to file an updated calculation to allow the PUCO to determine whether the revenue requirements were below the average 4% cap.

On November 2, 2007, AEP-Ohio filed its updated revenue calculation and revised tariffs. Based on this filing, CSP customers were to be charged a GCRR of 1.1% (applied to base generation rates) through December 2008; OP customers would not pay a GCRR in 2008 and also received a one-time credit (for December 2007 only) of 1.18%. Subsequently, the PUCO denied the Applications for Rehearing of AEP-Ohio and OCC and clarified that it expected AEP-Ohio to maintain detailed and accurate records to substantiate the monthly generation levels at each facility. The PUCO's Entry on Rehearing further mandated that AEP-Ohio document the emission credits needed per generation facility by emission control regulation as well as the number of emission credits generated, transferred, and/or purchased by or on behalf of CSP or OP by facility.⁵⁶²

II. 2008 Increase

Additionally, on October 24, 2007 (a couple weeks after the PUCO's decision for 2007), AEP-Ohio filed another discretionary generation increase application to recover expenditures incurred in 2008 related to changes in environmental requirements and to factor in increased costs resulting from PJM implementation (on June 1, 2007) of a marginal loss method for reflecting transmission losses.⁵⁶³ AEP-Ohio proposed recovery of \$35.2 million and \$11.9 million from CSP and OP customers in 2008, respectively, and also introduced a monthly adjustment mechanism in order to collect its actual, incurred costs on a timely basis.⁵⁶⁴ The resulting rider rates proposed for 2008 were 3.74% of base generation rates for CSP and 1.16% of base generation rates for OP. CSP's rider rate was in addition to the increases approved in the 2007 Discretionary Generation Increase Proceeding.⁵⁶⁵

⁵⁶² *AEP-Ohio 2007 Discretionary Generation Increase Proceeding*, Entry on Rehearing (November 28, 2007).

⁵⁶³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Additional Generation Service Rate Increase Pursuant to Their Post-Market Development Period Rate Stabilization Plans*, PUCO Case No. 07-1132-EL-UNC, Application (October 24, 2007) (hereinafter "*AEP-Ohio 2008 Discretionary Generation Increase Proceeding*").

⁵⁶⁴ *AEP-Ohio 2008 Discretionary Generation Increase Proceeding*, Direct Testimony of David M. Roush (October 24, 2007).

⁵⁶⁵ *Id.* at Exhibit 2, page 1 of 4.

On January 18, 2008, an unopposed Stipulation was submitted by multiple parties and was approved subsequently by the PUCO.⁵⁶⁶ The Stipulation: (1) moved recovery of \$78 million in net locational marginal pricing losses to AEP-Ohio's TCRR, subject to a true-up in 2009; (2) credited to customers \$18 million associated with net congestion costs, subject to a true-up in 2009; (3) included the net cost of marginal line losses towards the cap in generation increases that AEP-Ohio is permitted to request under its RSP; (4) reduced by \$10 million the amount of costs (as compared to AEP-Ohio's request) that AEP-Ohio could recover through its GCRR; and (5) forbade AEP-Ohio from making any filings for permission to collect additional monies related to specified environmental mandates.⁵⁶⁷

On February 27, 2008, Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation (collectively "Ormet") filed an Application for Rehearing of the PUCO's decision to adopt the Stipulation. Ormet claimed that the PUCO erred in permitting approximately \$78 million in generation-related locational marginal pricing ("LMP") losses to be recovered through AEP-Ohio's TCRR instead of its GCRR. Ormet complained that any transmission losses attributable to Ormet were recovered as part of its generation contract with AEP-Ohio and therefore recovery of these costs from Ormet through the TCRR resulted in a double recovery from Ormet. Ormet explained that it did not pay the GCRR, but pays the TCRR, and shifting recovery of the LMP losses to the TCRR amounted in an increase of \$4 million to its electric bills for 2008.

Ormet and AEP-Ohio submitted a Supplemental Agreement on August 20, 2008 for the PUCO's approval in which Ormet agreed to withdraw its Application for Rehearing so long as the Commission approved the proposed modification of Ormet's special contract to reduce Ormet's deposit obligation from 130% of its anticipated monthly bill to a flat \$7 million. On August 27, 2008, the PUCO approved the Supplemental Agreement and reiterated its adoption of the Stipulation in this case without modification.

C. Enhanced Service Distribution Reliability Plan

On January 31, 2006, AEP-Ohio filed a report ("Final Report") pursuant to a PUCO-approved stipulation that required AEP-Ohio to make specific quantified improvements to its distribution service quality for the years 2003 through 2005 ("Distribution Quality Stipulation").⁵⁶⁸ AEP-Ohio's Final Report indicated that, while AEP-Ohio had made the specified improvements, distribution quality in other areas did not meet the required standards.⁵⁶⁹ On April 17, 2006, in accordance with a PUCO directive, Staff filed an investigative report regarding AEP-Ohio's distribution service reliability, which found that there was degradation in performance over the period 2001 to 2005 and that "the

⁵⁶⁶ *AEP-Ohio 2008 Discretionary Generation Increase Proceeding*, Opinion and Order (January 30, 2008).

⁵⁶⁷ *Id.* at 10-11.

⁵⁶⁸ *In the Matter of a Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio and Columbus Southern Power Company and Ohio Power Company*, PUCO Case No. 03-2570-EL-UNC, Columbus Southern Power Company's and Ohio Power Company's Final Report (January 31, 2006).

⁵⁶⁹ *Id.* at 11 (Attachment 1).

Companies' performance continues to deteriorate over time."⁵⁷⁰ After reviewing AEP-Ohio's response to Staff's report and recommendations, the PUCO directed AEP-Ohio to earmark \$10 million to be dedicated toward future measures addressing service and reliability concerns and prohibited AEP-Ohio from recovering any of that money from AEP-Ohio ratepayers.⁵⁷¹

In conjunction with AEP-Ohio's filing of the Final Report, AEP-Ohio filed a self-complaint with the PUCO in which it reiterated the results of the Final Report and stated that existing distribution rates (the same rates that AEP-Ohio asked to be frozen as part of its RSP)⁵⁷² could not support the continued increased expenditures that AEP-Ohio made during the previous two years.⁵⁷³ The PUCO permitted AEP-Ohio to use the self-complaint mechanism to deal with issues related to improving its service reliability and ordered AEP-Ohio to submit a proposed reliability plan with supporting testimony by October 6, 2006.⁵⁷⁴ As ordered, AEP-Ohio filed its plan with the PUCO in which it proposed to initiate several programs to maintain its distribution system, including asset management and reliability, vegetation management, distribution station reliability, and the use of advancements in technology, on the condition that it be permitted to recover approximately \$640 million for the costs of implementing the plan.⁵⁷⁵

On April 18, 2007, multiple parties to this proceeding submitted a Joint Motion to Withdraw AEP's Self-Complaint.⁵⁷⁶ The signatory parties cited their inability to agree on

⁵⁷⁰ *In the Matter of the Commission Consideration of a Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio, Columbus Southern Power Company, and Ohio Power Company*, PUCO Case Nos. 03-2570-EL-UNC, *et al.*, Correction to Commission Ordered Investigative Report Submitted by the Staff of the Public Utilities Commission of Ohio at 2 (April 18, 2006).

⁵⁷¹ *In the Matter of a Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio and Columbus Southern Power Company and Ohio Power Company*, PUCO Case No. 03-2570-EL-UNC, Finding and Order at 6 (July 26, 2006).

⁵⁷² AEP-Ohio asked the PUCO to continue a freeze of its distribution rates as part of its RSP Proposal. This aspect of AEP-Ohio's proposal was opposed by the PUCO's Staff as well as IEU-Ohio. IEU-Ohio supported the Staff's position that AEP-Ohio's distribution rates should be evaluated in the event AEP-Ohio sought to increase generation prices above the automatic increase levels (3% for CSP and 7% for OP).

⁵⁷³ *In the Matter of the Self-Complaint of Columbus Southern Power Company and Ohio Power Company Concerning the Implementation of Programs to Enhance Their Currently Reasonable Level of Distribution Service Reliability*, PUCO Case No. 06-222-EL-SLF, Self-Complaint (January 31, 2006) (hereinafter, "AEP-Ohio Self-Complaint Proceeding").

⁵⁷⁴ *AEP-Ohio Self-Complaint Proceeding*, Entry at 2-3 (July 26, 2006).

⁵⁷⁵ *AEP-Ohio Self-Complaint Proceeding*; Enhanced Distribution Service Reliability Plan (October 6, 2006). Over a five-year period, AEP-Ohio estimated that it would spend a total of \$637.4 million in incremental O&M and capital costs, with \$234.1 million for O&M and \$403.3 million in capital, and asked to recover those costs through a new rider called the Reliability Cost Recovery Rider ("RCRR"). Initially, the RCRR would be set based on data for the period of July 1, 2007 through December 31, 2008, and would be effective until new base distribution rates were established through a rate case. *AEP-Ohio Self-Complaint Proceeding*, Testimony of David Roush at 3 (October 6, 2006). The requested RCRR rates, which would be applied to all customers' base distribution charges, represented an increase over current distribution rates of 8.54% for OP and 5.35% for CSP. *Id.* at 7.

⁵⁷⁶ *AEP-Ohio Self-Complaint Proceeding*, Joint Motion to Withdraw Self Complaint (April 18, 2007).

the critical legal and factual issues in the case or on a cost recovery component for AEP-Ohio's plan. Additionally, the signatory parties asked the PUCO to order AEP-Ohio to direct \$10 million, which had previously been earmarked for service and reliability improvements, towards additional vegetation management efforts in a manner consistent with AEP-Ohio's plan. The signatory parties also requested a PUCO directive for Staff and AEP-Ohio to determine the circuits to be addressed with the additional monies. On May 16, 2007, the PUCO granted the Joint Motion to Withdraw, as well as the requests contained within it.⁵⁷⁷ Additionally, the PUCO further required AEP-Ohio to cooperate with Staff;⁵⁷⁸ prohibited AEP-Ohio from recovering any of the \$10 million from ratepayers; and ordered that, beginning in July 2007, any remaining balance would accrue interest at a rate of 1% per month and the accrued interest had to be spent on the incremental vegetation management plan.

D. Power Acquisition Rider Proceeding

In 2005, after extensive litigation with Monongahela Power ("Mon Power") over its refusal to propose an RSP, the PUCO ordered Mon Power and CSP to enter into negotiations for CSP to acquire Mon Power's Ohio territory. CSP and Mon Power came to an agreement about CSP's purchase of Mon Power's Ohio service territory and the PUCO modified and approved their agreement.⁵⁷⁹ Among other things, the PUCO authorized CSP to collect through the Power Acquisition Rider ("PAR") mechanism the shortfall between its power acquisition costs to serve the former Mon Power load and the revenues produced by CSP's service to the former Mon Power customers at CSP's rates.⁵⁸⁰ The PUCO also set the initial PAR rate based upon CSP's purchase (from Mon Power) of its power requirements to serve the former Mon Power customers from January 1, 2006 through May 31, 2007.

For the remainder of the RSP period (June 1, 2007 through December 31, 2008), CSP was authorized to conduct an RFP for the generation to serve the former Mon Power load and to use the PAR mechanism to recoup the difference between the RFP price and CSP's generation price. After conducting the RFP, CSP filed an application (and a subsequent correction) requesting a PAR increase based on the average awarded bid price of \$55.88/MWh as well as a true-up of CSP's under-recovery of the PAR during

⁵⁷⁷ *AEP-Ohio Self-Complaint Proceeding*, Entry (May 16, 2007).

⁵⁷⁸ The PUCO required AEP-Ohio to: provide Staff a copy of its policies and communications for its tree trimming or tree removal plan; report to Staff on the service quality of the chosen circuits for two years after a circuit is cleared; report on a quarterly basis AEP-Ohio's tree trimming progress, including expenditures; audit at least 10% of the work performed pursuant to the incremental vegetation management plan; comply with national standards for tree trimming and removal; track expenditures in a manner which assists Staff's ability to audit the incremental vegetation management plan expenditures and; ensure the incremental vegetation management plan is work above and beyond the PUCO's vegetation management requirements and is not included in AEP-Ohio's budgets or plans. *Id.* at 3-4.

⁵⁷⁹ *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, PUCO Case No. 05-765-EL-UNC, Opinion and Order (November 9, 2005).

⁵⁸⁰ *Id.* at 17-18.

the initial 17-month period.⁵⁸¹ On June 27, 2007, the PUCO approved AEP-Ohio's application, the \$69.1 million PAR revenue requirement for the June 1, 2007 through December 31, 2008 time period, and an allocation of PAR costs using a uniform percentage of generation revenue allocation rather than a per kWh allocation.⁵⁸²

E. Electric Security Plan

On July 31, 2008, AEP-Ohio filed its ESP Application at the PUCO to establish its SSO pursuant to Section 4928.141, Revised Code.⁵⁸³ AEP-Ohio proposed an ESP with a three-year term from 2009 through 2011, indicating that it would not pursue the MRO option available under SB 221. AEP-Ohio's ESP Application defined the pricing applicable to SSO customers during the three-year period and included provisions for distribution service, economic development, alternative energy resources and AEP-Ohio's compliance with energy efficiency, corporate separation, and government aggregation requirements.

After a fully litigated proceeding, the Commission issued its Opinion and Order on March 18, 2009, nearly three months beyond the statutory timeframe that Ohio law required the PUCO to issue its Opinion and Order.⁵⁸⁴ The Commission modified and approved AEP-Ohio's ESP in several regards and found that the modified ESP met the statutory test for approval of the ESP (*i.e.* the ESP was "more favorable in the aggregate" as compared to the expected results of an MRO).

From a structural standpoint, the PUCO adopted the framework of AEP-Ohio's proposed ESP, which AEP-Ohio proposed as a 15% total bill cap with deferrals of authorized revenues that exceeded the bill caps. More specifically, the PUCO's decision appeared to limit annual increases to total bills to 7% for CSP and 8% for OP in 2009, 6% for CSP and 7% for OP in 2010, and 6% for CSP and 8% for OP in 2011. However, the actual total bill increases that the PUCO set in motion were much higher than the above-mentioned bill caps. Also, the PUCO did not actually limit the amount that customers would ultimately pay, but rather delayed the payment for a later time. The amounts the PUCO would otherwise permit AEP-Ohio to collect but for the limited

⁵⁸¹ *In the Matter of the Application of Columbus Southern Power Company to Adjust its Power Acquisition Rider Pursuant to its Post-Market Development Period Rate Stabilization Plan*, PUCO Case No. 07-333-EL-UNC, Application (March 28, 2007) (hereinafter, "AEP-Ohio PAR Proceeding"). See also *AEP-Ohio PAR Proceeding*, Correction to Application (March 30, 2007).

⁵⁸² *AEP-Ohio PAR Proceeding*, Opinion and Order (June 27, 2007).

⁵⁸³ *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Application (July 31, 2008) (hereinafter, "AEP-Ohio ESP Proceeding").

⁵⁸⁴ Section 4928.143, Revised Code, requires the PUCO to issue an order within 150 days of the filing of an initial ESP application by an EDU. The PUCO's Opinion and Order was issued 80 days after the statutory deadline. For the 2009 portion of the ESP, the PUCO's decision effectively resulted in providing CSP and OP retroactive rate increases. For 2009, the PUCO's decision crammed 12 months' worth of rate increase into a nine-month period. While the PUCO's decision indicated that rate increases would be moderated by "rate caps," the actual effects on customers' bills were well above anything suggested by the PUCO.

bill caps were, in accordance with the PUCO's decision, deferred for future collection through a non-bypassable charge that would fall on customers during the period 2012 through 2018. The PUCO also authorized AEP-Ohio to inflate the deferred amount to reflect a hypothetical carrying cost calculated, in part, as though the deferred balance was being financed by AEP-Ohio's equity investors. In other cases, the PUCO limited carrying costs by using an interest rate tied to the cost of long-term debt. As of December 31, 2011, OP's deferral was estimated to be \$624 million.

As indicated above, the PUCO's so-called total bill caps did not actually limit the increases customers saw on their total bill. For example, the PUCO's bill caps were diluted by the PUCO exempting AEP-Ohio's rider to recover its EE/PDR benchmark compliance costs, AEP-Ohio's TCRR, and any rate increase authorized in a distribution rate case.⁵⁸⁵ Finally, while the PUCO did not accept AEP-Ohio's proposal to implement a one-time rider to retroactively recover any increase in rates to make AEP-Ohio whole (back to January 1, 2009) because the Commission missed its statutory deadline to issue a decision on AEP-Ohio's proposed ESP, the PUCO in effect granted AEP-Ohio's request by permitting AEP-Ohio to collect 12 months' worth of ESP-approved revenue over the remaining nine months of 2009.

The PUCO also approved a Fuel Adjustment Clause ("FAC") for AEP-Ohio and modified AEP-Ohio's FAC request to limit the FAC mechanism to the term of the ESP. The PUCO noted also that the costs to comply with alternative energy portfolio requirements must be bypassable and separately accounted for from fuel even though the PUCO permitted AEP-Ohio to recover such costs through the FAC. Finally, the PUCO adopted Staff's recommendation to use 2007 actual fuel cost data, escalated by 3% for CSP and 7% for OP, as a reasonable proxy for 2008 fuel costs to serve as the FAC baseline instead of actual 2008 fuel costs (as recommended by IEU-Ohio and others).⁵⁸⁶

Additionally, the PUCO granted AEP-Ohio revenue increases for non-FAC costs, including carrying costs that AEP-Ohio would incur post-January 1, 2009 on environmental investments that it made between 2001 and 2008. The PUCO rejected AEP-Ohio's request for automatic non-FAC increases that AEP-Ohio contended would reflect the capitalized investments it intended to make in 2009, 2010, and 2011. Although the PUCO disallowed any recovery of automatic non-FAC increases, the PUCO found that AEP-Ohio could request, through an annual filing, recovery of

⁵⁸⁵ *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 9, 31 (July 23, 2009).

⁵⁸⁶ The recommendation to use the 2008 actual costs was designed to make sure that the FAC baseline value was not too low and the non-FAC rate set too high. Determination of the FAC baseline was critical inasmuch as FAC costs are the last costs recovered from customers under the revenue increase limitations imposed by the Commission and therefore those FAC costs that exceed the limitations and that are deferred will be collected (with interest) from all customers as part of the unavoidable surcharge pursuant to Section 4928.144, Revised Code. Setting the baseline too low means that it will appear that fuel costs increased more than they actually did, making the FAC adjustment greater than if the 2008 actual fuel costs had been used, and thereby possibly pushing too much money associated with the FAC into the deferral bucket that will be recovered through the unavoidable surcharge.

additional carrying costs for anticipated environmental investments made during the ESP period after the investments have been made.⁵⁸⁷

Further, the PUCO's Opinion and Order denied AEP-Ohio's request to include specific language in its tariffs to ban customers from participating in PJM's demand response programs, other than through AEP-Ohio. The PUCO reasoned that it did not have sufficient information on this matter and, thus, it should be deferred and addressed in a separate proceeding. However, on rehearing, the PUCO partially granted AEP-Ohio's request and prohibited customers served by reasonable arrangements from participating in PJM's demand response programs.⁵⁸⁸ The PUCO's confusing decisions related to the ability of customers to participate in the PJM demand response programs have benefited electric generators interested in using the PJM market structure to bias the operation of the market in favor of higher prices. Despite suggestions by the PUCO that it would move forward with a process to make effective use of the demand response programs available from RTOs such as PJM, the PUCO has not taken further action.

Additionally, AEP-Ohio's proposed ESP included a non-bypassable POLR rider (a generation-related item) as part of AEP-Ohio's distribution rates, based on AEP-Ohio's hypothetical cost of its POLR risk determined by using the Black-Scholes options valuation model. Despite strenuous objections from virtually every intervenor and the fact that there were virtually no customers shopping in AEP-Ohio's territory, the PUCO held that AEP-Ohio did have POLR risk associated with customers migrating from its system that was equal to 90% of the hypothetical POLR costs that AEP-Ohio requested. The PUCO granted AEP-Ohio the authority to collect *annual* POLR revenue of \$97.4 million for CSP and \$54.8 million for OP. The POLR charge was bypassable; however it was bypassable only by shopping customers that agreed to come back to AEP-Ohio at market-based prices. Since the PUCO could only approve AEP-Ohio's ESP based on a finding that the ESP was better in the aggregate than the MRO, the likely opportunity for customers to obtain a better price by shopping was quite slim (and particularly so in the case of OP customers) when the PUCO authorized AEP-Ohio to begin charging the POLR charge.

The PUCO also denied AEP-Ohio's request for authority to sell or transfer: two generating facilities (Waterford Energy Center and Darby Electric Generating Station); AEP-Ohio's entitlement in certain generating facilities of the Ohio Valley Electric Corporation ("OVEC"); and its ownership in the Lawrenceburg Generation Station. The PUCO held that AEP-Ohio's requests were premature and AEP-Ohio should file a separate application when it was ready to sell or transfer the generation facilities. However, the PUCO then held that AEP-Ohio could obtain recovery for Ohio customers' jurisdictional share of any costs associated therewith, through the non-FAC portion of the generation rate, and indicated that AEP-Ohio should modify its ESP accordingly. In

⁵⁸⁷ AEP-Ohio made its first request to recover carrying costs on environmental investments made during the ESP period on February 8, 2010. See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish Environmental Investment Carrying Cost Riders*, PUCO Case No. 10-155-EL-RDR, Application (February 8, 2010) (hereinafter, "AEP-Ohio EICCR Proceeding").

⁵⁸⁸ *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 40-41 (July 23, 2009).

its first Entry on Rehearing, the PUCO partially modified its Opinion and Order to remove cost recovery for expenses related to the Waterford and Darby generating assets .because (as IEU-Ohio demonstrated) CSP failed to show that its revenues were inadequate to cover such costs.⁵⁸⁹

IEU-Ohio and CSP filed additional Applications for Rehearing from the PUCO's July 23, 2009 Entry on Rehearing. IEU-Ohio challenged the PUCO's decision to prohibit customers served by reasonable arrangements from participating in PJM demand response programs and averred that it was illegal to permit AEP-Ohio to accept the benefits (higher rates) permitted by the ESP while simultaneously holding out its legal right to withdraw and terminate its ESP. CSP's Application for Rehearing objected to the Commission not permitting CSP to recover its costs associated with the Darby Electric Generation Station and the Waterford Energy Center while also prohibiting CSP from selling or transferring the generation assets. The PUCO denied IEU-Ohio's and CSP's Applications for Rehearing on November 4, 2009.

IEU-Ohio and OCC took appeals to the Ohio Supreme Court from the PUCO's Orders in November 2009.⁵⁹⁰ Additionally, CSP took its own appeal related solely to the PUCO's denial of its request to transfer generation assets.

I. CSP's ESP Appeal

On March 9, 2011, the Supreme Court of Ohio issued a decision affirming the PUCO's decision regarding CSP's appeal.⁵⁹¹ Specifically, the Court ruled that CSP did not demonstrate that the Commission's decision to deny CSP's request to transfer generation facilities or, alternatively, provide cost recovery for those facilities, was unlawful or unreasonable.

In its decision, the Court found that the General Assembly intended for the Commission to scrutinize any transfer of generation assets. The Court stated, "[t]he commission did not abuse its discretion by withholding review of CSP's request to sell until CSP submitted a concrete proposal. If nothing else, R.C. 4928.17(E) shows that the General Assembly made a policy judgment restricting the freedom of utilities to sell or transfer generation units. Although CSP plainly does not find this restriction salutary, the company did not challenge the statute, and the commission is obligated to follow its legislative mandate."

The Court also found the Commission did not err by denying CSP's request to increase rates by \$51 million annually. The Court found that the Commission had properly

⁵⁸⁹ *Id.* at 35-36.

⁵⁹⁰ IEU-Ohio also filed a Complaint for a Writ of Prohibition at the Ohio Supreme Court arguing that the PUCO lost jurisdiction over AEP-Ohio's ESP Application when it failed to issue an order within the 150-day timeframe required by Section 4928.143(C)(1), Revised Code. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-1907. The Court granted AEP-Ohio and PUCO Motions to Dismiss IEU-Ohio's Complaint for a Writ of Prohibition on January 27, 2010. See *01/27/2010 Case Announcements*, 2010-Ohio-188.

⁵⁹¹ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958.

considered CSP's cost of service study, as CSP had not identified any authority that would expressly prohibit it. The Court's decision also provided further guidance on the standards the Commission can apply when evaluating an ESP. The Court rejected arguments raised by CSP that the Commission could only consider whether the price under an ESP was lower than the MRO alternative, instead finding that the Commission was not bound to a strict price comparison.⁵⁹²

II. OCC's and IEU-Ohio's ESP Appeal

On April 19, 2011, the Ohio Supreme Court reversed the PUCO's Order authorizing AEP-Ohio to establish a POLR rider using an option pricing model with hypothetical cost and other input variables.⁵⁹³ The Court also found that the PUCO erred, as a matter of law, by permitting AEP-Ohio to establish charges for items not specifically included on the list of provisions that can be included in an ESP as provided in Section 4928.143, Revised Code. Additionally, the Court found that the PUCO illegally engaged in retroactive ratemaking by annualizing the amount of revenue that AEP-Ohio could collect in 2009.⁵⁹⁴ However, the Court did not order a remedy for the retroactive rate increase because OCC (the party that raised the issue) failed to request a stay and post a bond, actions the Court said were necessary to secure a remedy for the illegal retroactive rate increase.

Regarding POLR, the charges were based on the output of an option valuation model derived from the Black-Scholes option pricing model to calculate the amount of revenue that it should collect through the POLR charge. Over the objections of IEU-Ohio and others, the PUCO concluded that the POLR charge was derived from a "cost-based" methodology, accepted AEP-Ohio's methodology, and approved the POLR Rider.

Reversing the PUCO's authorization of the POLR charge, the Court found that the PUCO's conclusion that the POLR was cost-based was against the manifest weight of the evidence.⁵⁹⁵ The Court noted that instead of being cost-based, the option pricing formula which the PUCO relied upon to reach its decision had nothing to do with the costs associated with satisfying the POLR obligation. The decision further noted that other facts called into question the accuracy of using AEP-Ohio's POLR theory. In

⁵⁹² "The electric-security plan statute expressly allows the commission to modify plans, and it does not prohibit modifications based on a utility's cost of service. Section 4928.143(C)(1), Revised Code. Moreover, while it is true that the commission must approve an electric security plan if it is "more favorable in the aggregate" than an expected market-rate offer, id., that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider 'pricing and all other terms and conditions.'" *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958 ¶ 27 (emphasis added).

⁵⁹³ *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788 (April 19, 2011).

⁵⁹⁴ The Commission did not issue a decision until late in the first quarter of 2009 and set the rates for the remainder of 2009 in a manner that captured the increase in rates that would have gone into effect on January 1, 2009 as proposed in AEP-Ohio's application.

⁵⁹⁵ *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 29 (April 19, 2011).

particular, the Court noted that AEP-Ohio did not demonstrate any actual or expected shopping and did not seek to cover its POLR risk by hedging.

The Court remanded the case to the PUCO so that the PUCO could conform its decision to the Court's determinations. In remanding the case, the Court left open the question of "... whether a non-cost-based POLR charge is reasonable and lawful."⁵⁹⁶ Alternatively, the Court indicated that the PUCO could consider whether it was appropriate to allow AEP-Ohio to present evidence of its actual POLR costs. The Court also stated that "[h]owever the Commission chooses to proceed, it should nonetheless explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."⁵⁹⁷

The second issue on which the Court reversed the PUCO arose from the PUCO's authorization of an increase in electric rates for recovery of carrying costs on environmental investments. Section 4928.143, Revised Code, identifies the provisions that may be included in an ESP. Section 4928.143(B)(2), Revised Code, states that the PUCO may authorize "without limitation, any of the following" and then lists nine categories. In justifying recovery of environmental investments, the PUCO argued to the Court that Section 4928.143(B)(2), Revised Code, allowed it to establish recovery mechanisms beyond the nine categories. The Supreme Court rejected the PUCO's legal theory and stated that the PUCO was limited to allowing recovery only for the listed categories.

This issue was also remanded to the PUCO so that it could consider whether the environmental carrying costs that the PUCO folded into the ESP rate increase might fall within the scope of the nine categories.

The Supreme Court also upheld several provisions of the PUCO's Order appealed by OCC and IEU-Ohio. First, it found that the Commission's failure to comply with the statutory requirement to issue a decision within 150 days after the application for the ESP was filed did not limit the PUCO's authority to issue an ESP decision. Second, the Court rejected IEU-Ohio's argument that AEP-Ohio was required to make an election to be bound by the ESP decision before increasing rates based on the ESP decision. Third, the Court found that the PUCO adequately justified its determination to allow AEP-Ohio to raise rates to cover additional vegetation management (tree trimming) and its initial costs to implement gridSMART. Finally, the Court rejected a challenge to the Commission's calculation of the fuel clause baseline that IEU-Ohio argued was not cost-based.

III. ESP Remand

On May 4, 2011, the PUCO issued an Entry in response to the April 19, 2011 decision by the Supreme Court of Ohio. In the May 4 PUCO Entry, the PUCO directed AEP-

⁵⁹⁶ *Id.* at ¶ 30.

⁵⁹⁷ *Id.*

Ohio to file proposed tariffs to remove POLR charges and carrying costs associated with environmental investments made in 2001-2008 from AEP-Ohio's tariffs and rates.

On May 6, 2011, AEP-Ohio asked the PUCO to reconsider its May 4 Entry by filing an Application for Rehearing. The Application for Rehearing asserted that the PUCO must consider the arguments AEP-Ohio believed supported the continuation of the POLR charges and recovery of carrying costs for environmental investments. In a May 11, 2011 compliance tariff filing, AEP-Ohio proposed, for both CSP and OP, to remove the 2001-2008 environmental costs from base generation charges and to reduce the POLR rider rates to their pre-ESP levels (2008 POLR rates). As an alternative, AEP-Ohio requested that it be prevented to continue to bill under its existing tariffs subject to refund.

On May 25, 2011, the PUCO issued an Entry directing AEP-Ohio to continue its existing tariffs (with environmental carrying costs and POLR included) but held that these amounts would be subject to refund if AEP-Ohio failed to present evidence demonstrating their legality.⁵⁹⁸ That Entry also set the procedural schedule for the PUCO's hearing on remand.

On October 3, 2011, the PUCO issued its Order on Remand finding that AEP-Ohio had failed to prove its POLR charges were lawful but had demonstrated that its carrying costs on environmental investment were lawful.⁵⁹⁹

As an initial matter, the PUCO changed its prior determination that POLR charges were appropriately classified as distribution revenues. The PUCO instead found that the POLR obligation pertains to the provision of generation service and should be classified as generation revenue. In its Order on Remand, the PUCO found that AEP-Ohio continued to argue that its POLR charges should be calculated using the Black-Scholes model and failed to present any evidence of its actual POLR costs.

The PUCO found that the Black-Scholes model failed to provide a reasonable measure of AEP-Ohio's costs and also rejected AEP-Ohio's separate argument that its POLR costs could be calculated as the value customers received through AEP-Ohio's POLR service. The PUCO found the latter argument had been directly refuted by IEU-Ohio's and OCC's witnesses. Finally, the PUCO found AEP-Ohio's proposed POLR charges were intended to compensate AEP-Ohio both for customer return risk as well as the risk of customer migration. The PUCO found that the risk of customer migration was a business risk faced by all providers of generation service and was therefore not appropriate to include in POLR charges.

The PUCO determined that since it had already found AEP-Ohio's POLR charges were not appropriate, it was not necessary to determine whether the charges should be bypassable by customers that shop and agree to return to SSO service at a market-based price. The PUCO directed AEP-Ohio to refund (with interest at the cost of long-

⁵⁹⁸ *AEP-Ohio ESP Proceeding*, Entry at 3-4 (May 25, 2011)

⁵⁹⁹ *AEP-Ohio ESP Proceeding*, Order on Remand (October 3, 2011).

term debt) the amount of POLR charges collected since the first billing cycle in June 2011 by crediting amounts first to any deferred fuel costs on the books of either operating company, and crediting any remaining balance back to customers on a per kWh basis beginning with the first billing cycle of November 2011 through the end of the current ESP.

The PUCO, however, rejected arguments that it should prospectively reduce AEP-Ohio's deferrals by the amounts AEP-Ohio illegally collected through POLR rates up until the PUCO's May 25 Entry (when the PUCO established that the POLR charge rates was subject to refund). Because the illegal charges inflated the accumulated amount of the deferred charges, IEU-Ohio pushed the PUCO to eliminate the illegally authorized amounts from the deferred charges. The PUCO found that the prospective elimination of the illegal amounts from the deferred charges would be retroactive ratemaking, which it claimed was prohibited by Ohio law.

Had the PUCO agreed that the illegally authorized charges must be removed from the deferred charges, such agreement would have substantially reduced the amount of the deferred charges that customers began to see in their electric bills on or about January 1, 2012. As discussed below, these deferred charges are being paid by consumers through a rider called the Phase-In Recovery Rider or "PIRR" that is contributing to the increases that most AEP-Ohio customers saw in the first electric bills in 2012. While the effect of the PIRR is to increase post 2011 electric bills, it is not the main reason why many consumers are seeing substantial increases.

