INDIVIDUAL ELECTRIC UTILITIES' RATE HISTORY AND RATE PLANS

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INTRODUCTION[2]

On January 20, 1999, Amended Substitute Senate Bill 3 ("SB 3") was introduced in the Ohio General Assembly. The bill number and its relatively early introduction suggested that the long-standing campaign[3] to bring Ohio into the customer-choice-for-electricity era was nearing the goal line. The pace of movement of this legislation accelerated in the wake of the reliability and price volatility problems that occurred in 1997 and 1998. These very visible problems sharply conflicted with claims that traditional regulation was working well. These problems also highlighted the extent to which the rather crude tool of curtailment (sometimes called transmission line loading relief) was used by vertically integrated monopolies to balance the system through negative intervention rather than positive performance.

Ohio's legislation restructuring the retail electric sector made a number of assumptions about the implementation phase, the timing of critical developments (like fully functional regional transmission organizations or "RTOs") and the complementary work that had to be completed at the federal level to remedy the anticompetitive structure of the vertically integrated electric utility sector. On July 6, 1999, Governor Taft signed SB 3 and efforts to implement the legislation began almost immediately. As the implementation effort began, one thing was clear, SB 3 commanded that customers[4] would have the opportunity to select their generation supplier beginning on January 1, 2001.

Prior to SB 3, there was some customer choice in Ohio. Customers had the ability to self-generate electricity or substitute another form of primary energy (such as natural gas) for

[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] The views and opinions expressed in this introduction are mine (Sam Randazzo's) and mine alone.

[3] The first pro-choice bill, sponsored by Representative Ron Amstutz, was introduced in 1992.

[4] The customer choice right provided by SB 3 extended to customers of investor-owned electric utilities and, potentially, the customers of rural electric utilities. It did not apply to customers of municipal electric utilities. In the case of rural electric utilities, the customer choice right could be extended by an affirmative election by the rural electric utility. Customers of rural electric utilities interested in obtaining the benefits of customer choice can and should press their distribution cooperative to make the election that is part of Ohio law as a result of SB 3.

electricity. The natural gas v. electricity retail competition was most visible in the residential sector until the natural gas shortages of the 1970s arrived. In addition, the powers delegated to municipalities under Ohio's Constitution allowed (and allows) municipal electric utilities to serve customers located within the municipality even if they were customers of an investor-owned electric utility. This same Constitutional authority allowed (and allows) municipalities to grant franchises to multiple electric suppliers without regard to Ohio's certified service area law. Prior to SB 3, these municipality powers were used by cities like Clyde, Ohio where a Whirlpool Corporation manufacturing facility switched from an investor-owned electric utility to Clyde's new municipal electric utility. Brookpark, Ohio was actively engaged in forming a new municipal electric utility with strong support from Ford Motor Company; the Brookpark initiative ended short of implementation but it provided the Ford plant in Brookpark with an advantage to improve its position with the investor-owned utility. Today, the customer choice opportunity that can be enabled by Ohio's municipalities remains a powerful, albeit localized, force.

The post-SB 3 work to restructure the electric sector followed similar efforts in the communications and natural gas sectors, both network industries subject to extensive state and federal price and service quality regulation. Essential service components previously provided by one supplier were functionally unbundled into a production or generation component, a transmission component and a distribution component; the unbundled services were classified as non-competitive or competitive retail electric services. In electricity, natural gas and communications, no customers remained "captive," physically or financially, to any particular supplier offering a competitive service except as judged necessary to permit the incumbent supplier to amortize above-market costs (sometimes called "stranded costs') associated with the competitive services. Retail electric customers (acting individually or through aggregation programs) were given the right to obtain their competitive retail electric service from any supplier certified by the Public Utilities Commission of Ohio ("PUCO").

SB 3 also contained a number of provisions that were designed to guard against or block efforts by incumbent utilities to create or resurrect a deregulated monopoly. Similar rules were put in place at the federal level. Any non-competitive service had to be available on a comparable and non-discriminatory basis. Ohio required transmission owners to place control over their network in the hands of an RTO that became the supplier of comparable and non-discriminatory transmission services and responsible for maintaining reliability in real time. At the federal level, the transfer of control over the transmission system to a regional organization was voluntary and the federal slowness and looseness on this important component negatively affected the development of wholesale and retail "competition."

The experience in the natural gas and communications sectors suggested that "competition" would also be superior to "regulation" in the electric sector. And, at the time, the relatively low price of natural gas combined with new gas-fired generation technologies suggested, in theory, that incumbent technologies and generators could be reasonably disciplined by market forces. The massive amount of the "transition cost" (also known as "stranded cost" or "above-market cost") claims submitted to the PUCO by

Ohio's electric utilities as a result of SB 3 seemed to confirm that "regulation" had not well served the public interest.

Over the last 19 years plus since the introduction of SB 3, we have seen a Governor and many customer groups initiate or join a bipartisan push to return Ohio to regulation; a reaction to the challenging mismatch between the SB 3 assumptions and real-world events. That political push towards reregulation in 2007 and 2008 was strongly resisted by incumbent electric utilities who expressed support for "competition;" the collision resulted in the addition of the "electric security plan" ("ESP") option to the menu for setting the price of default generation supply. More recently, as wholesale electric prices dropped significantly, each of these previously pro-competitive utilities changed their tune and asked the PUCO or General Assembly to make captive customers responsible for providing their preferred generating plants with above-market compensation. And the customer groups that previously pushed for reregulation (when wholesale electric prices were high) changed their tune as well; today many of these customer groups are supporting legislation that would eliminate their ESP option [over the objections of electric distribution utilities ("EDUs") who, with the approval of the PUCO, have used the ESP option to obtain out-of-market and above-market compensation].

Looking back will yield history. But, what will happen in the days ahead to affect the price and availability of electricity in Ohio?

Clearly, the abundant and relatively cheap supply of natural gas is at the top of the list of fundamentals that will continue to affect the generation mix, reliability and price of electricity in wholesale and retail markets. Most forecasts indicate that this trend will continue.

Most of the Ohio generation plants owned or controlled by vertically integrated electric utilities have been sold or transferred. And, Ohio's investor-owned EDUs have adopted "new" business models that "conservatively" promise to grow their earnings by 5 to 8% **per year** through investments in distribution and transmission (the non-competitive services) while continuing to "derisk" their business. (Derisking the business in this context seems to be less about reducing risk and more about shifting risks to ultimate customers.) In an era of little or no growth in the size of the electric market, there is little, if any, sales growth to mitigate the upward pressure that these business models place on the "regulated" D (distribution) and T (transmission) prices. The cost of D and T services is rising, in some cases significantly, as a result.

The cost-plus traditional regulation formula used to set prices for regulated services paid by "captive customers" tends to encourage excess investment and overcapitalized lines of business. The current somewhat politicized regulatory emphasis on "grid modernization" or "smart grids" is a signal that regulators may offer little resistance to this excess and overcapitalized investment tendency which results, under regulation, in excessive prices. History tells us that this excess investment and capitalization tendency will give way to a "correction" that broadly affects financial markets and credit (the US and British railroad development history or, more recently, the home mortgage fiasco that ignited the Great Recession come to mind). Might the Constitutional authority of Ohio's municipalities provide some "bypass" opportunities?

Customers interested in improving their weighted average delivered cost of purchased electricity are increasingly resorting to capturing value from their demand response capabilities and behind the meter options. But, the use of demand response capabilities for this purpose requires customers to "chase" and avoid peaks that have billing demand significance at times when the peak is nowhere near the physical capability of the supply chain. This chasing-the-peaks behavior forces Ohio businesses to cut back on production for other than network emergency reasons thereby contributing to under-utilization of their productive capacity and the electric network (which, in turn, negatively affects the larger economy). Perhaps our current scarcity-oriented demand response approach needs to be reformed to better fit with our current abundant supply scenario.

Despite the obvious reliability-related problems created by deploying intermittent (don't show up for work) and non-dispatchable (can't be made to show up for work) generating technologies, government (local, state and federal) continues to spend taxpayers' and customers' money to fund subsidies for this purpose. In an era of little demand growth, subsidies that overheat investment in some generating technologies work to reduce market share and cash flow opportunities for other technologies. But, there are signs that the massive amount of land use and the invasiveness of this use that are necessary parts of utility scale wind and solar projects are increasingly igniting fierce local opposition that sometimes brings down elected officials. Strong resistance in Michigan that is prompting local officials to delay and prevent large wind project development or face recall provides a nearby example of the growing resistance to utility scale wind projects. The push-back in Michigan is also occurring in many areas in Ohio where large wind projects have been constructed or proposed (a condition that seems to go unnoticed by Ohio's current Governor). Germany made a show of accelerating the retirement of nuclear plants and heavily subsidizing "renewables" while promising to reduce air emissions. The German people have had enough; they are pushing back because electric prices have soared while air emissions have increased because coal (mostly lignite) plants are being run harder and longer to cover for the "renewable" resources when they don't show up for work. The experience in Ontario, Canada is similar to that in Germany. If they are attentive, there are lessons that can be learned by Ohio regulators and elected officials.

Governments' willingness to directly or indirectly subsidize[5] some generating plants or generating technologies and demand side goods and services is producing a feeding frenzy where businesses on the supply side or demand side are increasingly engaged in a highly politicized competition for subsidies paid for by captive customers or taxpayers. These large-dollar subsidies work initially to allocate market share and divert cash flow to the benefited business while raising the clearing price of electricity. As they rise, the higher prices invite innovation and new entry that can erode the advantage granted to the subsidized supply or demand side option. While some businesses have been able to secure these subsidies, the size of the subsidy advantage is limited by the power to collect

[5] As used here, portfolio mandate is an indirect subsidy while the federal production tax credit would be a direct subsidy.

the subsidy. The power-to-collect limitation on the advantage of a subsidy explains why those businesses seeking a subsidy also demand funding for the subsidy to be unavoidable (non-bypassable) by customers or taxpayers.

For more than 40 years, I have had the privilege of working with and on behalf of Ohio businesses that recognized, through word and deed, the importance of proactive engagement on issues that affect the price and availability of energy. I have been fortunate; much of my professional career involves advocating for and advancing proposals that displace monopoly-friendly natural gas, communications and electricity laws and policies with structures that respect the superior power of “customer choice.”

The lessons of history tell us that most of the potential continuous improvement value of “competition” and “customer choice” is determined by what happens on the implementation side of our policy and law. Customers that are not proactively engaged in the local, state and federal implementation efforts will leave an intellectual and political vacuum to be filled by people with a seat at the table. The customer is always right, but only if the customer is in the room.

This important energy conference, which began well before the introduction of SB 3, can help to identify things that real customers can do to continuously improve their delivered cost and quality of energy. But, the value of this knowledge can be and will be diminished by customers that absent themselves from the important work that must be completed on the implementation side of our law and policy; also a customer choice.