Regarding the environmental carrying costs, the PUCO found they could be authorized under Section 4928.143(B)(2)(d), Revised Code. On remand, the PUCO agreed with AEP-Ohio and the PUCO Staff that Section 4928.143(B)(2)(d), Revised Code, properly authorized cost recovery for the environmental carrying costs.⁶⁰⁰ The PUCO found that authorizing recovery of environmental carrying costs somehow provided certainty regarding retail electric service.

In response to its determination regarding POLR and the environmental investments, the PUCO directed AEP-Ohio to file revised tariffs consistent with its Order on Remand. On October 6, 2011, AEP-Ohio filed two sets of compliance tariffs: one that reduced its POLR charges to the amount that had been established in its RSP (which was effective immediately prior to the ESP), and one set that completely removed all POLR charges. In other words, AEP-Ohio filed a new tariff that limited the amount of the POLR rate reduction. On October 28, 2011, the PUCO rejected AEP-Ohio's effort to keep more of the POLR revenue and directed AEP-Ohio to remove all POLR charges and further directed AEP-Ohio to take up its claims regarding RSP POLR charges in an Application for Rehearing.

AEP-Ohio filed an Application for Rehearing on November 2, 2011, arguing that the Commission's Order in the ESP proceeding only authorized an incremental increase in

⁶⁰⁰ Section 4928.143(B)(2)(d), Revised Code, provides an ESP may include "[t]erms, conditions, or charges related to ... carrying costs, amortization periods, and accounting and deferrals as would have the effect of stabilizing or providing certainty regarding retail electric service."

POLR charges from its RSP levels to the ESP levels. IEU-Ohio also filed an Application for Rehearing arguing that the PUCO erred in determining that the environmental investment carrying costs could be authorized under Section 4928.143(B)(2)(d), Revised Code, and that the PUCO erred in determining it was retroactive ratemaking to prospectively reduce AEP-Ohio's deferrals. The PUCO denied both Applications for Rehearing in their entirety.⁶⁰¹

On February 1, 2012, IEU-Ohio appealed the PUCO's Order on Remand to the Ohio Supreme Court.⁶⁰² Briefs and Reply Briefs have been submitted to the Supreme Court and the parties are awaiting oral arguments. Through its latest appeal, IEU-Ohio is requesting the Court to find that the PUCO could and should do more to remove the effect of the charges that the PUCO illegally authorized from the portion of the illegally authorized revenue that was deferred for future collection.

F. Storm Cost Recovery Rider

On March 10, 2006, AEP-Ohio filed a request for approval of a Storm Cost Recovery Rider to recover expenses and capital costs incurred in restoring service after major storms that occurred in December 2004 and January 2005.⁶⁰³ AEP-Ohio sought to recover \$23.7 million over a 12-month period (or a shorter time if the full costs were recovered sooner) through a 3.8% adder to CSP customers' distribution charges and a 3.6% adder to OP customers' distribution charges. The PUCO approved AEP-Ohio's application, noting that AEP-Ohio sought recovery of costs over and above the costs normally incurred to repair storm damage, based upon a three-year average from 2003 through 2005.⁶⁰⁴

On December 15, 2008, AEP-Ohio filed an application for accounting authority to defer as regulatory assets the portion of its O&M expenses related to storm damage from Hurricane Ike in September 2008.⁶⁰⁵ AEP-Ohio explained that the total O&M expenses it proposed to defer was the amount by which the total O&M expenses associated with Hurricane Ike exceeded the three-year average service restoration O&M expenses associated with major storms. AEP-Ohio noted that it was not requesting authority to commence recovery of these expenses, but if the PUCO determined that such deferrals (with carrying costs) do not present the optimal method for AEP-Ohio recovering these

⁶⁰¹ *AEP-Ohio ESP Proceeding*, Entry on Rehearing (December 14, 2011).

⁶⁰² *In the Matter of the Application of Columbus S. Power Co. for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, S.C. Case No. 2012-187.

⁶⁰³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Implement Storm Related Service Restoration Cost Recovery Riders*, PUCO Case No. 06-412-EL-UNC, Application (March 10, 2006).

⁶⁰⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Implement Storm Related Service Restoration Cost Recovery Riders*, PUCO Case No. 06-412-EL-UNC, Finding and Order (August 9, 2006).

⁶⁰⁵ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify Their Accounting Procedure for Certain Storm Related Service Restoration Costs*, PUCO Case No. 08-1301-EL-AAM, Application (December 15, 2008).

costs, then AEP-Ohio requested permission to recover the O&M expenses over a 12-month period beginning with the first billing cycle in February 2009. On December 19, 2008, the PUCO modified and approved AEP-Ohio's application.⁶⁰⁶ The PUCO modified AEP-Ohio's application to remove the equity component from carrying costs, setting the interest rate at the same rate approved in AEP-Ohio's most recent TCRR case. The PUCO also stressed that the reasonableness of the deferred amounts and the recovery thereof would be addressed in a future Commission proceeding.

On December 21, 2012, AEP-Ohio filed an application to establish an initial Storm Damage Recovery Rider ("Rider SDRR").⁶⁰⁷ In its application, AEP-Ohio is seeking recovery of \$64 million of distribution storm damage expenses (incremental to a baseline of \$5 million embedded in distribution rates) which it has deferred since January 1, 2012. Rider SDRR was authorized by the Commission in AEP-Ohio's Second ESP proceeding. The \$62 million is related to the major storms that took place in June and July 2012. AEP-Ohio requested that it recover the \$62 million over a 12-month period commencing no later than April 1, 2013. The proposed Rider SDRR rate is 9.67% of base distribution charges for all customer classes. AEP's application is still pending with the PUCO.

G. Integrated Gasification Combined Cycle Facility

On March 18, 2005, AEP-Ohio filed an application for authority to recover costs of at least one 600 MW IGCC facility in Meigs County, Ohio through a three-phase recovery scheme.⁶⁰⁸ Phase I, originally estimated to cost \$18 million, would allow AEP-Ohio to recover expenditures made up until the time an Engineering, Procurement, and Construction contract was executed through a temporary (12-month) generation rate surcharge to the SSO. Phase II would allow AEP-Ohio to recover a carrying charge on costs of constructing the facility *via* the SSO rate, beginning with the first billing cycle of 2007 through the last billing cycle before the IGCC plant was in commercial operation. Also as part of Phase II, AEP-Ohio requested accounting authority to defer the carrying costs and asked to amortize those costs during the 12 months of 2007. Phase III would allow AEP-Ohio to recoup the costs incurred to build the facility, operating costs, and a return on investment for the useful life of the IGCC facility.⁶⁰⁹ AEP-Ohio's proposal was

⁶⁰⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify Their Accounting Procedure for Certain Storm Related Service Restoration Costs*, PUCO Case No. 08-1301-EL-AAM, Finding and Order (December 19, 2008).

⁶⁰⁷ *In the Matter of the Application of Ohio Power Company to Establish Initial Storm Damage Recovery Rider Rates*, Case No. 12-3255-EL-RDR, Application (December 21, 2012).

⁶⁰⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, PUCO Case No. 05-376-EL-UNC, Application (March 18, 2005) (hereinafter, "*AEP-Ohio IGCC Proceeding*"). AEP-Ohio also applied for Ohio Power Siting Board ("OPSB") approval of the IGCC Project, which the OPSB approved (with conditions) on April 23, 2007. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Certificate of Environmental Compatibility and Public Need for the Great Bend IGCC Project in Meigs County, Ohio*, PUCO Case No. 06-30-EL-BGN, Opinion, Order, and Certificate (April 23, 2007).

⁶⁰⁹ *AEP-Ohio IGCC Proceeding*, Application at 11 (March 18, 2005).

contested by all stakeholder sectors and the PUCO's Staff indicated that the quality of information available precluded anything more than moving forward with Phase I of AEP-Ohio's proposal.⁶¹⁰ Nonetheless, the PUCO authorized AEP-Ohio to recover approximately \$24 million associated with Phase I of its proposal over a 12-month period through a "bypassable" surcharge.⁶¹¹ The PUCO justified its allowance of Phase I costs by classifying AEP-Ohio's IGCC proposal as potentially providing ancillary services necessary to support the distribution function, which is noncompetitive and subject to PUCO regulation, as opposed to providing a competitive generation service.⁶¹² The PUCO put on hold AEP-Ohio's proposal to recover the Phase II and Phase III costs until some future proceeding. The PUCO denied all of the Applications for Rehearing as well as an AEP-Ohio Motion for Clarification requesting recovery assurance of non-Phase I expenditures.⁶¹³ In addition to denying the Applications for Rehearing, the PUCO ordered AEP-Ohio to refund all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites if AEP-Ohio had not commenced a continuous course of construction of the proposed facility within five years of the date of the Entry.⁶¹⁴

IEU-Ohio filed a Complaint for Writ of Prohibition at the Ohio Supreme Court that sought to stay the PUCO's allowance of the Phase I costs or make them subject to refund if found unlawful by the Ohio Supreme Court and to bar the PUCO from further entertaining any increase in rates for a hypothetical IGCC generating plant unless it did so in accordance with Ohio law.⁶¹⁵ The Ohio Supreme Court, by a 4-3 vote, granted a Motion to Dismiss the Complaint for Writ of Prohibition on October 4, 2006.⁶¹⁶ Additionally, four parties, including IEU-Ohio, filed appeals to the Ohio Supreme Court and oral arguments were held on October 9, 2007.⁶¹⁷

On March 13, 2008 (almost two years following the PUCO's decision), the Ohio Supreme Court overturned the PUCO's Order allowing AEP-Ohio to recover the IGCC Project's Phase I costs.⁶¹⁸ The Ohio Supreme Court ruled that the evidence assembled by the PUCO did not support the PUCO's ruling that the IGCC unit would provide distribution/ancillary services. However, the Ohio Supreme Court remanded this issue to the PUCO to see if the PUCO could develop a record to support the view that all or part of the IGCC unit might provide distribution/ancillary service. The Ohio Supreme

⁶¹⁰ *AEP-Ohio IGCC Proceeding*, Post Hearing Brief of PUCO Staff at 18-19 (September 20, 2005).

⁶¹¹ *AEP-Ohio IGCC Proceeding*, Opinion and Order at 11 (April 10, 2006).

⁶¹² *Id.* at 17.

⁶¹³ *AEP-Ohio IGCC Proceeding*, Entry on Rehearing (June 28, 2006).

⁶¹⁴ *Id.* at 16-17.

⁶¹⁵ *State of Ohio ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio, et al.*, Case No. 2006-1257, Writ of Prohibition (June 29, 2006).

⁶¹⁶ *October 4, 2006 Case Announcements*, 2006-Ohio-5803.

⁶¹⁷ *Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2006-1594. Appeals were filed by IEU-Ohio on August 23, 2006 and by OEG, OPAAE, and FES on August 25, 2006.

⁶¹⁸ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990.

Court's decision also noted that under traditional regulation as defined by Ohio law, the cost of a utility facility is not eligible for recovery unless the facility is at least 75% complete and suggested that the PUCO needed to address this requirement in the case of the IGCC unit since construction of the facility had not even started.⁶¹⁹ The Ohio Supreme Court declined to reach the question of whether a refund of the approximately \$24 million in Phase I costs was warranted.

On September 17, 2008, OCC filed a request to refund the \$24 million and on January 9, 2009, the Attorney Examiner in this proceeding issued an Entry directing AEP-Ohio to "provide a detailed statement outlining the status of the construction of the IGCC facility, including whether AEP is engaged in a continuous course of construction on the IGCC facility" by February 7, 2009.⁶²⁰ On February 6, 2009, AEP-Ohio filed the update required by the Attorney Examiner. AEP-Ohio stated that it had not commenced construction of the IGCC facility. AEP-Ohio explained that it believed there were still some barriers in Ohio law to construction of new base load generation in Ohio, despite the efforts contained in SB 221 to address advanced energy resources. AEP-Ohio also observed that a variety of changes (i.e. environmental legislation, changes in Ohio law, and changes in AEP-Ohio generating capacity) may occur and could result in a continuous course of construction by June 2011. AEP-Ohio further stated that it continued to believe there were substantial reasons for pursuing the construction of an IGCC facility and that such a facility, with appropriate rate recovery provisions, would be good for Ohio's economy, AEP-Ohio's customers, and AEP-Ohio. In response to the OCC request and the status report filed by AEP-Ohio, the PUCO did nothing to comply with the Ohio Supreme Court's order.

In September 2009, IEU-Ohio filed a motion asking the Commission to require AEP-Ohio to refund IGCC-related revenues collected from customers or to show cause why an immediate refund should not be required. IEU-Ohio provided the Commission with an integrated resource plan filed by an AEP-Ohio affiliate, Appalachian Power Company ("APCo"), at the Virginia State Corporation Commission that contained information pertaining to the entire eastern segment (which includes Ohio) of AEP-Ohio's parent company. The Virginia integrated resource plan stated that AEP-Ohio had no plans to initiate construction of any IGCC plant prior to June 28, 2011. More recently, AEP made a filing in Virginia indicating that it has abandoned any plans to move forward with the IGCC facility.

On June 28, 2011, five years after the PUCO's illegal decision and more than three years after the Ohio Supreme Court ruled the PUCO violated the law, a joint motion was filed by IEU-Ohio, OCC, OEG, and OP&E requesting that the Commission proceed in the case. The joint movants noted that AEP-Ohio had requested that the Commission not proceed on remand until five years had passed from the Commission's Entry on Rehearing (issued June 28, 2006) and five years have now passed. The joint motion requested that the Commission refund the \$24 million with interest.

⁶¹⁹ Prices for distribution/ancillary services are established based on traditional, cost-based ratemaking that continues to apply to regulated services such as distribution/ancillary services.

⁶²⁰ *AEP-Ohio IGCC Proceeding*, Entry (January 8, 2009).

The PUCO has not done anything to respond to the Ohio Supreme Court's remand or respond to IEU-Ohio's or OCC's Motion for Refunds or the joint motion to set a procedural schedule and issue a refund. Here again, the PUCO has been unwilling to act upon requests by consumers to obtain a remedy for the illegal authorization of AEP-Ohio to collect IGCC revenue.

H. Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation Proceedings

In 1996, the PUCO approved a Joint Application of OP and South Central Power Company ("SCP"), a municipal electric cooperative that is, in large part, not subject to PUCO regulation, for a reallocation of territory so that Ormet would be served by SCP and any other supplier as necessary.⁶²¹ The reallocation was to take effect on December 31, 1999, two years after an agreement between OP and Ormet entered into in 1966 was set to expire. In the interim period, however, Ormet and OP received approval of an Interim Agreement from the PUCO whereby OP would serve Ormet from November 30, 1997 through December 31, 1999.⁶²² Thus, Ormet was permitted to source generation from the market at favorable prices prior to all other customers.

On August 25, 2005, Ormet filed a complaint against SCP and OP, requesting among other things, that the PUCO either transfer SCP's rights to furnish electric service to Ormet to OP or reallocate the certified electric service territories of SCP and OP so that Ormet was part of OP's certified electric service territory, and order OP to serve Ormet pursuant to its GS-4 tariff rate schedule.⁶²³ In other words, Ormet sought to reverse the service area assignment and obtain OP's tariffed rates and charges applicable to similarly situated customers at a time when the market rates were no longer favorable. After the PUCO determined that SCP did not provide or propose to provide physically adequate service to Ormet, the parties submitted a Stipulation that the PUCO adopted on November 8, 2006.⁶²⁴ The Stipulation reallocated SCP's and OP's service territory such that Ormet's facility would be served by OP, provided that OP would serve Ormet's peak demand of approximately 520 MW, and required Ormet to prepay its estimated

⁶²¹ See *In the Matter of the Application of the Joint Petition of Ohio Power Company and South Central Power Company for Reallocation of Territory*, Case No. 96-1000-EL-PEB, Finding and Order (November 14, 1996).

⁶²² See *In the Matter of the Application of The Ohio Power Company for Approval of a Special Contract Arrangement with Ormet Primary Aluminum Corporation*, Case No. 96-999-EL-AEC, Finding and Order (November 14, 1996).

⁶²³ *In the Matter of the Complaint of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Company and Ohio Power Company*, PUCO Case No. 05-1057-EL-CSS, Petition to Transfer Rights to Furnish Electric Service and/or Reallocate Certified Electric Service Territories; Complaint for Inadequate Service; Complaint for Unjust, Unreasonable and Discriminatory Proposed Rates (August 25, 2005).

⁶²⁴ SCP appealed to the Ohio Supreme Court the PUCO's decision declaring that SCP was not providing or did not propose to provide physically adequate service to Ormet. *South Central Power Company v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2006-1866, Notice of Appeal (October 6, 2006). That appeal was stayed pursuant to the Court granting the parties' Joint Motion for a Stay of the proceeding and later dismissed at the request of the parties when a settlement was reached. *December 15, 2006 Case Announcements*, 2006-Ohio-6602.

monthly bill.⁶²⁵ Further, the Stipulation included a mechanism for pricing the service Ormet would pay OP, which directed Ormet to pay \$43/MWh for generation service. If the market price of electricity exceeded \$43/MWh, AEP-Ohio would be compensated for the differential between the market rate and the \$43/MWh charge by amortizing its Ohio Franchise Tax phase-out regulatory liability (which totals approximately \$57 million). Further, in the event that the amortization of the Ohio Franchise Tax phase-out regulatory liability would not fully compensate AEP-Ohio for the price differential, AEP-Ohio would be permitted to recover any remaining portion under the provision in its RSP allowing an additional 4% increase in its generation rates.⁶²⁶ Finally, the Stipulation required AEP-Ohio to make a filing prior to the start of 2007 to set a market rate for generation service to Ormet's facility for 2007 and required AEP-Ohio to do the same for Ormet's 2008 generation service.⁶²⁷

The PUCO issued a Supplemental Opinion and Order on November 8, 2006 adopting the Stipulation in its entirety.⁶²⁸ As required by the Supplemental Opinion and Order, AEP-Ohio made a filing indicating the 2007 market price for generation service to Ormet's facility would be \$47.69/MWh,⁶²⁹ which the PUCO approved on June 27, 2007.⁶³⁰ Additionally, AEP-Ohio filed for approval of the 2008 Ormet generation rate on December 27, 2007, quoting a market rate of \$53.03/MWh.⁶³¹

On December 29, 2008, AEP-Ohio and Ormet filed a Joint Application for accounting authority related to serving Ormet as well as approval of an interim reasonable arrangement with Ormet.⁶³² The Joint Application represented that Ormet could not continue to pay its current \$43/MWh rate for generation service without breaching certain covenants in its bank agreement that would threaten its continued operation. The Joint Application proposed to provide generation service to Ormet on an interim

⁶²⁵ *In the Matter of the Complaint of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Company and Ohio Power Company*, PUCO Case No 05-1057-EL-CSS, Stipulation and Recommendation at 6 (October 20, 2006).

⁶²⁶ *Id.* at 10.

⁶²⁷ *Id.* at 9-10.

⁶²⁸ *In the Matter of the Complaint of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Company and Ohio Power Company*, PUCO Case No. 05-1057-EL-CSS, Supplemental Opinion and Order (November 8, 2006).

⁶²⁹ *Columbus Southern Power Company's and Ohio Power Company's Application to Set the 2007 Generation Market Price for Ormet's Hannibal Facilities*, PUCO Case No. 06-1504-EL-UNC, Columbus Southern Power Company's and Ohio Power Company's Ormet-Related 2007 Generation Market Price Submission at 1 (December 26, 2006).

⁶³⁰ *Columbus Southern Power Company's and Ohio Power Company's Application to Set the 2007 Generation Market Price for Ormet's Hannibal Facilities*, PUCO Case No. 06-1504-EL-UNC, Finding and Order at 2-3 (June 27, 2007).

⁶³¹ *Columbus Southern Power Company's and Ohio Power Company's Application to Set the 2008 Generation Market Price for Ormet's Hannibal Facilities*, PUCO Case No. 07-1317-EL-UNC, Application at 1 (December 27, 2007). The PUCO approved the 2008 Market Price on December 10, 2008.

⁶³² *In the Matter of the Joint Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify Their Accounting Procedure*, Case Nos. 08-1338-EL-AAM, *et al.*, Joint Application (December 29, 2008).

basis (until the effective date of tariffs implementing AEP-Ohio's ESP and a new agreement is reached with Ormet) at the otherwise applicable tariff-based price (in this case one-half of Ormet's load would pay OP's GS-4 rate and the other half would pay CSP's GS-4 rate) instead of the \$43/MWh that Ormet currently paid. The difference between the price paid by Ormet and the 2008 market price would continue to be amortized against the Ohio Franchise Tax phase-out regulatory liability. However, once the regulatory liability was gone (which AEP-Ohio estimated would occur by the end of 2008), AEP-Ohio requested accounting authority to defer that differential and to recover that differential from its remaining retail customers through the FAC that AEP-Ohio proposed in its ESP. The PUCO approved the Joint Application on January 7, 2009. OCC filed an Application for Rehearing on February 6, 2009 and on March 4, 2009, the PUCO issued an Entry granting OCC's Application for Rehearing to further consider the issues.

On February 17, 2009, Ormet filed a unilateral application at the PUCO for approval of a long-term reasonable arrangement governing service for 2009 through 2018. On July 15, 2009, the PUCO modified and approved Ormet's application, largely keeping the suggested structure for the reasonable arrangement.⁶³³ For calendar year 2009, the PUCO directed AEP-Ohio to bill Ormet at a rate which, for all of 2009, averaged \$38/MWh for periods when Ormet operated six potlines, \$35/MWh for periods when Ormet curtailed production to 4.6 potlines, and \$34/MWh when Ormet curtailed production to 4 potlines. This pricing was contingent upon Ormet maintaining 900 employees at its facility through 2009.

For the years 2010 and 2011, the PUCO approved a modified form of the index pricing tied to the price of aluminum on the London Metals Exchange ("LME"). Each year Ormet was to file at the PUCO a target LME price which represented the selling price for aluminum at which Ormet would be able to pay AEP-Ohio's weighted tariff rates and still have adequate cash flow to sustain operations and pay required legacy costs. The index rate would be the power price Ormet would be able to pay based upon then-current LME prices for aluminum while maintaining adequate cash flow to sustain operations and pay required legacy costs. When the LME price for aluminum was less than the target price, Ormet would pay the index price for power. When the LME price for aluminum was greater than the target price by not more than \$300 per ton, Ormet would pay 102% of the AEP-Ohio weighted tariff rate. When the LME price for aluminum was greater than the target price by more than \$300 per ton, Ormet would pay 105% of the AEP-Ohio weighted tariff rate.

For the years 2012 through 2018, the formula rate is to be adjusted. Each year Ormet will still file an index rate and target price as described above. However, when the LME price for aluminum is greater than the target price by not more than \$300 per ton, Ormet will pay 104% of the AEP-Ohio weighted tariff rate. When the LME price for aluminum is greater than the target price by more than \$300 per ton, Ormet will pay 108% of the AEP-Ohio weighted tariff rate. Any revenue in excess of AEP-Ohio's tariff rate paid by

⁶³³ *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, PUCO Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009).

Ormet is to be treated as delta revenue credits, first against any deferred balances, with any remaining credit recognized in AEP-Ohio's Economic Development Rider (i.e. Rider EDR).

In addition to the formula pricing the PUCO approved for the years 2010 through 2018, the PUCO also imposed a maximum discount Ormet may receive in any calendar year, which it subjects to further reduction due to changes in employment and other factors. For calendar years 2010 and 2011, the maximum annual discount that Ormet may receive is \$60 million.

The PUCO also established a cap on the maximum amount of annual delta revenue that other customers will be required to pay of \$54 million per year. AEP-Ohio was authorized to defer the potential difference of up to \$6 million per year as a regulatory asset, with carrying costs. AEP-Ohio will be permitted to recover the deferred costs after the end of the term of the reasonable arrangement with Ormet.

For the remaining years of the agreement after 2011, the PUCO directed that the maximum discount to Ormet be reduced to \$54 million in 2012; and by an additional \$10 million each year thereafter for the remaining years of the agreement. The PUCO also provided for a carryover of any unused discount that may result from fluctuations in the LME price for aluminum. For example, in 2012, if Ormet only received a discount of \$50 million, then in any subsequent year it would be allowed to carry over the unused \$4 million discount to increase a discount in a subsequent year.

In the years 2010 through 2018, any discounts to Ormet are contingent upon maintaining employment levels at the facility at or above 650 full time employees. The PUCO directed that the discount will be reduced each month by \$10 million for every 50 employees below 650 employees that Ormet employed in the previous month.

The PUCO also found that under terms of the arrangement AEP-Ohio will be the exclusive supplier to Ormet and that there is no shopping risk. Therefore, compensating AEP-Ohio for POLR charges would be paying AEP-Ohio for a service it is not providing. The Order directed AEP-Ohio to credit any POLR revenues it receives from Ormet to its Rider EDR to reduce the impact of the reasonable arrangement on other customers.

Additionally, the PUCO approved the proposal to treat Ormet under AEP-Ohio's standard credit terms. Further, the Opinion and Order imposed an independent termination provision based upon Ormet's claim that aluminum prices will recover. If Ormet does not begin to reduce deferred delta revenue through the payment of above-tariff rates by April 1, 2012, the PUCO retained the option to immediately terminate the agreement.

Several parties filed Applications for Rehearing and the PUCO granted, in part, and denied, in part, the Applications for Rehearing.⁶³⁴ The PUCO generally denied the

⁶³⁴ *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, PUCO Case No. 09-119-EL-AEC, Entry on Rehearing (September 15, 2009).

Applications for Rehearing, but granted, in part, AEP-Ohio's Application for Rehearing, reaffirming its finding that there is no risk that Ormet will be permitted to shop for competitive generation and therefore AEP-Ohio is not entitled to recovery of POLR charges from Ormet, but clarified that the POLR charge is only known and relevant for the duration (through 2011) of AEP-Ohio's approved ESP. The PUCO's Entry on Rehearing also granted, in part, the Joint Application for Rehearing of OCC and OEG to clarify that the rate discount provided to Ormet has no impact whatsoever on the amount of credit to be applied to Rider EDR and that Rider EDR should be credited the full amount of the POLR component of the tariff rate which would otherwise apply to Ormet on an MWh basis. On November 12, 2009, AEP-Ohio appealed the PUCO's decision to credit the EDR with the POLR charge.⁶³⁵

On November 13, 2009, AEP-Ohio filed an application in PUCO Case No. 09-1094-EL-FAC for permission to recover delta revenue related to the Commission-approved interim reasonable arrangement with Ormet ("Ormet Interim Collection Case"). The delta revenue in the Ormet Interim Collection Case was associated with service to Ormet for the period of January 1, 2009 through September 17, 2009 and included carrying costs proposed by AEP-Ohio. On November 13, 2009, AEP-Ohio also filed an application in PUCO Case No. 09-1095-EL-UNC to recover through Rider EDR its actual and predicted 2009 delta revenue associated with the long-term unique arrangement approved for Ormet in PUCO Case No. 09-119-EL-AEC.

Without issuing a decision in the Ormet Interim Collection Case, the PUCO approved AEP-Ohio's request to recover delta revenue associated with the interim reasonable arrangement in AEP-Ohio's initial EDR proceeding.⁶³⁶ The initial EDR proceeding established the initial level for Rider EDR. Subsequently, Rider EDR experienced two semiannual adjustments.⁶³⁷ The initial EDR proceeding and the first adjustment were appealed to the Ohio Supreme Court.⁶³⁸

⁶³⁵ *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Ohio Supreme Court Case No. 2009-2060; PUCO Case No. 09-119-EL-AEC. Issues about applying the POLR credit against Rider EDR recovery are more fully discussed in the EDR section (Section M).

⁶³⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates*, PUCO Case No. 09-1095-EL-RDR, Finding and Order (January 7, 2010) (hereinafter, "AEP-Ohio Initial EDR Proceeding").

⁶³⁷ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to §4901:1-38-05(A)(5)*, Ohio Admin. Code, PUCO Case No. 10-154-EL-RDR; (hereinafter, "AEP-Ohio EDR Update Proceeding"); *In the Matter of the Application of Columbus Southern Power Company And Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates* PUCO Case No. 10-1072-EL-RDR (hereinafter, "AEP-Ohio Second EDR Update Proceeding"). Rider EDR and the proceedings related to it are discussed further below.

⁶³⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates*, Ohio Supreme Court Case No. 2010-722 (appeal from the AEP-Ohio Initial EDR Proceeding); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5)*, Ohio Administrative Code, Ohio Supreme Court Case No. 2010-1073 (appeal from the AEP-Ohio EDR Update Proceeding).

On May 24, 2011, the Court affirmed the PUCO's determination that delta revenue paid by other customers to compensate AEP-Ohio for discounts approved in the reasonable arrangement need not include POLR charges.⁶³⁹ At the time, AEP-Ohio had two customers on reasonable arrangements, Ormet and Eramet Marietta, Inc.

In its appeal, AEP-Ohio argued that there should not be a credit to the delta revenue for the POLR charges. AEP-Ohio based its claim on Section 4905.31, Revised Code, which provides a reasonable arrangement "may include a device to recover costs incurred in conjunction with any economic development and job retention program ... including recovery of revenue foregone as result of any such program." The Court, however, agreed with the PUCO's decision to reduce delta revenue by the amount associated with POLR because, pursuant to the reasonable arrangements, neither Ormet nor Eramet had the right to "shop." The Court stated, "[i]n short, AEP seeks payment of millions of dollars a year to prepare for the return of two customers even though those two customers cannot lawfully depart."

In affirming the PUCO's decision, the Court rejected AEP-Ohio's contention that the PUCO lacked discretion to reduce the amount of delta revenue recovered from other customers. The Court noted that "[t]he statute states that delta revenue 'may' be recovered," finding that recovery was permitted but not required.

The Court also rejected AEP-Ohio's now ironic assertion that the exclusive-supplier provisions in Ormet's and Eramet's reasonable arrangements violate public policy. AEP-Ohio had argued that exclusive-supplier provisions conflict with policies in favor of customer choice, the right to shop, and retail choice. The Court, however, determined that the PUCO's Order advanced the customer choice of Eramet and Ormet inasmuch as Eramet and Ormet proposed the reasonable arrangements, supported them before the Commission, and defended them on appeal. The PUCO further rejected AEP-Ohio's claim that removing Eramet and Ormet from the competitive market might harm competition because AEP-Ohio failed to provide any evidence to support its claim. The Court stated, "[i]t is a question of fact [whether the market would be harmed], but no evidence was provided, and we will not reverse the commission based on speculation."

The Court also rejected AEP-Ohio's allegation that the PUCO erred in determining that there was no risk that Eramet or Ormet will shop and then return to AEP-Ohio for POLR service. The Court noted that "AEP challenges a factual finding, so our review is deferential." According to the Court, "[t]he Commission relied on the fact that 'AEP-Ohio will be the exclusive supplier' to the manufacturers. As we have already discussed, that is true—the orders require the customers to take service exclusively from AEP. If they must take service exclusively from AEP, then it follows that they cannot take it from another supplier."

Finally, the Court determined that a customer may unilaterally secure a reasonable arrangement with a utility without its consent, subject to PUCO review. The Court

⁶³⁹ *In re Application of Ormet Primary Aluminum Corp.*, Slip Opinion No. 2011-Ohio-2377, Supreme Court Case Nos. 2009-2060, 2010-0722, and 2010-0723.

determined that the statute does not require an arrangement to occur by mutual agreement. The Court stated, "The word 'arrangement' has more than two possible definitions. Webster's Third gives seven main senses, and AEP's preferred definition is the only one denoting any sense of mutual assent." The Court noted that the statute did not require the utility's consent, allowed a customer to file for the arrangement (a substantial change from prior law which allowed only the utility to make the filing), required the utility to comply with the Commission-ordered arrangement, and gave the Commission, not the utility, final say over the approval of the arrangement.

On October 12, 2012, Ormet filed a motion for expedited approval of a payment deferral under its unique arrangement. Under the proposed modification, Ormet would be permitted to enter into a deferred payment arrangement to defer two payments by Ormet otherwise due to AEP-Ohio. It would pay the deferred amounts through a 17-month payment plan, with the first payment due in January 2014. Ormet sought expedited approval of the modification, claiming that it was a minor change, did not affect the substantive rights of other parties, and would not impose additional costs on other ratepayers. The motion also stated "that if Ormet fails to make a scheduled repayment, such amount may be treated as delta revenues." The motion also sought a waiver of the 20-day comment period that would apply under the PUCO's rules.

According to the motion, Ormet had already exhausted the entire 2012 discount when the PUCO approved, over the objections of Ormet and many other parties, rate increases and other bill-increasing riders in AEP-Ohio's Second ESP proceeding. As a result of the PUCO's decision approving AEP-Ohio's Modified ESP, Ormet claimed that its electric bill increased by \$20 million annually.