May the force be with you.

Section I: The Dayton Power & Light Company

Section II: Duke Energy Ohio, Inc.

Section III: FirstEnergy Corp.

Section IV: American Electric Power-Ohio

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

Section V: General Electricity Matters

Section VI: 2017 Summary of Key Energy Legislation in the 132nd Ohio General Assembly

Section I
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 plan[1] ("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 Recommendation[2] ("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.[3] 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

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[1] *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).

[2] *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.

[3] *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.

competitive methods in Section 4928.14, Revised Code.[4] Finally, the PUCO encouraged other electric distribution utilities ("EDUs") to consider RSPs if competitive electric markets had not fully developed in their service territory by the end of the MDP.[5]

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.[6] 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 ("Staff Report") found that DP&L's actual cost increases were in excess of the 11% cap.[7]

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.[8] 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.[9]

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[4] 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, 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).

[5] *Id.* at 29.

[6] *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*").

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

[8] *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.

[9] *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).

OCC appealed the RSS Order to the Ohio Supreme Court.[10] While the appeal to the Ohio Supreme Court was pending, the PUCO approved DP&L's application to implement and set the EIR, which increased generation rates 5.4% on top of the 11% RSS increase.[11]

On September 5, 2007, the Ohio Supreme Court affirmed the PUCO's decision in the case except in one area.[12] 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 and directed the PUCO, on remand, to remove the RSS charges from DP&L's distribution rate schedules.[13] 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."[14] 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.[15]

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.[16] DP&L sought to recover $8.6 million over a two-year period through a 2.3% adder to distribution charges.[17] The PUCO approved DP&L's application[18] and denied OCC's Application for Rehearing since OCC

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[10] *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).

[11] *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).

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

[13] *Id*. at ¶26.

[14] *Id*. at ¶41.

[15] *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).

[16] *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*").

[17] 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.

[18] *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

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 application for an increase in rates.[19] 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.[20]

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.[21] 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.[22] On December 19, 2012, the Commission granted DP&L's application.

On December 21, 2012, DP&L filed an application[23] requesting authorization of the Storm Cost Recovery Rider ("Rider SCRR"). The proposed rider sought to recover the storm-related expenses that the PUCO had previously authorized DP&L to defer. In total, DP&L sought recovery of $22.3 million through the rider, which also included an amount related to capital expenditures.

In comments filed on June 17, 2013, Staff recommended that DP&L not be authorized to recover O&M expenses for major event storms in 2008, 2011, and 2012, as well as other storms in 2008 and 2011, as DP&L's historic O&M expenditures had been too low, its historic earnings had been too high, and its return on equity ("ROE") for 2011 was higher

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clearance expenditures in half (as compared to expenditures from 1996 through 1998) during the time that the storm damage occurred.

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

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

[21] *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).

[22] *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*, PUCO Case No. 12-2281-EL-AAM, Application (August 10, 2012).

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

than its Commission-approved ROE. Staff also stated that this case was not the appropriate proceeding for the Commission to authorize DP&L to establish a charge to recover capital expenditures related to storm restoration.

The Commission issued an Entry on October 23, 2013 in which it agreed with Staff that capital expenditures should not be recovered in this case, and directed Staff to conduct a full audit of the storm costs that were incurred in the years for which DP&L requested recovery before the case went to hearing. Staff submitted its audit report on January 3, 2014. On May 1, 2014, a Stipulation among several parties to the case was submitted, which provided that DP&L could recover $22.3 million over one year, and would accrue no additional carrying costs during recovery.

The Stipulation also provided that DP&L would not recover its capital expenditures associated with the 2008, 2011, and 2012 storms in this case, but that nothing prohibited DP&L from seeking recovery of those expenditures in a future distribution rate case. The Commission approved the Stipulation on December 17, 2014.

D. PJM 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.[24] On August 20, 2008, the PUCO approved DP&L's application and required DP&L to file an application no later than June 1, 2009 to begin collecting the deferred TECs.[25]

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.[26] 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.

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[24] *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).

[25] *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).

[26] *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).

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.[27] DP&L requested authority to recover approximately $96 million through its TCRR.[28] 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 were not transmission or transmission-related costs.[29] 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 generation rates.[30] The Second Finding and Order also approved DP&L's revised TCRR and new RPM riders.

E. ESP I

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 competitive retail electric service ("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.

[27] *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*").

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

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

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

DP&L filed its ESP proposal on October 10, 2008.[31] Consistent with SB 221, DP&L proposed to continue its current RSP, but make some adjustments related to providing standard service offer ("SSO") service.[32] 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.[33] 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 (also referred to as the fuel adjustment clause or "FAC") to recover fuel and purchased power costs.[34] 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.[35] 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 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

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[31] *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 I Proceeding*").

[32] *See* Section 4928.141(A), Revised Code.

[33] *DP&L ESP I Proceeding*, Opinion and Order (June 24, 2009).

[34] 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").

[35] The only party to oppose any portion of the settlement was Cargill. Cargill argued that all shopping customers should be able to avoid the Rate Stabilization Charge or "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).

Grid plans, thereby delaying implementation of DP&L's Infrastructure Investment Rider ("IIR") until further approved by the Commission.[36] However, when DP&L submitted its revised business cases for Smart Grid and AMI, the PUCO Staff recommended that the PUCO not approve the plans.[37] 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.[38]

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 221[39] 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,[40] but the EER was 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.[41] 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.[42] In DP&L's ESP proceeding, DP&L envisioned using its Smart Grid/AMI plans to meet the EE/PDR benchmarks. However, as mentioned above, DP&L's Smart Grid/AMI programs were

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[36] 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 I Proceeding*, Comments of the Staff of the Public Utilities Commission of Ohio at 8, 15 (December 15, 2009).

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

[38] *DP&L ESP I Proceeding*, Entry at 2 (January 5, 2010).

[39] 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).

[40] 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).

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

[42] *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).

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.[43] 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.[44] A hearing was scheduled for December 14, 2010; however, the procedural schedule was significantly delayed as parties attempted to settle the matter themselves.[45]

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.[46] 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.[47]

On April 15, 2013, DP&L made a filing for approval of its EE/PDR portfolio plan for the years 2013 through 2015.[48] The plan included two "cross-sector programs": a new pilot program, which would allow the flexibility to research or pilot programs to test their feasibility for cost-effective savings and potential inclusion in future portfolio plans, and a transmission and distribution infrastructure improvements program, for projects that reduce line losses. DP&L did not seek to recover the program costs of the transmission and distribution infrastructure improvements through the EER. In addition, DP&L proposed a shared savings mechanism that would provide an after-tax benefit of 87% to DP&L's customers and 13% to DP&L, based on the utility cost test ("UCT"). DP&L would be eligible for shared savings if the EE/PDR benchmarks established in Ohio law were exceeded. The estimated cost of the three-year plan was $62.5 million.

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[43] *DP&L EE/PDR Proceeding,* Entry (May 19, 2010).

[44] *DP&L EE/PDR Proceeding,* Supplement (July 15, 2010).

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

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

[47] 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.

[48] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2013 through 2015*, PUCO Case Nos. 13-833-EL-POR, *et al*., Application (April 15, 2013) (hereinafter, "*DP&L 2013 EE/PDR Proceeding*").

On October 2, 2013, a number of parties to the proceeding filed a stipulation with the Commission. The stipulation provided that a shared savings mechanism would be implemented that provided an after-tax net benefit of 87% to DP&L's customers and 13% to DP&L when DP&L exceeded its energy efficiency requirements by 15%. If DP&L exceeded the requirements by 10 to 15%, the corresponding shared savings incentive percent would be 10%, and if the Company exceeded the requirements by 5 to 10%, the shared savings incentive percent would be 7.5%. If DP&L exceeded the requirements by less than 5%, the corresponding shared savings incentive would be 5%. Shared savings benefits that could be recovered by DP&L were capped at $13.5 million. In addition, the stipulation capped lost revenues for DP&L at $72 million, such that DP&L would collect no more than $72 million in total lost distribution revenues related to its EE/PDR portfolio plans through December 31, 2015.

For the term of the 2013 to 2015 program portfolio plan, mercantile customers who self-directed their projects and applied for and received an exemption from the EER, or who elected to receive a cash payment in lieu of an exemption, maintained the rights to the energy efficiency capacity for purposes of bidding capacity into PJM auctions, but could elect to voluntarily commit the right to bid the capacity to DP&L, such that DP&L could bid it into the PJM auctions. Further, the demand response capabilities of customers would count toward DP&L's compliance with the peak demand reduction benchmarks.

The Commission approved the stipulation in an order issued on December 4, 2013 and ordered DP&L to file compliance tariffs for the EER to be effective with the January 2014 billing cycle. DP&L filed the tariffs on December 30, 2013.

On June 30, 2014, DP&L filed an application[49] to revise its EER rates to be effective September 1, 2014. On March 14, 2016, DP&L again filed to update its EER rates.[50] The Commission has taken no action on either application to date.

On June 15, 2016, DP&L filed an application to establish a three-year portfolio plan beginning January 1, 2017.[51] The application largely proposed the continuation of DP&L's existing programs at an increased spending level. On December 13, 2016, a Stipulation was filed in the case. The Stipulation recommended a one-year portfolio plan that continued DP&L's existing programs. The Stipulation also recommended a continued after-tax cap on shared savings of $4.5 million and an overall cap on the costs (portfolio plan costs plus shared savings) of approximately $35 million.

[49] *In the Matter of the Application of The Dayton Power and Light Company to Update its Energy Efficiency Rider*, PUCO Case No. 14-1080-EL-RDR, Application (June 30, 2014).

[50] *In the Matter of the Application of The Dayton Power and Light Company to Update its Energy Efficiency Rider*, PUCO Case No. 16-329-EL-RDR, Application (March 14, 2016).

[51] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, PUCO Case No. 16-649-EL-POR, Application (June 15, 2016).

Only OCC opposed the stipulation for DP&L's 2017 plan. OCC challenged DP&L's continued collection of significant amounts of lost distribution revenue through its EER. As a point of reference, DP&L's 2016 plan costs were approximately $22 million, and 2016 lost distribution revenue was approximately $21 million.

On September 27, 2017, the Commission approved the stipulation without modification. Regarding the collection of lost distribution revenue, the Commission found that the issue would likely be resolved as a function of DP&L's pending distribution rate case and proposal for a distribution revenue decoupling rider.

On June 15, 2017, DP&L filed an application to establish a three-year portfolio plan for 2018-2020.[52] An unopposed Stipulation was filed to resolve the case. The Stipulation largely reflected the continuation of the existing portfolio plan with the inclusion of the $35 million cost cap, but allowed for an increase in the collection of shared savings from $4.5 million after-tax (approximately $7 million before-tax collected from customers) to $7 million after-tax (approximately $11 million before-tax collected from customers). The Commission approved the Stipulation on December 20, 2017.