On October 12, 2012, the PUCO granted Ormet's motion. As part of its entry approving the motion, the PUCO granted Ormet's request to review the motion on an expedited basis and waived the opportunity for interested parties to comment and further granted Ormet's request to modify the terms of the unique arrangement such that Ormet may defer payment of its bills for October and November 2012, with payment to occur in 2014 and the first five months of 2015.

It also authorized AEP-Ohio to modify its accounting procedures to defer incurred costs not recovered from Ormet's billings for October and November 2012 in an amount not to exceed \$20 million and granted Ormet's request that any missed deferred payment may be treated as delta revenue, subject to the \$20 million "cap." The PUCO further stated that "any amounts, up to \$20 million, that are not timely paid by Ormet under the deferred payment schedule approved today shall be considered a foregone revenue ... and shall be recovered by [AEP] through its Economic Development Rider."

As justification for its action, the PUCO indicated that the relief it was granting was designed to address Ormet's cash flow problem and considered the interests of other ratepayers. Stressing that the relief granted was limited to two payments, the PUCO expressed concern for the financial risk being incurred by other AEP-Ohio ratepayers, but after noting the prior deals provided to Ormet, including the current one, which provided a \$56 million subsidy in 2012, the PUCO further stated that the "record" in the prior deals demonstrated that Ormet brings benefits to Monroe County, the region and

State, and that the modification was approved “in order to provide continuity to the employees and businesses that are dependent on Ormet.”

The PUCO concluded that any further relief should be “accompanied by a detailed business plan confirming the long-term ability to exist without ratepayer support.”

As explained above, the PUCO has generally responded positively to AEP-Ohio’s proposals to increase electric prices and block consumers from realizing the full benefits from shopping. As a consequence, AEP-Ohio’s default generation supply prices have, over time, moved further above market and made AEP-Ohio a relatively expensive supplier. Since the generation supply component of large consumers’ electric bill is a very large percentage of their total electric bill, the consequence of the PUCO’s AEP-friendly decisions has significantly increased the electric bills of larger customers and Ormet is one of the largest. Had the PUCO done as Ormet and many other consumers asked, set AEP-Ohio’s generation supply prices based on a competitive bid process (like that used in the case of FirstEnergy and Duke) and rejected AEP-Ohio’s request for non-bypassable charges that insulate its competitive generation business from market forces, Ormet and AEP-Ohio’s customers would have been able to reduce their electric bills by obtaining generation supply from a CRES provider. Instead and in self-defense, customers like Ormet are forced to ask the PUCO to shift the pain of the PUCO-approved excessive generation supply prices onto other customers making the excessive rate problem more acute for other AEP-Ohio customers.

I. EE/PDR Portfolio Plans

On November 12, 2009, AEP-Ohio filed a three-year EE/PDR Program Portfolio Plan for PUCO approval in accordance with Rule 4901:1-39-04, O.A.C. AEP-Ohio also simultaneously filed a Stipulation with many consumer and environmental organizations as signatory parties. Under AEP-Ohio’s proposed Application and Stipulation, AEP-Ohio would recover from customers estimated expenditures of \$161.9 million over a three-year period to comply with the EE/PDR benchmarks, as well as additional amounts related to allowances for shared savings, incentives, and lost distribution revenues.⁶⁴⁰ IEU-Ohio did not sign the Stipulation and filed comments objecting to, among other things, the excessive rate impacts of the EE/PDR Program portfolio, excessive administrative costs for the portfolio programs, and AEP-Ohio’s failure to take advantage of lower cost compliance options.⁶⁴¹ On February 25, 2010, an evidentiary hearing was held, and on May 13, 2010, the PUCO approved the Stipulation with two modifications.

First, the PUCO agreed with IEU-Ohio that AEP-Ohio failed to demonstrate that its proposal to recover lost distribution revenue was reasonable because the record failed to establish what revenue was necessary to provide AEP-Ohio with the opportunity to

⁶⁴⁰ *The Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, PUCO Case Nos. 09-1089-EL-POR, *et al.*, Application at 3 (November 12, 2009) (hereinafter, “*AEP-Ohio EE/PDR Proceeding*”).

⁶⁴¹ *AEP-Ohio EE/PDR Proceeding*, Initial Objections and Recommendations of the Industrial Energy Users-Ohio (December 11, 2009).

recover its costs and to earn a fair and reasonable return. Given that CSP's last distribution rate case was in 1991 and OP's last distribution rate case was in 1994, AEP-Ohio's actual costs of service were unknown. Without this information, the PUCO could not determine whether the proposal for AEP-Ohio to recover lost distribution revenue was reasonable. Nonetheless, the PUCO authorized AEP-Ohio to collect lost revenue. In approving a potential lost distribution revenue recovery mechanism, the PUCO noted that while it would not have approved the mechanism based on the record, the mechanism was a key component of the Stipulation. The PUCO then temporarily granted AEP-Ohio lost revenue recovery through January 1, 2011. Between May 13, 2010 and January 1, 2011, the PUCO directed AEP-Ohio to propose a mechanism to answer the PUCO's concern regarding quantification of fixed costs, as well as a mechanism to achieve revenue decoupling. The PUCO stated that if AEP-Ohio proposed a reasonable mechanism, it would consider a request to extend the recovery period while the mechanism was being considered.

Second, the PUCO noted that in previous mercantile customer applications that sought an exemption from AEP-Ohio's EE/PDR Rider, the PUCO had found that using the "benchmark comparison method" to determine whether a rider exemption is appropriate was both reasonable and equitable. In other words, if the mercantile customer agreed to commit an energy savings or peak demand reduction of an equivalent percentage as required by SB 221 for the utilities to achieve (a like-kind contribution), the PUCO approved an exemption. However, the PUCO's May 13 Finding and Order stated that agreements reached between a customer and AEP-Ohio after December 10, 2009 shall not rely upon the "benchmark comparison method." The PUCO directed its Staff to track volumes, and report quarterly to the PUCO, percentages of nonresidential sales for customers that have been granted exemptions from the EE/PDR Riders. However, the PUCO did not provide direction on how customers and AEP-Ohio should determine whether a mercantile customer's energy savings or peak demand reduction is sufficient to receive an exemption from the EE/PDR Rider going forward.⁶⁴²

Finally, the PUCO rejected IEU-Ohio's argument that AEP-Ohio's proposal to recover approximately \$7 million for its peak demand reduction plan (which essentially included only an expansion of its current interruptible rider) was inappropriate as it is not a least cost option. The PUCO simply noted that AEP-Ohio had filed an additional peak demand reduction plan in a separate and pending case.

It is also worth noting that AEP-Ohio sought to recover three years of costs (2009–2011) over a two-year period (2010–2011). But because the PUCO's Finding and Order was issued five months into 2010, the cost recovery period was compressed from 24 months to 18. Thus, the actual bill impacts were higher than projected by AEP-Ohio in its application because of the time the PUCO took to process the case.

On June 14, 2010, IEU-Ohio filed an Application for Rehearing on four grounds arguing that it was unlawful and unreasonable for the PUCO to: (1) allow AEP-Ohio to recover lost distribution revenue; (2) approve the Stipulation without first considering overall rate

⁶⁴² AEP-Ohio's website provides additional information about ongoing programs and is available at: <https://www.aepohio.com/save/Default.aspx>.

impacts on customers; (3) approve the proposed cost recovery for AEP-Ohio's PDR program; and (4) prohibit AEP-Ohio mercantile customers from utilizing the "benchmark comparison method." On July 14, 2010, the PUCO denied IEU-Ohio's Application for Rehearing on all four grounds. On August 31, 2010, IEU-Ohio appealed the matter on all four grounds to the Ohio Supreme Court (discussed below).

I. Solar Energy Benchmarks

On October 26, 2009, AEP-Ohio filed a request for a "*force majeure*" determination regarding its 2009 solar energy resource requirement in SB 221, claiming that there were factors outside of its control that prevented it from meeting its SER requirement.⁶⁴³ SB 221 grants the PUCO the authority to waive the renewable energy requirements if it makes a *force majeure* determination that the utility did not meet a renewable energy mandate for circumstances beyond its control. AEP-Ohio stated that it had an agreement with a solar facility in Wyandot County that would allow it to meet its 2010 solar requirements as well as make up its 2009 shortfall. On January 7, 2010, the PUCO approved AEP-Ohio's request to defer 2009 compliance. The PUCO also noted that AEP-Ohio's 2010 SER benchmark would be modified to include any shortfall from 2009.

II. Peak Demand Programs

On March 29, 2010, AEP-Ohio filed an application to amend its Emergency Curtailment Service Rider ("Rider ECS") through the creation of a new peak demand reduction tariff applicable to retail customers. Previously in AEP-Ohio's ESP proceeding, the PUCO stated that AEP-Ohio customers taking service under a special tariff, i.e., through a reasonable arrangement, could not also participate in PJM demand response programs ("DRP").⁶⁴⁴ In its application, AEP-Ohio contended that its retail customers, those not taking service under a special tariff, should be eligible to either: (1) participate in demand response through AEP-Ohio-sponsored, Commission-approved programs; or (2) integrate their customer-sited resources with AEP-Ohio by committing their resources toward AEP-Ohio's compliance with its EE/PDR benchmarks. The first option was essentially an AEP-Ohio equivalent to PJM's DRPs, and the second option would permit retail customers' participation in curtailment service programs such as PJM's on the condition that the retail customers commit their demand response to AEP-Ohio. However, retail customers opting for the latter option would not be able to seek an exemption from AEP-Ohio's EE/PDR Rider.

A procedural schedule was set in the matter to allow comments to be filed. AEP-Ohio and OCC each expressed their concern that if retail customers could both participate in PJM's DRP, where the customers would receive benefits, and be exempt from AEP-

⁶⁴³ *In the Matter of the Application of Columbus Southern Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code*, PUCO Case No. 09-987-EL-EEC, Motion (October 26, 2009)

⁶⁴⁴ *In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders*, PUCO Case No. 10-343-EL-ATA, Entry (May 10, 2010) (hereinafter, "AEP-Ohio Rider ECS Proceeding").

Ohio's EE/PDR Rider, these customers would essentially be receiving double compensation. IEU-Ohio filed comments opposing this view and claimed that under Section 4928.66, Revised Code, customers who participated in programs like PJM's DRP were also free to voluntarily commit their demand response capabilities to an EDU and in turn receive a benefit for the contribution.⁶⁴⁵

The PUCO agreed that the PDR capabilities of retail customers that were enrolled in PJM's programs could be properly counted towards the PDR benchmarks in SB 221. However, the PUCO has resisted giving customers who commit such capabilities an exemption from the rider used to fund the cost of compliance. The net effect of the PUCO's behavior has been to drive up the cost of compliance and electric bills for all customers.

On February 2, 2011, AEP-Ohio filed an Amended Application modifying the proposed method for calculating the rate of its Rider ECS.⁶⁴⁶ The filing proposed that Noncompliance Demand Charges and Curtailment Demand Credits under customer option 1 would be calculated in accordance with the cost of AEP-Ohio's capacity obligation under PJM's Reliability Assurance Agreement ("RAA") model rather than PJM's RPM auction price.⁶⁴⁷

On September 7, 2011, AEP-Ohio's application to amend Rider ECS was consolidated with AEP-Ohio's Second ESP proceeding. As part of the Stipulation filed in that proceeding, AEP-Ohio agreed to withdraw its current Rider ECS and the proposed Rider ECS in its application in that proceeding.⁶⁴⁸ AEP-Ohio also agreed to allow retail customer participation in PJM's DRPs. Finally, the Stipulation allowed any customer on a reasonable arrangement to participate in PJM's DRPs so long as the customer committed its PDR attributes that cleared in the PJM market to AEP-Ohio to count towards AEP-Ohio's EE/PDR benchmarks. On December 14, 2011, the PUCO approved the Stipulation without modification to Rider ECS or participation in PJM's DRPs.⁶⁴⁹

III. Renewable Energy Technology Program

AEP-Ohio first filed for approval of Renewable Energy Technology ("RET") programs in November 2009. The purpose of the RET programs was to assist AEP-Ohio in meeting its AER benchmarks through the purchase of RECs. Subsequently, in AEP-Ohio's portfolio plan case, a Stipulation was entered into and ultimately approved by the

⁶⁴⁵ IEU-Ohio stated that OCC's and AEP-Ohio's argument was akin to a claim that a taxpayer should not be able to take a deduction on their federal taxes and then turn around and take a deduction for that same item on their state taxes.

⁶⁴⁶ *AEP-Ohio Rider ECS Proceeding*, Amended Application at 2 (February 2, 2011)..

⁶⁴⁷ *Id.* at 2.

⁶⁴⁸ *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*, PUCO Case Nos. 11-346-EL-SSO, *et al.*, Stipulation at 24 (September 7, 2011) (hereinafter, "*AEP-Ohio Second ESP Proceeding*").

⁶⁴⁹ *AEP-Ohio Second ESP Proceeding*, Opinion and Order (December 14, 2011).

PUCO. The Stipulation, among other things, approved the proposed RET programs and allowed AEP-Ohio to recover its prudently-incurred costs associated with the RET programs through its FAC.

The key features of the program were: AEP-Ohio would retain title to the RECs it purchased under the program for 20 years; its budget for the RET programs through December 2011 would be \$5 million divided equally between CSP and OP with an annual cap of \$1.25 million for 2010 and 2011; incentive payments not awarded in 2010 would be carried over to 2011; all incentive payments would be awarded by December 31, 2011; eligible projects had to be installed after January 1, 2010 to receive incentive payments; and, incentive payments would be awarded on a first-come, first-served basis.⁶⁵⁰ AEP-Ohio proposed incentive payments of: \$1.50/kW for solar photovoltaic capped at \$12,000 for residential customers and \$75,000 for non-residential customers; \$.275/kWh for wind energy capped at \$7,500 for residential customers and \$12,000 for non-residential customers.

On September 24, 2010, the PUCO issued an Entry establishing a procedural schedule. Several parties filed comments discussing the RET program's upfront recovery for the RECs, even though the program was for a 20-year term, and also brought up the due date of December 31, 2011. OCC and the Vote Solar Initiative proposed extending the date by one year.

On June 8, 2011, the PUCO approved AEP-Ohio's application, as updated on December 7, 2009, with several clarifications: (1) The RET programs should be open to both shopping and non-shopping customers; (2) participants must agree to assign their RECs to AEP-Ohio for 15 years; (3) customers may participate in the RET programs if they own the RECs, regardless of whether they own or lease the facilities that produce the RECs; (4) AEP-Ohio should file quarterly updates; (5) AEP-Ohio should modify its proposed riders and RET program agreements to be consistent with the PUCO's metering requirements; (6) the programs should remain in place for a two-year period from their starting date, with an annual cap of \$1.25 million per year for each CSP and OP; (7) AEP-Ohio's prudently incurred costs should be recovered through the respective FAC mechanisms of OP and CSP; (8) the proceeds from any decision to ultimately sell these RECs should flow directly to the benefit of ratepayers via the FAC.

IV. Supreme Court Appeal

On May 24, 2011, the Ohio Supreme Court issued its decision on IEU-Ohio's appeal of AEP-Ohio's Portfolio Plan. On appeal, the Court addressed four propositions of law: (1) whether the PUCO erred in authorizing the collection of lost distribution revenue; (2) whether the PUCO considered the price impact of the portfolio plan; (3) whether AEP-Ohio's plan for reducing peak-demand was unlawful inasmuch as it did not adopt the lowest-cost option; and (4) whether the PUCO erred in prohibiting mercantile customers from relying on the benchmark comparison method.⁶⁵¹

⁶⁵⁰ *In the Matter of the Application of Ohio Power Company for Approval of its Renewable Energy Technology Program*, PUCO Case No. 09-1871-EL-ACP, Entry at 1-2 (September 24, 2010).

⁶⁵¹ *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383.

IEU-Ohio argued that the PUCO should not have authorized CSP to collect lost distribution revenue because CSP had not demonstrated (and the PUCO agreed that AEP-Ohio had not demonstrated) what amount of revenue was necessary to recover fixed distribution costs and to earn a fair and reasonable return. The Court determined that the statute “does not require the commission to find that the recovery of the lost distribution revenue is necessary to recover costs and to ensure a fair rate of return.” The Court noted that, while the PUCO need not take account of costs, “[s]haring IEU’s concerns that CSP’s distribution rates might be too high, the commission sharply limited the period in which CSP could recoup lost revenue.”⁶⁵²

While affirming the PUCO’s decision on lost revenue, the Court criticized the PUCO’s reasoning regarding evidentiary weight of the Stipulation, stating:

The Commission appeared to believe that the requirement that its finding be based on record evidence is somehow lessened when the Commission is reviewing a stipulation. For example, the commission stated in its entry on rehearing that ‘in a litigated case,’ it ‘would have required more information to find that AEP-Ohio had met its burden of proof. Contrary to the commission’s statement, this was ‘a litigated case’—IEU contested the stipulation. When the commission reviews a contested stipulation, the requirement of evidentiary support remains operative. While the commission may ‘place substantial weight on the terms of a stipulation,’ it ‘must determine, from the evidence, what is just and reasonable.’⁶⁵³

Regarding IEU-Ohio’s claim that the PUCO failed to consider price impacts, the Court held that the PUCO satisfied this requirement in the Entry on Rehearing by stating that “[t]he Commission is mindful of the rate impact of this case on AEP-Ohio customers.”⁶⁵⁴

The Court also affirmed the PUCO’s decision to approve CSP’s PDR plan, which did not utilize the lowest-cost option. The Court stated that “[t]he statute created a goal, but does not tell the commission how to get there.” Thus, the Court held that the Commission is given broad discretion since the statute does not provide a particular formula or require the least-cost method. This holding makes more ominous the PUCO’s holding that the portfolio mandate compliance obligation of electric distribution companies is not limited by the compliance percentages set forth in the law and include all cost effective compliance.

Additionally, the Court affirmed the PUCO’s decision to prohibit mercantile customers from relying on the benchmark comparison method for agreements reached after December 19, 2009. The Stipulation provided two methods of determining whether customers who committed their energy efficiency reductions and peak demand reductions to the utility could be eligible for an exemption from the energy efficiency and

⁶⁵² *Id.* at ¶ 17.

⁶⁵³ *Id.* at ¶ 19.

⁶⁵⁴ *Id.* at ¶ 23.

peak demand riders. The benchmark comparison method allowed an exemption for a mercantile customer (generally commercial or industrial customers consuming more than 700,000 kWh per year or part of a multistate national account) if the customer's committed energy savings were equal to the utility's mandated benchmark requirement percentages based on the customer's 2006-2008 average energy usage. All parties to the Stipulation had agreed that the benchmark comparison method was a valid means of determining if a customer was eligible for an exemption, but the PUCO modified the Stipulation to remove this option.

IEU-Ohio raised several challenges to the PUCO decision to eliminate the benchmark comparison method. The Court rejected a challenge to the modification on the basis of the agreement of the parties, noting that the PUCO was not bound by the stipulation. In response to IEU-Ohio's claim that the PUCO's rules do not address what criteria must be met in order for a mercantile customer to qualify for an exemption from the rider, the Court held that "the commission addressed this issue in its entry on rehearing. It explained that it was in the process of developing an application and filing instructions to enable mercantile customers to request the exemption."⁶⁵⁵ Finally, the Court held that the PUCO's decision to follow its then-current rule which did not permit the benchmark comparison method as a reason for modifying the stipulation was a sufficient explanation for the change because the PUCO could not ignore its own rules.

IV. Lost Distribution Revenue

On November 18, 2010, AEP-Ohio filed a motion to extend recovery of its lost distribution revenue.⁶⁵⁶ AEP-Ohio cited the PUCO's May 13, 2010 Finding and Order as a basis for extending the recovery; however, AEP-Ohio had not proposed any mechanism to achieve revenue decoupling as required by the Finding and Order. IEU-Ohio opposed the motion as untimely and thus a collateral attack on the Finding and Order. IEU-Ohio claimed that the May 13 Finding and Order was clear in that the PUCO stated it would only consider an extension on the lost distribution revenue recovery if AEP-Ohio proposed a reasonable recovery mechanism.

On January 27, 2011, the PUCO clarified its May 13, 2010 Finding and Order.⁶⁵⁷ The PUCO stated that its May 13 Finding and Order recognized that AEP-Ohio would experience lost distribution revenue and should have some opportunity to recover that revenue.⁶⁵⁸ The PUCO clarified that when it approved lost distribution revenue recovery through January 1, 2011, it was the PUCO's intent that AEP-Ohio would be able to recover lost distribution revenue that occurred through December 31, 2010.⁶⁵⁹ The Entry then permitted AEP-Ohio to continue to recover calendar year 2010 lost distribution revenue resulting from the implementation of EE/PDR programs through the existing PUCO-approved program until the 2010 lost distribution revenue was fully

⁶⁵⁵ *Id.* at ¶ 34.

⁶⁵⁶ *AEP-Ohio EE/PDR Proceeding*, Motion and Request for Expedited Treatment (November 18, 2011).

⁶⁵⁷ *AEP-Ohio EE/PDR Proceeding*, Entry (January 27, 2011).

⁶⁵⁸ *Id.* at 3.

⁶⁵⁹ *Id.*

recovered during 2011. However, the PUCO denied AEP-Ohio's November 18, 2010 motion to the extent it was requesting recovery of lost distribution revenue incurred in 2011. AEP-Ohio filed an Application for Rehearing of the January 27 Entry. However, the PUCO denied the Application for Rehearing, finding that AEP-Ohio had failed to propose a reasonable mechanism or otherwise address the PUCO's concerns.⁶⁶⁰

On April 29, 2011, AEP-Ohio again made a filing at the PUCO seeking to collect lost distribution revenue for 2011, this time in the context of a true-up of its EE/PDR Rider.⁶⁶¹ Staff reviewed the application and recommended that the PUCO reject the application and extend the current rider rates until such a time as AEP-Ohio refiled the application excluding lost distribution revenue for 2011.⁶⁶²

V. AEP-Ohio's Portfolio Plan for 2012-2015

On November 18, 2011, AEP-Ohio filed a motion to extend its current EE/PDR Rider beyond its termination date of December 31, 2011.⁶⁶³ In its motion, AEP-Ohio cited the need to continue the rider to begin funding its EE/PDR programs for its next portfolio plan which it claimed would be filed by the end of 2011.

On November 29, 2011, AEP-Ohio filed its three-year portfolio plan with a proposed start date of January 1, 2012.⁶⁶⁴ The plan was filed along with a Stipulation recommending approval of the three-year plan. The main aspects of the Stipulation were that it recommended: (1) a shared savings mechanism, (2) customer classes would only pay for programs designed to benefit their respective classes, and (3) it did not recommend that AEP-Ohio recover lost distribution revenue.

The shared savings mechanism provides AEP-Ohio the ability to benefit from any energy-efficiency efforts that AEP-Ohio undertakes that result in AEP-Ohio exceeding the statutory EE/PDR benchmark for a given year. The incentive payment is calculated using the UCT methodology and is based on a 4-tiered approach: for compliance that exceeds its benchmarks by 5% AEP-Ohio is entitled to 5% of the net benefits; for exceeding the benchmarks by 5-10% AEP-Ohio is entitled to 7.5% of the net benefits; for exceeding by 10-15% AEP-Ohio is entitled to 10% of the net benefits; and for compliance that exceeds 15% AEP-Ohio is entitled to 13% of the net benefits.⁶⁶⁵ In any given year, AEP-Ohio's incentives are capped at \$20 million.⁶⁶⁶

⁶⁶⁰ *AEP-Ohio EE/PDR Proceeding*, Entry on Rehearing (March 23, 2011).

⁶⁶¹ *In the Matter of the Application of Columbus Southern Power Company to Update the Energy Efficiency and Peak Demand Reduction Rider*, PUCO Case Nos. 11-2768-EL-RDR, *et al.* Application (April 29, 2011) (hereinafter, "*AEP-Ohio EE/PDR Update Proceeding*").

⁶⁶² *AEP-Ohio EE/PDR Update Proceeding*, Staff Review and Recommendation (June 24, 2011).

⁶⁶³ *AEP-Ohio EE/PDR Proceeding*, Motion (November 18, 2011).

⁶⁶⁴ *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, PUCO Case Nos. 11-5568-EL-POR, *et al.* (November 29, 2011) (hereinafter, "*AEP-Ohio Second EE/PDR Proceeding*").

⁶⁶⁵ *AEP-Ohio Second EE/PDR Proceeding*, Stipulation at 5 (November 29, 2011).

⁶⁶⁶ *Id.* at 6.

Regarding the rate design of the EE/PDR Rider, program costs will be assigned to the respective classes whose customers are eligible to participate in the program. On March 21, 2012, the PUCO issued an order approving the Stipulation.

J. Fuel Adjustment Clause

In AEP-Ohio's first ESP proceeding, the PUCO approved a fuel cost recovery mechanism for AEP-Ohio called the Fuel Adjustment Clause or FAC, which is audited annually. In AEP-Ohio's ESP proceeding, IEU-Ohio and others argued that AEP-Ohio failed to provide enough detail on how its proposed FAC would work and how the audit function would be accomplished. IEU-Ohio also complained that AEP-Ohio's proposed FAC transferred risks to customers without imposing customer-focused obligations on AEP-Ohio that had been part of prior PUCO-approved EFC. IEU-Ohio took the position that AEP-Ohio took the cost recovery benefits of, in effect, the old EFC without taking on the obligations (least-cost dispatch for example) of the old EFC. AEP-Ohio also got to transfer the risk of changes in cost for the categories of expense and investment subject to reconciliation through the mechanism with no recognition of the reduction in the business/financial risk that occurs upon introduction of such a mechanism (legacy weighted cost of capital including equity component adopted by PUCO).

Additionally, the ESP approved by the PUCO contained partial rate increase protections in 2010 of 6% for CSP customers and 7% for OP customers. On December 1, 2009, AEP-Ohio filed a request in Case Nos. 09-872-EL-FAC and 09-873-EL-FAC to increase their FAC rates to "reflect the percent increases permitted by the Commission in the ESP cases."⁶⁶⁷ AEP-Ohio also specifically noted that its FAC increase filing included the FAC-related deferrals associated with the interim reasonable arrangement approved for Ormet for the January 2009 through September 2009 time period. Additionally, in conjunction with its request to increase its FAC rates, AEP-Ohio filed a separate Application to decrease certain non-FAC riders in order to stay within the maximum rate increase limitations set forth in the approved ESP. However, the non-FAC Application was not actually a rate decrease inasmuch as it was merely collecting the same revenues over 12 months instead of cramming the revenue collection into 9 months as AEP-Ohio was permitted to do in 2009.⁶⁶⁸

On December 10, 2009, the PUCO's Staff issued a review and recommendation in Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, and 09-1906-EL-ATA. Staff found that the rates proposed by AEP-Ohio provided for increases no greater than those authorized by the PUCO and recommended that the Applications be approved and the proposed rates be effective on a bills rendered (somewhat retroactive) basis beginning with the first billing cycle of 2010. And, on January 7, 2010, the PUCO approved AEP-Ohio's request to adjust its FAC and non-FAC rates. On February 5, 2010, IEU-Ohio filed an

⁶⁶⁷ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 08-972-EL-FAC, *et al.*, Tariff Filing (December 1, 2009) (hereinafter, "AEP-Ohio 2009 FAC Proceeding").

⁶⁶⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Modify Their Standard Service Offer Rates*, Case No. 09-1906-EL-ATA, Application (December 3, 2009).

Application for Rehearing arguing that the PUCO lost jurisdiction to hear this case when it lost jurisdiction to hear the underlying ESP case, that AEP-Ohio cannot accept benefits under the PUCO's ESP order while appealing the ESP, and that it was unreasonable to allow AEP-Ohio to recover delta revenues associated with the Ormet reasonable arrangement through the FAC. On March 24, 2010 the PUCO denied IEU-Ohio's Application for Rehearing. On April 27, 2010, IEU-Ohio appealed the case to the Ohio Supreme Court (the Court's decision is discussed above under AEP-Ohio's ESP Section).⁶⁶⁹

Subsequently, on May 14, 2010, EVA (the independent auditor assigned by the PUCO to audit AEP-Ohio's FAC) filed its 2009 management and performance and financial audit of AEP-Ohio's FAC. EVA found that there was a large under-recovery of FAC costs that amounted to \$37.5 million for CSP and \$297.6 million for OP. EVA attributed the large under-recovery for OP to actions OP took which resulted in higher coal costs for customers while AEP's shareholders received benefits that were not netted against the higher costs. EVA suggested that the PUCO should consider whether proceeds OP received for agreeing to end a low-priced coal contract should be credited against OP's under-recovery under the FAC. An evidentiary hearing was held on August 23-24, 2010.

Meanwhile, AEP-Ohio's proceeding to determine if its 2009 earnings were significantly excessive, as required by Section 4928.143(F), Revised Code, was underway.⁶⁷⁰ On September 1, 2010, AEP-Ohio filed its application for administration of the SEET. A hearing began on October 25, 2010 and concluded on November 1, 2010. On November 25, 2010, a Stipulation was filed by AEP-Ohio, Staff, OHA, the OMA, The Kroger Company ("Kroger"), and Ormet. The Stipulation covered outstanding issues in both the SEET proceeding and the FAC proceeding as well as various other items. However, it was eventually withdrawn and the FAC and SEET cases proceeded separately.

I. AEP-Ohio's Proposed FAC/SEET Stipulation

The proposed Stipulation included provisions on AEP-Ohio's 2011 rate caps and environmental investment recovery, capital investment requirements, the FAC audit, the proposed merger of CSP and OP,⁶⁷¹ the application of SEET to CSP and OP, and several other items. First, AEP-Ohio proposed to maintain its then-current rates for CSP in 2011. In addition, CSP was to forego the carrying charges the PUCO approved for deferred recovery under the FAC for deferrals created in 2011. The proposed CSP 2011 rate provision, however, did not affect rates that were subject to the rate cap (such as the EDR and TCRR). In addition to maintaining CSP's 2010 rates, AEP-Ohio also agreed to prospectively "forego" \$18 million in carrying charges relating to CSP's 2010 environmental investment associated with its Environmental Investment Carrying Cost

⁶⁶⁹ Supreme Court Case No. 2010-729.

⁶⁷⁰ *In the Matter of the 2009 Annual Filing of Columbus Southern Power Company And Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code, PUCO Case No. 10-1261-EL-UNC.* (hereinafter, "AEP-Ohio SEET Proceeding").

⁶⁷¹ The proposed merger is discussed in more depth in Section X.

Rider (“EICCR”). If actual revenue turned out to be less than the projected \$18 million, AEP-Ohio agreed to reduce OP’s 2010 recovery under its EICCR by the same amount.

Second, under the Stipulation, CSP agreed to make a \$20 million equity investment in the Turning Point solar project proposed in the SEET proceeding (AEP-Ohio had previously made this commitment in October 2010 during a joint press conference with Governor Strickland). AEP-Ohio indicated that the cost of this investment would be imposed on customers. CSP also agreed to commit an additional \$25 million investment in gridSMART metering technologies and customer facility infrastructure. Along with this investment, AEP-Ohio agreed to develop a Phase II pilot program for its gridSMART program.

Third, the Stipulation would have resolved issues that were identified in its FAC audit. Specifically, an undefined portion of the net gain from a sale of certain coal reserves was to be distributed between CSP and OP ratepayers even though the extra FAC cost burden discussed above was placed on OP customers.

Fourth, the parties to the Stipulation agreed to support AEP-Ohio’s proposed merger of CSP and OP that had recently been filed in PUCO Case No. 10-2376-EL-UNC, even though the Stipulation was not filed in the merger proceeding. In association with the proposed merger, AEP-Ohio agreed to make a regulatory commitment of \$50 million that would be used to refund earnings to AEP-Ohio customers if the merged companies earned in excess of 15% return on equity in either of the first two year-end periods following the merger. The \$50 million commitment would also serve as a cap for the total amount the merged company would be required to return as a result of a SEET review.

Fifth, the Stipulation recommended that the Commission find that CSP and OP met their burden for demonstrating that they did not have significantly excessive earnings for 2009. Specifically, the Stipulation recommended that the Commission find that OP’s 2009 earnings were within the “safe harbor” earning range established in PUCO Case No. 09-786-EL-UNC.⁶⁷² Additionally, the Stipulation recommended that the Commission exclude Off System Sales (“OSS”) for the purposes of administration of SEET to CSP and OP (or the merged company) for the 2010 and 2011 SEET proceedings.

The parties submitting the settlement to the PUCO claimed that it would avoid rate increases for CSP customers in 2011 even though CSP had already notified customers that it would not be raising rates in 2011.

Finally, under the Stipulation, CSP agreed to make payments to certain parties who signed the Stipulation, including stakeholders who were not even parties to the cases affected by the settlement. There was a payment of \$1 million to OMA and \$1 million to OHA.

⁶⁷² The “safe harbor” range is determined by comparing the earnings of other similar companies. The PUCO established a “safe harbor” range of 200 basis points (*i.e.* two percent) above the mean return on common equity (“ROE”) of the comparable group.

On December 16, 2010, AEP-Ohio withdrew the Stipulation, voiding it in its entirety. However, in the Notice of Withdrawal, AEP-Ohio voluntarily agreed to fulfill several of its obligations in the Stipulation which included: (1) a \$1 million payment to OMA; (2) a \$1 million payment to OHA; and (3) a \$100,000 payment to Kroger.⁶⁷³

The facts and circumstances associated with this Stipulation, and its withdrawal, are difficult to reconcile with the adjudicatory responsibilities at the PUCO. They include joint efforts by the PUCO's Staff and AEP-Ohio to advance settlements negotiated around the active parties in the cases and substantial payments to parties not active in the cases. Beyond the process which produced the Stipulation, the substantive results recommended by the settlement parties were inconsistent with the evidence, the positions advanced by the settling parties themselves, and the requirements of Ohio law.

II. AEP-Ohio's Fourth Quarter 2010 FAC Filing

With the Combined Stipulation covering its FAC pulled, AEP-Ohio moved forward with its FAC proceeding and on December 16, 2010 filed its quarterly update to the FAC.⁶⁷⁴ The filing contained actual fuel data for the period of July through September of 2010 and forecasted data for the first quarter of 2011. AEP-Ohio did not seek an increase in CSP's FAC rates, although it was projecting an increase in its actual fuel costs for the first quarter of 2011. AEP-Ohio indicated that it was foregoing the increase for CSP because it had previously indicated to CSP's customers that an increase in FAC rates in the first quarter was not going to be necessary. AEP-Ohio reserved the right to increase CSP's FAC rates, as permitted under the rate caps, in subsequent filings. AEP-Ohio was, however, seeking the maximum allowed increase in OP's FAC rates.⁶⁷⁵

In the December 16, 2010 filing, the FAC rates proposed for OP increased effective with the first billing cycle of 2011 to reflect the 8% billing cap increase. OP continued to incur fuel costs above the capped increases and therefore continued to add fuel costs to the deferral bucket, and was projected to have a balance of uncollected fuel costs at the end of the ESP period (currently estimated at \$642 million).

On January 19, 2011, the PUCO approved AEP-Ohio's application and the proposed rates went into effect with the February 2011 billing cycle. AEP-Ohio's quarterly FAC filings for 2011 were submitted in March, June, September, and December.⁶⁷⁶ Throughout 2011, CSP's rates remained below the ESP rate caps. At the end of 2011 it did not have any deferral amount. OP's rates remained at the ESP rate caps and OP carried significant fuel deferrals into 2012. In its December 2011 update, AEP-Ohio

⁶⁷³ *AEP-Ohio SEET Proceeding*, Notice of Withdrawal (December 16, 2010).

⁶⁷⁴ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, PUCO Case No. 10-3042-EL-FAC, et al., Application (December 16, 2010).

⁶⁷⁵ See *Id.* at 15.

⁶⁷⁶ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*. PUCO Case No. 11-281-EL-FAC (hereinafter, "*AEP-Ohio 2011 FAC Proceeding*").

noted that the rate caps established as part of its first ESP would no longer be in effect and proposed rates that reflected its proposed ESP in its Second ESP proceeding.⁶⁷⁷ The proposed FAC rates would go to AEP-Ohio's "full cost of fuel" and its deferrals will be collected through a separate rider (discussed in more detail below).

III. PUCO Resolution of the 2009 FAC Audit

The most significant issue associated with this audit proceeding dealt with whether AEP-Ohio must credit against its fuel costs the direct benefits AEP-Ohio received pursuant to an agreement to terminate a favorably-priced coal supply contract early. By agreeing to the early termination of a favorably priced coal supply contract, AEP-Ohio received a \$30 million cash settlement payment and a coal reserve in West Virginia. The independent auditor retained by the PUCO to review AEP-Ohio's practices recommended the PUCO consider whether these benefits should be credited against the higher fuel costs that were passed on to customers when AEP-Ohio bought replacement coal at higher prices.

On January 23, 2012, the PUCO issued an Opinion and Order in which it agreed with arguments raised by IEU-Ohio and OCC that all of the benefits AEP-Ohio received in exchange for agreeing to the early contract termination must be credited against the higher fuel costs including the higher fuel costs embedded in the deferred charges. The PUCO directed AEP-Ohio to credit customers with the remaining portion of the \$30 million contract termination payment not already credited as well as the value of the coal reserve. The PUCO noted that AEP-Ohio booked the coal reserve at \$41 million, so as an initial matter, AEP-Ohio should credit \$41 million. The PUCO also found that the actual value of the coal mine was not clear and directed AEP-Ohio to hire an auditor to determine the value of the coal mine. The PUCO further held that any incremental value above the \$41 million would be credited against the deferrals as well but left unclear the process by which consumers will receive the balance of the charge-offsetting credit as well as the timing of such further credit.

On April 11, 2012, in response to an Application for Rehearing submitted by IEU-Ohio, the PUCO clarified that AEP-Ohio should include a carrying cost component on the credit to the deferrals. In response to an Application for Rehearing submitted by AEP-Ohio, the PUCO determined that the credit should be limited to the amount associated with the Ohio retail jurisdiction of the FAC. The PUCO, however, denied the portion of AEP-Ohio's Application for Rehearing which challenged the PUCO's order that AEP-Ohio credit the value of the coal reserve and cash payment as an offset to the deferrals.

On May 11, 2012, IEU-Ohio submitted an Application for Rehearing, challenging the PUCO's limitation of the offset to the deferrals. IEU-Ohio claimed AEP-Ohio had an obligation to allocate its least-cost fuel to SSO customers, and the below-market fuel contract at issue would have, but for AEP-Ohio's actions, flowed exclusively to the benefit of SSO customers; thus, the PUCO's downward adjustment to the credit was unlawful and unreasonable.

⁶⁷⁷ See AEP-Ohio's Second ESP Section, *supra* at Section W.

Since January 1, 2012, AEP-Ohio has been charging customers to collect charges previously deferred and these previously deferred charges were inflated by AEP-Ohio's failure to reduce its fuel costs by the full amount of the benefits it received by agreeing to terminate the favorably-priced fuel supply contract early. As indicated above, these delayed charges are now being collected through the PIRR.

Here again, the PUCO had an opportunity to mitigate the electric bill increases that are landing on AEP-Ohio customers by proactively requiring AEP-Ohio to credit the benefits it received for the early termination of a low-price coal supply contract to the deferrals created by the rate increase phase-in process approved by the PUCO as part of AEP-Ohio's first ESP. Instead the PUCO kicked this opportunity into some future year with no indication of the process it would follow to remedy the excessive fuel costs that AEP-Ohio imposed on its consumers.

IEU-Ohio and AEP-Ohio both took appeals to the Ohio Supreme Court.⁶⁷⁸ These appeals are currently in the briefing stage at the Ohio Supreme Court.

K. AEP-Ohio's 2009 SEET

With the SEET/FAC Stipulation withdrawn, the PUCO moved forward with CSP's and OP's SEET determinations for 2009. On January 11, 2011, the PUCO issued its Opinion and Order in AEP-Ohio's SEET proceeding, finding that OP's 2009 earnings for purposes of the SEET were not excessive, but that CSP's 2009 earnings were excessive in the amount of \$42.6 million.⁶⁷⁹ The PUCO ordered CSP to first apply the excessive earnings against CSP's FAC deferrals with any remaining amount of excess earnings credited to customers' bills.⁶⁸⁰ The bill credits were made on a kWh basis beginning with the first billing cycle of February 2011 and continued through the end of AEP-Ohio's initial ESP (December 31, 2011).⁶⁸¹

Under the SEET, the PUCO must determine whether the earned return on common equity that results from an EDU's ESP is significantly excessive when compared to the earned return of companies with comparable financial and business risk. Staff had proposed the PUCO adopt an ROE for the comparable group of companies ("comparison ROE") of 10.7% with a 50% adder to establish a threshold ROE of 16.05%.⁶⁸²

⁶⁷⁸ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Ohio Supreme Court Case No. 2012-1484.

⁶⁷⁹ *AEP-Ohio SEET Proceeding*, Opinion and Order (January 11, 2011).

⁶⁸⁰ *Id.* at 35.

⁶⁸¹ *Id.*

⁶⁸² Staff had proposed using a threshold range of 10-11% and settled on a comparison ROE of 10.7%. Additionally Staff believed an adder of 50% above the comparison ROE would be an appropriate threshold to determine when earnings became significantly excessive. *Id.* at 21. However, Staff and AEP-Ohio both expressed concerns over using a 10.7% threshold, which prompted the Commission to settle on a threshold ROE at the high end of Staff's proposed range (11%). The Commission also found that a 50% adder was an appropriate guide, given that a 50% downward adjustment to 11% threshold

The PUCO selected 11% as the comparable ROE and then added an additional 60% to that amount to establish a threshold ROE of 17.6%. The PUCO determined that a 60% adder to the comparable ROE was justified to take into account factors such as improvement in CSP's distribution service reliability and CSP's "commitment to innovation" by way of its gridSMART program. An earned return in excess of 17.6% was thus deemed significantly excessive.

The PUCO then found that OP had an ROE of 10.81% for OP and CSP had an ROE of 20.84%. Because OP's ROE was within 200 basis points (*i.e.* 2%) of the comparable ROE, the Commission determined that OP did not have significantly excessive earnings. However, CSP's ROE required further review. Starting from a ROE of 21.84%, the PUCO adjusted the ROE of CSP to remove the effect of OSS, which the PUCO held should not be included in the SEET. This reduced CSP's ROE to 19.73%. This adjusted ROE, however, remained 2.13% over the threshold ROE.

The PUCO's Opinion and Order also addressed two procedural matters raised in the proceeding. First, IEU-Ohio filed a Motion to Dismiss AEP-Ohio's Application for several reasons, among them: AEP-Ohio did not come forward with evidence that satisfied AEP-Ohio's burden of proving that CSP and OP did not have significantly excessive earnings for calendar year 2009; the SEET quantification was based on net income and common equity data for more than retail services; the application included revenues for a period less than one year; and the application included nonretail transactions such as those subject to FERC jurisdiction and considers revenue, expenses and earnings of any affiliate or parent company. The PUCO denied IEU-Ohio's Motion to Dismiss, and found that it was acceptable to make appropriate adjustments to FERC Form 1 data or total company (wholesale and retail) in order to develop an earned ROE for SEET (the FERC Form 1 is the Annual Report that electric utilities are required to file with FERC).

Second, AEP-Ohio argued that Section 4928.143(F), Revised Code, was void and unenforceable because it is impermissibly vague and failed to provide CSP and OP with fair notice, or the PUCO with meaningful standards, as to what was meant by "significantly excessive earnings." The PUCO stated that it was the province of the courts, and not the PUCO, to judge the constitutionality of Section 4928.143(F), Revised Code. The PUCO also determined that there was ample legislative direction to reasonably apply the SEET in this case, without addressing the constitutional threshold issue propounded by AEP-Ohio.

On January 21, 2011, AEP-Ohio filed its proposed tariffs to implement the bill credit portion of the SEET refund for CSP customers. On January 27, 2011, the PUCO modified the proposed bill credit tariffs to exclude reasonable arrangement customers who take service under a discounted rate. This increased the discount to remaining customers from \$.001256/kWh to \$.001395/kWh. On January 28, 2011, AEP-Ohio filed

ROE would result in earnings of 5.5% (which is similar to CSP's embedded cost of debt). However, the Commission believed that a 60% adder was more appropriate in applying SEET.

revised tariffs that went into effect with bills rendered in the first billing cycle of February 2011.

The SEET language was inserted in SB 221 as a result of demands made by certain stakeholders and elected officials that it was necessary to protect customers' interest in reasonable electric rates. As applied by the PUCO, however, the PUCO refused to examine the return on equity produced by the ESP applicable to Ohio retail customers. Instead, the PUCO conducted the SEET analysis as though it is to be applied to evaluate the return on equity associated with all lines of business in which a utility may engage (wholesale, retail, unregulated and other). As applied by the PUCO, the SEET is incapable of providing the type of protection that was attributed to the SEET when it was inserted into SB 221.

In the CSP ESP, several stakeholders, including IEU-Ohio, protested the PUCO's decision because it awarded excessive rates to CSP and OP. The evidence in the ESP clearly indicated that CSP's ROE had been in the 20% range for many years and further rate increases (which the PUCO allowed) would just make things worse. The AEP-Ohio SEET experience confirms that customers would be much better served if greater care was taken by the PUCO to manage the risk of excessive earnings when it approved an ESP. The AEP-Ohio SEET experience indicates that the after-the-fact SEET test will not protect Ohio electric customers against rates that produce excessive utility earnings.

I. Appeal of CSP's 2009 Earnings Under SEET

On May 5, 2011, OEG filed an appeal with the Ohio Supreme Court regarding AEP-Ohio's 2010 earnings under SEET. The following day, IEU-Ohio filed a second notice of appeal regarding AEP-Ohio's 2009 earnings. AEP-Ohio filed a notice of cross-appeal on May 13, 2011. OEG argued on appeal that the PUCO erred in removing OSS from the SEET calculation inasmuch as its removal biased AEP-Ohio's earnings when compared to other companies.⁶⁸³

IEU-Ohio's appeal focused on the PUCO's improper use of the total company data supplied by AEP-Ohio, rather than on the earnings solely attributable to the ESP as required by statute.⁶⁸⁴ IEU-Ohio also argued that even if total company data was appropriate, the PUCO failed to properly remove the effect of OSS on AEP-Ohio's net income.

Oral arguments before the Supreme Court were held on March 21, 2012.

On December 6, 2012, the Supreme Court issued its decision and affirmed the PUCO's decision. While leaving open the legal issues raised by IEU-Ohio for future cases, the Court held that IEU-Ohio had not demonstrated that it was prejudiced by the manner in

⁶⁸³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Ohio Supreme Court Case No. 2011-751, Notice of Appeal of the Ohio Energy Group (May 5, 2011) (hereinafter, "AEP-Ohio 2009 SEET Appeal").

⁶⁸⁴ *AEP-Ohio 2009 SEET Appeal*, Notice of Appeal of the Industrial Energy Users-Ohio (May 6, 2011).

which the PUCO performed the SEET test, and that there was not sufficient record evidence to support the IEU-Ohio position that AEP-Ohio should have made an adjustment to the common equity used to calculate earnings to account for transmission plant used for OSS. The Court also rejected AEP-Ohio's claim that the statute authorizing the SEET was unconstitutionally vague.

L. AEP-Ohio's 2010 and 2011 Earnings Under SEET

On July 29, 2011, AEP-Ohio filed testimony claiming to demonstrate that AEP-Ohio's 2010 earnings were not significantly excessive in violation of the SEET.⁶⁸⁵ As was the case in AEP-Ohio's 2009 SEET proceeding, AEP-Ohio based its calculation on total company numbers. However, in regard to removing OSS as the PUCO determined in the 2009 proceeding, AEP-Ohio developed a new formula to deal with OSS.

The Staff also proposed a new method for determining the ROE of comparable companies based on the group of companies in an indexed stock fund.⁶⁸⁶ OEG, OCC and OPAE once again proposed to calculate OP's and CSP's ROE without removing the effects of OSS. The Staff, OEG, OCC, and OPAE argued that CSP had significantly excessive earnings. Staff recommended the PUCO direct CSP to refund \$22.58 million in significantly excessive earnings.

On December 2, 2011, IEU-Ohio moved to dismiss AEP-Ohio's application and supporting testimony and requested that the PUCO direct AEP-Ohio to refile its application and testimony with data that complied with the statutory requirements. Section 4928.143(F), Revised Code, requires the PUCO to apply the SEET to earnings attributable to an EDU's (such as CSP and OP) ESP, rather than apply the SEET to total company earnings. On December 6, 2011, the hearing on AEP-Ohio's 2010 earnings commenced where IEU-Ohio's motion was taken under advisement. The briefing stage of the case was finished in early February 2012 and the case is currently pending at the PUCO.

The PUCO granted AEP-Ohio's request to delay filing the information necessary to conduct a review of AEP-Ohio's 2011 earnings under the SEET. AEP-Ohio must file an application to initiate the 2011 review within one month of the PUCO issuing its decision regarding AEP-Ohio's 2010 earnings under the SEET. As the 2013 Manufacturers' Education Council's energy conference commences, it is unknown when the PUCO intends to fulfill its obligation to complete the SEET review process for 2010 or begin the SEET review process for 2011.

M. Economic Development Rider

Rider EDR was established in AEP-Ohio's ESP proceeding for the purpose of collecting the "delta revenue associated with AEP-Ohio's reasonable arrangements." Delta

⁶⁸⁵ *In the Matter of the 2010 Annual Filing of Columbus Southern Power Compare and Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code*, PUCO Case Nos. 11-4571-EL-UNC, *et al.* (hereinafter, "AEP-Ohio 2010 SEET Proceeding").

⁶⁸⁶ The indexed stock fund selected by the Staff was the SPDR Select Sector Fund – Utility (XLU).

revenue is the difference in the revenue produced by the otherwise applicable rate schedule and the approved reasonable arrangement. The PUCO also approved carrying costs for Rider EDR, based on AEP-Ohio's weighted average cost of long-term debt, to be applied to any under-recovery or over-recovery. Currently, AEP-Ohio has several reasonable arrangements: one with Eramet Marietta, Inc., one with Ormet Primary Aluminum Corporation, one with The Timken Company ("Timken"),⁶⁸⁷ and agreements with Globe Metallurgical, Inc. ("Globe") and Solsil, Inc. ("Solsil") (both subsidiaries of Globe Specialty Metals, Inc.). AEP-Ohio also has a unique arrangement with Severstal Wheeling, Inc.; however, it only provides relief from the two-year commitment required to take service under Rate Schedule GS-4 and therefore the arrangement does not generate any delta revenue.⁶⁸⁸

Ohio law states that the PUCO may allow an EDU to recover delta revenue from customers. On November 13, 2009, AEP-Ohio filed an application to set the initial level of Rider EDR. On January 7, 2010, the PUCO approved the application; however, AEP-Ohio and IEU-Ohio filed Applications for Rehearing. AEP-Ohio argued that the Rider EDR rates should not reflect a credit for POLR costs, which would in turn reduce the amount AEP-Ohio would collect through Rider EDR. Over the objections of IEU-Ohio, the PUCO found that Rider EDR was excluded from the maximum revenue increase limitations. Therefore, the increase from Rider EDR (like certain other rate adjustment mechanisms) was on top of the other rate increase amounts approved in the FAC/non-FAC proceedings during AEP-Ohio's initial ESP.

On March 24, 2010, the PUCO issued a substantive Entry on Rehearing which rejected both AEP-Ohio's and IEU-Ohio's arguments. Both parties took appeals to the Ohio Supreme Court (discussed below).⁶⁸⁹

AEP-Ohio filed two applications to adjust Rider EDR pursuant to the ESP, which established semiannual review of the EDR (in April and October).⁶⁹⁰ The semiannual adjustments are used to true-up the estimated delta revenues with actual delta revenues.

The first of these two adjustments decreased CSP's Rider EDR rate by 0.00246% to 10.52455% and increased OP's Rider EDR by 0.03602% to 8.36693% of the base distribution rate.⁶⁹¹ On March 24, 2010, the PUCO approved the Application. IEU-Ohio filed an Application for Rehearing asserting similar arguments to those made in the

⁶⁸⁷ *In the Matter of the Joint Application of the Timken Company and the Ohio Power Company for Approval of a Unique Arrangement for the Timken Company's Canton Ohio Facilities*, PUCO Case No. 10-3066-EL-EEC.

⁶⁸⁸ *In the Matter of the Joint Application for Establishment of a Unique Arrangement Between The Ohio Power Company and Severstal Wheeling, Inc.*, PUCO Case No. 10-1461-EL-AEC, Application at 2 (October 1, 2010) (hereinafter, "*Severstal Wheeling Reasonable Arrangement*").

⁶⁸⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates*, Ohio Supreme Court Case No. 2010-722.

⁶⁹⁰ See *AEP-Ohio EDR Update Proceeding*; *AEP-Ohio Second EDR Update Proceeding*.

⁶⁹¹ *AEP-Ohio EDR Update Proceeding*, Finding and Order at 2 (March 24, 2010).

proceeding to initially set Rider EDR (the PUCO lost jurisdiction to hear the case, etc.). On May 19, 2010, the PUCO denied the Application for Rehearing, and subsequently IEU-Ohio appealed the initial adjustment decision to the Ohio Supreme Court.⁶⁹²

On August 4, 2010, AEP-Ohio filed its second semiannual adjustment of Rider EDR.⁶⁹³ This adjustment increased the EDR to 10.74420% for CSP and to 8.48794% for OP. The PUCO again rejected AEP-Ohio's contention that its recovery under Rider EDR should not be reduced by a POLR credit. No party sought rehearing or appealed the second semiannual adjustment. On April 13, 2011, the PUCO approved a third update to Rider EDR.⁶⁹⁴ CSP's rate was decreased to 9.663290% and OP's rate was increased to 8.72497% of base distribution rates.⁶⁹⁵

Additional updates to the Rider EDR rates were approved by the PUCO in orders dated October 20, 2011⁶⁹⁶ and March 28, 2012.⁶⁹⁷ This first update decreased CSP's EDR rate to 6.96141% of the base distribution charges and increased OP's rate to 13.94508% of base distribution charges. The latter update increased CSP's rate to 10.08734% and increased OP's rate to 14.06695% of base distribution charges.

On September 26, 2012, the Commission approved the consolidation of the separate CSP and OP Rider EDR rates into a single rate of 13.054648%.

I. Timken Agreement

On December 20, 2010, Timken and AEP-Ohio filed a joint application seeking approval of a 10-year unique arrangement for Timken's Canton, Ohio, facilities.⁶⁹⁸ In the application, they stated that approval of the unique arrangement would allow Timken to pursue capital investments in production and energy conservation, which, in turn, should preserve employment and increase efficiency. The application contained two primary components: (a) establishment of a special rate for energy prices to allow Timken to pursue capital investments in production and energy conservation, which, in turn would sustain Timken's competitiveness and employment rates, and (b) integration

⁶⁹² *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Ohio Supreme Court Case No. 2010-1073.

⁶⁹³ *AEP-Ohio Second EDR Update Proceeding*, Application (August 4, 2010).

⁶⁹⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5)*, Ohio Administrative Code, PUCO Case No. 11-705-EL-RDR, Finding and Order (April 13, 2011).

⁶⁹⁵ *Id.* at 2.

⁶⁹⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5)*, Ohio Administrative Code, PUCO Case No. 11-4570-EL-RDR.

⁶⁹⁷ *In the Matter of the Application of Ohio Power Company to Adjust Its Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5)*, Ohio Administrative Code, PUCO Case No. 12-688-EL-RDR.

⁶⁹⁸ *In the Matter of the Joint Application of the Timken Company and The Ohio Power Company for Approval of a Unique Arrangement for the Timken Company's Canton, Ohio, Facilities*, PUCO Case No. 10-3066-EL-AEC, Application (December 20, 2010).

of Timken's conservation efforts at the Canton facility into AEP-Ohio's peak demand reduction and energy efficiency programs, which would help AEP-Ohio achieve its statutory goals under SB 221 and would benefit other AEP-Ohio customers.

Regarding the special rate design for Timken, the application proposed a declining discount off the applicable tariff rates beginning at 15% for the first twelve months, and, thereafter, declining by 1% every year for the first five years, and by 2% every year for the remaining years. In order to temper the effect of spikes in prices during the term of the unique arrangement, the proposed rate design included a "limiter" or a pre-set ceiling for Timken's power costs every month of the unique arrangement. According to the application, the base amount of the limiter would be set at the cost of power for each month in 2008 (the last normal year prior to the recession). Thereafter, the limiter ceiling would be reset each year by increasing the prior year's monthly maximum by 5%. In order to limit the resulting delta revenue in the event that power prices reached unexpected levels, the special rate design also included a cap on the limiter should it result in a tariff discount of more than 25%.

The application emphasized that no tariff discounts over 25% would be authorized. Further, as an additional limit on the delta revenue to be collected through the EDR, the application proposed an absolute cap on the aggregate discount arising from the rate discount and limiter. Additionally, the special rate design preserved Timken's right under SB 221 to switch from purchasing electricity under the SSO to purchasing electricity on the open market, in which case the unique arrangement would terminate. On April 27, 2011, the PUCO approved the application without modification.

II. Severstal Wheeling, Inc. Unique Arrangement

On October 1, 2010, OP and Severstal Wheeling, Inc. ("Severstal") filed a joint application for a unique arrangement. Severstal requested market-based pricing for generation service from OP without the two-year commitment contained in OP's Rate GS-4.⁶⁹⁹ Severstal claimed that avoiding the two-year commitment would provide it with greater operational flexibility, without which it would not be restarting operations.⁷⁰⁰ Because the proposed arrangement did not include a discount in the otherwise applicable rate, no delta revenue was involved. On October 22, 2010, the PUCO approved the arrangement.

III. Appeals Regarding AEP-Ohio's EDR

An appeal was taken from the PUCO's Order which set the initial rate of the EDR in PUCO Case No. 09-1095-EL-RDR.⁷⁰¹ In that appeal, discussed in greater length above, the Court affirmed the Commission's determination that the EDR could be reduced by the POLR revenue paid by customers on a unique arrangement.⁷⁰²

⁶⁹⁹ *Severstal Wheeling Reasonable Arrangement*, Application at 2 (October 1, 2010).

⁷⁰⁰ *Id.*

⁷⁰¹ See Section H regarding Ormet's Unique Arrangement.

⁷⁰² *In re Application of Ormet Primary Aluminum Corp.*, Slip Opinion No. 2011-Ohio-2377, Supreme Court Case Nos. 2009-2060, 2010-0722, and 2010-0723.

An appeal was also taken by AEP-Ohio and IEU-Ohio from the PUCO's March 24, 2010 Order in Case No. 10-154-EL-RDR that authorized an update to AEP-Ohio's EDR rates. On August 24, 2011, the Supreme Court of Ohio issued a decision that affirmed the PUCO's March 24, 2010 Order.⁷⁰³ In short, the Court affirmed the Commission's decision to: (1) exempt the EDR from the bill limits set in AEP-Ohio's ESP; and (2) allow carrying charges at a long-term debt rate. The Court determined that exempting the EDR from the bill limits was not reversible error for two reasons. First, the "commission has discretion to revise earlier regulatory decisions and modify them prospectively." Second, the bill limits were set pursuant to Section 4928.144, Revised Code, which provides for any just and reasonable phase-in of ESP rates "as the commission considers necessary to ensure rate or price stability for customers." The Court determined that the statute provides the Commission with discretion to set rates during a phase-in and the Court's review of discretionary decisions is deferential. The Court also determined that the Commission had justified its decision to permit a long-term debt rate in a separate proceeding.

N. Transmission Cost Recovery Rider

In September 2005, AEP-Ohio filed an application to adjust (through its proposed TCRR) its transmission charges to reflect rate changes approved by FERC.⁷⁰⁴ AEP-Ohio proposed to use the TCRR to recover costs it incurred to join an RTO as well as suggested that the TCRR be annually true-up. AEP-Ohio proposed to implement this process by filing an application by November 1 of each year to become effective the following year. The PUCO approved AEP-Ohio's original TCRR application, with some modifications, and also ordered its Staff to review the costs included in the TCRR prior to the next filing and to update and true-up the rider. The PUCO specifically directed its Staff to ensure controllable costs were minimized.⁷⁰⁵

In February 2006, AEP-Ohio filed an application requesting, among other things, permission to adjust the transmission components of its unbundled rates to reflect changes approved by FERC and to combine the transmission component of each operating company's standard service tariff with its previously-approved TCRR.⁷⁰⁶ The PUCO approved AEP-Ohio's Application, making adjustments to preclude recovery of

⁷⁰³ *In re Application of Columbus S. Power Co.*, 129 Ohio St. 3d 568.

⁷⁰⁴ *In the Matter of the Application of The Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Components of the Companies' Standard Service Tariffs to Reflect the Applicable FERC-Approved Charges or Rates Related to Open Access Transmission, Net Congestion, and Ancillary Services*, PUCO Case No. 05-1194-EL-UNC, Finding and Order (December 14, 2005). AEP-Ohio was granted authority to file applications to adjust its respective transmission charges in its RSP proceeding. *Id.* at 1.

⁷⁰⁵ *Id.* at 5.

⁷⁰⁶ *In the Matter of the Application of The Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Component of Each Company's Standard Service Tariff to Combine That Component with its Transmission Cost Recovery Rider*, PUCO Case No. 06-273-EL-UNC, Application (February 3, 2006) (hereinafter, "AEP-Ohio 2006 TCRR Proceeding").

certain ancillary service costs and to reconcile AEP-Ohio's net RTO formation costs.⁷⁰⁷ Additionally, the PUCO ordered its Staff to complete a biannual audit to determine if AEP-Ohio's management and operating processes minimize controllable transmission service costs, ordered AEP-Ohio to provide a detailed report of the identified controllable costs, including all actions taken to minimize those costs, and directed its Staff, with each update filing, to audit all costs included in the TCRR to verify the accuracy of the charges and to ensure they relate only to the provision of service to native load customers (essentially OP's and CSP's retail customers in Ohio).

On October 26, 2006, AEP-Ohio filed a TCRR Update Application, asking to reduce the TCRR by 30% and 25% for OP and CSP customers, respectively.⁷⁰⁸ Staff completed its audit of AEP-Ohio's TCRR and recommended approval of AEP-Ohio's requested TCRR reduction. Additionally, pursuant to the TCRR review process established in other dockets, Staff conducted its biannual audit of AEP-Ohio's TCRR to ensure that the appropriate costs were included and that AEP-Ohio was minimizing controllable transmission costs. The PUCO concurred with Staff's findings and concluded that AEP-Ohio fairly determined and reasonably incurred its transmission costs during calendar year 2006 and that AEP-Ohio's practices and policies minimized controllable RTO costs during that same time period.⁷⁰⁹

On November 8, 2007, AEP-Ohio filed its TCRR update for 2008, asking for TCRR increases of 58% and 61% for OP and CSP customers, respectively.⁷¹⁰ The PUCO approved AEP-Ohio's application on December 19, 2007, thereby permitting AEP-Ohio to collect \$159 million in transmission costs from OP customers and \$145 million from CSP customers.⁷¹¹ Additionally and pursuant to the settlement in AEP-Ohio's 2008 Discretionary Generation Increase Proceeding, net locational marginal losses were also recoverable through the TCRR.

On October 31, 2008, AEP-Ohio proposed its annual update to its TCRR rates for 2009, to be effective on a bills-rendered basis beginning on December 30, 2008.⁷¹² AEP-Ohio

⁷⁰⁷ *AEP-Ohio 2006 TCRR Proceeding*, Finding and Order (May 26, 2006).

⁷⁰⁸ *In the Matter of the Application of The Columbus Southern Power Company and Ohio Power Company to Adjust Each Company's Transmission Cost Recovery Rider*, PUCO Case No. 06-1294-EL-UNC, Application (October 26, 2006) (hereinafter, "*AEP-Ohio 2006 TCRR Update Proceeding*").

⁷⁰⁹ *AEP-Ohio 2006 TCRR Update Proceeding*, Entry at 9 (July 25, 2007). The PUCO also left open for the audit in AEP-Ohio's next TCRR filing an OCC concern that AEP-Ohio double-recovered approximately \$200,000 in transmission costs in the TCRR that were also recovered in the PAR.

⁷¹⁰ *In the Matter of the Application of The Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, PUCO Case No. 07-1156-EL-UNC, Application (November 8, 2007) (hereinafter, "*AEP-Ohio 2007 TCRR Proceeding*").

⁷¹¹ *AEP-Ohio 2007 TCRR Proceeding*, Finding and Order (December 19, 2007).

⁷¹² *In the Matter of the Application of The Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, PUCO Case No. 08-1202-EL-UNC, Application (October 31, 2008) (hereinafter, "*AEP-Ohio 2008 TCRR Proceeding*").

requested an increase of \$12.6 million for OP (an average increase in transmission rates of 7%), and an overall decrease of approximately \$5.1 million for CSP (an average decrease in transmission rates of 3%). Additionally, the TCRR proposal included AEP-Ohio's proposed increases in its FERC rate case (starting on March 1, 2009.). On December 17, 2008, the PUCO modified and approved AEP-Ohio's Application.⁷¹³ The PUCO modified AEP-Ohio's Application to lower AEP-Ohio's carrying cost rate. The PUCO also explained that any over-recovery caused by a removal of the credit against the cost of marginal losses from the TCRR would be trued-up in AEP-Ohio's next TCRR application.⁷¹⁴

On April 16, 2009, AEP-Ohio filed an application to adjust its TCRR for the July 2009 through June 2010 time period.⁷¹⁵ The proposed TCRR rates (after an update filed by AEP-Ohio) reflected a proposed revenue reduction of \$6.4 million from the then-current TCRR for CSP for a total revenue authorization of \$168.8 million and proposed a \$5.1 million revenue reduction from the current TCRR for OP for a total revenue authorization of approximately \$200 million.⁷¹⁶ The PUCO approved AEP-Ohio's TCRR adjustment on June 24, 2009.