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.[53] On March 17, 2010, the PUCO granted DP&L's application.[54] 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.[55] However, the PUCO's approval of the application was contingent on DP&L satisfying its revised 2010 SER benchmarks.[56] DP&L's revised benchmark for 2010 included the statutorily set benchmark plus DP&L's shortfall from the 2009 Ohio SER benchmark.[57]

[52] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2018 Through 2020*, Case Nos. 17-1398-EL-POR, et al.

[53] *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).

[54] *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, Finding and Order (March 17, 2010).

[55] *Id*. at 4.

[56] *Id*.

[57] *Id*.

On April 15, 2010, DP&L filed an application to update its AER.[58] 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.[59] 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. DP&L's Rider AER was approved in its subsequent ESP as well and has been updated on a quarterly basis.

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 Ventures 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.[60]

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 audit.[61] 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 kilowatt-hour ("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. DP&L's undercollection since 1993 led to a deferred balance of $6 million. Pursuant to the Stipulation, this balance and ongoing emission fees were amortized through the fuel rider, allocated on a percentage of a customer's distribution-related charges.

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[58] *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*").

[59] *DP&L AER Proceeding*, Amended Application (July 22, 2010).

[60] *DP&L FAC Proceeding*, Entry (November 10, 2010).

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

I. TCRR and Rider RPM

As of 2010, DP&L's TCRR had a projected annual revenue requirement of $68 million and the RPM rider had a projected revenue requirement of $49 million.[62] Through the fall of 2013, the bypassable TCRR collected all transmission-related costs and the RPM rider collected all capacity costs incurred by DP&L to serve non-shopping customers taking service under DP&L's ESP.

Following approval of DP&L's ESP ii, DP&L was authorized to implement a bypassable transmission rider ("TCRR-B") and a non-bypassable transmission rider ("TCRR-N"). The TCRR-N collects what DP&L labeled "non-market based transmission costs," the largest of which is Network Integration Transmission Service ("NITS") charges. Prior to approval of DP&L's ESP II, NITS and the other non-market-based transmission services were provided to retail customers through the retail customers' generation provider: that is, through DP&L for non-shopping customers and through CRES providers for shopping customers. The rebundling of NITS and the other non-market-based transmission services reduced retail customers' ability to contract for these services based upon their respective needs. Previously retail customers could have elected to receive an all-in fixed price that included an assumed cost level for these non-market-based transmission charges, or alternatively could have contracted for these services on a pass-through basis. Under the previous structure, retail shopping customers had some ability to control their exposure to these non-market-based transmission costs by reducing their demand during peak usage on the transmission system. More specifically, PJM had billed CRES providers based on the shopping customers' demand during the highest hour of demand in each transmission zone. Therefore, shopping customers could have reduced their peak demand during the highest transmission zone peak, reducing congestion on the transmission grid and reducing their exposure to transmission costs.

DP&L, however, bills its non-bypassable transmission rider, the TCRR-N, based upon monthly billing demand. Billing demand is calculated differently depending on which rate schedule the customer takes service under. For customers on primary, primary-substation, secondary voltage, and high voltage tariffs, billing demand is calculated as the greatest 30-minute integrated demand during the following periods: 100% of monthly on-peak demand (weekdays between 8:00 a.m. to 8:00 p.m.); 75% of monthly off-peak demand (weekdays between 8:00 p.m. and 8:00, weekends, and holidays), or 75% of the greatest 30 minutes of demand during the months of June, July, August, December, January and February during the past 11 months prior to the current billing month.[63] Thus, a customer who reduces demand during the transmission zonal peak, and thus benefits the grid by reducing transmission congestion during times of peak transmission congestion, no longer sees a direct reduction in the transmission portion of its bill.

[62] *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. 10-88-EL-RDR, Application at Schedule B-1 (February 16, 2010) (hereinafter, "*DP&L 2010 TCRR Proceeding*").

[63] DP&L's Distribution Tariffs, Sheets D19, D20, D21, and D22, are available at: http://www.puco.ohio.gov/apps/directorylister/index.cfm?path=Electric\The%20Dayton%20Power%20and%20Light%20Company\&filearea=2.

On May 28, 2014, the PUCO issued an Order denying DP&L's request to transfer $11.9 million from collection through its TCRR-B to the TCRR-N. The PUCO agreed with IEU-Ohio and Staff that DP&L's proposal was unreasonable. Specifically, the PUCO agreed with IEU-Ohio's arguments that the PUCO had already rejected the same proposal (to shift large under-recovery balances from the TCRR-B to the TCRR-N) in DP&L's ESP II case.

Under DP&L's ESP II, competitive auctions were implemented to provide increasing percentages of the SSO supply with 100% of the supply being sourced through the competitive auctions beginning January 1, 2016. The auction winners are responsible for providing capacity and the market-based transmission services. Accordingly, the RPM riders and TCRR-B riders are no longer needed as of January 1, 2016 and, therefore, the PUCO Staff recommended that DP&L conduct a final bypassable true-up of these riders in the first half of 2016 with the riders terminating thereafter.[64] On December 9, 2015, the Commission found that DP&L should be allowed to continue the TCRR-B until May 31, 2016 to collect the remaining balance. The Commission then ordered a final reconciliation through the CBT Rider and the TCRR-B and PJM RPM were set to zero, effective January 1, 2016. Any remaining balance were collected through the Competitive Bid True-up Rider ("CBT Rider").

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,[65] and on December 19, 2009, DP&L filed a joint application with Appleton Papers, Inc. ("Appleton")[66] to establish a reasonable arrangement.[67] 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.

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[64] *In the Matter of the Application of The Dayton Power and Light Company to Update its Transmission Cost Recovery Rider-Bypassable*, PUCO Case No. 15-46-EL-RDR, Staff Review and Recommendation at 2 (November 18, 2015).

[65] *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.

[66] Appleton is now Appvion, Inc. ("Appvion").

[67] *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.

After more than three years and on February 20, 2013, the PUCO issued an Order in Case No. 09-702-EL-AEC approving the Airgas application. Regarding the Appleton application, on May 2, 2013, Staff issued a letter indicating that Staff became aware that as of June 1, 2012 the customer no longer maintained its demand response capability and therefore the terms of the agreement should cease. The change in circumstances for Appleton occurred because while its application was pending at the PUCO, it idled the Ohio facility served by DP&L. Accordingly, the Staff recommended that DP&L issue a rider exemption credit to Appleton for the period of time beginning January 1, 2009 through May 31, 2012. The rider exemption would not apply post-June 1, 2012, pursuant to the terms of the agreement. On August 7, 2013, the Commission issued an Order approving the application and directing DP&L to refund to the customer any assessed charges under DP&L's rider that collected the costs of its EE/PDR portfolio plan, Rider EE/PDR, during the exemption period approved in the order.

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 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.[68] 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.[69] 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.[70]

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.[71] 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.[72] 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

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[68] *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).

[69] *Id*.

[70] *Id*.

[71] *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).

[72] *Id.* at 2.

collecting the "lost revenue" through its EDR.[73] On June 8, 2011, the Commission approved the application without modification.

On October 7, 2013, DP&L and WPAFB filed a joint application in the docket to modify their unique arrangement. The modification sought to establish a fixed rate of $0.02642/kWh and $8.463614/kW for all bypassable charges. In addition, WPAFB would pay tariff rates for all non-bypassable charges. DP&L and WPAFB stated that the pricing modifications would take effect in the first billing cycle after the Commission issued an order, and would continue until December 31, 2014. Further, the joint application requested that the Commission approve the continuation of DP&L's recovery of costs associated with the unique arrangement, including 100% of the delta revenue.

On December 11, 2013, the PUCO approved the modification to the unique arrangement.

On July 10, 2014, DP&L and WPAFB filed a joint application[74] to establish a new unique arrangement commencing January 1, 2015. Under the proposed new arrangement, WPAFB would take service under DP&L's approved distribution, generation, and transmission tariffs and would receive a 14% discount on total monthly DP&L charges. In 2016 and 2017, WPAFB would take service under the same tariffs and would receive an 11% discount on total monthly DP&L charges.

On October 22, 2014, the PUCO approved the unique arrangement.

K. Economic Development Rider (EDR)

On August 12, 2011, DP&L filed an application to update its non-bypassable EDR.[75] The EDR was established in 2009 as part of DP&L's ESP.[76] 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 to collect less revenue (referred to as "delta revenue") than it would have collected from Caterpillar and WPAFB had these customers paid the otherwise applicable rates. 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 2011,[77] with the EDR updated and reconciled semi-

[73] *Id.* at 2-3.

[74] *In the Matter of the Application of The Dayton Power and Light Company and Wright-Patterson Air Force Base for Approval of a Unique Arrangement*, PUCO Case No. 14-1217-EL-AEC.

[75] *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*").

[76] *DP&L ESP I Proceeding*, settlement at 7 (February 24, 2009).

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

annually. The proposed EDR charge was approved by the Commission on October 26, 2011.[78]

The most recent Rider EDR update was filed by DP&L on September 15, 2017.[79] In that filing, DP&L requested to collect approximately $2.6 million on an annualized basis, with new rates proposed to be effective on November 1, 2017. The Commission issued a Finding and Order approving DP&L's application on October 20, 2017.

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.[80] 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.[81]

The first Stipulation was filed on September 2, 2011 between AES, DPL, Dolphin, DP&L, and Dayton.[82] 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

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

[79] *In the Matter of the Application of The Dayton Power and Light Company to Update its Economic Development Rider*, PUCO Case No. 17-1976-EL-RDR.

[80] *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*").

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

[82] *DP&L Merger Proceeding*, Stipulation (September 2, 2011).

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 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.[83]

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.[84] 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 appears that the representations made by DPL, DP&L and AES at the time of the merger and about the benefits of the merger were subsequently replaced by very different claims which DP&L then advanced in its subsequent ESP proceeding for the purpose of protecting its relatively high prices and revenue against the decline that would otherwise occur from market pressure and "customer choice."

M. DP&L's Market Rate Offer ("MRO") Application[85]

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 competitive bidding process ("CBP"), blending a portion of its legacy generation supply prices with the results produced from the CBP for the first five years.

[83] *DP&L Merger Proceeding*, Finding and Order at 7-8 (November 22, 2011).

[84] *Id.* at 8-11.

[85] *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*., Application (March 30, 2012) (hereinafter, "*DP&L ESP II Proceeding*").

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 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.