On April 14, 2010, AEP-Ohio filed an application to adjust its TCRR to reflect a proposed revenue reduction for July 2010 through June 2011 time period. On June 10, 2010, AEP-Ohio updated its application to reflect a settlement at FERC. That settlement created a lower-than-originally proposed NITS revenue requirement. As a result of the FERC settlement, IEU-Ohio pushed to have the rates filed with the PUCO lowered accordingly and AEP-Ohio ultimately did so. CSP's proposed rates, as updated, reflected a \$25.6 million reduction of the revenue that would have been collected under the then-current rates for the July 2010 through June 2011 timeframe. OP's proposed rates, as updated due to the FERC settlement, reflected a \$29 million reduction. This represented an average decrease in the TCRR of approximately 15.93% for CSP and 15.46% for OP.⁷¹⁷

On June 23, 2010, the PUCO approved the application, as updated on June 10. IEU-Ohio sought rehearing, claiming: (1) that the PUCO lost jurisdiction to hear this case because it lost jurisdiction to hear AEP-Ohio's ESP proceeding which established the TCRR; and (2) that AEP-Ohio could not accept certain provisions of its ESP while it

⁷¹³ *AEP-Ohio 2008 TCRR Proceeding*, Finding and Order (December 17, 2008).

⁷¹⁴ A Staff Report regarding AEP-Ohio's TCRR application pointed out that AEP-Ohio proposed to remove the credit against the cost of marginal losses from the TCRR because it proposed a FAC as part of its ESP, but Staff noted that if the ESP (including a FAC) was not in place by January 1, 2009, then an over-recovery in the TCRR would occur.

⁷¹⁵ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, PUCO Case No. 09-339-EL-UNC, Application (April 16, 2009) (hereinafter, "*AEP-Ohio 2009 TCRR Proceeding*").

⁷¹⁶ *AEP-Ohio 2009 TCRR Proceeding*, Staff Report (June 9, 2009).

⁷¹⁷ *In the Matter of the Application of Columbus Southern Power Company And Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, PUCO Case No. 10-477-EL-UNC, Supplement to Application at 2-3 (June 10, 2010).

appealed others at the Ohio Supreme Court. On July 22, 2010, the PUCO denied IEU-Ohio's Application for Rehearing.

On April 15, 2011, AEP-Ohio filed an application for its annual update to adjust its TCRR for the period July 2011 through June 2012. The application reflected a proposed increase to the TCRR revenue requirement. On June 9, 2011, AEP-Ohio updated its application to incorporate a change in its NITS formula rates that would become effective July 1, 2011. CSP's proposed rates, as updated, reflected a \$48.6 million increase over the revenue that would have been collected under the then-current rates for the July 2011 through June 2012 period.⁷¹⁸ OP's proposed rates, as updated, reflected a \$38 million increase over the revenue that would have been collected under the then-current rates for the July 2011 through June 2012 period. The application, as updated on June 9, was approved by the PUCO on June 22, 2011.

On June 15, 2012, AEP-Ohio filed an application for its annual update to adjust the TCRR for the period through August 2013.⁷¹⁹ The application reflected a proposed increase to the TCRR revenue requirement. The proposed increases to the TCRR rates were due in part to a significant TCRR under-recovery. The under-recovery was estimated by AEP-Ohio to be approximately \$36 million. In the application, AEP-Ohio stated that it was proposing to collect the under-recovery over a three-year period, in order to mitigate the rate impacts of flowing through the under-recovery in one year (as under-recoveries would normally be treated in the annual TCRR updates). AEP-Ohio also suggested in the application that, should the PUCO find it necessary to further mitigate the rate impact on customers, it could adopt a plan to phase-in the under-recovery balance over three years as a non-bypassable charge).

In comments filed on July 25, 2012, IEU-Ohio opposed the establishment of a non-bypassable charge for the recovery of transmission-related costs on the basis that Section 4928.144, Revised Code, does not apply to AEP-Ohio's TCRR and therefore does not provide the PUCO with authority to make AEP-Ohio's under-recovery non-bypassable. IEU-Ohio also argued that Rule 4901:1-36-04(B), O.A.C., states that the TCRR is avoidable by shopping customers and that PUCO precedent requires a true-up of a bypassable rider to also be bypassable.

On October 15, 2012, the Staff recommended that AEP-Ohio be permitted to collect the under-recovered amount through the establishment of a separate non-bypassable rate as part of the current TCRR rider. On October 24, 2012, the PUCO approved, effective November 1, 2012, updated TCRR rates as well as a separate non-bypassable charge designed to retroactively collect the under-recovery over a three-year period. Once again, the PUCO authorized a non-bypassable charge to reduce the savings that shopping consumers – consumers who secure and pay for their own transmission service – would otherwise enjoy. On November 21, 2012, IEU-Ohio sought rehearing of

⁷¹⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, PUCO Case No. 11-2473-EL-RDR, Staff Report (June 13, 2011).

⁷¹⁹ *In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates*, PUCO Case No. 12-1046-EL-RDR, Application (June 15, 2012).

the PUCO's order, which the PUCO denied on December 12, 2012. On January 25, 2013, IEU-Ohio initiated an appeal to the Ohio Supreme Court of the PUCO's order in the TCRR proceeding.⁷²⁰

O. Environmental Investment Carrying Cost Rider

In AEP-Ohio's initial ESP proceeding, the PUCO authorized AEP-Ohio to recover the incremental capital carrying costs associated with environmental investments made during the three-year ESP period through the EICCR. Additionally, in its Entry on Rehearing in the initial ESP proceeding, the PUCO stated that recovery should be based on actual expenditures already incurred.⁷²¹ The revenue requirement included four components: (1) a rate of return factor; (2) a depreciation expense factor; (3) a federal income tax ("FIT") factor; and (4) a combined property tax and administrative and general ("A&G") factor.

I. Recovery of 2009 Expenditures

On February 8, 2010, AEP-Ohio filed an application to establish the initial rate of the EICCR. AEP-Ohio proposed an initial rate of 4.31451% of non-FAC generation charges for CSP and 4.18938% of non-FAC generation charges for OP. This reflects a 2009 capital expenditure of \$5,757,000 for CSP and \$8,651,000 for OP.⁷²² AEP-Ohio also proposed an effective date of July 2010 for the EICCR, which would have coincided with the proposed effective date for its FAC Rider. Because the EICCR is subject to the annual rate caps, any recovery under the rider would then reduce the level of allowed recovery under the residually determined FAC Rider. The proposed recovery period for 2009 expenditures would be an 18-month period starting with the July 2010 billing cycle.

Staff, IEU-Ohio, and others filed comments in the case. Staff recommended a reduction in the proposed rate of the EICCR to reflect the removal of property taxes for exempt certified pollution control facilities as well as two adjustments to plant balances. IEU-Ohio's comments were aimed at reducing the amounts that AEP-Ohio may recover under the EICCR and therefore reducing the deferrals that AEP-Ohio may carry forward and collect from customers on a non-bypassable basis beginning in 2012. IEU-Ohio urged the PUCO to: (1) adopt a single end-of-year calculation of carrying charges rather than a monthly compounding calculation; and, (2) limit the EICCR return on investment to the Companies' average debt rate. AEP-Ohio ultimately agreed to remove the property taxes identified by Staff from recovery under its EICCR.⁷²³ AEP-Ohio also agreed to modify its carrying cost calculation slightly to conform to what was approved in its ESP proceeding.⁷²⁴

⁷²⁰ *In re Industrial Energy Users-Ohio v. Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2011-751, Notice of Appeal of Appellant Industrial Energy Users-Ohio (January 25, 2013).

⁷²¹ *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 14 (July 23, 2009).

⁷²² *AEP-Ohio EICCR Proceeding*, Application at 5, 11 (February 8, 2010) *AEP-Ohio*.

⁷²³ *AEP-Ohio EICCR Proceeding*, Opinion and Order at 9-10 (August 25, 2010).

⁷²⁴ This included using the same weighted average cost of capital ("WACC"), debt/equity ratio, depreciation factor and FIT factor, property taxes and A&G factor.

On August 25, 2010, the PUCO approved AEP-Ohio's Application as modified. Specifically, the PUCO approved a carrying cost rate of 13.59% for CSP and 13.34% for OP and a revenue recovery of roughly \$26 million and \$34 million, respectively. On September 24, 2010, OCC filed an Application for Rehearing on three grounds: (1) the carrying cost calculation did not utilize short-term debt and low-cost financing options; (2) the carrying cost was calculated monthly rather than at the end of the year; and (3) the PUCO did not hold a hearing in the case.⁷²⁵ On October 22, 2010, the PUCO denied OCC's Application for Rehearing.⁷²⁶

II. Recovery of 2010 Expenditures

On March 18, 2011, AEP-Ohio filed an application to adjust the EICRR rates of CSP and OP to reflect incremental environmental investments made in 2010.⁷²⁷ AEP-Ohio proposed that the 2010 carrying costs be collected over the six-month period of July 2011 through December 2011. The proposed EICRR rates were 8.78602% of non-FAC generation charges for CSP and 6.55762% of non-FAC generation charges for OP. Comments on the application were filed by IEU-Ohio and other parties in the case. IEU-Ohio recommended that the application be rejected because AEP-Ohio failed to demonstrate the basis under Section 4928.143(B)(2), Revised Code, that would authorize recovery of the revenues for carrying charges on environmental investments for 2010. In addition, IEU-Ohio noted that AEP-Ohio's methodology for collecting more revenue failed to satisfy Section 4928.02, Revised Code, inasmuch as customers faced rate shock from the shortened recovery period on costs for which there was minimal review.

On June 29, 2011, the PUCO approved the requested EICRR rates, effective July 2011, to collect revenue of \$10.1 million for CSP and \$6.1 million for OP.⁷²⁸ The PUCO rejected IEU-Ohio's recommendation (that the application be rejected), stating that recovery on environmental investments for 2009-2011 as set forth in the initial ESP Order was non-appealable and not subject to challenge at this point in either the remand proceeding or this case. The PUCO also indicated that, as it noted in the initial ESP Order, environmental investments which are made during the ESP period and are necessary for the provision of generation service may be recovered through the EICCR.

The PUCO directed AEP-Ohio to work with Staff in any future filings such that Staff could review any new environmental investments to ensure the costs complied with laws, statutes, rules, regulations, or a court order related to environmental

⁷²⁵ *AEP-Ohio EICCR Proceeding*, Entry on Rehearing at 2 (October 22, 2010).

⁷²⁶ *Id.* at 7-8.

⁷²⁷ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update the Environmental Investment Carrying Costs Rider*, PUCO Case No. 11-1337-EL-RDR, Application (March 18, 2011) (hereinafter "*AEP-Ohio 2010 EICCR Proceeding*").

⁷²⁸ *AEP-Ohio 2010 EICCR Proceeding*, Finding and Order at 3 (June 29, 2011).

requirements. The PUCO also directed AEP-Ohio to include a description of AEP-Ohio's long-term environmental compliance strategy.⁷²⁹

As part of its second ESP application (discussed below), AEP-Ohio proposed that Rider EICCR be eliminated and rolled into the base generation rates of CSP and OP. By order dated August 8, 2012, the PUCO approved AEP-Ohio's request to roll Rider EICCR into base generation rates, effective September 1, 2012.

P. Enhanced Service Reliability Rider

Like the EICCR, the Enhanced Service Reliability Rider ("ESRR") was established in AEP-Ohio's initial ESP proceeding. The ESRR was supposed to recover the cost of the "enhanced" vegetation initiative, which in essence was designed to keep vegetation from interfering with AEP-Ohio's electrical grid.⁷³⁰ Also like the EICCR, the ESRR's revenue components include: (1) a rate of return factor; (2) a depreciation expense factor; (3) an "FIT" factor; and (4) a combined property tax and A&G factor.

On February 11, 2010, AEP-Ohio filed an application to establish and set the initial level of the ESRR. AEP-Ohio proposed the level be set at 3.34395% of distribution charges for CSP and 5.59907% of distribution charges for OP. After Staff performed an audit and made several recommendations, AEP-Ohio agreed to modify its carrying cost calculation, which increased by roughly \$60,000 for both CSP and OP.⁷³¹ On September 24, 2010, OCC filed an Application for Rehearing that mainly argued that AEP-Ohio should not have been allowed an additional \$1.64 million to complete clearing circuits in 2010 that were supposed to be cleared in 2009. On October 22, 2010, the PUCO denied OCC's Application for Rehearing.⁷³² The final 2010 rate for the ESRR was 3.0537% of distribution charges for CSP and 5.589939% for OP.

On March 18, 2011, AEP-Ohio filed an application to update the ESRR to reflect actual incremental spending in 2010 and projected spending for 2011. AEP-Ohio proposed that the rate for the ESRR be set at 3.94187% of distribution charges for CSP, and 6.72393% of distribution charges for OP, to become effective in July 2011. Staff filed comments and recommendations on May 20, 2011, recommending that AEP-Ohio's

⁷²⁹ *Id.* at 5-6.

⁷³⁰ This includes a five-year transition period to facilitate end-to-end clearing of all of AEP-Ohio's circuits, after which AEP-Ohio will implement a four-year full cycle vegetation program. AEP-Ohio and Staff have developed an understanding of the schedule for end-to-end clearing of circuits during the five-year transition period, prioritized, in part, based on breaker zone circuits already cleared under AEP-Ohio's existing program.

⁷³¹ The modification came as a result of several expenditures AEP-Ohio had inadvertently excluded in its Application as well as several charges that PUCO Staff concluded should have been excluded.

⁷³² *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Their Enhanced Service Reliability Riders*, PUCO Case No. 10-163-EL-RDR, Entry on Rehearing (October 22, 2010).

March 18 filing be accepted. On June 15, 2011, the PUCO approved the filed ESRR rates, effective July 2011.⁷³³

Through an order dated August 8, 2012, the PUCO approved continuation of the ESRR and consolidation of the separate CSP and OP rates into a single rate of 5.30956% that is applied to base distribution charges, effective September 1, 2012.⁷³⁴ On December 21, 2012, AEP-Ohio filed an application to update the ESRR rate, requesting a rate of 5.25993%.⁷³⁵ This application is currently pending with the PUCO.

Q. gridSMART Rider

Established in AEP-Ohio's initial ESP proceeding, the gridSMART Rider recovers costs associated with AEP-Ohio's gridSMART program and is reconciled annually. This program like similar programs proposed by other utilities was strongly encouraged by certain PUCO Commissioners even though no cost-benefit analysis was done to support moving forward with the programs. Phase I of the gridSMART program for CSP consisted of 3 components: AMI, Home Area Network ("HAN"), and Distribution Automation ("DA"). On February 11, 2010, AEP-Ohio filed for an annual reconciliation (the initial level was set in the ESP proceeding).⁷³⁶ AEP-Ohio's Application proposed to lower the rider from 2.55030% to 2.30342%. After an audit by Staff, AEP-Ohio agreed to exclude roughly \$9 million from its 2009 recovery request.⁷³⁷

On August 11, 2010, the PUCO approved AEP-Ohio's Application, as modified by AEP-Ohio, with one additional change. The PUCO agreed with the position of OPAE that customers be able to understand the charges on the electric bill; specifically, that customers be able to understand the costs of the gridSMART program. To that end, the PUCO ordered AEP-Ohio to modify the gridSMART Rider rate to reflect a single fixed monthly per bill charge, rather than a percentage of base distribution rates.⁷³⁸

On September 10, 2010, OCC filed an Application for Rehearing and on October 22, 2010 the PUCO issued an Entry on Rehearing granting, in part, OCC's Application for Rehearing on two grounds: (1) the PUCO agreed to reconsider CSP's disconnection and reconnection fee through a future filing; and (2) the PUCO clarified that CSP should record all depreciation expenses it collects through the annual carrying charges in the

⁷³³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Enhanced Service Reliability Rider*, PUCO Case No. 11-1361-EL-RDR, Application at 2 (March 18, 2011).

⁷³⁴ *AEP-Ohio Second ESP Proceeding*, Opinion and Order (August 8, 2012).

⁷³⁵ *In the Matter of the Application of Ohio Power Company to Update Its Enhanced Service Reliability Rider*, PUCO Case No. 12-3285-EL-RDR, Application (December 21, 2012).

⁷³⁶ *AEP-Ohio ESP Proceeding*, Opinion and Order at 39 (March 18, 2009).

⁷³⁷ Most of this amount (\$8,789,680) was initially included because AEP-Ohio recorded it, due to accounting reasons, in December 2009 rather than in January 2010. AEP-Ohio will seek recovery of the amount through its next annual reconciliation.

⁷³⁸ *In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider*, PUCO Case No. 10-164-EL-RDR, Finding and Order at 14 (August 11, 2010) (hereinafter, "AEP-Ohio gridSMART Proceeding").

gridSMART Rider as accumulated depreciation to be deducted from the rate base of distribution-related assets in the company's next distribution case or ESP proceeding.

AEP-Ohio had proposed taking two additional steps with its gridSMART program in the Stipulation in the combined SEET/FAC proceeding but the Stipulation was subsequently withdrawn (as discussed above). The first one would have provided an additional \$25 million commitment by AEP-Ohio in distribution infrastructure in its CSP service area, which would be allocated between gridSMART metering technologies and customer facility infrastructure. The second proposed step would have created a Phase II pilot program for CSP beyond the current footprint of Phase I, which would have included dynamic pricing options.⁷³⁹

On March 18, 2011, AEP-Ohio filed an application to revise the gridSMART rider to reflect actual spending and recovery in 2010 and projected spending and revenue requirements through 2011.⁷⁴⁰ AEP-Ohio requested the rider rates be a monthly charge of \$0.52 for residential customers and \$2.27 for non-residential customers, the same approved monthly rates from Case No. 10-164-EL-RDR. In AEP-Ohio's initial ESP filing the gridSMART rider was approved for a three-year period, ending in 2011. In their Second ESP proceeding, (discussed below) AEP-Ohio requested that the term of the rider be extended through December 31, 2013, in order to allow for recovery of the cost of assets that have already been installed or planned to be installed as part of the completion of Phase I of the gridSMART demonstration project. The monthly rates developed for the rider were designed to recover the allowable expenses over a 12-month period.

On May 20, 2011, Staff filed comments, stating that If extension of the rider was not granted, rates from the rider would be in effect for less than half of the year and would be suspended at the end of 2011 when the initial ESP expired. Staff further indicated that granting an extension to the rider would provide greater certainty and continuity while avoiding a suspension of the rate being billed under the rider.

IEU-Ohio filed reply comments, indicating that Staff's comments regarding the extension of the gridSmart rider went well beyond what was necessary to review the current application and argued that the Staff recommendation to extend the gridSMART rider should be rejected. IEU-Ohio encouraged the PUCO to address whether AEP-Ohio should continue to collect revenue for gridSmart in AEP-Ohio's Second ESP proceeding, which was still pending at that time.

On August 24, 2011, the PUCO issued an Order approving the requested rider rates; however, the PUCO agreed with IEU-Ohio's comments. The PUCO ordered that the rates were to be effective with the first billing cycle in September 2011, and continue through December 31, 2011. The PUCO further indicated that the pending application to update the gridSMART rider was not the appropriate docket to consider the extension of the rider beyond the term of the initial ESP. Instead, the PUCO stated that it would

⁷³⁹ *AEP-Ohio SEET Proceeding*, Stipulation and Recommendation at 6 (November 30, 2010).

⁷⁴⁰ *In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider*, PUCO Case No. 11-1353-EL-RDR, Application (March 18, 2011).

consider the extension of the gridSMART rider as part of AEP-Ohio's 2011 ESP (discussed below) proceeding. By order issued on August 8, 2012, the PUCO approved the continuation of the gridSMART rider and approval to initiate gridSMART Phase 2.⁷⁴¹

On December 12, 2012, the PUCO approved a consolidated gridSMART rider rate to be applied to non-residential customers at a rate of \$0.42/month, to be effective January 1, 2013.⁷⁴²

R. Certified Retail Electric Supplier

On December 31, 2009, AEP's retail arm in Ohio, AEP Retail Energy, filed a Certification Application for Retail Generation Providers, Power Marketers, Power Broker, and Aggregator for status as a CRES supplier in Ohio.⁷⁴³ The application indicated AEP Retail Energy would focus on commercial and industrial customers. On April 30, 2010, the PUCO issued AEP Retail Energy its CRES certification.

S. AEP-Ohio Transmission Company

On March 2, 2010, AEP-Ohio filed an application to establish a new transmission company, AEP-Ohio Transmission Company, Inc. ("OHTCo"), which would perform only transmission functions, mainly focusing on larger, new transmission projects.⁷⁴⁴ Specifically, the new company would provide wholesale transmission services to the AEP East Operating Companies, including AEP-Ohio. AEP claimed that small projects would still be completed and financed by the Ohio operating companies. AEP said the transmission company would make it easier to raise capital for transmission projects. Several parties, including IEU-Ohio, filed comments in the case. IEU-Ohio argued that the proposed company would only further complicate an already complex corporate structure and there was not enough information in the application to justify the change.⁷⁴⁵

On December 29, 2010, the PUCO approved the application, finding that OHTCo qualified as an electric light company and a public utility within the meaning of Sections 4905.03(A)(3) and 4905.02, Revised Code. The Commission also modified the application. While the application requested OHTCo be able to participate in AEP's money pool for AEP's affiliated companies, the PUCO modified the request and imposed the same conditions on OHTCo that it imposed on OP and CSP, which the

⁷⁴¹ *AEP-Ohio Second ESP Proceeding*, Opinion and Order (August 8, 2012).

⁷⁴² *In the Matter of the Application of Ohio Power Company to Update its gridSMART Rider*, PUCO Case No. 12-509-EL-RDR, Entry (December 12, 2012).

⁷⁴³ AEP Retail Energy had initially applied for CRES status as AEP Retail Energy Partners LLC but subsequently changed its name.

⁷⁴⁴ *In the Matter of the Application of AEP-Ohio Transmission Company, Inc., for Confirmation That Its Operations Will Render It an Electric Light Company and a Public Utility Within the Meaning of Sections 4905.03(A)(4) and 4905.02, Revised Code*, PUCO Case Nos. 10-245-EL-UNC, *et al.*, Application (March 2, 2010) (hereinafter, "*OHTCo Proceeding*").

⁷⁴⁵ *OHTCo Proceeding*, Initial Comments of IEU-Ohio (April 30, 2010).

Commission felt helped insulate the regulated companies from their non-regulated affiliates.⁷⁴⁶

T. Shutdown of Unit 5 at the Philip Sporn Generating Station

On October 1, 2010, AEP-Ohio filed an application to establish a non-bypassable Plant Closure Cost Recovery Rider (“PCCRR”) to compensate AEP-Ohio for shutdown costs and the unamortized balance on Unit 5 of the Philip Sporn Generating Station (“Sporn Unit 5”).⁷⁴⁷ AEP-Ohio indicated that the total cost recovery would be at least \$58 million. According to AEP-Ohio, the proposed plant shutdown rider relied on a provision in the ESP that allowed AEP-Ohio to make such an application for an unanticipated plant shutdown.

IEU-Ohio filed comments in April 2011, arguing that neither SB 221 nor the PUCO’s Order authorizing AEP-Ohio’s first ESP provided a basis for cost recovery. IEU-Ohio further argued that even under cost-of-service regulation, OP’s request would be denied pursuant to Section 4909.15(A), Revised Code, because Sporn Unit 5 was not used and useful in supplying service to its customers. Additionally, IEU-Ohio identified that AEP-Ohio’s right to recover stranded costs was long over and that AEP-Ohio agreed to forgo recovery of stranded generation costs during the market development period pursuant to the stipulation in its ETP case.

On January 11, 2012, the PUCO denied AEP-Ohio’s request for authority to close Sporn Unit 5 and also denied AEP-Ohio’s request that the PUCO authorize the PCCRR such that AEP-Ohio could recover the costs associated with the closure. The PUCO found that closure of Sporn Unit 5 was not subject to PUCO approval because it was beyond its jurisdiction as a competitive retail electric service. Regarding cost recovery under the PCCRR, the PUCO found that although it approved AEP-Ohio’s request for

⁷⁴⁶ The conditions are:

(1) The aggregate amount to be loaned to the Money Pool by OHTCo should not exceed \$50 million at any one time and shall only be loaned to those Money Pool participants who are regulated public utilities or such utilities’ subsidiaries.

(2) If any regulatory agency having jurisdiction over one or more of the participating companies imposes any condition limiting the amount of short-term debt that may be loaned to any participating company in the Money Pool, OHTCo shall inform the Director of the Utilities Department of this Commission within 10 days.

(3) Loans to participating companies made through the Money Pool should be made only to those participating companies that have, or whose direct parent company has, investment grade or higher credit ratings on their senior secured or unsecured debt from at least one nationally recognized rating agency, or in the absence of such rating, investment grade or higher credit ratings on their corporate credit rating. In the event the credit rating of any participating company, or its parent company in the case of an unrated company, falls below investment grade, OHTCo shall inform the Director of the Utilities Department of this Commission in a timely manner.

(4) OHTCo should provide information to the Director of the Utilities Department of the Commission relating to its participation in the Money Pool on a quarterly basis.

⁷⁴⁷ *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, PUCO Case No. 10-1454-EL-RDR, Application (October 1, 2010). The Sporn facility is a 450 MW facility.

authority to come before the PUCO during the term of its first ESP to determine the appropriate treatment for accelerated depreciation and other net early closure costs, nothing in the Order contemplated AEP-Ohio's recovery of early closure costs or approved the legality of such costs, as AEP-Ohio had suggested. Finally, the PUCO found, as IEU-Ohio had argued, that there was no statutory basis to authorize the PCCRR.

The PUCO also found that the proposed PCCRR violated State policy. The PUCO found that the PCCRR would allow AEP-Ohio to recover competitive, generation-related costs through a noncompetitive distribution rate in contravention of Section 4928.02(H), Revised Code, which requires the PUCO avoid authorizing subsidies flowing from a noncompetitive retail electric service to a competitive one.

U. Monongahela Power Litigation Termination Rider Extension Proposal

On December 21, 2010, AEP-Ohio filed an application with the PUCO to extend AEP-Ohio's Monongahela Power Litigation Termination Rider ("Rider LTR") to recover \$4.1 million in Mon Power-related regulatory assets.⁷⁴⁸ Rider LTR was originally approved by the PUCO as part of AEP-Ohio's purchase of the Ohio assets of Mon Power in Case No. 05-765-EL-UNC, and was designed to recover \$10 million paid by AEP-Ohio to Mon Power to compensate MP for terminating certain pending litigation. The PUCO's Order provided that Rider LTR was a temporary rider that was to remain in effect until the amounts authorized by the PUCO had been collected. AEP-Ohio estimated that the initial \$10 million litigation termination charge would be fully recovered in February 2011, and that if its request to recover the additional \$4.1 million of regulatory assets was granted, Rider LTR would remain in effect until approximately October 2012.

AEP-Ohio asked the PUCO to grant its application in time for AEP-Ohio to file a new tariff effective with the first billing cycle of February 2011, to allow for the continuous operation of Rider LTR at its then-current rate of \$0.0001229/kWh. On January 14, 2011, IEU-Ohio filed comments opposing AEP-Ohio's request to continue Rider LTR, inasmuch as the rider was intended to be temporary and expired automatically once AEP-Ohio had recovered the authorized costs. IEU-Ohio also commented that any further discussion of this subject be in a distribution rate case where all revenues and expenses could be considered to determine what if any rate increases might be "just and reasonable".

On February 9, 2011, the PUCO issued an Order denying AEP-Ohio's request to extend Rider LTR for the recovery of the regulatory assets. The PUCO indicated that if CSP wished to pursue recovery it should do so in its next distribution rate case.

V. Market-Based Rates for Customers Returning from Shopping

On February 4, 2011, AEP-Ohio filed an application with the PUCO to establish a new "market-based" rate for returning CRES customers that had elected to avoid the POLR

⁷⁴⁸ *In the Matter of the Application of Columbus Southern Power Company to Extend the Monongahela Power Litigation Termination Rider*, PUCO Case No. 10-3104-EL-RDR (December 21, 2010).

charge.⁷⁴⁹ In the application, AEP-Ohio indicated that the PUCO had authorized it, in its initial ESP proceeding, establishment of a market-based service tariff for shopping customers that return to default generation supply from a CRES provider, where that customer had elected to avoid AEP-Ohio's (now illegal) POLR charge and agreed to pay a market rate upon returning.

On February 18, 2011, IEU-Ohio filed a motion to consolidate this case with other proceedings (including the newly-filed ESP case among others) in order to avoid duplication, achieve process and administrative efficiencies, and recognize the interrelated nature of the cases at issue.

On June 29, 2011, the PUCO issued an Entry permitting comments to be filed on AEP-Ohio's Application. IEU-Ohio filed comments in the case on July 22, 2011, urging the PUCO to find that AEP-Ohio's proposed market-based rate schedules were not reasonable and to set the matter for hearing. IEU-Ohio also urged the PUCO to grant IEU-Ohio's motion to consolidate.

The Stipulation filed in AEP-Ohio's Second ESP proceeding on September 7, 2011 (discussed below) included a provision that shopping customers that waived the (now illegal) POLR charge would be served at the applicable SSO rate, and AEP-Ohio agreed to dismiss this proceeding upon approval of the Stipulation. The PUCO approved the ESP Stipulation with modifications, on December 14, 2011. The provision specifying that retuning customers will be served at the applicable SSO rate was, accordingly, approved and therefore, beginning January 2012, such customers would be served at the applicable SSO or default service rate.

W. AEP-Ohio's Second ESP Proceeding

AEP-Ohio's Second ESP proceeding had three separate phases, each with an ESP proposal that was significantly different. The first phase focused on AEP-Ohio's initial application, which was filed in early 2011 ("Second ESP"). The next phase was the result of a Stipulation that proposed to resolve the issues in the Second ESP proceeding and several other proceedings that were consolidated with the Second ESP proceeding for purposes of considering the Stipulation (the "Stipulation ESP"). The third and final phase was a result of the PUCO ultimately rejecting the Stipulation ESP that it previously approved after finding that the Stipulation ESP it had previously approved over the objections of IEU-Ohio, FES and OCC was, after all, not in the public interest. Once the Stipulation ESP was ultimately rejected, the PUCO allowed AEP-Ohio to partially operate under the rejected Stipulation ESP and allowed AEP-Ohio to file a new ESP application ("Modified ESP"). The three phases of this proceeding are discussed below. In the end and over the objections of every stakeholder but AEP-Ohio, including the PUCO's own Staff, the PUCO substantially approved AEP-Ohio's Modified ESP application on August 8, 2012.

⁷⁴⁹ *Application Not for An Increase in Rates Pursuant to Section 4909.18, Revised Code, Of Ohio Power Company and Columbus Southern Power Company to Establish New Market Based Rate for Returning CRES Customers That Elected to Avoid the POLR Charge*, PUCO Case No. 11-531-EL-ATA, Application (February 4, 2011).

I. Second ESP

On January 27, 2011, AEP-Ohio filed an application to establish an ESP (Second ESP) for the period of January 1, 2012 through May 31, 2014.⁷⁵⁰ The application was filed as a single-company filing anticipating approval of the proposed merger of CSP and OP.⁷⁵¹ In the event the merger had not been approved by the end of the fourth quarter of 2011 or was rejected by the PUCO, AEP-Ohio stated that it would propose alternative generation rates for each EDU in an amended application.⁷⁵² AEP-Ohio's Second ESP application included higher prices for many customers, more riders, many non-bypassable, to negatively affect the ability of customers to shop. The Second ESP application also included provisions for which AEP-Ohio did not provide information to identify the impact on electric bills.

Various intervenors filed testimony in July 2011, which generally opposed the Second ESP application on grounds that the proposed rate increases were not lawful or reasonable and on grounds that the Second ESP application contained proposals for unlawful non-bypassable riders. Shortly after many of these parties filed testimony opposing AEP-Ohio's Second ESP application, these same parties joined a Stipulation and Recommendation recommending the PUCO approve a successor ESP for AEP-Ohio that was described somewhat in the Stipulation and Recommendation.

II. Stipulation ESP

On September 7, 2011, the Stipulation and Recommendation was filed ("Stipulation ESP"). It was signed and supported by AEP-Ohio, the PUCO's Staff, and various stakeholders⁷⁵³ (jointly "Signatory Parties") purporting to settle AEP-Ohio's Second ESP as well as consolidate and settle several outstanding cases, including: AEP-Ohio's merger proceeding,⁷⁵⁴ AEP-Ohio's Emergency Curtailment Service Rider proceeding,⁷⁵⁵ AEP-Ohio's proceeding to increase the compensation its receives for providing capacity service to CRES providers,⁷⁵⁶ and AEP-Ohio's fuel deferral proceeding.⁷⁵⁷ The

⁷⁵⁰ *AEP-Ohio Second ESP Proceeding*, Application (January 27, 2011).

⁷⁵¹ *AEP-Ohio Second ESP Proceeding*, Exhibit 1 of Application at 3 (January 27, 2011).

⁷⁵² *Id.* at 3-4.