II. Continuation of Riders

DP&L requested authorization to continue several riders, including the AER, RPM Rider, TCRR, Fuel Rider, and EER. 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 included PJM regional transmission expansion planning costs (“RTEP”), 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 was to 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 above-market 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 associated with such competition.

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 was approved. The practical effect of this PUCO order was 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. On February 19, 2013, the PUCO issued an Entry on Rehearing, denying the Application for Rehearing on the basis that the RSC had been adequately supported.

N. ESP II

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. It also included a request for authorization of a non-bypassable rider with an annual revenue requirement of $120 million.

After discovering a significant mathematical error in its application, DP&L filed an amended ESP application on December 12, 2012. DP&L's amended application requested that the Commission increase the size of the generation-related non-bypassable rider, the Service Stability Rider ("SSR"), from $120 million to $135 million. 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 ROE, calculated based upon total company equity (including the investment in non-utility and the competitive generation 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 operated to transfer the business and financial risks of DP&L's and DPL's competitive and non-utility businesses from AES, their shareholder, to DP&L's retail distribution customers (similar to the risk transfer approved by the PUCO in the AEP-Ohio cases).

DP&L also requested approval of a Switching Tracker or rider triggered when customer shopping exceeded 62% of retail load. The proposed Switching Tracker was essentially a true-up mechanism designed to compensate DP&L for lost generation-related 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. 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."[86] "Each month, DP&L [proposed to] 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) [would produce] the dollars to be added to the switching tracker for the month."[87] 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) were recovered/amortized.

DP&L also 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 called for DP&L to acquire RECs and recover that cost through its AER. DP&L also proposed a 3% cap on the AER-B.

DP&L proposed to bifurcate the TCRR into non-bypassable and bypassable portions depending on whether the transmission service component was subject to market-based pricing. DP&L stated that this would 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 Energy Ohio, Inc. ("DE-Ohio") and FirstEnergy Corp. ("FirstEnergy") service areas. DP&L's proposed ESP also sought approval of a new allocation method for its Fuel Rider based upon a system-average methodology (rather than a least-cost method).

DP&L also proposed to further delay the full separation of its competitive generation business from its non-competitive distribution and transmission businesses (a separation required by Section 4928.17, Revised Code). To achieve this, DP&L proposed to file a separate application pursuant to Section 4928.17(E), Revised Code, and Rule 4901:1-

[86] *DP&L ESP II Proceeding*, Direct Testimony of Craig L. Jackson at 13-14 (October 5, 2012).

[87] *Id*.

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.[88] 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.[89]

DP&L's ESP II proposal was strongly contested by consumers and some competitive suppliers.

On September 4, 2013, the Commission issued an Order approving the ESP II application, with modifications. The Commission approved an ESP for DP&L for the period of January 1, 2014 through December 31, 2016. The Commission directed DP&L to establish SSO rates through a CBP. CBP blending percentages (the percentages used to blend the generation supply price not established by a CBP and the results of the CBP) were set at 10% from January 2014 to December 31, 2014; then 40% from January 1, 2015 to December 31, 2015; and 70% from January 1, 2016 to December 31, 2016. The Commission required DP&L to include in the CBP the load associated with customers taking service under a reasonable arrangement.

With respect to the SSR, the Commission authorized DP&L to collect $110 million in above-market generation-related revenue annually in 2014 and 2015. As discussed above, protecting DP&L's financial integrity is the Commission code for requiring consumers to subsidize DP&L's competitive generation business long after Ohio law mandated an end to such subsidization. The PUCO also set up an opportunity for DP&L to request authority to extend the SSR further into the future by filing an application at least 275 days prior to December 31, 2015, to collect a maximum of $92 million in 2016. Any extension, however, was conditioned. In an application to extend the SSR, DP&L was required to demonstrate that SSR extension was necessary to preserve its financial integrity (protect its generation business), and DP&L must show that it exhausted other opportunities for revenues. An extension was also conditioned on a requirement that DP&L file a distribution base rate case by July 1, 2014. Additionally, DP&L was required to file a Smart Grid and AMI plan and a plan to upgrade its billing system. The SSR was to automatically expire on October 31, 2016.

In a ruling inconsistent with the ruling on the SRR, the Commission denied DP&L's request to establish a Switching Tracker, saying that the Switching Tracker was anticompetitive and duplicative of the relief DP&L obtained through the anticompetitive SSR.

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[88] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, PUCO Case No. 13-2420-EL-UNC, Application (December 30, 2013) (hereinafter, "*DP&L Generation Asset Transfer Proceeding*").

[89] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Amend its Corporate Separation Plan*, PUCO Case No. 13-2442-EL-UNC, Application (December 30, 2013) (hereinafter, "*DP&L Corporate Separation Plan Proceeding*").

The Commission also denied DP&L's proposed non-bypassable rider (Rider AER-N) to collect the costs associated with the Yankee solar generating facility. The Commission held that the non-bypassable rider for the Yankee solar generating would have unfairly subsidized DP&L and mismatched costs and benefits by charging all customers, while it would only provide benefits to SSO customers. The Commission also rejected authorization of the AER-N because authorization would require the EDU to own a generation plant instead of transferring all generating assets through corporate separation.

The Commission approved DP&L's request to bifurcate transmission service into non-bypassable and bypassable portions, effective January 1, 2014. In addition, with regard to corporate separation, DP&L was required to submit a plan by December 31, 2013 to the PUCO to separate its generation assets by December 31, 2016.[90]

On September 6, 2013, the PUCO issued an Entry Nunc Pro Tunc that substantially modified the term of the ESP and some of its key provisions. The Entry:

- Moved the end date of the ESP from December 31, 2016 until May 31, 2017;
- Moved the end date of the initial SSR from December 31, 2015 to December 31, 2016 (an extension from two to three years);
- Permitted DP&L to request a further extension of the SSR for the first four months of 2017 ($45.8 million); and
- Extended the deadline for the generation asset separation until May 31, 2017.

On October 4, 2013, several parties, including IEU-Ohio, filed Applications for Rehearing challenging the PUCO's authorization of the SSR and the SSR Extension ("SSR-E"). DP&L also filed an Application for Rehearing challenging the conditions the PUCO placed on the SSR-E, as well as the requirement that DP&L include the load associated with customers taking service under a reasonable arrangement in the load that will be auctioned off. On October 23, 2013, the PUCO denied DP&L's request to exclude the load of reasonable arrangement customers in the CBP and granted the other Applications for Rehearing for the purpose of giving the PUCO more time to consider the issues. DP&L filed compliance tariffs on December 30, 2013, for rates to become effective January 1, 2014.

In its Second Entry on Rehearing issued on March 19, 2014, the PUCO denied IEU-Ohio's Application for Rehearing. IEU-Ohio filed a second Application for Rehearing on April 17, 2014, arguing that the Second Entry on Rehearing was unlawful and unreasonable because the Commission relied on unidentified nonquantifiable benefits to support its finding that the ESP was more favorable in the aggregate than an MRO.

[90] See *DP&L Generation Asset Transfer Proceeding.*

The Application for Rehearing also addressed some changes that the PUCO ordered to the non-bypassable SSR and the possible extension of the rider through the SSR-E. On May 7, 2014, the PUCO issued its Third Entry on Rehearing, ordering that IEU-Ohio's second Application for Rehearing be granted for further consideration. However, in its Fourth Entry on Rehearing issued on June 4, 2014, the PUCO denied the Application for Rehearing.

On July 30, 2014, several parties, including IEU-Ohio and OCC, filed a joint motion requesting a stay to prevent DP&L from charging customers the SSR while appeals were pending or, in the alternative, a motion to make DP&L's rates for charging the SSR costs to customers subject to refund pending the outcome of rehearing and any appeals. The PUCO denied the joint motion on October 1, 2014.

IEU-Ohio filed an appeal challenging the authorization of the SSR with the Ohio Supreme Court on August 29, 2014.[91] OCC also filed an appeal.

On October 14, 2014, IEU-Ohio and OCC filed a joint motion requesting the Court to order that the SSR rates be suspended during the pendency of IEU-Ohio's and OCC's appeals. The Supreme Court denied this motion on February 18, 2015.

On June 20, 2016, the Supreme Court issued a decision reversing the authorization of the SSR. The decision held that the PUCO's order was reversed based on the Court's decision reversing a similar charge for AEP-Ohio that was found to allow the unlawful collection of transition revenue.[92]

On July 27, 2016, DP&L requested authority to withdraw from its ESP II and to implement rates "consistent" with those authorized as part of its ESP I.[93] Notably, under its ESP I, DP&L was authorized to collect the non-bypassable RSC amounting to approximately $76 million per year. Although it sought to return to ESP I, DP&L did not propose any changes to how generation and transmission services would be procured. To that end, DP&L proposed to retain the generation supply for SSO customers that was secured through the SSO auctions and to use those auction prices in place of the base generation rates that were in effect under ESP I. DP&L also proposed to retain its non-bypassable transmission rider, the TCRR-N, authorized in ESP II. Finally, DP&L sought to reinstate its EIR, a bypassable charge that recovered DP&L's costs to comply with environmental regulations placed on generating plants.

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[91] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Supreme Court Case No. 2014-1505, Notice of Appeal (August 29, 2014).

[92] *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490 (June 20, 2016).

[93] The ESP statute allows an EDU to withdraw its ESP application and return to its prior SSO rates if the PUCO makes any modification to the EDU's ESP application.

The PUCO authorized DP&L's request to withdraw from its ESP II and approved DP&L's proposed ESP I rates with one modification—setting the EIR rate to zero.[94] The PUCO denied authorization of the EIR because DP&L's generating plants were no longer dedicated to serving SSO customers (generation supply was secured through the SSO auctions).[95] DP&L filed compliance tariffs on September 1, 2016, effectuating the withdrawal from ESP II and return to ESP I.

Several parties, including IEU-Ohio, sought rehearing of the PUCO's decision permitting DP&L to implement tariffs "consistent" with its ESP I. The Commission denied the Applications for Rehearing on December 14, 2016.

Appeals from the Commission's orders authorizing DP&L to withdraw from the ESP II and return to the rates the Commission held were "consistent" with the ESP I were filed with the Supreme Court in February 2017.[96] The appeals challenged the Commission's authority to authorize DP&L to withdraw its ESP II based on the Court's decision reversing the authorization of the SSR, the Commission's failure to provide prospective relief to customers to account for the unlawful revenue DP&L collected through the SSR, that the Commission failed to restore the bypassable transmission rider under ESP I, and on gounrds that reinstatement of the non-bypassable RSC charge was unlawful and unreasonable. Oral argument was held in the appeal from the ESP II case in December 2017. Arguments in the ESP I appeal have not yet been scheduled.