⁷⁵³ OEG, Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (jointly "Constellation"), OHA, OMAEG, Kroger, City of Hilliard, Ohio ("Hilliard"), City of Grove City, Ohio ("Grove City"), AICUO, Exelon Generation Company, LLC ("Exelon"), Duke Energy Retail Sales, LLC ("Duke Retail"), AEP Retail Energy Partners LLC ("AEP Retail"), Wal-Mart Stores East, LP and Sam's East, Inc., ("Wal-Mart"), Retail Energy Supply Association ("RESA"), Paulding Wind Farm II LLC ("Paulding"), OEC, Environmental Law and Policy Center ("ELPC"), EnerNoc, Inc. ("EnerNoc"), Natural Resources Defense Council ("NRDC"), and PJM Power Providers Group ("P3").

⁷⁵⁴ *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, PUCO Case No. 10-2376-EL-UNC.

⁷⁵⁵ *In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders*, PUCO Case Nos. 10-343-EL-ATA, *et al.*

⁷⁵⁶ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, PUCO Case No. 10-2929-EL-UNC.

Stipulation ESP also purported to authorize legal corporate separation and AEP-Ohio's transfer of generation assets to an unregulated affiliate; however, at the time the Stipulation ESP was filed AEP-Ohio had not filed a new corporate separation plan in any docket. AEP-Ohio's request to consolidate the corporate separation plan with the consolidated ESP proceeding was denied by the PUCO.

As discussed below, the Stipulation ESP contained multiple parts that, as proposed, increased rates for the SSO customers while restricting customers' ability to shop for alternative electric suppliers. The other matters that were consolidated with the proposed ESP are discussed separately.

I. Stipulation ESP Terms

The Stipulation ESP recommended an ESP beginning January 2012 and extending through May 2016.⁷⁵⁸ The Stipulation ESP eliminated AEP-Ohio's request to create and extend various riders,⁷⁵⁹ recommended an arbitrary increase in base generation rates, established a discount for high load factor customers, created a Market Transition Rider ("MTR") purportedly to mitigate the effect of changed rate design and revenue responsibility, created a new non-bypassable rider to recoup the costs of new generation, created a new rider to recoup the costs associated with securing renewable generation, continued the FAC mechanism, created a rider to recover distribution investments, conditionally established a procedure to set the base generation price through a CBP starting in May 2015 and extending through May 2016, and established a threshold ROE for application of the SEET.

Regarding the base generation increase, the Stipulation ESP recommended automatic annual rate increases to achieve an average base generation rate of \$0.0245/kWh starting in January of 2012, \$0.0257/kWh in January of 2013 and \$0.0272/kWh in January of 2014 to be in effect through May 31, 2015.⁷⁶⁰ Starting June 1, 2015 and continuing through May 31, 2016, a CBP would potentially be relied upon (as opposed to the PUCO's "administratively determined" prices) to establish a default generation service supply price.

The CBP would be for 1% slice-of-the-system tranches with the first auction set to occur on September 1, 2013 for the first 20 tranches, with the second auction on September 1, 2014 for the next 40 tranches, and the final auction for the final 40 tranches being held on January 1, 2015. The Stipulation ESP conditioned this timeframe upon AEP-

⁷⁵⁷ *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, PUCO Case Nos. 11-4920-EL-RDR, *et al.*

⁷⁵⁸ *AEP-Ohio Second ESP Proceeding*, Stipulation at 4 (September 7, 2011).

⁷⁵⁹ AEP-Ohio agreed to drop its proposals for the Facility Cost Closure Recovery Rider ("FCCRR"), the NERC Compliance Cost Recovery Rider, the Carbon Capture and Sequestration Rider, the POLR Rider, the EICCR, and the Rate Security Rider. AEP-Ohio also agreed to drop its proposal to establish a non-bypassable environmental unit conversion/re-dedication structure.

⁷⁶⁰ The base generation rate excludes the FAC and other generation-related riders.

Ohio receiving FERC and/or PUCO approval of corporate separation, generation divestiture, and pool termination (discussed in more detail below). If FERC denied AEP-Ohio's request, AEP-Ohio would be relieved from any obligation to conduct the final two auctions.⁷⁶¹

The Stipulation ESP also significantly modified AEP-Ohio's rate structure and revenue distribution relative to the previously approved rates and also relative to what AEP-Ohio had proposed when it filed its Second ESP Application. AEP-Ohio claimed that the proposed changes would make its rates more market-based while also strenuously resisting the use of a CBP to set default generation supply prices and advancing rate proposals designed to erect a toll booth between customers and any competitive supplier. The Stipulation ESP also created the MTR, a non-bypassable charge that would reduce the impact of the rate changes on some customers and increase it on others. The "fine print" associated with the MTR also included an additional \$24 million in revenue for AEP-Ohio above the base generation charge increases to be collected in 2012.

To "stabilize" the bill impact effects of AEP-Ohio's new rate design, high charges and the MTR, the Stipulation ESP also proposed a load factor provision ("LFP").⁷⁶² The LFP was a non-bypassable demand charge and a non-bypassable energy credit. For GS-3 and GS-4 customers, the Stipulation ESP proposed a non-bypassable demand charge of \$6.57/kW-month and an initial energy credit of \$0.01545/kWh (adjusted quarterly) to produce a net revenue of zero dollars. For GS-2 customers, the Stipulation ESP proposed a non-bypassable demand charge of \$3.29/kW-month and an initial energy credit of \$0.00228/kWh (adjusted quarterly). The Stipulation ESP would have also restricted access to the LFP; it would only apply to customers whose monthly peak demand was less than 250 MW (selectively excluding one large customer). It was later revealed that the only customer whose monthly peak demand was greater than 250 MW was Ormet (which joined the few other parties that opposed the Stipulation ESP).

The Stipulation ESP also proposed a new non-bypassable rider, the Generation Resource Rider ("GRR"), to recover costs associated with the construction of a new solar generating plant (the Turning Point Solar Project) and a new generator at Muskingum River 6 ("MR6"). Under the ESP statute,⁷⁶³ an EDU, such as OP or CSP, may recover costs of constructing new generation that is completely dedicated to its SSO customers if the PUCO first determines that there is a need for new generation and the new generation is procured through a CBP. AEP-Ohio proposed the GRR such that it could seek cost recovery at some time in the future as it had not yet started construction on Turning Point or MR6, established a need for either, or conducted the required CBP.

⁷⁶¹ The Stipulation, however, also included language that would allow the final CBP auctions to move forward if the PUCO determined that AEP-Ohio failed to diligently pursue FERC approval.

⁷⁶² *AEP-Ohio Second ESP Proceeding*, Stipulation at 2 (September 7, 2011).

⁷⁶³ Section 4928.143, Revised Code.

The Stipulation ESP also proposed to establish a Distribution Investment Rider (“DIR”) to recover distribution-related capital expenditures that were incurred post-2000. As proposed, the incremental DIR revenue was capped at \$86 million in 2012, \$104 million in 2013, and \$124 million in 2014 and the first half of 2015. A significant portion of the capital expenditures to be recovered through the DIR overlapped with the capital expenditures that were included in AEP-Ohio’s distribution rate case. The potential double-recovery was addressed in AEP-Ohio’s distribution rate case discussed below.

On December 14, 2011, the PUCO issued its Opinion and Order and found that the Stipulation ESP was less favorable in the aggregate than an MRO.⁷⁶⁴ The PUCO relied on Staff’s testimony, as partially corrected.⁷⁶⁵ To this end, the PUCO found the Stipulation ESP was less favorable by \$325 million and cut the base generation increase in half. With this modification, the PUCO found that the Stipulation ESP, as modified, was slightly more favorable than an MRO by \$42 million.⁷⁶⁶ In all other regards, the PUCO approved the Stipulation ESP. And as IEU-Ohio and others including the PUCO’s own technical Staff had warned, there was a significant negative reaction to the resulting electric bills once they were distributed to AEP-Ohio’s consumers.

II. Entry on Rehearing

Various parties, including IEU-Ohio, AEP-Ohio, FES, Ormet, and OCC, jointly with APJN, filed Applications for Rehearing regarding the ESP portion of the Stipulation ESP. The Applications for Rehearing challenged most of the provisions of the Stipulation ESP approved by the PUCO. As indicated above, the negative public reaction to the rate increases caused by the Stipulation ESP was massive. Thousands of customers and community representatives complained to the PUCO, political representatives, and the press and the Columbus Dispatch reported extensively on the consumer rate shock that occurred as a result of the PUCO’s approval of the Stipulation ESP.

On February 23, 2012, the PUCO issued an Entry on Rehearing reversing its decision approving the Stipulation ESP based on two concerns. First, the PUCO found that there was a fundamental disagreement over the expected treatment of generating assets that were to be divested to a competitive affiliate. While the PUCO anticipated that all assets that were being divested would be bid into the PJM BRAs, AEP-Ohio’s filings with FERC indicated that some assets would not be bid into the BRA. Second,

⁷⁶⁴ *AEP-Ohio Second ESP Proceeding*, Opinion and Order at 31-32 (December 14, 2011).

⁷⁶⁵ All parties that testified regarding the ESP price versus the MRO price concluded that the MRO would be more favorable than the ESP. Staff presented testimony that indicated the ESP was less favorable by \$276 million. FES noted several errors in Staff’s calculations and revised the calculation, which then indicated the ESP was less favorable by \$325 million. Both of these estimates, however, failed to include in their analysis the last 12 months of the ESP. IEU-Ohio noted that during the last year alone the ESP was less favorable by \$389 million, and that over the duration of the entire ESP, the ESP was less favorable by \$714 million. AEP-Ohio also testified that the Stipulation ESP was less favorable, finding that an MRO would be more favorable by \$22 million.

⁷⁶⁶ *Id.* at 32.

the PUCO found that the rate impacts of the Stipulation ESP, particularly for smaller commercial customers, exceeded what had been represented by AEP-Ohio and undermined the evidence that provisions of the Stipulation ESP provided rate stability and certainty. Therefore, the PUCO concluded that the parties supporting the Stipulation ESP had not demonstrated that the Stipulation ESP benefited ratepayers and was in the public interest. The PUCO ordered AEP-Ohio to file new proposed tariffs to continue the provisions, terms, and conditions of the previous ESP (the first ESP) and to make “an appropriate application of capacity charges under the approved state compensation mechanism established in the capacity charge case.” As discussed separately, AEP-Ohio successfully requested that it be authorized to continue the two-tiered capacity pricing contained in the Stipulation ESP with some modifications.

III. Modified ESP

After the PUCO rejected the Stipulation ESP, AEP-Ohio filed an application for a Modified ESP on March 30, 2012. The PUCO modified and approved the Modified ESP on August 8, 2012 over the objections of every stakeholder with the exception of AEP-Ohio. As authorized, the Modified ESP retained existing generation rates at the prior levels, but approved a new non-bypassable rider, the Retail Stability Rider (“RSR”), by which AEP-Ohio will collect \$508 million over the term⁷⁶⁷ of the Modified ESP. As discussed below, the PUCO directed that \$1/MWh of the amount collected under the RSR be applied to the deferral created by the PUCO’s decision in AEP-Ohio’s capacity charge case. If there is any unamortized balance after the Modified ESP has ended, the PUCO authorized AEP-Ohio to collect that balance through another non-bypassable charge over three years.

The PUCO also directed that AEP-Ohio begin an energy-only auction for 10% of its SSO load six months after it receives a corporate separation order based on the PUCO’s unwarranted speculation that an energy-only auction would be beneficial to non-shopping consumers. The energy auction is to increase to 60% of SSO load on June 1, 2014, and 100% commencing January 1, 2015. All capacity and energy is to be procured through a CBP beginning June 1, 2015. Evidence presented during the hearing but unheeded by the PUCO indicated that these energy-only auctions would likely increase, rather than decrease, the overall cost of AEP-Ohio’s default generation supply prices. As discussed above, the generation supply portion of a large, high load factor manufacturer’s total electric bill makes up almost all of the total electric bill. Thus, AEP-Ohio consumers like Ormet are likely to see further increases in their electric bills as a result of the way that the PUCO has bundled the results of an energy-only auction with the balance of the provisions in the Modified ESP.

The PUCO also approved several additional riders that raise electric bills and make them less predictable or stable. These include a DIR to fund the replacement of distribution infrastructure, a Pool Modification Rider (“PMR”) to recover lost revenue associated with the dissolution of the AEP East Pool Agreement if the PUCO modifies

⁷⁶⁷ AEP-Ohio’s Modified ESP extends through May 31, 2015.

AEP-Ohio's application for corporate separation,⁷⁶⁸ and a PIRR to amortize the deferred balance (including the illegally authorized revenue amounts) created by the phase-in authorized in the ESP case. The PUCO reauthorized the FAC, Alternative Energy Rider, TCRR, the ESRR, the EE/PDR Rider, gridSMART Rider, and the EDR. It also authorized a storm damage recovery mechanism to permit AEP-Ohio to defer any incremental distribution expenses above or below \$5 million per year and permitted AEP-Ohio to file a new application to seek to recover costs due to one or more unexpected large scale storms. The PUCO permitted AEP-Ohio to eliminate its Rider Emergency Curtailable Services and Rider Price Curtailable Service.

IEU-Ohio, FES, OCC, and others filed Applications for Rehearing. The PUCO granted rehearing for further consideration on October 3, 2012. On January 30, 2013 the PUCO denied most assignments of errors raised by the parties in the pending Applications for Rehearing, but granted rehearing on a few issues.

The PUCO granted FES' application for rehearing and held that AEP-Ohio must eliminate its current 90-day shopping notice and 12-month minimum stay requirements that apply to certain large industrial customers. The PUCO held that waiting to remove these provisions until January 2015 was too restrictive, and instead directed AEP-Ohio to remove the restrictions effective January 1, 2014. The PUCO also granted rehearing to add an additional statutory basis for its approval of the Pool Termination Rider ("PTR"). The PUCO found that Section 4928.143, Revised Code, also supported this provision.

The PUCO clarified that in the 12% threshold it established for the SEET, the PUCO would include the entire \$188.88/megawatt-day ("MW-day") capacity charge. The PUCO also clarified that June 2013 was not a hard date for when AEP-Ohio's FAC would be merged between the CSP and OP rate zones. The PUCO also clarified that only the RSR, DIR, PTR, and GRR would be counted for purposes of the 12% individual bill rate increase cap thereby making the 12% increase limiter less of a limiter. Finally, the PUCO clarified that consistent with its decision in Case No. 12-1126-EL-UNC regarding AEP-Ohio's corporate separation plan, AEP-Ohio would have to hold harmless its customers from any effects associated with leaving certain liabilities on AEP-Ohio's books after it transfers the related generation assets to its affiliate.

X. CSP and OP Merger

On October 18, 2010, AEP-Ohio filed an application to merge CSP and OP into a single operating company.⁷⁶⁹ This case was eventually consolidated with AEP-Ohio's Second ESP proceeding as part of the Stipulation ESP, which proposed a settlement of various cases.

⁷⁶⁸ The Pool Modification Rider is set to zero and AEP-Ohio must file a separate application to demonstrate the extent to which the Pool Agreement benefitted Ohio ratepayers and the amount of revenue that should be allocated to Ohio ratepayers.

⁷⁶⁹ *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company For Authority to Merge and Related Approvals*, PUCO Case No. 10-2376-EL-UNC, Application (October 18, 2010).

On December 14, 2011, the PUCO approved the merger as part of its decision regarding the ESP Stipulation. The PUCO noted that no party had substantively challenged the merger and found that the merger would not adversely affect any customer class of CSP or OP.⁷⁷⁰

Because the PUCO rejected the Stipulation ESP in February 2012, the PUCO separately addressed the merger application. On March 7, 2012, the PUCO issued an order approving the merger with an effective date of December 31, 2011. The PUCO found that it had continuing jurisdiction of the retail rates of the merged company, and directed that an audit be conducted of the savings, costs and benefits of the merger. The PUCO also held that the SEET review for AEP-Ohio's 2011 earnings would be done on separately for CSP and OP wherever it is done. No party requested rehearing of the order.

Y. Capacity Charges

On November 24, 2010, AEP-Ohio filed an application at FERC that sought approval from FERC to change the capacity prices charged to CRES providers under the Fixed Resource Requirement ("FRR") Alternative option of PJM's RAA.⁷⁷¹ AEP-Ohio proposed that CRES providers pay for capacity based on a so-called cost-based formula which would have significantly increased capacity prices and, on a practical level, greatly inhibited shopping.

After AEP-Ohio filed its FERC application, the PUCO opened a proceeding to address the state compensation mechanism, an alternative means under the FRR Alternative to set capacity prices. On December 8, 2010, the PUCO adopted the capacity costs established through the RPM auction process (the "RPM-Based Price" or "RPM-Based Pricing") as the state compensation mechanism.

On January 20, 2011, following the PUCO's decision, FERC rejected AEP's proposal.⁷⁷² FERC noted that the RAA⁷⁷³ provides that a state's "compensation mechanism will prevail" over alternative pricing methods with regard to the pricing of capacity for load serving entities ("LSE") (which in Ohio are referred to as CRES providers).⁷⁷⁴ Because the PUCO confirmed the use of the RPM auction process to set the price under the state compensation mechanism,⁷⁷⁵ the FERC Order stated that AEP was not permitted to submit its proposed formula for collecting capacity costs.⁷⁷⁶

⁷⁷⁰ *AEP-Ohio Second ESP Proceeding*, Opinion and Order at 56 (December 14, 2011).

⁷⁷¹ See FERC Docket ER11-2183 (hereinafter, "*AEP-Ohio FERC Capacity Charges Proceeding*").

⁷⁷² *AEP-Ohio FERC Capacity Charges Proceeding*, Order (January 20, 2011).

⁷⁷³ The RAA is a rate schedule that is one method of recouping capacity obligations. The alternative method to recouping costs associated with capacity obligations is through the Reliability Pricing Model auction process.

⁷⁷⁴ *AEP-Ohio FERC Capacity Charges Proceeding*, Order at 4 (January 20, 2011).

⁷⁷⁵ *AEP-Ohio FERC Capacity Charges Proceeding*, Comments of the PUCO (December 8, 2010); *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus*

In the capacity proceeding that was ongoing at the PUCO, the Commission also requested public comment on: (1) what changes to the current state mechanism would be appropriate to determine AEP's FRR capacity charges to Ohio CRES providers; (2) the degree to which AEP's capacity charges were being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP's capacity charges upon CRES providers and retail competition in Ohio.⁷⁷⁷ Comments and reply comments were filed by various parties.

On September 14, 2011, the PUCO's capacity proceeding was consolidated with AEP-Ohio's Second ESP proceeding. Through the Stipulation ESP filed in the consolidated proceeding, AEP-Ohio proposed to establish a two-tiered approach to the state compensation mechanism. The first tier applied to shopping customers under AEP-Ohio's shopping caps. Customers under the shopping caps would have access to capacity at RPM prices. The shopping caps were proposed to be 21% for 2012, 29% for 2013 (31% if AEP-Ohio was able to securitize the PIRR before or during 2013), and 41% for 2014 and the first five months of 2015. The Stipulation ESP proposed that the caps would be first allocated based on customer class. Starting on January 1, 2012, any unallocated capacity was proposed to be applied on a first-come, first-served basis regardless of customer class. CRES providers of shopping customers who did not receive capacity at the RPM price would be charged \$255/MW-day.

Following the hearing on the Stipulation ESP, the PUCO authorized the two-tiered capacity structure including the \$255/MW-day charge. The PUCO determined that the \$255/MW-day charge was a reasonable amount given the evidence presented in the case and given that it resolved pending litigation at FERC. Although the PUCO approved the structure and rate, it modified the Stipulation ESP to address two issues.

First, the PUCO was concerned that the shopping caps would prevent governmental aggregation programs from accessing tier one RPM capacity prices. The PUCO noted that many communities had recently approved governmental aggregation programs and without a modification to the Stipulation ESP they could not benefit from RPM-priced capacity. The PUCO also modified the Stipulation ESP to ensure that unallocated capacity from each customer class would not be applied to other customer classes.⁷⁷⁸

On December 29, 2011, AEP-Ohio filed a revised Detailed Implementation Plan ("DIP"), claiming that it reflected the PUCO's approval of the two-tiered capacity structure and shopping caps. AEP-Ohio, however, sought to implement the PUCO's order such that only governmental aggregation programs approved in the November 2011 elections were not subject to the shopping caps. Additionally, AEP-Ohio sought to exclude

Southern Power Company, PUCO Case No. 10-2929-EL-UNC, Entry (December 8, 2010) (hereinafter "*AEP-Ohio PUCO Capacity Charges Proceeding*").

⁷⁷⁶ *AEP-Ohio FERC Capacity Charges Proceeding*, Order at 5 (January 20, 2011).

⁷⁷⁷ *AEP-Ohio PUCO Capacity Charges Proceeding*, Entry at 1 (December 8, 2010).

⁷⁷⁸ The Stipulation ESP had proposed to allocate any unused RPM-priced capacity to over-subscribed classes as of January 1, 2012.

mercantile customers from participating in the aggregation programs. IEU-Ohio and FES challenged AEP-Ohio's restrictive interpretation.

On January 23, 2012, the PUCO issued an Entry clarifying its December 14, 2011 Order. The January 23, 2012 Entry stated that: (1) all governmental aggregation that was approved on or before the November 2011 elections was eligible for RPM capacity if they took the necessary steps by December 2012, *i.e.*, begin taking service; (2) the governmental aggregation capacity was not subject to the shopping caps; and (3) mercantile customers were allowed to participate in governmental aggregation programs.

AEP-Ohio filed a procedural motion to avoid filing a second revised DIP in accordance with the PUCO's January 23, 2012 Entry while the PUCO considered Applications for Rehearing. On February 3, 2012, the PUCO granted AEP-Ohio's procedural request over the objections of IEU-Ohio, OCC, and FES. The PUCO, however, found that AEP-Ohio had to update and file a completely revised DIP at the earlier of seven days from the PUCO's decision on rehearing or March 14, 2012.

Applications for Rehearing were filed by IEU-Ohio and FES challenging the two-tiered capacity structure and the lawfulness of the \$255/MW-day charge. AEP-Ohio also filed an Application for Rehearing challenging the PUCO's modification to the shopping caps. As discussed above, the PUCO eventually reversed its approval of the Stipulation ESP purporting to resolve AEP-Ohio's capacity charges, and this case then proceeded separately from the other cases. On March 23, 2012, AEP-Ohio updated the testimony it had originally filed in August 2011 and the case moved forward to an evidentiary hearing, which took place in April 2012.

In the meantime, AEP-Ohio filed several motions seeking to keep in place the two-tiered capacity pricing scheme that was first proposed in the then-rejected Stipulation ESP. Despite the fact that this proceeding was consolidated with AEP-Ohio's Second ESP proceeding for the sole purpose of considering the Stipulation ESP, the PUCO held that the record from the hearing on the Stipulation ESP could be used to support AEP-Ohio's two-tiered pricing scheme on an independent basis. To that end, on March 30, 2012, the PUCO authorized AEP-Ohio to continue billing CRES providers based upon the two-tiered pricing scheme. The PUCO held that its authorization was only temporary and would expire on May 31, 2012. However, on May 30, 2012, the PUCO granted a second motion of AEP-Ohio to increase and extend the two-tiered charges. The PUCO authorized AEP-Ohio to increase the first tier from RPM-Based Pricing, which was set to decrease from \$146 to roughly \$20/MW-day on June 1, 2012, to a constant and arbitrary \$146/MW-day. The second tier remained at the arbitrarily set \$255/MW-day. The two-tiered pricing scheme continued until August 8, 2012.

On July 2, 2012, the PUCO issued its Opinion and Order in the case and invented and applied a cost-based ratemaking methodology to increase the compensation AEP-Ohio received for generation-related capacity service. The PUCO's decision relied upon its Staff's version of a so-called "cost-based" approach to establishing capacity charges even though the Staff recommended that the PUCO stay with market-based pricing. Under the Staff's version of this approach, it began with AEP-Ohio's proposed formula

rate before it made its own modifications. The result of the PUCO's order was to increase AEP-Ohio's compensation from the price established by PJM's RPM (the default pricing mechanism under the RAA) to \$188.88/MW-day. As mentioned above the RPM-Based Price was roughly \$20/MW-day for the timeframe of June 2012 through May 2013. The PUCO, however, only authorized AEP-Ohio to bill CRES providers the RPM-Based Price and directed AEP-Ohio to defer for future collection the difference between the RPM-Based Price and \$188.88/MW-day. The PUCO authorized AEP-Ohio to add carrying charges to the deferred amount of the capacity compensation at AEP-Ohio's embedded cost of long-term debt, roughly 5.34% (a debt rate much higher than the then-current cost of long-term debt in capital markets). The significantly higher price for capacity will be in place through May 31, 2015, at which time AEP-Ohio will begin participating in the RPM auctions and will receive compensation at the RPM-Based Price.

As mentioned above, the PUCO authorized AEP-Ohio to collect part of the deferred capacity-related revenue through the non-bypassable RSR. Specifically, the PUCO directed AEP-Ohio to credit \$1/MWh collected through the RSR to amortize the amount of the capacity compensation that is deferred for future collection. The PUCO then authorized AEP-Ohio to collect any deferral that remained at the expiration of AEP-Ohio's Modified ESP (set to expire on May 31, 2015) through additional non-bypassable charges that will become effective after the Second ESP expires.

Various parties, including IEU-Ohio, FES, OCC, and AEP-Ohio, filed Applications for Rehearing challenging the lawfulness and reasonableness of the PUCO's decision. These parties identified numerous unlawful and unreasonable aspects of the PUCO's decision, but focused on several themes. More specifically, they claimed that the PUCO lacked authority to regulate competitive retail electric services such as generation supply outside of Chapter 4928, Revised Code (which generally limits the PUCO's regulatory authority to establish the default SSO rates for non-shopping customers). The intervenors also argued AEP-Ohio was prohibited under Ohio law from charging above-market rates for competitive retail electric services. Parties also argued that AEP-Ohio was barred by a previous PUCO-approved stipulation from imposing transition charges (also known as "stranded costs") on shopping customers. Finally, parties argued that the PUCO lacked jurisdiction to regulate wholesale transactions under Chapter 4905, Revised Code. AEP-Ohio argued that the PUCO and its Staff had made unreasonable adjustments to its formula rate, and claimed that its actual cost of capacity was greater than \$188.88/MW-day.

On October 17, 2012, the PUCO issued its Entry on Rehearing and denied all assignments of errors raised by the parties in their various Applications for Rehearing. The PUCO's Entry on Rehearing, however, clarified two issues. First, the PUCO claimed that an additional jurisdictional ground, Section 4905.26, Revised Code, provided the PUCO with authority to establish the level of compensation AEP-Ohio receives for providing generation capacity service to CRES providers. Second, the PUCO held that the result it was approving for AEP-Ohio was limited to the unique circumstances AEP-Ohio faced (a holding that has not done anything to discourage DP&L and Duke from asking the PUCO to give them what the PUCO gave AEP-Ohio).

Additional Applications for Rehearing were filed regarding the PUCO's two clarifications. The PUCO denied these Applications for Rehearing on December 12, 2012.

On December 14, 2012, IEU-Ohio appealed the PUCO's decision to the Ohio Supreme Court.⁷⁷⁹ Subsequent to IEU-Ohio's appeal, OCC filed an additional Application for Rehearing challenging the rationale the PUCO used to support its December 12, 2012 Entry on Rehearing. On January 30, 2013, the PUCO denied OCC's application for rehearing holding it was procedurally improper because OCC had already raised all of the issues contained in the application for rehearing and the PUCO had already denied those assignments of error.

Z. Fuel Deferrals & the Phase-In Recovery Rider

On September 1, 2011, AEP-Ohio filed an application to implement a cost recovery mechanism to begin collecting its deferrals that resulted from its first ESP proceeding.⁷⁸⁰ The application was consolidated into the Stipulation ESP filed in AEP-Ohio's Second ESP proceeding on September 16, 2011. The Stipulation ESP provided that collection of the deferrals would begin on January 1, 2012. Also beginning on January 1, 2012, the Stipulation ESP proposed to reduce the carrying charges on the deferral balance to a long-term debt rate of 5.34% instead of the higher WACC rate that it had been previously authorized. The Stipulation ESP also deferred collection of the PIRR from residential customers until 2013. Finally, the Stipulation ESP required AEP-Ohio and the other Signatory Parties to pursue securitization legislation (discussed below).

In the December 14, 2011 Order, the PUCO rejected arguments raised by IEU-Ohio (regarding the proper carrying charges and proper balance to apply the carrying charges to) and adopted this part of the Stipulation ESP without modification.⁷⁸¹ The PUCO, however, emphasized that prior to securitization of the PIRR, if the PUCO or the Ohio Supreme Court issued a decision that impacted the balance of the deferrals, AEP-Ohio would be required to appropriately adjust the balance on its books. On February 23, 2012, the PUCO rejected the Stipulation ESP and the PUCO directed interested parties to file comments regarding AEP-Ohio's September 1, 2011 application.

Various parties filed comments arguing that the PUCO should reduce the carrying charges on the deferral balance to a long-term debt rate. IEU-Ohio also suggested AEP-Ohio's embedded cost of long-term debt (roughly 5.34%) was too high a rate for the carrying charges because the then-current cost of long-term debt in capital markets was around 3%. Parties also argued that AEP-Ohio should reduce the deferral balance to account for tax savings AEP-Ohio had received.

⁷⁷⁹ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Co. and Columbus Southern Power Co.*, Ohio Supreme Court Case No. 2012-2098.

⁷⁸⁰ *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144*, PUCO Case Nos. 11-4920-EL-RDR, *et al*, Application (September 1, 2011).

⁷⁸¹ *AEP-Ohio Second ESP Proceeding*, Opinion and Order at 57-59 (December 14, 2011!).

On August 1, 2012, the PUCO modified and approved AEP-Ohio's application based on the comments that had been filed in the proceeding. The PUCO directed AEP-Ohio to reduce the going-forward carrying charges from a WACC rate of roughly 11% to AEP-Ohio's embedded cost of long-term debt. The PUCO rejected the arguments that the deferral balance needed to be adjusted for the tax savings AEP-Ohio had received (although one week later the PUCO issued its decision regarding AEP-Ohio's Modified ESP and directed AEP-Ohio to reduce the amount it collected through the DIR to account for these same tax savings AEP-Ohio was receiving). The PUCO also clarified that the merger of CSP into OP would not affect the recovery of ESP deferrals. To that end, the PUCO held that any deferral related to CSP's ESP rates would be collected from the customers who were served by CSP, and deferrals related to OP's ESP rates would only be collected from the customers who took service from OP prior to the merger. AEP-Ohio's compliance tariff filing subsequent to the PUCO's order indicated that in total AEP-Ohio would collect \$703 million through the PIRR.

The PUCO's decision was appealed by IEU-Ohio, OCC and AEP-Ohio.⁷⁸² The appeal is currently in the briefing stage.

AA. Corporate Separation and Generation Transfer

Although corporate separation and generation divestiture were included as terms in the September 7, 2011 ESP, AEP-Ohio had not yet filed a revised corporate separation plan. In an attempt to remedy this problem, AEP-Ohio filed an application to modify its corporate separation plan on September 30, 2011, several days before the hearing was set to begin on the Stipulation ESP.⁷⁸³ At the start of the hearing on the Stipulation ESP, however, the Attorney Examiner denied AEP-Ohio's motion to consolidate the corporate separation application with the consolidated ESP proceeding.

The PUCO conditionally authorized AEP-Ohio to divest its generation in its Order in the Second ESP proceeding, subject to PUCO approval of the amendment to the corporate separation plan. The PUCO also directed AEP-Ohio to notify PJM that AEP-Ohio intended to enter PJM's auction for the 2015-2016 delivery year.

Interested parties, including IEU-Ohio, FES, and OCC, filed comments in the corporate separation docket. The intervening parties' comments generally focused on the lack of detail in AEP-Ohio's application as well as AEP-Ohio's failure to comply with PUCO's rules that require the disclosure of certain information in conjunction with generation divestiture. These parties also expressed concerns regarding the impact that generation divestiture would have on pool modification and the associated costs that AEP-Ohio might try to pass on to customers. Staff also filed comments that generally supported AEP-Ohio's application; however, Staff requested that AEP-Ohio supplement the application with additional information required by PUCO rules and that AEP-Ohio

⁷⁸² *In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Ohio Supreme Court Case No. 2012-2008.

⁷⁸³ *In the Matter of the Application of Ohio Power Company for Approval of An Amendment to Its Corporate Separation Plan*, PUCO Case No. 11-5333-EL-UNC, Application (September 30, 2011).

be directed to collaborate with Staff as AEP-Ohio proceeded with efforts to secure corporate separation and pool modification at FERC.

On January 24, 2012, the PUCO approved AEP-Ohio's application to amend its corporate separation plan subject to several conditions. First, the PUCO directed that Staff or an independent auditor would conduct an audit of the generation divestiture to ensure AEP-Ohio complied with the terms of the Stipulation ESP, as well as the Ohio Revised Code. Second, the PUCO required AEP-Ohio to provide Staff with access to information needed to conduct its audit. Third, the PUCO prohibited AEP-Ohio from seeking to recover generation-related costs associated with implementing corporate separation from customers (a condition AEP-Ohio agreed to as part of the Stipulation ESP).