O. Generation Asset Transfer

As required by the Opinion and Order modifying and approving DP&L's ESP, II on December 30, 2013, DP&L filed applications for authority to transfer or sell its generation assets[97] and to amend its corporate separation plan.[98] DP&L proposed to continue to operate under functional separation until such time that it could complete structural separation. DP&L's application to transfer its generation assets stated that DP&L had not developed a definitive plan for achieving structural separation, but that it would file a supplement to its application "setting forth a detailed plan for such a separation, once the Company has had the opportunity to complete its review of the pending issues and their operational and financial impacts."[99] DP&L also requested a waiver of the requirement to state the book value and fair market value of its generation assets, as well as the requirement to hold a hearing.

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[94] *DP&L ESP I Proceeding*, Finding and Order at 8-9 (August 26, 2016).

[95] *Id.* at 9.

[96] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan,* Supreme Court Case No. 2017-0204 (appeal of ESP I) and *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan,* Supreme Court Case No. 2017-0241 (appeal of ESP II).

[97] *DP&L Generation Asset Transfer Proceeding*, Application (December 30, 2013).

[98] *DP&L Corporate Separation Plan Proceeding*, Application (December 30, 2013).

[99] *DP&L Generation Asset Transfer Proceeding*, Application at 2 (December 30, 2013).

On February 25, 2014, DP&L filed a supplemental application seeking Commission authority to transfer its generation assets to an affiliate at fair market value ("FMV") on or before May 31, 2017. The supplemental application stated that DP&L was attempting to transfer or sell the assets and might be able to do so in 2014. The application did not indicate the name of the potential buyer, the transfer price, or other terms, but did request that DP&L be permitted to continue the non-bypassable SSR after it transferred the assets and retain environmental liabilities associated with the transferred assets and be provided the opportunity to defer environmental clean-up costs associated with the assets for collection at a later time. The application also implied that DP&L might retain some portion of debt associated with the generation assets it would transfer and requested relief from a commitment it made to maintain an equity ratio of at least 50%. The application further requested authority for DP&L to retain its interest in Ohio Valley Electric Corporation ("OVEC") rights. DP&L also requested that the PUCO not conduct an evidentiary hearing on the application.

In comments filed on March 25, 2014, IEU-Ohio argued that the supplemental application did not include information required by PUCO rules, proposed several unlawful and unreasonable charges and terms, would expose customers to unreasonable leverage, and sought authority to allow DP&L to renege on prior commitments arising from the approval of the merger with AES.

The PUCO issued an order on September 17, 2014, finding that DP&L's application to divest its generation assets should be approved, and approving the application as supplemented on February 25, 2014. Several parties challenged the PUCO's refusal to terminate the authorization of the SSR after the generation assets were transferred and other terms permitting DP&L to defer costs of the transfer for potential future recovery. The PUCO denied the Applications for Rehearing on December 17, 2014.

Following the Supreme Court's decision reversing the authorization of the SSR, DP&L stated that it believed it was no longer required to transfer the generation assets to an affiliate. Concurrently, however, DP&L and its unregulated generation affiliate, AES Ohio Generation, LLC, filed an application with FERC seeking authorization of the transfer of the assets by January 1, 2017.[100] After parties filed comments, answers, and protests, FERC filed a Deficiency Letter indicating that it would not approve the application until the applicants provided additional information addressing whether DP&L had "captive customers" and the extent of state regulation to prevent cross-subsidization.[101] The applicants responded to the letter on December 1, 2016. FERC requested that interested parties file comments regarding the applicants' response to the Deficiency Letter by December 22, 2016. In response, an additional round of comments was filed by the parties.

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[100] *The Dayton Power and Light Company; AES Ohio Generation, LLC*, FERC Docket No. EC16-173, Application for Authorization under Section 203 of the Federal Power Act and Request for Waivers (August 25, 2016).

[101] *Id*., Letter to Randall Griffin from Steve P. Rodgers (November 9, 2016).

On August 29, 2017, FERC approved DP&L's application. DP&L filed a notice of consummation of the approved transfer on October 18, 2017.

P. SEET

On May 15, 2015, as updated May 28, 2015, DP&L filed for a review of its 2014 earnings under the SEET.[102] DP&L reported per book ROE of 9.7% and, with several proposed adjustments, requested that the PUCO find its 2014 earnings were 9.4% under the SEET. The PUCO Staff and DP&L entered into a stipulation recommending that the PUCO conclude that DP&L's 2014 earnings were not significantly excessive.

Q. Distribution Rate Increase

On November 30, 2015, DP&L filed an application to increase its distribution rates.[103] DP&L's application requested a $65.8 million increase in distribution revenue, which represented an increase of approximately 31% over the revenue generated by current distribution rates. DP&L also proposed a return on equity of 10.5% be established, for an overall rate of return of 7.86%.

In its application, DP&L also requested authorization of two new riders. The first, the Uncollectible Rider, would move uncollectible expense collection out of base rates and into a rider in order to collect DP&L's actual uncollectible expenses. The second, the Regulatory Compliance Rider, would amortize over three years several regulatory asset balances, which currently total approximately $24 million. DP&L also requested authority to continue its Storm Cost Recovery Rider for future storm cost recovery. DP&L proposed that, if approved, the rider be set at zero initially.

The Staff is currently reviewing DP&L's application and is preparing a Staff Report of Investigation.

R. ESP III

On February 22, 2016, DP&L filed an application to establish its next ESP (ESP III). DP&L requested that the ESP begin January 1, 2017 (five months before its current ESP was set to expire) and continue for 10 years ending December 31, 2016.[104] Generation supply for non-shopping customers under ESP III would continue to be secured through a CBP.

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[102] *In the Matter of the Application of the Significantly Excessive Earnings Test under Section 4928.143(F), Ohio Revised Code, and Rule 4901:1-35-03(C)(10), Ohio Administrative Code, for The Dayton Power and Light Company*, PUCO Case No. 15-928-EL-UNC, Application (May 15, 2015).

[103] *In the Matter of the Application of The Dayton Power and Light Company for an Increase in is Electric Distribution Rates*, PUCO Case Nos. 15-1830-EL-AIR, *et al*., Application (November 30, 2015).

[104] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 16-395-EL-SSO, *et al*. (hereinafter, "*DP&L ESP III Proceeding*").

DP&L's ESP III application requests the approval of a non-bypassable rider, the Reliable Electricity Rider ("RER"), which would operate in a manner similar to a purchased power agreement ("PPA"). The proposed rate would be linked to the generating plants previously owned by DP&L. For each year of the proposed ESP, a revenue requirement would be calculated for the rider. The revenue requirement would be based on the difference between a calculation of the plants' annual "costs" (including a return on and of the invested capital) and the expected revenue that would be received by the plants by selling their output into the PJM markets. The difference would be credited or charged to customers through the rider. As an alternative, DP&L proposed that the rider be set at an annual amount of $130 million.

DP&L also requested a Distribution Investment Rider ("DIR") to collect distribution capital investment made subsequent to the date certain in its distribution rate case filed in 2015. DP&L further proposed decoupling its distribution rates through a Distribution Decoupling Rider. DP&L also proposed to extend its non-bypassable Reconciliation Rider to collect costs related to its interest in the OVEC generating plants that it was not otherwise able to recoup in the PJM markets. Finally, DP&L proposed to implement a new non-bypassable rider, the Clean Energy Rider. The rider was proposed to be set to zero in this ESP proceeding. If the rider were approved, DP&L would seek recovery of the costs associated with compliance with environmental regulations, costs associated with green energy initiatives, and costs associated with decommissioning older generating plants in a future proceeding.

On October 11, 2016, DP&L filed an amended application and supporting testimony.[105] In the amended application, DP&L dropped its request for the RER and instead asked for authorization of a Distribution Modernization Rider ("DMR"). DP&L requested that the PUCO authorize DP&L to collect $145 million/year through the DMR for seven years beginning January 1, 2017. DP&L stated that the purpose of the non-bypassable DMR charge is to pay down debt at its parent company, DPL Inc., and DP&L and to invest in distribution and transmission operations if there is any additional revenue left over.

On January 30, 2017, DP&L and several parties filed a Stipulation and Recommendation. The stipulating parties recommended that the PUCO approve an ESP with a six-year term that authorized non-bypassable riders that would permit DP&L to bill retail customers $125 million on a non-bypassable basis for five years. They also recommended that DP&L be permitted to recover the above-market costs of its interest in OVEC and recover costs related to incremental increases in distribution plant. The recommendation also included the continuation of the SSO that would be priced based on a competitive auction process, the authorization of economic development credits for certain parties agreeing to the Stipulation or agreeing not to oppose it, and various other benefits to identified parties.

[105] *Id*., Amended Application of the Dayton Power and Light Company for Approval of its Electric Security Plan (October 11, 2016).

On March 14, 2017, an Amended Stipulation was filed. The Amended Stipulation provided that DP&L could bill a DMR designed to collect $105 million annually for three years. DP&L would be required to file a grid modernization plan no later than February 1, 2018 that considered smart metering, distribution automation, and volt-VAR optimization. To mitigate the effects of the DMR on industrial and commercial customers, the Amended Stipulation proposed to provide a credit of 40 ¢/kWh for single site customers with demand exceeding 10 MW, automakers with demand of 4 MW or greater, and aggregated accounts of businesses headquartered in Ohio exceeding 2 MW. DP&L also agreed to make economic development payments for energy and infrastructure and grants to regions affected with plant closures. As proposed in the Amended Stipulation, DP&L would recover its above-market costs associated with its interest in OVEC on a bypassable basis. The Amended Stipulation also provided for a transmission pilot program modelled on a similar pilot approved for the FirstEnergy Companies that would allow customers to avoid the DP&L transmission charge and secure transmission service from PJM indirectly. The Amended Stipulation also provided for several commitments by DP&L to specific customers and customer groups. The Amended Stipulation was contested by OCC.

On October 20, 2017, the PUCO approved the Amended Stipulation with one significant modification. That modification related to the collection mechanism for DP&L's recovery of above-market costs associated with its ownership interest in OVEC. The PUCO modified the recovery mechanism from a bypasable charge to a non-bypassable charge. Applications for Rehearing were filed by several parties and the case remains pending on rehearing before the PUCO.

S. SSR-E Extension

As noted in the discussion of the ESP II decision above, the PUCO included an authorization of an extension of the SSR-E in the Opinion and Order. In a motion filed on March 30, 2016, DP&L sought authorization of an increase in the SSR-E rate. DP&L alleged that the increase is necessary to maintain its financial integrity and that it has substantially complied with the conditions set out in the ESP II Orders.[106] IEU-Ohio and other customers opposed the motion on the grounds that the rider permitted DP&L to bill and collect transition revenue or its equivalent and that DP&L had not satisfied the conditions the PUCO established as a basis for increasing the SSR-E rate from zero. Before the Commission ruled on DP&L's pending motion to extend the SSR-E, the Ohio Supreme Court reversed the Commission's authorization of the SSR. Ultimately, DP&L withdrew the ESP II effective September 1, 2016 thereby rendering the SSR-E extension moot.