Finally, the PUCO prohibited OP from providing any loan guarantees for the generating assets once the assets are transferred to an affiliate company. However, the PUCO held that contractual obligations arising before its Order were "permitted to remain with OP, without prior Commission approval, for the remaining period of the contract, but only the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities." The significance of this last condition is that while the generation assets themselves will be transferred to AEP-Ohio's affiliated generation company, it is possible that the liabilities associated with the assets will remain on the books of OP.

Having received the PUCO's approval to move forward with corporate separation, AEP-Ohio was still required to receive additional regulatory authority. The next step for AEP-Ohio was to secure FERC approval for corporate separation. On February 10, 2012, AEP filed an application at FERC seeking authority for corporate separation. On February 23, 2012, however, the PUCO rejected the Stipulation ESP, revoking AEP-Ohio's authority to proceed with corporate separation. In response, AEP withdrew its state and federal applications for approval of corporate separation.

On March 30, 2012, AEP-Ohio filed a new application for approval of full legal corporate separation and amendment to its corporate separation plan ("Corporate Separation Application").⁷⁸⁴ The Corporate Separation Application requested a waiver of the requirement to state the market value of its generating assets and it requested authority to transfer the generating assets to AEP-Ohio Generation Resources ("Genco") at net book value. The Corporate Separation Application also requested authority for AEP-Ohio to enter into a purchase power contract ("SSO Contract") so that Genco could supply AEP-Ohio's SSO requirements after corporate separation took place. The Corporate Separation Application also requested authority to pass through to Genco generation-related revenue as well as "transition revenue" collected by AEP-Ohio through non-bypassable charges authorized by the PUCO in the Second ESP decision.

⁷⁸⁴ *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, PUCO Case No. 12-1126-EL-UNC, Application (March 30, 2012).

IEU-Ohio requested that the PUCO dismiss the Corporate Separation Application, claiming that it failed to provide the necessary information, and where information had been provided it failed to comply with the statutory requirements and the PUCO's rules.

On October 17, 2012, the PUCO approved AEP-Ohio's Corporate Separation Application, as well as AEP-Ohio's request for a waiver of the requirement to file the market value of its generating assets. With respect to the value to be assigned to the generating assets upon transfer, the PUCO authorized AEP-Ohio to transfer its generating assets to Genco at net book value. The PUCO also authorized AEP-Ohio to enter into an SSO Contract so that Genco could supply AEP-Ohio's SSO requirements after corporate separation took place. The PUCO also authorized AEP-Ohio to pass through to Genco generation-related revenue as well as "transition revenue" collected by AEP-Ohio through non-bypassable charges authorized by the PUCO in the Second ESP decision.

IEU-Ohio filed an Application for Rehearing, claiming that it was unlawful and unreasonable for the PUCO to authorize AEP-Ohio to collect transition revenue in AEP-Ohio's ESP without netting the above-book market value of the assets against the amount of above-market revenue which AEP-Ohio could collect through various non-bypassable charges. IEU-Ohio also argued that the PUCO order was unlawful and unreasonable because the SSO Contract approved by the order violates Ohio laws pertaining to corporate separation. Similarly, OCC filed an Application for Rehearing, claiming that the PUCO's order was unlawful and unreasonable for authorizing AEP-Ohio to transfer its generating assets at net book value rather than market value. On December 12, 2012, the PUCO granted the Applications for Rehearing for further consideration of the matters specified in the Applications for Rehearing.

On October 31, 2012, AEP Service Corporation ("AEPSC") filed 12 applications at FERC, two of which are directly related to AEP-Ohio and the PUCO's decisions in the Modified ESP, capacity charge, and corporate separation cases.

The first application proposes to transfer all 15 of AEP-Ohio's generation facilities to Genco.⁷⁸⁵ The application will result in the transfer of a total about 11,700 MW and includes AEP-Ohio's interest in the following facilities: Cardinal, Conesville, Darby, Gen. J.M. Gavin, J.M. Stuart, John E. Amos, Kammer, Mitchell, Muskingum River, Philip Sporn, Picway, Racine, W.C. Beckjord, Waterford, and William H. Zimmer. The application states that the transfer of these facilities will close on or about December 31, 2013. (Through a separate application, AEPSC is seeking to transfer the Amos and Mitchell facilities to Kentucky Power Company and Appalachian Power Company.)

The second application seeks approval of a Power Supply Agreement ("PSA") between Genco and AEP-Ohio. The PSA would lock AEP-Ohio into purchasing its full requirements from Genco for the first 17 months after the date on which AEP-Ohio would transfer its generation assets to Genco, *i.e.*, from January 1, 2014 to May 31,

⁷⁸⁵ *Ohio Power Company*, FERC Docket No. EC13-26-000.

2015.⁷⁸⁶ The stated purpose of the PSA is to enable AEP-Ohio to serve the energy requirements of its SSO customers (i.e., those customers that are not served by CRES providers or through PUCO-approved competitive bid for a portion of the SSO energy requirements), as well as AEP-Ohio's capacity commitments under its FRR obligations for both SSO customers and those retail customers that choose to be served by CRES providers (non-SSO customers).⁷⁸⁷

In return, AEP-Ohio would pay a capacity charge for the capacity supplied for non-SSO customers, which is defined as the product of \$188.88/MW-day and the megawatts of capacity provided each day during a month for shopping load. The remainder of the monthly charges would include a generation charge, the PUCO-approved RSR charges less \$1/MWh, a fuel charge, and PJM charges and credits. The generation charge is equal to the sum of the generation components billed or accrued to SSO customers during a month based on generation rates contained in the base generation tariffs of AEP-Ohio's retail SSO rates.

IEU-Ohio and OCC challenged both applications on the basis that they do not satisfy requirements of federal law. At the time this summary was prepared, FERC had not ruled on the applications.

BB. Pool Modification

As part of the Stipulation ESP, AEP-Ohio was authorized to request recovery of some of the costs associated with the termination or modification of its pooling agreement with other AEP-Ohio affiliated companies through the PMR.⁷⁸⁸ AEP-Ohio argued that the pool must be modified or terminated before AEP-Ohio could participate in the CBP auctions that were set to occur for the 2015-2016 delivery period.⁷⁸⁹

Over objections, the PUCO approved a modified PMR in its December 14, 2011 Opinion and Order. The Stipulation ESP, as written, would have allowed AEP-Ohio to recoup pool modification or termination costs if the total impact exceeded \$50 million, and if that occurred, AEP-Ohio would then be able to recover all of its costs, inclusive of the \$50 million threshold. The PUCO modified the Stipulation ESP to allow AEP-Ohio the opportunity to request recovery of only the amount in excess of the \$50 million threshold. The PUCO also found that it was not authorizing cost recovery at that point in time, instead: (1) AEP-Ohio would have to meet its burden of proof set forth in Section 4928.143, Revised Code, when it filed for cost recovery in a future proceeding; (2) AEP-Ohio would have to demonstrate the extent that pool modification or termination benefited ratepayers; and (3) AEP-Ohio would have to demonstrate the

⁷⁸⁶ *AEP Generation Resources Inc.*, Docket No. ER13-232-000, Letter from John C. Crespo to Secretary Kimberly Bose at 1-2 (November 1, 2012) (hereinafter, "Transmittal Letter").

⁷⁸⁷ *Id.* at 1-2.

⁷⁸⁸ *Id.* at 49-50.

⁷⁸⁹ *Id.* at 49.

extent that pool modification or termination costs should be allocated to Ohio ratepayers.⁷⁹⁰

IEU-Ohio, OCC, and FES filed Applications for Rehearing regarding the PMR arguing that the rider could not be authorized pursuant to Section 4928.143, Revised Code, and the costs associated with the rider had to be addressed in the ESP versus MRO test. The authorization for the PMR was reversed when the PUCO rejected the Stipulation ESP in February 2012.

As part of AEP-Ohio's Modified ESP, AEP-Ohio again requested a PMR. This time, however, AEP-Ohio conditioned its request on the PUCO approving its corporate separation plan without modification. The PUCO ultimately authorized the PMR, but held that before AEP-Ohio could recover any costs through the rider it would have to demonstrate the extent to which the Pool Agreement benefited Ohio customers over the long-term and the extent to which the costs and revenues associated with pool termination should be allocated to Ohio customers.

CC. Distribution Rate Increase

On January 27, 2011, AEP-Ohio filed a notice with the PUCO stating that AEP-Ohio planned to file an application seeking an increase in distribution rates and filed the application to increase distribution rates on February 28, 2011.⁷⁹¹ AEP-Ohio's distribution rates had not been adjusted since its last distribution rate cases, which occurred in 1991 for CSP, and 1994 for OP.

In its application, AEP-Ohio sought an increase of \$34 million in base distribution revenue for CSP and \$59 million for OP.⁷⁹² Following AEP-Ohio's filing, Staff conducted a review of AEP-Ohio's application and issued its Staff Reports of Investigation for CSP and OP. In its Staff Reports, Staff recommended a revenue requirement range for both CSP and OP. For CSP, Staff recommended a new revenue requirement range of \$354-\$361 million, which translated to a decrease of \$2.3-\$9.5 million from the then-current distribution rates. For OP, Staff recommended a revenue requirement range of \$360-\$369 million, or a \$23.2-\$31.9 million increase from the then-current distribution rates.

In its application, AEP-Ohio also proposed adjusting each customer class' allocation of revenue responsibility based on cost-causation principles. The Staff Reports accepted this proposal for the most part; however, Staff proposed slight modifications that would have more gradually adjusted rates. AEP-Ohio also proposed a modification to residential rate design. AEP-Ohio had proposed increasing the fixed monthly residential

⁷⁹⁰ *AEP-Ohio Second ESP Proceeding*, Opinion and Order at 50 (December 14, 2011).

⁷⁹¹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP-Ohio) for an Increase in Electric Distribution Rates*, PUCO Case Nos. 11-351-EL-AIR *et al.*, Application (February 28, 2011) (hereinafter, "AEP-Ohio Distribution Rate Increase Proceeding").

⁷⁹² *AEP-Ohio Distribution Rate Increase Proceeding*, CSP Staff Report at 67; OP Staff Report at 68 (September 15, 2011).

customer charges and decreasing the variable volumetric kWh charges.⁷⁹³ Staff supported this modification and noted that most distribution costs are fixed and do not vary with usage and therefore the modification was appropriate. Finally, the application sought PUCO approval to implement a Deferred Asset Recovery Rider (“DARR”) to recover previously authorized distribution deferrals.

Various parties, including AEP-Ohio, OCC, IEU-Ohio, ODOD, and OHA filed objections to the Staff Reports on October 17, 2011. Ultimately, a settlement was reached in the proceeding and a Stipulation was filed on November 23, 2011.

The Stipulation recommended that AEP-Ohio maintain its base distribution revenue requirement at its then-current level in recognition of the distribution revenues AEP-Ohio would be collecting through the DIR established in AEP-Ohio’s Second ESP proceeding. AEP-Ohio estimated that the double-recovery of distribution revenues through the DIR was approximately \$63 million. In addition to off-setting any increase in AEP-Ohio’s revenue requirement, the Stipulation recommended AEP-Ohio credit residential customers’ bills \$14.7 million annually (through May 31, 2015—the expiration date of the DIR), and credit \$1 million annually to the Partnership with Ohio (“PWO”) Fund (through May 31, 2015).

The Stipulation also recommended that the PUCO adopt AEP-Ohio’s proposed revenue responsibility reallocation for commercial and industrial customers; residential customers’ revenue responsibility would remain the same pursuant to the Stipulation. Further, the Stipulation proposed that residential rate design would remain unchanged (as opposed to the recommendations in AEP-Ohio’s application and Staff Reports). AEP-Ohio further agreed that it would initiate a three-year decoupling rider pilot program to address the potential for lost distribution revenue. Finally, the Stipulation recommended approval of the DARR with carrying charges set at a long-term debt rate of 5.34% and an amortization period of seven years.

On December 14, 2011, the PUCO approved the Stipulation with one modification that it further clarified in a subsequent Entry on December 15, 2011. The modification addressed residential rate design, and required AEP-Ohio to implement the residential rate design recommended in the Staff Reports following the end of the three-year decoupling pilot program.

AEP-Ohio and OCC filed Applications for Rehearing regarding the PUCO’s modification, which the PUCO subsequently denied.

DD. Securitization of the DARR

On July 31, 2012, AEP-Ohio filed an application to securitize the DARR.⁷⁹⁴ At the time AEP-Ohio filed the application, it had a deferred balance of \$291 million that was being

⁷⁹³ *Id.* at 34-36.

⁷⁹⁴ *In the Matter of the Application of Ohio Power Company for Authority to Issue Phase-In-Recovery Bonds and Impose, Charge and Collect Phase-In-Recovery Charges and For Tariff and Bill Format Changes*, Case No. 12-1969-EL-ATS, Application (July 31, 2012).

collected through the DARR. AEP-Ohio estimates that customers will save between \$12 million and \$20 million if the deferred balance is securitized.⁷⁹⁵ AEP-Ohio's application is currently pending.

EE. Long-Term Forecast Proceeding

On April 15, 2010, AEP-Ohio filed its long-term forecast report ("LTFR") pursuant to Section 4935.04, Revised Code.⁷⁹⁶ LTFRs are designed to present the PUCO with the information needed to address and review the State's long-term energy and capacity needs. On December 20, 2010, AEP-Ohio supplemented its LTFR to include information pertaining to the Turning Point Solar project. On July 22, 2011, AEP-Ohio requested that a procedural schedule be established in the docket such that it could move forward on its attempt to demonstrate a need for the Turning Point Solar project. AEP-Ohio claimed that the solar project was needed in order for it to comply with the State's EE/PDR requirements, specifically, the solar energy component. A finding of need is one of several conditions that must be satisfied before an EDU can obtain a non-bypassable surcharge under Section 4928.143(B)(2)(c), Revised Code.

On November 21, 2011, AEP-Ohio and Staff entered into a Stipulation in the proceeding and recommended the PUCO find a need for the Turning Point Solar project for purposes of satisfying the solar portfolio mandate contained in Section 4928.64, Revised Code. AEP-Ohio and the PUCO Staff teamed up in this Stipulation to use the PUCO's rather obscure LTFR process to try to bridge around the requirement that the need determination be made in an ESP proceeding and to build a foundation for yet another non-bypassable charge. A hearing was held on March 28, 2012 about two years after AEP-Ohio filed its LTFR. During the hearing, the PUCO's Staff and AEP-Ohio's witnesses claimed that absent constructing Turning Point, by 2015, there will be insufficient SRECs available for all EDUs and CRES providers to satisfy the benchmark requirements contained in Section 4928.64, Revised Code. IEU-Ohio and FES argued that the PUCO could not make the finding of need required to set up a non-bypassable charge in an LTFR proceeding, that AEP-Ohio had failed to demonstrate either on an EDU-specific or statewide basis that additional SRECs were needed to comply with the benchmark requirements contained in Section 4928.64, Revised Code, and that a finding of need for Turning Point would be unlawful and unreasonable because Section 4928.64(E), Revised Code, prohibits collecting the cost of compliance with renewable energy requirements through non-bypassable charges.

On January 9, 2013, the PUCO issued an Opinion and Order rejecting the Turning Point provision in the Stipulation. The PUCO determined that it was appropriate to address issues pertaining to a finding of need in an LTFR proceeding, but that AEP-Ohio had not met its burden. The PUCO held that AEP-Ohio had failed to demonstrate that Turning Point was needed to satisfy its own renewable energy benchmark requirements or the statewide requirements of other utilities or CRES providers; thus, the Stipulation was

⁷⁹⁵ *Id.* at Exhibit A.

⁷⁹⁶ In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters, PUCO Case Nos. 10-501-EL-FOR, *et al.*, Long-Term Forecast Report (April 15, 2010) (hereinafter, "*AEP-Ohio LTFR Proceeding*").

not in the public interest. The PUCO's order emphasized that it was not determining in its order whether renewable energy facilities are eligible for non-bypassable cost recovery under Section 4928.143(B)(2)(c), Revised Code. The PUCO, however, stated that it expected AEP-Ohio to continue to develop the Turning Point project.

As explained in the introduction and as is clear from the PUCO's own records, the claims that Turning Point was needed to satisfy the SREC compliance requirements were incorrect when the claims were presented during the hearing process. Thanks to the efforts of hundreds of residential, commercial and industrial consumers who have installed certified solar facilities on their own and without the benefit of non-bypassable charges (hidden taxes), Ohio has an ample supply of SRECs. Had the PUCO approved the Turning Point project and the non-bypassable charges proposed by its supporters, the additional SRECs produced by Turning Point would have reduced the value of the SRECs available to the consumers who have spent their funds to erect solar facilities.

After the PUCO rejected the Turning Point provision discussed above, the proponents of the Turning Point project emerged, stating that they may be able to obtain funding for the project from the market (by earning it based on merit).

The Turning Point case (which has a litigation phase that spanned over two years) is symptomatic of the challenges that business consumers face in their efforts to secure PUCO decisions that are both lawful and reasonable. Beginning in April 2010 and through AEP-Ohio's Second ESP proceeding and then in the PUCO's obscure LTFR process, IEU-Ohio and FES resisted the combined efforts of the PUCO and AEP-Ohio as they relentlessly teamed up to cram over \$300 million in unneeded Turning Point costs into the already unconscionable non-bypassable portion of AEP-Ohio's electric bills. The wear, tear and cost of maintaining such vigilance against illegal and unreasonable actions is a sad testament to regulation as we now know it. It is also confirmation of the compelling need for Ohio to find better ways to ensure that Ohio's businesses have the capability to endure a regulatory process that may not be as open, transparent and accountable to the interest of Ohio's businesses as is warranted by the public interest.

Universal Service Fund Rider-Statewide

The Universal Service Fund (“USF”) Rider rates fund assistance for income-eligible residential customers. This assistance is known as PIPP (Percentage of Income Payment Program), under which eligible customers make payments against their electric bills that are based on a percentage of the customer’s income.

The primary cost associated with PIPP that is recovered through the USF is the cost of electricity consumed by PIPP customers, less the payments made by, or on behalf of, the PIPP customers.

The annual revenue requirement to be recovered through the USF has increased significantly since the inception of the USF in 2001. In 2001, the statewide annual revenue requirement for the USF was approximately \$65 million. The estimated statewide revenue requirement for the 2013 USF is approximately \$337 million, representing an increase of over 400% from the 2001 funding level.

Each EDU in Ohio bills its customers the USF Rider and the rates vary by EDU. The rate design for the USF for all EDUs is a two-block, kWh-based rate design, with the first block of the rate applying to a customer’s first 833,000 kWh of consumption per month and the second block of the rate applying to consumption greater than 833,000 kWh per month. The USF rates are updated in an annual filing each year.

On May 31, 2012, the Ohio Department of Development (“ODOD”), which has the responsibility for administration of programs that provide assistance for income-eligible residential customers, filed a Notice of Intent to initiate its 2012 proceeding.

The Ohio Department of Development was renamed the Ohio Development Services Agency (“ODSA”), effective September 28, 2012.

A Stipulation executed by most parties on the two-block rate design was submitted to the PUCO on September 4, 2012 and subsequently approved on September 19, 2012. The ODSA made its USF application for the 2013 USF rates on November 7, 2012 and a Stipulation on the USF rates was entered into by most parties to the case on November 30, 2012. The PUCO approved the Stipulation on December 12, 2012, making the new USF rates effective January 1, 2013.

Included below is a table of the USF rates for each EDU for 2012 and 2013.

Company	2012 USF Rider		2013 USF Rider	
	First 833,000 kWh	Above 833,000 kWh	First 833,000 kWh	Above 833,000 kWh
CEI	\$ 0.0033760	\$ 0.0005680	\$ 0.0016007	\$ 0.0005680
DUKE	0.0012231	0.0004690	0.0007860	0.0004690
CSP	0.0028680	0.0001830	0.0046813	0.0001830
DP&L	0.0050775	0.0005700	0.0048579	0.0005700
OE	0.0041799	0.0010461	0.0026872	0.0010461
OP	0.0024169	0.0001681	0.0056727	0.0001681
TE	0.0060155	0.0005610	0.0022377	0.0005610

PUCO Implementation of Amended Substitute Senate Bill 221

A. Green Rules

The PUCO adopted rules on April 15, 2009 to implement the EE/PDR and alternative energy requirements contained in SB 221.⁷⁹⁷ Several of the provisions were contrary to SB 221 and illegally constricted the opportunities for mercantile customers contained in SB 221. One of the largest issues in the rules was a provision that would have only permitted counting of efficiencies and peak demand reductions achieved by mercantile customers that are above a hypothetical benchmark rather than the benchmark (actual, historic) envisioned in the law.

Several parties, including IEU-Ohio, filed Applications for Rehearing.⁷⁹⁸ On June 17, 2009, the PUCO issued an Entry on Rehearing, largely denying IEU-Ohio's Application for Rehearing. On October 28, 2009, the Green Rules were adopted, as modified, by the PUCO and forwarded to the Joint Committee on Agency Rule Review ("JCARR"), which is a legislative committee through which the rules must pass before becoming effective. IEU-Ohio met with the members of JCARR to encourage the PUCO to remove the rules from JCARR's consideration and to remove provisions of the rules that gutted provisions of SB 221 granting mercantile customers' opportunities to capture value from their EE/PDR and alternative energy capabilities.

The Green Rules were eventually pulled from JCARR consideration due to IEU-Ohio and others pointing out the problems with the rules to JCARR members. The PUCO then placed the Green Rules on a "To Be Refiled" status at JCARR. The eventually revised Green Rules cleared JCARR on November 16, 2009. IEU-Ohio filed another Application for Rehearing contesting the PUCO's implementation of the EE/PDR and AEPS portions of SB 221. Specifically, IEU-Ohio argued that the PUCO had illegally diminished opportunities for eligible industrial and commercial customers to harvest value from their EE/PDR and alternative energy capabilities. On December 9, 2009, the PUCO granted IEU-Ohio's Application for Rehearing to further consider the matter. The PUCO has not yet issued a substantive Entry on Rehearing and therefore has failed to address issues that must be addressed to both comply with Ohio law and to guide compliance with Ohio's portfolio requirements.

⁷⁹⁷ *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, 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221*, PUCO Case No. 08-888-EL-ORD, Opinion and Order (April 15, 2009) (hereinafter, "*Green Rules Proceeding*"). The PUCO ended up rewriting much of what Staff had proposed for the EE/PDR rules.

⁷⁹⁸ See, e.g., *Green Rules Proceeding*, Application for Rehearing of IEU-Ohio (May 15, 2009).

On December 10, 2009, the Green Rules went into effect. The rules cover: renewable energy certification;⁷⁹⁹ energy efficiency compliance;⁸⁰⁰ program portfolio plans;⁸⁰¹ alternative energy compliance;⁸⁰² environmental compliance plans,⁸⁰³ and certain forecast rules.⁸⁰⁴

B. Protocols for Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures

On June 16, 2009, the PUCO established this sister proceeding to the Green Rules to adopt standardized measurement and verification (“M&V”) protocols for EE/PDR projects.⁸⁰⁵ Section 4928.66(B), Revised Code, requires the PUCO to verify the annual levels of energy efficiency and peak demand reduction achieved by each electric utility. In its June 24 Entry, the PUCO proposed the creation of a Technical Reference Manual (“TRM”) to incorporate the M&V protocols.⁸⁰⁶ Through the June 24 Entry, the PUCO directed interested parties to file comments to help shape the TRM. Specifically, the PUCO directed interested parties to advise the Commission on: (1) M&V measures that were in current use; (2) M&V measures that were intended by the electric utilities to be proposed within their initial submissions of program portfolio plans; and (3) M&V measures that were used or intended to be used by any mercantile customer intending to seek an exemption from a cost recovery mechanism.

On October 15, 2009, the PUCO issued the TRM, which contained proposed provisions that limited eligibility of mercantile customer capabilities for compliance purposes.⁸⁰⁷ Specifically, the TRM covered five issues: (1) how the PUCO should evaluate performance of EE/PDR programs; (2) defining baseline efficiency; (3) the use of retroactive or prospective TRM values to reported energy savings; (4) determining at what level the cost-effectiveness test should be applied; and (5) PUCO expectations for EE/PDR M&V.⁸⁰⁸

⁷⁹⁹ Rule 4901:1-40-04, O.A.C.

⁸⁰⁰ Including energy efficiency programs, benchmark reports, and the annual March 15 portfolio status reports. Rules 4901:1-39-02, 4901:1-39-05, & 4901:1-39-06, O.A.C.

⁸⁰¹ Including related assessments and applications for recovery of program costs. Rules 4901:1-39-03, 4901:1-39-04, & 4901:1-39-07, O.A.C.

⁸⁰² Rules 4901:140-05, 4901:1-40-06, 4901:140-07, 4901:1-40-09, & 4901:1-41-03, O.A.C. Including the annual April 15 alternative energy portfolio status report, the annual April 15 renewable and alternative energy compliance plan, all benchmark-related filings, and all other annual reports filed pursuant to these rules.

⁸⁰³ Rule 4901:1-41-03, O.A.C.

⁸⁰⁴ See Chapters 4901:5-1, 5-3, 5-5 & 5-7, O.A.C.

⁸⁰⁵ *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, PUCO Case No. 09-512-GE-UNC (hereinafter, “*M&V Protocols Proceeding*”).

⁸⁰⁶ *M&V Protocols Proceeding*, Entry at 3 (June 24, 2009).

⁸⁰⁷ *M&V Protocols Proceeding*, Finding and Order (October 15, 2009).

⁸⁰⁸ *Id.* at 4-15.

First, the PUCO determined that EE/PDR program performance would initially be evaluated using a gross savings methodology.⁸⁰⁹ However, the PUCO found that there might be some instances in which it might specify the use of net savings as a condition of program approval. The PUCO gave one example where the net savings methodology might be more appropriate in situations where an energy efficiency program is implemented by a utility, and customers have already taken the steps promoted by the program.⁸¹⁰

Second, the TRM indicated that when equipment was replaced at the end of its useful life only the incremental efficiency (a hypothetical measure) above the higher of state or federal standards or market practices (an unknown and moving target) could count towards the EE/PDR benchmarks.⁸¹¹ In adopting this standard, the PUCO specifically rejected the “as-found methodology” that was suggested by several commentators.⁸¹² The PUCO found that the as-found method could potentially overstate the energy savings effects of efficiency programs, such as when new equipment is installed as a result of new construction, normal replacement schedules, or the failure of existing equipment.⁸¹³ The PUCO claimed that using the as-found methodology could potentially allow utilities to claim savings for changes in energy use that were unrelated to any effects of efficiency programs.⁸¹⁴ The PUCO ignored requests that it follow the law.

Third, the PUCO found that estimates for cost, energy, and demand savings should be based on the best information available at the time the estimates or calculations were derived. Additionally, the PUCO found that any recovery of lost revenue associated with the implementation of programs to comply with EE/PDR benchmarks should be trued-up based on *ex post* calculations of savings.⁸¹⁵

Fourth, the PUCO concluded that the TRC test should be applied at the portfolio level, stating that it believed that this would provide for program flexibility and enable utilities to implement programs that demonstrate non-energy benefits, regardless of whether the program is cost-effective. Under the TRC, the PUCO prohibited incentives for EE/PDR projects with a payback of one year or less and suggested that exemptions from the cost recovery mechanism available to mercantile customers contributing compliance would not be available in cases where the payback was one year or less. Again, the PUCO ignored requests that it follow the law.

Fifth, the PUCO found that, with regard to determining certainty with M&V protocols that, for systematic errors, the utilities and independent program evaluators be required

⁸⁰⁹ *Id.* at 5.

⁸¹⁰ *Id.*

⁸¹¹ *Id.* at 6.

⁸¹² *Id.* at 8.

⁸¹³ *Id.*

⁸¹⁴ *Id.*

⁸¹⁵ *Id.* at 10-11.

to use "best practices" to establish quality assurance and quality control procedures that include field inspections and full documentation analyses.⁸¹⁶ For random errors, the utilities and independent program evaluators are required to perform evaluation sampling at a 90% confidence interval, with a 10% precision level.

On November 16, 2009, IEU-Ohio filed an Application for Rehearing seeking clarification on the issue of what counts for compliance purposes. OCC and FirstEnergy also filed Applications for Rehearing in November 2009. On December 11, 2009, the PUCO granted the Applications for Rehearing to further consider the issues raised in the Applications for Rehearing. On June 16, 2010, the PUCO issued a substantive Entry on Rehearing denying all three Applications for Rehearing, specifically rejecting IEU-Ohio's argument that the as-found method for counting EE/PDR gains should be the only method used. In rejecting the as-found methodology for most projects, the Commission's actions have, in effect, increased the utilities' targets by setting the performance benchmark at a higher level. The PUCO refused to follow the law.

On August 6, 2010, a draft TRM was filed for review by interested parties. The draft was prepared by Vermont Energy Investment Corporation ("VEIC"), the consultant hired by the PUCO. In November 2010, various parties filed comments. Specifically, electric utilities and IEU-Ohio jointly filed Comments and Objections to the TRM.⁸¹⁷ The comments indicated that the TRM needed to be redrafted to comply with Ohio law.

This case is still pending at the PUCO even though 2011 was the third compliance year for Ohio's mandatory portfolio requirements.

C. Energy Efficiency Applications

I. Renewable Energy Applications

Under Ohio law, any qualifying facility (mercantile customer-owned, utility-owned, residentially-owned, etc.) may apply to the PUCO for certification as an Eligible Ohio Renewable Energy Resource Generating Facility. Once the application is approved, electricity generated by the facility gives rise to an opportunity to obtain RECs that can be relied upon by EDUs or electric service companies to meet their statutory portfolio obligations. Approved facilities earn 1 REC for each MWh of electricity generated.⁸¹⁸

In order to be certified as an Eligible Ohio Renewable Energy Resource Generating Facility, the electricity generated at the facility must be deliverable into Ohio⁸¹⁹ and its generation typically must be verified by a utility-grade meter (facilities 6 kW or

⁸¹⁶ *Id.* at 13.

⁸¹⁷ *M&V Protocols Proceeding*, Joint Comments and Objections (November 3, 2010).

⁸¹⁸ See Rule 4901:1-40-01(BB), O.A.C. "'Renewable energy credit' means the environmental attributes associated with one megawatt-hour of electricity generated by a renewable energy resource" *Id.*

⁸¹⁹ Deliverable into Ohio "means that the electricity originates from a facility within a state contiguous to Ohio. It may also include electricity originating from other locations, pending a demonstration that the electricity could be physically delivered to the state." Rule 4901:1-40-01(I), O.A.C.

greater). Additionally, the customer must register with PJM (through its Generation Attribute Tracking System or “GATS”) or MISO (through its Midwest Renewable Energy Tracking System or “M-RETS”) to track and verify REC generation transfer and use.

A study conducted by MWN in the summer of 2010 found that a majority of RECs were generated by utility-owned projects (roughly 82%), and almost the entire remainder were created by large scale generating non-utility owned facilities (100,000 kWh or larger facilities). Mercantile customer facilities were generating roughly 1.6% of the RECs and residential facilities (which accounted for a good majority of the overall applications) accounted for 0.0035% of the overall RECs.

In addition, of the approved facilities, the majority of potential generation of RECs were attributable to biomass facilities (88%); trailed by wind (9%); solid waste (1%); hydro (0.84%); and solar (0.19%). However, the biomass figure was skewed by the fact that many utility-owned power plants had been approved as eligible biomass facilities but were not yet burning biomass and generating RECs. Finally, of the approved facilities, Ohio represented the largest source for potential generation of RECs (88%); trailed by Indiana (6%), Pennsylvania (3%), West Virginia (2%); Kentucky (0.68%); and Michigan (0.14%). Applications from Iowa, Minnesota, and Virginia had been filed but were not approved due to the deliverability requirement.

II. Mercantile Customer EE/PDR Capabilities

During the debate regarding SB 221’s portfolio requirements provisions, IEU-Ohio was one of the few stakeholders that urged the General Assembly to further investigate the cost and benefits before making arbitrary requirements part of Ohio law. This point of view was rejected by both sides of the aisle. In the alternative, IEU-Ohio urged the General Assembly to allow customer-sited capabilities of mercantile customers to count against the compliance benchmarks and to allow customers that contribute their capabilities to seek an exemption from the compliance cost recovery mechanism. IEU-Ohio’s alternative suggestion was adopted and, as a result, Ohio’s portfolio requirements provide a unique-in-the-Nation focus on reducing Ohio’s energy intensity on the customers’ side of the meter. Indeed, the language adopted by the General Assembly directs the PUCO to encourage such activities. The PUCO’s implementation of SB 221 has produced a very different result, unfortunately.

Under SB 221, mercantile-customers may commit their customer-sited energy-efficiency or peak-demand reduction capabilities towards an electric distribution company’s obligation to achieve EE/PDR benchmarks. In exchange for such commitments, a mercantile customer may be eligible for rebates and/or commitment payments or alternatively an exemption from the EDU’s rider to collect the costs associated with achieving energy efficiency savings and peak demand reductions. Mercantile customers who undertake energy efficiency programs or demand response/reduction programs may also, if eligible, participate in PJM’s DRP. Participation in PJM DRPs may offer the opportunity to capture additional economic benefits.⁸²⁰

⁸²⁰ However, under current PUCO rules, participation in a PJM program prohibits a mercantile customer from also receiving an incentive from committing its capabilities to an EDU.