[106] *Id.*, Motion of the Dayton Power and Light Company to Implement the SSR Extension Rider (March 30, 2016).

Section II
Duke Energy Ohio, Inc.[1]

A. Rate Stabilization Plan

On January 10, 2003, Duke Energy Ohio, Inc., ("DE-Ohio") filed an application with the PUCO[2] 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.[3] 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.[4]

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,[5] 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

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[1] 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.

[2] *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, OPAE, 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.

[3] *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).

[4] *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).

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

accept the PUCO's Order.[6] DE-Ohio filed an Application for Rehearing on October 29, 2004, requesting that the PUCO adopt the original Stipulation without modification or a new alternative proposal included in its Application for Rehearing.[7] On November 23, 2004, the PUCO issued an Entry on Rehearing generally adopting DE-Ohio's alternative plan with yet more modifications.[8]

OCC appealed the PUCO's RSP determinations for DE-Ohio to the Ohio Supreme Court.[9] 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.[10]

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[6] 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 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.*

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

[8] *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 Midcontinent Independent System Operator, Inc. ("MISO") (was previously the Midwest Independent Transmission System Operator, Inc.) 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.

[9] 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.

[10] 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.*, Ohio Supreme Court Case Nos. 2005-0518 and 2005-0946. The Court granted a joint

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 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.[11]

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.[12] 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.[13] 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.[14]

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-

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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.

[11] *Id*. at ¶¶36, 94.

[12] *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.

[13] *DE-Ohio RSP Remand Proceeding,* Entry (January 3, 2007).

[14] *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.

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.[15] The PUCO's Order on Remand made it clear that the PUCO rejected the May 19, 2004 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.[16] 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.[17]

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.[18]

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

[16] *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 shopping and not return to be served under DP&L's RSP.

[17] *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.

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

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 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."[19]

Several Applications for Rehearing were filed and the PUCO denied all of them, except to make changes requested by DE-Ohio and IEU-Ohio.[20] 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.[21] 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.[22] 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.

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[19] *Id*. at 37.

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

[21] *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio,* Ohio Supreme Court Case No. 2008-0367.

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

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 accordance with the PUCO's Entry on Rehearing in the RSP proceeding.[23] 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").[24]

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.[25]

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.[26] 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

[23] *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.

[24] *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).

[25] *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.

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

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.[27] Regarding the DENA assets, the PUCO 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.[28] OCC and OPAE 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.[29] 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.[30] 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' under-recovery 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.[31]

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

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[27] *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: (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.

[28] *Id*. at 20-21.

[29] *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).

[30] *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).

[31] *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).

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.[32]

In March 2008, OCC and OPAE filed appeals with the Ohio Supreme Court contesting the PUCO's approval of the Phase II Stipulation.[33] 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.[34]

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.[35] The audit was performed by Schumaker and Company and was filed with the Commission on May 14 2010.[36] 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.[37] 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.[38] 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 its Price-to-Compare Fuel and Purchased Power Rider ("Rider PTC-FPP") and its System Resource Adjustment, System Reliability Tracker Rider ("Rider SRA-SRT").[39]

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[32] *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*, PUCO Case No. 07-974-EL-UNC, Opinion and Order (September 30, 2009).

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

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

[35] *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*").

[36] *DE-Ohio FPP Proceeding*, Audit Report (May 14, 2010).

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

[38] *Id.* at 3-7.

[39] *Id.* at 8.

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 non-residential customers. On September 22, 2010, the PUCO adopted the Stipulation without modification.[40]

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 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.[41] 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 ("SO_2") emission allowance ("EA") bank to FPP customers; and made certain allocations for Environmental Protection Agency ("EPA")-allotted zero-cost SO_2 EAs.[42] On February 6, 2006, the PUCO issued an Opinion and Order approving the Stipulation in its entirety.[43]

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.[44] 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

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40 *See Id.* at 11.

41 *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).

42 *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*., Stipulation and Recommendation (January 18, 2006).

43 *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*., Opinion and Order (February 6, 2006).

44 *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).

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 power portfolio.[45] 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.[46] 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.[47] 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.

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[45] *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).

[46] *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*, PUCO Case No. 07-974-EL-UNC, Application (September 4, 2007).

[47] *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*, PUCO Case No. 07-974-EL-UNC, Opinion and Order (September 30, 2009).

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.[48] 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 AAC Rider on September 5, 2006 in order to set AAC levels for 2007 bills.[49] 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.[50] However, pursuant to the Phase II Stipulation, the PUCO permitted DE-Ohio to: adjust its AAC to collect $74 million;[51] collect an AAC true-up to January 1, 2007; and recoup construction work in progress ("CWIP") costs through the AAC.[52]

On September 4, 2007, DE-Ohio filed its application for approval of its 2008 AAC Rider.[53] 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.[54]

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

[49] *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).

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

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

[52] *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).

[53] *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).

[54] *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.

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.[55] 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.[56]

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.[57]

IV. RSP Extension

On August 2, 2006, DE-Ohio filed a proposal to modify its MBSSO, beginning January 1, 2009, and continuing for an indefinite time.[58] 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.[59]

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.[60] 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.[61] 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.

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[55] *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).

[56] *Id*. at 4.

[57] *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) (hereinafter, "*DE-Ohio 2009 AAC Proceeding*").

[58] *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).

[59] *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).

[60] *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*").

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

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.[62] 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.[63] On November 28, 2006, the PUCO accepted DE-Ohio's proposed TCRR for December 2006 through May 2007 and also adopted Staff's recommendation regarding the biennial review of DE-Ohio's TCRR.[64] A subsequent Staff review concluded that DE-Ohio properly included and calculated the controllable RTO-related costs/credits in its TCRR rates.[65] 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 ("RSG") costs; and, (3) collect data on all events that result in generation deviations and allocation of uninstructed deviation charges.[66]

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 ("FTRs") and auction revenue rights, through DE-Ohio's FPP Rider instead of through its TCRR.[67] 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.[68]

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

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

[64] *DE-Ohio TCRR Proceeding*, Entry (November 28, 2006).

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

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

[67] *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).

[68] *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).

C. Distribution Rate Increases

DE-Ohio filed an application to increase its distribution rates and to change its accounting procedures on February 17, 2005.[69] 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.[70] 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; (3) continue to fund its weatherization and energy assistance programs until 2009; and, (4) implement a non-residential demand-side management ("DSM") tracker.[71]

In June 2008, DE-Ohio filed another application with the PUCO to increase its distribution rates.[72] On July 8, 2009, the Commission approved an unopposed Stipulation which permitted DE-Ohio to increase its distribution revenues by $55.3 million annually.[73] 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,[74] and resolved issues related to DE-Ohio's rider governing back-up delivery point capacity.[75]

On July 9, 2012, DE-Ohio filed an application to increase its distribution rates.[76] DE-Ohio's application sought an $86.1 million increase in annual revenues, which DE-Ohio

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[69] *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).

[70] *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).

[71] *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).

[72] *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*").

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

[74] 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.

[75] *Id*. at 9-10.

[76] *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*"").

claims is roughly a 5.1% increase over current rates.[77] DE-Ohio also sought to establish a Facilities Relocation and Transportation Tariff Rider ("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%.[78] 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 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."[79] 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%.[80] The Staff Report also opposed Rider FRT, claiming that it was not well-defined and too open-ended.[81] 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.

On April 2, 2013, a Stipulation was filed in the case. The Stipulation provided for a total revenue requirement of $413.6 million, including a $49 million increase in overall base distribution revenues and a $4.4 million baseline allowance for major storm recovery. The Stipulation provided for an ROE of 9.84% (7.73% rate of return) and DE-Ohio agreed to withdraw its request to establish a storm deferral and tracking mechanism. The Stipulation also provided that DE-Ohio would not seek recovery from customers or deferral of incremental storm expenses for 2012 storms and that Rider FRT would not be approved in this proceeding. The PUCO approved the Stipulation on May 1, 2013 and the new distribution rates became effective May 6, 2013.

[77] *Id.* at 3.

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

[79] *Id.* at 13.

[80] *Id.* at 16.

[81] *Id.* at 21.

D. Electric Security Plan ("ESP I")

On July 31, 2008 (the date that SB 221 became effective), DE-Ohio filed its initial ESP application[82] and on October 27, 2008 a Stipulation was filed resolving most of the issues in the case.[83] 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.[84] 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.[85] 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,[86] 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.[87]

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.[88] Additionally, the PUCO accepted IEU-Ohio's primary argument that the provision of the Stipulation preventing any "mercantile customer"[89] with demand of 3 megawatts ("MW") or less from seeking or obtaining an

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[82] *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 I Proceeding*").

[83] *DE-Ohio ESP I Proceeding*, Stipulation and Recommendation (October 27, 2008).

[84] *Id.* at 32, FN 11 (October 27, 2008).

[85] *DE-Ohio ESP I Proceeding*, Opinion and Order (December 17, 2008).

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

[87] On December 15, 2008, DE-Ohio filed a letter indicating that implementation of the Stipulation would effectuate a total bill rate <u>decrease</u> 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.

[88] *DE-Ohio ESP I 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.

[89] 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.

Section IV: American Electric Power-Ohio

Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP")

exemption from the rider recovering EE/PDR benchmark compliance costs[90] was illegal and modified the Stipulation accordingly.[91]

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 ("Rider SRA-CD").[92] 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?[93] Several parties filed Briefs addressing these issues and on May 26, 2010, the Ohio Supreme Court dismissed the appeal *sua sponte* for failing to present a justifiable case or controversy.[94]

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

I. Annually Adjusted Component

On April 16, 2010, DE-Ohio filed an application to true-up and adjust its Annually Adjusted Component Rider ("Rider PTC-AAC"), a component of its SSO. This rider was designed to collect costs of environmental compliance, and expenditures related to homeland

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[90] 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"*).

[91] *DE-Ohio ESP I Proceeding*, Opinion and Order at 36-37 (December 17, 2008).

[92] *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 I Proceeding*, Opinion and Order at 27 (December 17, 2008).

[93] 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.

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

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.[95] 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.[96]

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.[97] This rider was carried over from DE-Ohio's RSP to its initial ESP.[98] The FPP consists of fuel and purchased power expenses, a reconciliation adjustment, a system loss adjustment, and emission allowances. Rider 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.[99] On May 14, 2010, Schumaker and Company issued its m/p and financial audit of Rider PTC-FPP.[100] As a result of the audit and a subsequent Stipulation, a credit of $865,365 was credited against the costs included for recovery in Rider PTC-FPP.[101] The credit was allocated evenly between residential and non-residential customers. The audit report also recommended DE-Ohio establish an accounting and procedures manual governing the process involved in filing Rider PTC-FPP.[102] 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.[103]

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[95] *See DE-Ohio 2009 AAC Proceeding*.

[96] *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).

[97] *DE-Ohio 2009 AAC Proceeding*, Opinion and Order (December 16, 2009).

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

[99] *DE-Ohio FPP Proceeding*, Entry (January 7, 2010).

[100] *DE-Ohio FPP Proceeding*, Audit Report (May 14, 2010).

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

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

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

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.[104] On January 7, 2010, the Commission selected Schumaker and Company to conduct an audit of Rider SRA-SRT.[105] An audit of this rider was conducted by Schumaker and Company simultaneously with Rider PTC-FPP. As was the case with Rider PTC-FPP, the audit report recommended that DE-Ohio develop an accounting and procedures manual governing the process involved in filing Rider SRA-SRT.[106] The audit report recommendations were agreed to and approved in the PUCO's September 22, 2010 Opinion and Order.[107]

IV. Transmission Cost Recovery Rider

On June 15, 2010, DE-Ohio filed an application to update its TCRR.[108] 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.[109] 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.[110] On September 29, 2010, the Commission adopted Staff's recommendations and approved DE-Ohio's application as revised and supplemented.[111]

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.[112] 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

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[104] *Id.*

[105] *DE-Ohio FPP Proceeding*, Entry (January 7, 2010).

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

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

[108] *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 2010 TCRR Proceeding*").

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

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

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

[112] Section 4928.66, Revised Code.

January 1, 2010.[113] On December 29, 2009, DE-Ohio filed its portfolio plan.[114] 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.[115]

A hearing was held in this case on June 3, 2010.[116] 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.[117] No parties in this case objected to this program, termed the "Home Energy Comparison Report,"[118] which Staff recommended be approved.[119] 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.[120] 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.[121] Staff also claimed that the first objection was without merit since DE-Ohio had not sought cost recovery in this case.[122] 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.[123] 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.

On December 15, 2010, the PUCO issued its decision on DE-Ohio's portfolio plan.[124] 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

[113] Rule 4901:1-39-04, O.A.C.

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

[115] *DE-Ohio ESP I Proceeding*, Opinion and Order (December 17, 2008).

[116] Rule 4901:1-39-04(E), O.A.C.

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

[118] *See Id.* at 2.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 3.

[122] *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.

[123] *Id*.

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

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."[125]

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.[126]

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 ("Rider DR-SAW") 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.[127] 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.[128] 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.[129] Rider EE/PDR recovers the same costs that were being recovered through Rider DR-SAW, plus the costs of three 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, the Environmental Law and Policy Center ("ELPC"), Natural Resources Defense Council ("NRDC"), People Working Cooperatively ("PWC"), Vectren Retail, the Sierra Club, and OPAE; the Ohio Energy Group ("OEG") opposed the Stipulation.

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[125] *Id.* at 10.

[126] *Id.* at 12.

[127] *Id.* at 13-15.

[128] *Id.* at 15.

[129] *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*").

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 (paid for by consumers) for exceeding the statutory benchmarks based upon the following formula.

Percent Achievement of Annual Target	After Tax Shared Savings
<100	0.0%
>100-105	5.0%
>105-110	7.5%
>110-115	10.0%
>115	13.0%[130]

The maximum benefit DE-Ohio could receive under the shared-savings incentive mechanism is roughly $4.5 million. As indicated above, 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.

On April 15, 2013, as amended on May 9, 2013, DE-Ohio filed an application, pursuant to the Commission's direction, for approval of its EE/PDR portfolio of programs.[131] The application requested that the Commission extend the EE/PDR programs previously authorized by the Commission for one year, or through the end of 2016. DE-Ohio also requested that the Commission expand the SmartSaver Residential program, and authorize a new program applicable to non-residential customers, the Energy Management and Information Services program. Finally, DE-Ohio requested that its shared savings incentives mechanism be extended for one year, through the end of 2016.

[130] *DE-Ohio Interim EE/PDR Proceeding*, Opinion and Order at 8 (August 15, 2012).

[131] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak-Demand Reduction Portfolio Programs*, PUCO Case No. 13-431-EL-POR, Application (April 15, 2013).

On September 6, 2013, as amended on September 9, 2013, an unopposed Stipulation and Recommendation was entered into between DE-Ohio, Staff, OEC, ELPC, The Greater Cincinnati Energy Alliance, Inc. ("Energy Alliance"), OCC, OPAE, the Kroger Company ("Kroger"), EMC Development Company, Inc. ("EMC"), NRDC, Ohio Advanced Energy Economy ("Ohio AEE"), and the Sierra Club. The Stipulation recommended that the Commission approve the programs outlined in DE-Ohio's application and authorize an additional program. The new program required DE-Ohio to bid 80% of eligible cost-effective EE/PDR savings achieved by DE-Ohio's portfolio program into PJM's RPM auctions. The net proceeds from the auctions were to be used as a credit against the costs otherwise collected through DE-Ohio's Rider EE/PDR. Finally, the Stipulation noted that DE-Ohio's shared savings incentives were controlled by a prior Stipulation and Commission order and therefore would continue only through the end of 2015 pursuant to the terms of the prior Commission-approved Stipulation. The Commission approved the Stipulation on December 4, 2013.

On September 9, 2014, DE-Ohio filed an application[132] for approval to continue its current cost recovery and incentive mechanism for energy efficiency programs, as structured during 2012 through 2015, through 2016. In the application, DE-Ohio requested that if the Commission determined that the continuation of the existing cost recovery and incentive mechanism through the end of 2016 is not appropriate then the Commission provide DE-Ohio 30 days from the date of the Commission Order to file an amended portfolio plan as contemplated in Senate Bill 310 ("SB 310"). A hearing was held in this matter in July 2015, with briefing concluded in September 2015. The case remains pending before the PUCO.

On June 15, 2016, DE-Ohio filed an application to establish a three-year portfolio plan beginning January 1, 2017.[133] DE-Ohio's application largely proposed a continuation of its existing slate of programs at an increased spending level. Although DE-Ohio requested that it be authorized to collect shared savings, it did not propose any cap on the total amount of shared savings it could collect. A stipulation was filed in the proceeding December 22, 2016. The stipulation largely recommends the approval of DE-Ohio's application with only minor modifications. A hearing on the stipulation is scheduled to commence in February 2017.

[132] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs through 2016*, PUCO Case No. 14-1580-EL-RDR, Application (September 9, 2014).

[133] *In The Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, PUCO Case No. 16-576-EL-POR, Application (June 15, 2016).

G. Advanced Energy Resource Mandate[134] 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.[135] 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.[136] DE-Ohio claimed that four factors 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.[137]

In seeking the adjustment, DE-Ohio claimed its previous three-year rolling average of megawatt-hour ("MWh") sales incorrectly reflected DE-Ohio's baseline.[138] 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.[139] 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.[140]

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.[141] Specifically, these projects did not utilize "utility-grade" meters when they went into service, a requirement under Commission rules,[142] but had since been retrofitted with "utility-grade" meters.[143] However, DE-Ohio indicated that these projects were undertaken before the PUCO had issued its rules requiring "utility-grade" metering

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[134] Section 4928.64, Revised Code.

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

[136] *Id.* at 2.

[137] *Id.* at 3-4.

[138] *Id.* at 5.

[139] *Id.*

[140] *Id.* at 8-9.

[141] *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.

[142] *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.

[143] *Id*.

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.[144]

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.[145] 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.[146]

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.[147] As part of DE-Ohio's Stipulation in its ESP I 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,[148] and on October 19, 2010, a Stipulation was reached between DE-Ohio, Staff, OPAE, and OEG.[149] 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).[150]

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[144] *Id*.

[145] *Id*.

[146] *Id.* at 9-10.

[147] Rule 4901:1-35-10, O.A.C.

[148] *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*").

[149] *DE-Ohio 2009 SEET Proceeding*, Stipulation (October 19, 2010).

[150] *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

The Stipulation found that this rate of return was not significantly excessive and recommended that the Commission find the same.[151] On November 22, 2010, the PUCO approved the Stipulation.

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.[152] 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.[153] 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%.[154] On July 19 2011, a Stipulation was signed by DE-Ohio, Staff, OPAE, Kroger, and OEG recommending that the PUCO find DE-Ohio's earnings were not significantly excessive.[155] 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.[156] 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.

("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.

[151] *Id.* Of note, the PUCO approved a Stipulation in DE-Ohio's ESP I 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.

[152] *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*").

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

[154] *Id.* at 3.

[155] *Id.*

[156] *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) (hereinafter, "*DE-Ohio 2011 SEET Proceeding*").

IV. 2012 Earnings Review under the SEET

DE-Ohio filed an application on April 15, 2013 to begin the review of its 2012 earnings under the SEET.[157] DE-Ohio indicated that, with the required adjustments for SEET purposes, the ROE was -2.76%. A Stipulation was filed by DE-Ohio and Staff recommending that the Commission find that DE-Ohio did not have significantly excessive earnings as the earnings were below the 15% SEET threshold. The PUCO approved the Stipulation on August 21, 2013.

V. 2013 Earnings Review under the SEET

On April 30, 2014, DE-Ohio filed an application with the PUCO to begin the review of its 2013 earnings under the SEET.[158] DE-Ohio indicated that with the required adjustments for SEET purposes, the ROE was 3.05%. A Stipulation was filed by Staff and DE-Ohio recommending that the PUCO find that DE-Ohio did not have significantly excessive earnings as the ROE was below the 15% SEET threshold. The Commission approved the Stipulation on July 9, 2014.

VI. 2014 Earnings Review under the SEET

On September 16, 2015, the PUCO approved a stipulation regarding DE-Ohio's 2014 earnings under the SEET test, finding that DE-Ohio's ROE of 8.27% was not significantly excessive.[159]

VII. 2015 Earnings Review under the SEET

On April 15, 2016, DE-Ohio filed for review of its 2015 earnings under the SEET.[160] A Stipulation between Staff and DE-Ohio was filed on July 29, 2016, recommending the Commission find that DE-Ohio's earnings for 2015 under the SEET was 5.34% and not significantly excessive. The Stipulation was approved by the PUCO on September 6, 2017.

[157] *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. 13-804-EL-UNC (hereinafter, "*DE-Ohio 2012 SEET Proceeding*").

[158] *In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F), and Ohio Adm. Code 4901:1-35-10*, PUCO Case No. 14-577-EL-UNC, Application (April 30, 2014).

[159] *In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F), and Ohio Adm. Code 4901:1-35-10 for 2014*, PUCO Case No. 15-665-EL-UNC, Opinion and Order (September 16, 2015).