Mercantile customers who wish to commit their EE/PDR capabilities to an EDU can file, either individually or jointly with an electric utility, an application to commit such capabilities and receive a one-time incentive payment or an exemption from the utility's EE/PDR rider.⁸²¹ To be eligible for the rider exemption, the mercantile customer must submit an annual report to the PUCO confirming the energy savings achieved.⁸²² However, PUCO delay in finalizing rules on how such energy efficiency savings can be counted and the applicable M&V protocols have created continuing uncertainty..

The PUCO's implementation of SB 221 led to a backlog of mercantile customer applications without any real indication of when and how the PUCO would deal with the large amount of applications. Before the PUCO initiated the two proceedings discussed below (the conditional approval process and the pilot program), a mercantile customer's application would stand by waiting for Staff to issue its review and recommendations regarding the application. No formal process governed the review or Commission decision making. The lack of procedures led to a backlog of 319 applications, as of June 23, 2010, when the PUCO established (after some prodding by legislative leaders) the conditional approval process. On average, the PUCO took over five months to act on an application, approving 57 applications in the process. The remaining 319 applications had been, on average, pending for 161 days.

D. Conditional Approval of EE/PDR Mercantile Customer Applications

In an attempt to relieve some of the growing backlog of mercantile customer EE/PDR applications, the PUCO created a new process through a June 23, 2010 Finding and Order in Case No. 10-833-EL-EEC.⁸²³ This new process conditionally approves mercantile customer applications, subject to Staff's review and recommendations.⁸²⁴ The PUCO has not identified the process by which conditional approval might be transformed into final approval. After Staff issues its review and recommendations, interested parties would have 15 days to object and then the PUCO would determine if a hearing was necessary before the application would be finally approved. The Finding and Order did not discuss what process would be used for the over 300 applications that were currently pending; however, the June 23 Finding and Order conditionally approved 241 of the pending mercantile exemption applications. Additionally, the June 23, 2010 Order was not clear on what the PUCO would do with new applications, in what timeframe it would conditionally approve the applications, or the timeframe that Staff had to review the applications. Removing some of the clarity issues with the

⁸²¹ See Rule 4901:1-40-05, O.A.C.; Section 4928.66(A)(2)(d), Revised Code.

⁸²² Rule 4901:1-39-08, O.A.C.

⁸²³ As of June 23, 2010, there were 319 pending mercantile customer EE/PDR incentive applications that, on average, had been pending for 165 days. The PUCO had approved 57 applications; however, the average time those applications were pending was still 161 days.

⁸²⁴ *In the Matter of the Applications of Various Mercantile Companies and Electric Utilities for Approval of Special Arrangements and Exemptions from Payment of Energy Efficiency and Peak Demand Reduction Riders*, PUCO Case No. 10-833-EL-EEC, Finding and Order (June 23, 2010).

conditional approval process, the PUCO then established an EE/PDR pilot program that has resulted in a 60-day automatic approval process.

E. EE/PDR Pilot Program

In an additional attempt to clear up some of the self-inflicted confusion regarding mercantile customer EE/PDR incentive applications, the PUCO established an 18-month Pilot Program (that will be reviewed after 12 months).⁸²⁵ The PUCO extended the program for an additional 6 months, however, it is set to expire September 15, 2012 without further PUCO action. In its Entry initiating the Pilot Program, the PUCO stated that the Pilot Program would be implemented to: simplify the Energy Efficiency Credits (“EEC”) application process through the development of a standard application template for use by mercantile customers; expedite the approval of certain applications through the creation of an automatic approval process; and simplify various incentive programs for mercantile customers who commit their programs for integration with an electric utility.⁸²⁶ The PUCO also directed Staff to develop a standard application form for use by mercantile customers.

During the Pilot Program, the PUCO said that it would count more mercantile customer-sited capabilities, for purposes of measuring compliance, than it had previously said it was willing to count. While the PUCO limited the duration of this “pilot program”, it did not set a start date for the program.⁸²⁷ And, the PUCO’s requirement for a review of the program after 12 months has also created confusion about the real effects of the Pilot Program.

Because positions adopted by the PUCO in the Pilot Program conflict with positions the PUCO adopted in the Green Rules, individual case decisions and elsewhere, the PUCO’s Pilot Program has produced additional litigation over the conflicting rules and decisions. In an attempt to reconcile these and other conflicts, the PUCO’s Entry stated that the PUCO was, in effect, waiving everything it had said and done that would otherwise stand in the way of the results indicated by the Entry.⁸²⁸ Commissioner Roberto’s Dissenting Opinion was a reminder of all the conflicting things that the PUCO had said and done in this area and asserted that the PUCO could not simply ignore all the things it had previously said and done on this subject by adopting a Pilot Program.

⁸²⁵ *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, PUCO Case No. 10-834-EL-EEC (hereinafter, “*Mercantile Customer Pilot Program Proceeding*”).

⁸²⁶ *Mercantile Customer Pilot Program Proceeding*, Entry at 2 (September 15, 2010).

⁸²⁷ The Entry indicated that mercantile customer capabilities would be included in the numerator of the compliance math regardless of the payback period (the PUCO had previously said that it would exclude mercantile customer performance that has a payback of less than 12 months thereby prejudicing the least expensive measures). The Entry also indicated that mercantile customer capabilities related to equipment replacement would be included in the numerator of the compliance math regardless of when the equipment is replaced during the life of the replaced equipment.

⁸²⁸ *Mercantile Customer Pilot Program Proceeding*, Entry at 7 (September 15, 2010).

The Pilot Program Entry also indicated that the PUCO was not done making things more complicated for utilities and mercantile customers interested in committing their customer-sited capabilities. First, the PUCO limited access to the Pilot Program to mercantile customers who opt for a one-time cash incentive payment rather than those who opt for an exemption from the application EE/PDR rider.⁸²⁹ Second, while the approval process is “automatic,” the process may be extended indefinitely if the PUCO intervenes (as the PUCO has done in some renewable energy certification applications). Third, although the PUCO approved cash rebates for mercantile customers programs where the payback period is less than one year (in other words, when there is a very cost-effective measure), the PUCO limited the maximum rebate incentive payment to 50% of the project cost. Finally, the PUCO continued to exclude incentive rebates for efficiency achieved from cost-free behavioral modifications (such as turning off lights). The PUCO, however, allowed incentive rebates for behavioral modifications with an attached cost that can be measured and verified.

On October 13, 2010, IEU-Ohio filed an Application for Rehearing and on October 15, 2010, OEC, FirstEnergy, AEP-Ohio, and DP&L each filed an Application for Rehearing. In its First Entry on Rehearing, issued November 10, 2010, the PUCO granted the Applications for Rehearing to further consider the matter.

On May 25, 2011, nearly seven months after Applications for Rehearing were filed, the PUCO issued its first substantive response to the applications. In its Second Entry on Rehearing, the PUCO upheld the use of the “benchmark comparison method” which it had previously held could not be used for mercantile applications filed after December 9, 2009. However, and in keeping things complicated, the PUCO stated that following the end of the 24-month Pilot Program, it may no longer allow use of the “benchmark comparison method.”⁸³⁰

In its Second Entry on Rehearing the PUCO agreed with IEU-Ohio, FirstEnergy, and AEP-Ohio that mercantile customer applications seeking a rider exemption should also be included in the Pilot Program, a modification from its September 15, 2010 Entry. The PUCO, however, held that these applications were not subject to the automatic approval process. Applications seeking an EE/PDR rider exemption in excess of 24 months were additionally required to file updated information with the PUCO demonstrating that they should remain eligible for the exemption after the initial 24-month period. The PUCO

⁸²⁹ SB 221 allows mercantile customers contributing their customer-sited capabilities towards compliance to request an exemption from the cost recovery rider established to pass utility compliance costs on to customers. This statutory structure recognizes that customers helping utilities hit the compliance requirements by contributing their customer-sited capabilities are making an “in kind” contribution towards compliance and that this type of contribution should be recognized through an exemption from the cash-collecting-rider that funds the balance of a utility’s compliance program. However, the Pilot Program Entry continues to treat the rider exemption opportunity as an “incentive” (rather than a means of recognizing contributed compliance). SB 221 does not authorize the PUCO to force a cash payment approach on customers or utilities; SB 221 authorizes the PUCO to grant an exemption from the cost recovery rider to encourage mercantile customers to bring their customer-sited capabilities forward to help Ohio hit its portfolio objectives.

⁸³⁰ *Mercantile Customer Pilot Program Proceeding*, Second Entry on Rehearing at 4 (May 25, 2011).

also modified its Pilot Program template after IEU-Ohio and AEP-Ohio identified the template's inconsistencies with the September 15, 2010 Entry.

The PUCO also clarified that under the Pilot Program all valid mercantile customer programs implemented during 2006 or 2007 would be eligible for counting towards EE/PDR benchmarks and incentives if the completed application was currently pending or was filed within 30 days after the issuance of the Second Entry on Rehearing. Finally, the Second Entry on Rehearing recognized that mercantile customers participating in an RTO's DRPs, such as PJM's DRPs, had the option to also commit its EE/PDR to an EDU but were not required to. To this end, the PUCO recognized that it would be appropriate for utilities to offer an incentive payment not to exceed \$.005/kWh-savings, or a \$.005/kW-reduction until such time as the electric utility had achieved 100% of its demand reduction benchmark for a given year.

FirstEnergy and DP&L filed for rehearing regarding the 30-day timeframe, requesting that they have until March 15, 2012 to file the mercantile applications for programs implemented in 2006 or 2007. DP&L also sought rehearing regarding the \$.005 EE/PDR payments.

On September 20, 2011, the PUCO issued its Fourth Entry on Rehearing.⁸³¹ The PUCO declined to extend its initial 30-day timeframe to file mercantile application for programs implemented in 2006 or 2007. The PUCO also concluded that the pilot program docket was not the appropriate place to address the EE/PDR payments to customers who were also participating in RTO programs. Instead, the PUCO determined that the maximum payment amounts should be addressed in each utility's portfolio program proceeding. Additionally, the PUCO reversed its Second Entry on Rehearing and held that mercantile applications seeking a rider exemption would be automatically approved for up to the first 24 months of the exemption. Finally, the PUCO determined that the Pilot Program should be extended another 6 months, through September 15, 2012.

FirstEnergy filed an Application for Rehearing from the PUCO's Fourth Entry on Rehearing, seeking clarification regarding which rider exemption applications were subject to the automatic approval process. On November 9, 2011, the PUCO issued its Fifth Entry on Rehearing. In that Entry, the PUCO clarified that applications seeking a rider exemption filed prior to September 15, 2010 were not eligible for automatic approval under the Pilot Program and rider exemption applications filed after September 15, 2010 but prior to May 25, 2011 were also not eligible for automatic approval under the Pilot Program.

On September 5, 2012, the PUCO issued a Finding and Order that addressed four matters concerning the Pilot Program. The PUCO removed a requirement that a new application be filed to extend a rider exemption beyond two years. Instead, it directed electric utilities to forward to PUCO Staff the mercantile customer's annual report. If any exemption period should be adjusted to reflect EE/PDR savings from the mercantile

⁸³¹ The PUCO's Third Entry on Rehearing was merely a procedural entry that had granted the applications for rehearing to further consider the matters raised in the applications.

customer project, the PUCO directed the electric utility to file a notification and calculation of the adjustment in the case originally approving the rider exemption. Second, the PUCO authorized the continued use of the benchmark comparison method to calculate the term of the rider exemption.⁸³² Third, the PUCO extended the Pilot Program to March 15, 2013 and directed PUCO Staff to file a review and recommendation by January 15, 2013. Fourth, the PUCO ordered that a technical workshop be conducted on November 15, 2012.⁸³³ OEC sought rehearing, arguing that the Pilot Program was unlawful because it allowed the calculation of savings from mercantile energy efficiency projects on an “as found” basis and violated the PUCO’s rules concerning the calculation of savings provided by mercantile customers toward energy efficiency requirements. The PUCO denied the Application for Rehearing. OEC filed a Notice of Appeal of the Finding and Order and Sixth Entry on Rehearing to the Ohio Supreme Court on December 31, 2012.⁸³⁴

F. Revenue Decoupling

On December 29, 2010, the PUCO issued an Entry establishing a docket and a procedural schedule to review whether any modifications were needed to rate design structures to better align utility performance with Ohio’s desired public policy outcomes.⁸³⁵ The PUCO’s Entry posed seven questions for discussion. A couple of the questions were related to whether or not the PUCO should apply the decoupling rate designs already established for natural gas utilities. Others sought comments on what decoupling method would work best, what customer classes the methods should apply to, and how to implement them. The Commission also sought comments on whether a decoupling mechanism would reduce the risk utilities face and ultimately their authorized ROE. Finally, the Commission sought guidance on when decoupling mechanisms should be implemented.

In February 2011, numerous parties filed comments in response to the PUCO’s December 29, 2010 Entry. The case is still pending at the PUCO.

⁸³² Under the benchmark comparison method, the mercantile customer can maintain the rider exemption for so long as it demonstrates that its own energy savings is equal to or greater than the electric utility’s benchmark requirement of energy savings.

⁸³³ The PUCO conducted the Technical Workshop and then requested interested persons to file comments. Electric utilities, consumer groups, and environmental groups filed comments concerning the Technical Conference on November 15, 2012.

⁸³⁴ *In the Matter of the Mercantile Customer Pilot Program for Integration of Customer Energy Efficiency or Peak-Demand Reduction Programs*, Ohio Supreme Court Case No. 2012-2082.

⁸³⁵ *In the Matter of Aligning Electric Distribution Utility Rate Structure With Ohio’s Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation*, PUCO Case No. 10-3126-EL-UNC, Entry (December 29, 2010).

G. Economic Development Tariff

On July 15, 2011, the PUCO requested comments regarding a standard Economic Development Tariff.⁸³⁶ The PUCO proposed the tariff to be adopted by all electric utilities to replace the reasonable arrangement process, noting that reasonable arrangements involved significant transaction costs. The PUCO also sought comments on how to address the delta revenue that had been traditionally created under reasonable arrangements and which would continue to be incurred under the proposed Economic Development Tariff. In the tariff, the PUCO proposed that the utility absorb 20% of the delta revenue and customers absorb the remaining 80%.

Under the proposed tariff, mercantile customers could receive discounts for three types of improvements: (1) increases in payroll or jobs; (2) capital investment; and (3) new constructed facilities with a high load factor. The incentives for payroll/job increases were proposed as follows:

Payroll Created or Increased	\$5-\$10 million	>\$10-\$17.5 million	>\$17.5 million
Minimum new employees	75	100	125
Discount year 1-3	10%	12%	15%
Discount year 4-5	5%	7%	10%

Incentives for capital investments were proposed as:

Investment	Discount	Term
\$50-\$99 million	2%	5 years
\$100-\$149 million	3%	5 years
\$150-\$199 million	4%	5 years
Over \$200 million	5%	5 years

Finally, the incentives for new economic development mercantile customers that: (1) add or create at least 75 new permanent Ohio employees; (2) have a minimum monthly demand of at least 5 MW; (3) have an annual average load factor of at least 60%; and (4) where the customer's electric cost is at least 4 percent of its total O&M costs, would be billed the rates below for all kWh:

Electric Cost/ Total Op Cost	4%-9%	10%-19%	20-30%	30-40%	>40%
LF 60-70%	\$0.055/kWh	\$0.053/kWh	\$0.051/kWh	\$0.049/kWh	\$0.047/kWh
LF 70-80%	\$0.054/kWh	\$0.052/kWh	\$0.050/kWh	\$0.048/kWh	\$0.046/kWh
LF Over 80%	\$0.053/kWh	\$0.051/kWh	\$0.049/kWh	\$0.047/kWh	\$0.045/kWh

Various parties filed comments and attended the oral argument held on September 15, 2011. Most parties agreed that the proposed Economic Development Tariff would not

⁸³⁶ *In the Matter of the Staff Proposal for An Economic Development Tariff Template*, PUCO Case No. 11-4304-EL-UNC, Entry (July 15, 2011) (hereinafter, "Economic Development Tariff Case").

really assist Ohio in distinguishing itself in a competitive marketplace. Much of the focus of the comments surrounded the delta revenue issue, as neither customer groups nor utilities wanted to absorb the delta revenues. Addressing this issue, many commenters suggested that the PUCO leverage the power of competitive markets to improve Ohio's competitiveness. IEU-Ohio, for example, demonstrated the ability to avoid the delta revenue debate altogether (as discussed earlier, delta revenue is measured as the discount a customer receives off the otherwise applicable SSO rate of the EDU).⁸³⁷ By leveraging shopping opportunities in the competitive marketplace to advance economic development and retention objectives, the PUCO could altogether avoid the need to discount an EDU's SSO rate; and could thus promote economic development while at the same time could avoid creating delta revenue that inevitably has to be paid by either customers or utilities, or both.

⁸³⁷ *Economic Development Tariff Case*, IEU-Ohio Initial Comments at 6 (August 5, 2011).

Recent Legislation Affecting the Ohio Electric Utility Industry

A. House Bill 64—Securitization

As discussed above, the General Assembly passed and signed into law, HB 364, which allows EDUs to apply to the PUCO for approval to securitize previously authorized deferrals. Securitization is a financial method that allows a utility to accelerate cash recovery for deferred assets, among other things, by having a third party issue bonds for the value of the deferred balance. Repayment of the bonds occurs through the use of a non-bypassable charge levied against customers through the utility's billing process. Securitization has the effect of reducing the interest or carrying cost component of the deferral by having the State of Ohio make a pledge to not interfere with the cost recovery mechanism.

HB 364 requires that securitization will result in cost savings to customers before being approved by the PUCO. Furthermore, HB 364 mandates that securitization cannot be approved by the PUCO unless the PUCO finds that customer savings would be measurably enhanced through this process. HB 364 also requires that the securitization can only be approved after the PUCO issues a final order and all judicial appeals are exhausted concerning the deferral subject to securitization. Finally, HB 364 exempts governmental aggregation customers from the non-bypassable charges that will be used to fund the bonds approved in a PUCO securitization order.

To date, FirstEnergy and AEP-Ohio have filed applications to securitize deferred assets. FirstEnergy's application was approved and AEP-Ohio's application is currently pending.

B. Substitute Senate Bill 315

I. Governor's Energy Mid-Biennium Review

Substitute Senate Bill 315 ("Sub. SB 315") resulted from the work and discussion that occurred at Governor John Kasich's 2011 21st Century Energy and Economic Summit that was held in September of 2011 at The Ohio State University.

The bill updates Ohio law concerning oil and gas drilling regulations, electricity generation and transmission, cogeneration, energy efficiency, and coal development. Listed below is a brief summary of those statutory changes related to the regulatory oversight of oil and gas drilling and electricity in Ohio.

II. Energy Efficiency and Renewable Energy

Sub. SB 315 expands the list of renewable resources to include waste energy recovery systems ("WER"). It defines a WER as either a facility that generates electricity through exhaust heat or reduction of pressure in gas pipelines that occurs without using additional fossil fuels, or a facility at a state institution of higher education, placed into

service in 2002, 2003, or 2004, that recovers waste heat from electricity producing engines to produce steam or generate electricity.

An EDI may use a WER as an alternative energy resource to meet its alternative energy resource requirements or as a means to satisfy its energy efficiency requirements. A single WER that is included in an energy efficiency program on or after January 1, 2012, however, cannot also be counted as a renewable energy resource (it cannot be counted against an alternative energy and energy efficiency requirement at the same time).

Fossil fuel fed Combined Heat and Power systems ("CHP") can also be used to meet Ohio's energy efficiency requirements contained in Ohio law. The bill maintains eligible renewable energy resources under existing law to include solar, wind, biomass, hydropower, and certain fuel cells.

Sub. SB 315 expands the definition of advanced energy resources to include: (1) any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input; and, (2) any uprated capacity of an existing electric generating facility, resulting from the deployment of advanced technology.

Finally, Sub. SB 315 allows the OPSB to adopt rules for accelerated review of an electric transmission line needed to meet a specific customer's need, the use of waste heat or natural gas for electric generation facilities and a gas pipeline needed to meet a specific customer's need.

III. Regulatory Oversight of Natural Gas Drilling in Ohio

Sub. SB 315 contains updates to Ohio's regulatory oversight of oil and gas exploration. Sub. SB 315 requires oil and gas drillers operating in Ohio to increase the information that they have to disclose concerning the chemicals that they use in the fracturing process. Hydraulic fracturing fluid compositions used at specific wells in Ohio can be viewed by the public at www.fracfocus.org. Additionally, the Ohio Department of Natural Resources ("ODNR") is required to make available through their website chemical information used in the oil and gas drilling process.

When applying for an ODNR drilling permit, operators are required to include the rate, volume and source of water that will be used in the drilling operation. Operators are also required to take pre-drilling water samples within 1,500 feet of a proposed horizontal well. The **results of the water sampling** are then required to be reported on the operator's application for a well permit with ODNR. The sampling shall be conducted in accordance with the guidelines established in "Best Management Practices for Pre-drilling Water Sampling" in effect at the time that the application is submitted.

Sub. SB 315 encourages natural gas well operators to enter into Road Use Maintenance Agreements ("RUMA") with the local governments where the wells are

being sited. The RUMA is intended to provide for cooperation between local governments and well operators.

The bill also increases the ODNR registration and certification requirements for brine, or waste haulers for the purposes of providing detailed reports to track the brine waste. In Ohio, brine waste from the fracturing process may only be disposed of in regulated Class Two injection wells.

Sub. SB 315 establishes daily fines of up to \$20,000 for well operators who are found to be in violation of state law. The bill requires that well operators maintain liability insurance of at least \$5 million to pay for injury to persons or damage to property caused by faulty production operations.

ACRONYM / ABBREVIATION LISTING

Note: This listing has been compiled for easy reference. Although we have tried to identify all acronyms/abbreviations used in this paper, some references may not be listed.

A&G	Administrative & General
AAC	Annually Adjusted Component
AEP	American Electric Power
AEP Retail	AEP Retail Energy Partners LLC
AEPS	Alternative Energy Portfolio Standards
AEPSC	AEP Service Corporation
AER	Alternative Energy Rider
AER-N	Alternative Energy Rider-Non-Bypassable
AER-B	Alternative Energy Rider-Bypassable
AES	AES Corporation
AICUO	Association of Independent Colleges and Universities of Ohio
AMI	Advanced Metering Infrastructure
APAC	Appalachian People's Action Coalition
APCo	Appalachian Power Company
ARR	Auction Revenue Rights
ATSI	American Transmission Systems, Inc.
BGS	Basic Generation Service
BRA	Base Residual Auction
C&I	Commercial & Industrial
CAP	Community Action Partnership of the Greater Dayton Area
CAT	Commercial Activity Tax
CBP	Competitive Bidding Process
CB Rider	Competitive Bidding Rider
CBT Rider	Competitive Bid True-Up Rider
CEI	Cleveland Electric Illuminating Company
CFL	Compact Fluorescent Light
CG&E	Cincinnati Gas & Electric Company
CHP	Combined Heat and Power
Commission	The Public Utilities Commission of Ohio
Constellation	Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.
COSE	Council of Smaller Enterprises
CRES	Competitive Retail Electric Service
CSP	Columbus Southern Power Company
CWIP	Construction Work in Progress
DA	Distribution Automation
DARR	Deferred Asset Recovery Rider
DENA	Duke Energy North America
DE-Ohio	Duke Energy Ohio, Inc.
DFR	Deferred Fuel Rider

DIP	Detailed Implementation Plan
DIR	Distribution Investment Rider
DOE	Department of Energy
Dolphin	Dolphin Sub, Inc.
DPL	DPL Inc.
DP&L	Dayton Power & Light Company
DRP	Demand Response Programs
DSM	Demand-Side Management
Duke	Duke Energy Corporation
Duke Retail	Duke Energy Retail Sales, LLC
EA	Emission Allowance
EDR	Economic Development Rider
EDU	Electric Distribution Utility
EE/PDR	Energy Efficiency and Peak Demand Reduction
EEC	Energy Efficiency Credits
EER	Energy Efficiency Rider
EFC	Electric Fuel Component
EICCR	Environmental Investment Carrying Cost Rider
EIR	Environmental Investment Rider
ELPC	Environmental Law and Policy Center
EnerNoc	EnerNoc, Inc.
EPA	Environmental Protection Agency
Eramet	Eramet Marietta, Inc.
ESP	Electric Security Plan
ESRP	Enhanced Service Reliability Plan
ESRR	Enhanced Service Reliability Rider
ESSC	Electric Service Stability Charge
ETP	Electric Transition Plan
EVA	Energy Venture Analysis, Inc.
EWG	Exempt Wholesale Generator
Exelon	Exelon Generation Company, LLC
FAC	Fuel Adjustment Clause
GCCRR	Facility Cost Closure Recovery Rider
FERC	Federal Energy Regulatory Commission
FES	FirstEnergy Solutions Corp.
FFG	Fuel Fund Grant Program
FirstEnergy	FirstEnergy Corporation
FIT	Federal Income Tax
FPP	Fuel and Economy Purchased Power
FR	Fuel Rider
FRM	Fuel Recovery Mechanism
FRR	Fixed Resource Requirement
GATS	Generation Attribute Tracking System
GCAF Rider	Generation Charge Adjustment Factor Rider
GCCR	Generation Cost Recovery Rider
GRR	Generation Resource Rider

HAN	Home Area Network
HB 364	House Bill 364 (129 th General Assembly)
IEU-Ohio	Industrial Energy Users-Ohio
IGCC	Integrated Gasification Combined-Cycle
IIR	Infrastructure Investment Rider
IMF	Infrastructure Maintenance Fee
JCARR	Joint Committee on Agency Rule Review
kV	Kilovolts
kWh	Kilowatt-hour
LDA	Local Delivery Area
LFP	Load Factor Provision
LIA	Low Income Advocates
LME	London Metals Exchange
LMP	Locational Marginal Pricing
LSE	Load Serving Entity
LTFR	Long-Term Forecast Report
M&V	Measurement & Verification
m/p	Management/Performance
MBSSO	Market-Based Standard Service Offer
MBT	Market-Based Tariff
MDP	Market Development Period
MISO	Midwest Independent Transmission System Operator
Mon Power	Monongahela Power Company
MR6	Muskingum River 6
M-RETS	Midwest Renewable Energy Tracking System
MRO	Market Rate Offer
MSG	Market Support Generation
MTEP	Midwest Transmission Expansion Planning
MTR	Market Transition Rider
MVP	Multi-Value Projects
MW	Megawatts
MW-day	Megawatt-day
MWh	Megawatt-hour
MWN	McNees Wallace & Nurick LLC
NERA	National Economic Research Associates Inc.
NERC	North American Electric Reliability Corporation
NITS	Network Integration Transmission Services
NRDC	Natural Resources Defense Council
Nucor	Nucor Steel
O&M	Operation & Maintenance
O.A.C.	Ohio Administrative Code
OCC	Office of the Ohio Consumers' Counsel
OCEA	Ohio Consumer and Environmental Advocates
ODOD	Ohio Department of Development
OE	Ohio Edison Company
OEC	Ohio Environmental Council

OEG	Ohio Energy Group
OGF	Ohio Growth Fund
OGMG	Ohio Gas Marketers Group
OHA	Ohio Hospital Association
OHTCo	AEP-Ohio Transmission Company, Inc.
OMA	Ohio Manufacturers' Association
OMAEG	Ohio Manufacturers' Association Energy Group
OP	Ohio Power Company
OPAE	Ohio Partners for Affordable Energy
OPSB	Ohio Power Siting Board
Ormet	Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation
OSS	Off System Sales
OVEC	Ohio Valley Electric Corporation
P3	PJM Power Providers Group
PAR	Power Acquisition Rider
Paulding	Paulding Wind Farm II LLC
PCCRR	Plant Closure Cost Recovery Rider
PIPP	Percentage of Income Payment Plan
PIR	Phase-In Recovery
PIRR	Phase-In Recovery Rider
POLR	Provider of Last Resort
PJM	PJM Interconnection, L.L.C.
PMR	Pool Modification Rider
PSA	Power Supply Agreement
PTR	Peak-Time Rebate
PUCO	The Public Utilities Commission of Ohio
PWC	People Working Cooperatively
PWO	Partnership With Ohio
RAA	Reliability Assurance Agreement
RCP	Rate Certainty Plan
RCRR	Reliability Cost Recovery Rider
REC	Renewable Energy Credit
RESA	Retail Energy Supply Association
RET	Renewable Energy Technology
RFC	ReliabilityFirst Corporation
RFP	Request for Proposal
Rider AER-R	Alternative Energy Resource Rider
Rider BDC	Business Distribution Credit Rider
Rider BTR	Base Transmission Rider
Rider DCR	Delivery Capital Recovery Rider
Rider DFC	Deferred Fuel Cost Recovery Rider
Rider DGC	Deferred Generation Cost Recovery Rider
Rider DSE	Demand-Side Management and Energy Efficiency Rider
Rider DSI	Delivery Service Improvement Rider
Rider ECS	Emergency Curtailment Service Rider

Rider ELR	Economic Load Response Program Rider
Rider GCR	Generation Cost Reconciliation Rider
Rider FRT	Facilities Relocation and Transportation Tariff
Rider LFA	Load Factor Adjustment Rider
Rider LTR	Litigation Termination Rider
Rider NDU	Generation Service Uncollectible Rider / Non-Distribution Related Uncollectable
Rider NMB	Non-Market-Based Services Rider
Rider OLR	Optional Load Response Rider
Rider PTC-FPP	Price-to-Compare Fuel and Purchased Power Rider
Rider PTC-SRT	Price-to-Compare System Reliability Tracker Rider
Rider PTR	Peak-Time Rebate Rate
Rider RC	Retail Capacity Rider
Rider RDC	Residential Distribution Credit Rider
Rider RDD	Residential Distribution Deferral Rider
Rider RE	Retail Energy Rider
Rider RECON	Reconciliation Rider
Rider RGC	Residential Generation Credit Rider
Rider SCR	Supplier Cost Reconciliation Rider
Rider SCRR	Storm Cost Recovery Rider
Rider SDRR	Storm Damage Recovery Rider
Rider UE-GEN	Uncollectable Expense Generation Service Rider
Rider-DR	Distribution Reliability Rider
RNU	Revenue Neutrality Uplift
ROE	Return on Equity
RPM	Reliability Pricing Model
RR	Reconciliation Rider
RSG	Revenue Sufficiency Guarantee
RSP	Rate Stabilization Plan
RSR	Retail Stability Rider
RSS	Rate Stabilization Surcharge
RTC	Regulatory Transition Cost or Regulatory Transition Charge
RTCO	RTC Offset Rider
RTEP	Regional Transmission Expansion Planning
RTO	Regional Transmission Organization
SB 221	Amended Substitute Senate Bill 221
SB 3	Amended Substitute Senate Bill 3
SCP	South Central Power Company
SEET	Significantly Excessive Earnings Test
SER	Solar Energy Resource
SO ₂	Sulfur Dioxide
SOX	Sarbanes-Oxley
SREC	Solar Renewable Energy Credits
SRT	System Reliability Tracker
SSO	Standard Service Offer
SSR	Service Stability Rider

Staff	Public Utilities Commission of Ohio Staff
TAS	Transmission and Ancillary Service
TCRR	Transmission Cost Recovery Rider
TDP	Time-Differentiated Pricing
TE	Toledo Edison Company
TEC	Transmission Enhancement Charges
TRC	Total Resource Cost
TRM	Technical Reference Manual
UCT	Utility Cost Test
USF	Universal Service Fund
VEIC	Vermont Energy Investment Corporation
VEP	Voluntary Enrollment Procedure
WACC	Weighted Average Cost of Capital
Wal-Mart	Wal-Mart Stores East, LP and Sam's East, Inc.

**SUPPLEMENTAL
MATERIALS**

LIST OF SUPPLEMENTAL MATERIALS

Columbia Gas Modernization Program – Eligible Facilities Plan

August 9, 2012

PUCO Investigation of Ohio’s Retail Electric Service Market, PUCO Case No. 12-3151-EL-COI

Entry, January 24, 2013

House Public Utilities Committee Briefing

Presentation by the Public Utilities Commission of Ohio September 29, 2011

Letter to Members of the 129th General Assembly of Ohio from PUCO Chairman Todd A. Snitchler on the Federal Energy Advocate’s RTO Report

December 12, 2012

The Value of Continued Participation in Regional Transmission Organizations by the State of Ohio

A Report of the Federal Energy Advocate, Public Utilities Commission of Ohio, December 12, 2012

Have Restructured Wholesale Electricity Markets Benefitted Consumers?

Electricity Policy.com, December 2012

The Emerging Ohio Market

Presentation by PUCO Chairman Todd A. Snitchler to the 21st Century Manufacturing Task Force, November 26, 2012

The High Cost of Renewable-Electricity Mandates

Energy Policy & The Environment Report, Robert Bryce, Senior Fellow (Manhattan Institute), Center for Energy Policy and the Environment at the Manhattan Institute, February 2012

Solar is growing in Ohio without Turning Point

Columbus Dispatch, editorial by Sam Randazzo, January 19, 2013