[160] *In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F), and Ohio Adm. Code 4901:1-35-10 for 2014*, PUCO Case No. 16-781-EL-UNC, Application (April 15, 2016).

VIII. 2016 Earnings Review under the SEET

On April 20, 2017, DE-Ohio filed for review of its earnings under the SEET. DE-Ohio indicated that its return on common equity for 2016 was 8.08%.[161] DE-Ohio and the PUCO Staff filed a Stipulation on January 16, 2018.

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-IKE").[162] 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.[163] After 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) timesheets that reflected a lower amount of hours than what DE-Ohio had included in its application to establish Rider DR.[164] DE-Ohio agreed to adjust its proposed recovery according to these recommendations as well further reduce its proposed recovery by approximately $1 million.[165] 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.[166] The total revised rider recovery sought was $28,473,244.[167] 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.[168]

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[161] *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. 17-932-EL-UNC.

[162] *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) (hereinafter, "*DE-Ohio Hurricane Ike Proceeding*").

[163] *See 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 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).

[164] *DE-Ohio Hurricane Ike Proceeding,* PUCO Staff Post-Hearing Brief at 4-5 (June 15, 2010).

[165] *Id.*at 5.

[166] *Id*.

[167] *Id*.

[168] *Id*.

On January 11, 2011, the PUCO issued its Opinion and Order in the case,[169] 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.[170] The reduction reflected an exclusion of: (1) discretionary supplemental pay (a $3,279,446 reduction);[171] (2) certain affiliate-related costs (a $1,371,657 reduction);[172] (3) contract labor expenses associated with a DE-Ohio affiliate (a $2,748,442 reduction);[173] and allocating evenly the remaining $10,455,169 of 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

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

[170] *Id.* at 7.

[171] 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.

[172] 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.

[173] 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.

to a certain baseline (yet to be determined) and to amortize that balance (positive or negative) as part of a future distribution rate case.

On April 2, 2013, a Stipulation was filed in *DE-Ohio's 2012 Distribution Rate Increase Proceeding*. The Stipulation provided for a $49 million increase in overall base distribution revenues, including an allowance of $4.4 million for major storm recovery, and DE-Ohio agreed to withdraw its request to establish a storm deferral and tracking mechanism. The Stipulation also provided that DE-Ohio would not seek recovery from customers or deferral of incremental storm expenses for 2012 storms. The PUCO approved the Stipulation on May 1, 2013. The storm provision in the Stipulation did not deny DE-Ohio any rights to seek deferral authority for incremental storm costs for future events after 2012.

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.[174] 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.[175] Rate PTR provided for critical peak pricing events, was limited to eight hours per day from noon to 8 p.m., and was limited to ten days per year, excluding weekends and holidays during June, July, August, and September.[176] In exchange for reducing their demand from their historical levels, customers participating in the program received a credit of $0.28 kWh of reduction.[177] The PUCO approved Rate PTR on June 23, 2010.[178]

J. Customer Shopping

DE-Ohio experienced a high volume of customer shopping in terms of MWh of electric load supplied. At the end of the third quarter of 2017, 86% of DE-Ohio's MWh of electric load was shopping. Broken down by MWh shopping by class, the 86% consisted of: 59% residential, 86% commercial, and 98% industrial.[179]

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[174] *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*").

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

[176] *Id*.

[177] *Id.* at 1-2.

[178] *Id.* at 3-4.

[179] More information on customer shopping can be found at: http://www.puco.ohio.gov/puco/index.cfm/industry-information/statistical-reports/electric-customer-choice-switch-rates-and-aggregation-activity/#sthash.44kRmduU.dpbs (last visited January 18, 2018).

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.[180] As proposed, the MRO would have started on January 1, 2012, as DE-Ohio's ESP I ran through December 31, 2011.[181] 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").[182] 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.[183] 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.[184] DE-Ohio stated that the request to transfer generation assets was independent of the MRO application.[185]

On February 23, 2011, the PUCO issued an order finding DE-Ohio's MRO application non-compliant with statutory requirements.[186] 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-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.[187] DE-Ohio's application requested that the

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[180] *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*").

[181] *Id.* at 1.

[182] *Id.* at 36.

[183] Section 4928.142(F), Revised Code.

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

[185] *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.

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

[187] *Id.* at 8-9.

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.[188] 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."[189] 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.[190] 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.[191]

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."[192] 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 find that [DE-Ohio's] application does not meet the requirements of the statute."[193] 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.[194]

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[188] "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.

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

[190] *Id.* at 17.

[191] *Id.* at 24.

[192] *Id.* at 26.

[193] *Id*.

[194] *Id*. at 27.

Ohio law[195] 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.[196] To address the interplay of these issues, Commission rules[197] 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."[198] 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. [199]

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.[200] The Commission then directed DE-Ohio to include information regarding DSM, TDP, and AMI in any future MRO applications.[201]

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.[202] 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."[203]

[195] Section 4928.142(A)(l)(a), Revised Code.

[196] Section 4928.02, Revised Code.

[197] Rules 4901:1-35-03(B)(2)(e) and (i), O.A.C.

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

[199] *Id*.

[200] *Id*.

[201] *Id.* at 36.

[202] *Id*.

[203] *Id*.

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 quarterly[204] and annual reporting requirements.[205] 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."[206] 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 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,

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[204] 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."

[205] 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."

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

2011, DE-Ohio filed an ESP application to set its SSO rather than continue to pursue setting its SSO through an MRO.

L. ESP II

Following the failed effort to secure approval of its proposed MRO, DE-Ohio filed an application to set its SSO rates through an ESP.[207] In its application, DE-Ohio proposed a 9½-year ESP with a bifurcated approach to supplying energy and capacity to its customers.[208] 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.[209] 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).[210] 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%.[211]

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.[212] The ESP recommended in the Stipulation was vastly different than DE-Ohio's proposed ESP. The Stipulation recommended a 3½-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 Electric Service Stability Charge ("ESSC").[213] 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 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.

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[207] *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 ESP II Proceeding*").

[208] *DE-Ohio ESP II Proceeding*, Opinion and Order at 8 (November 22, 2011).

[209] *Id*.

[210] *Id*.

[211] *Id*.

[212] *Id.* at 52.

[213] *Id.* at 13.

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.[214] 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.[215] In addition to these significant provisions, the following riders were established.

I. Riders Established Pursuant to DE-Ohio's ESP II

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") recovered 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") recovered 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.[216] Together, Rider RC and Rider RE equaled the competitive auction clearing prices.[217] These two riders were bypassable by shopping customers.

Rider SCR recovered the difference between payments made to suppliers for SSO service and amounts collected from Riders RC and RE.[218] Rider SCR also recovered 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.[219] Any under-accrual or over-accrual of Rider SCR included a carrying charge equal to DE-Ohio's overall cost of long-term debt and is reconciled in the quarterly updates. Rider SCR was subject to annual audit by the Commission. Rider SCR was 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") applied to non-residential demand-metered rates and establishes a non-bypassable demand charge, and a non-bypassable energy credit.[220] The rider was designed to reward high load-factor customers for efficiently using energy and mitigate the impact of volumetric energy charges on energy

[214] *DE-Ohio ESP II Proceeding*, Stipulation at 25 (October 24, 2011).

[215] *Id*.

[216] *DE-Ohio ESP II Proceeding*, Opinion and Order at 12 (November 22, 2011).

[217] *Id*.

[218] *Id*.

[219] *Id*.

[220] *Id.* at 17.

intensive industries. The benefit which this Rider provided to some customers was paid for by other customers and it therefore created controversy when it went into effect.

The Reconciliation Rider ("Rider RECON") was limited in duration and its sole purpose is to conduct a final true-up of DE-Ohio's Rider PTC-FPP and its Price-To-Compare System Reliability Tracker Rider ("Rider PTC-SRT") that expired on December 31, 2011.[221]

The Alternative Energy Resource Rider ("Rider AER-R") recovered DE-Ohio's reasonable and prudently incurred costs of complying with Ohio's advanced energy resources portfolio requirements.[222] The rider was updated quarterly and was subject to annual audits.

The Uncollectable Expense Generation Service Rider ("Rider UE-GEN") recovered DE-Ohio's bad debt expenses associated with generation service.[223] Rider UE-GEN was 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.[224] Finally, the Stipulation allowed DE-Ohio to establish Rider ESSC. Rider ESSC allowed 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 ESP II proceeding, DE-Ohio agreed to implement distribution revenue decoupling.[225] 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.

[221] *Id*.

[222] *Id*.

[223] *Id.* at 18.

[224] *Id.* at 32.

[225] *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.[226] The CBP auction included tranches[227] 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,[228] 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.

DE-Ohio's subsequent SSO prices have been determined through a CBP.

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.[229] 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 ("BRA"), and accepted DE-Ohio's Fixed Resource Requirement ("FRR") Integration Plan.[230] In its MRO proposal (discussed above), DE-Ohio had proposed recovery of MISO exit fees and PJM entrance

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[226] *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*").

[227] "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 ESP II Proceeding*, Stipulation at 10 of Attachment G (October 24, 2011).

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

[229] FERC Docket No. ER10-1562-000.

[230] Filed under FERC Docket No. ER10-2254-000.

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.[231] In the latter proceeding, DE-Ohio proposed a non-bypassable Base Transmission Rider ("Rider BTR") to recover its NITS costs, its Midwest Transmission Expansion Planning ("MTEP") costs, and all other costs billed to DE-Ohio under FERC-approved tariffs.[232] 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 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.[233] 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. Riders BTR and RTO were designed to supplant DE-Ohio's Rider TCRR at its expiration on December 31, 2011, with a trueing-up of Rider TCRR to take place through Rider RTO.

Filed simultaneously with the application was a Stipulation signed by DE-Ohio, Staff, OCC, and OEG.[234] 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.[235] 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.[236] On May 25, 2011, the PUCO approved the Stipulation without modification. On July 15, 2011, the PUCO denied OPAE's Application for Rehearing.

On July 17, 2013, as amended on August 1, 2013, DE-Ohio filed an application to update Riders BTR and RTO, effective September 30, 2013.[237] The application requested an

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[231] *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*").

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

[233] *Id*.

[234] *Id.*

[235] *Id.* at 6.

[236] *Id.* at 5.

[237] *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set its Rider BTR and Rider RTO*, PUCO Case No. 13-1633-EL-RDR, Application (July 17, 2013).

$8.5 million increase in Rider BTR's revenue requirement, for a total of $74.4 million. The application proposed to maintain the current rate for Rider RTO, a credit of $0.000394/kWh. The Commission approved the application on September 18, 2013. DE-Ohio filed compliance tariffs on September 25, 2013.

On January 23, 2014, DE-Ohio filed an application to update Rider RTO, to become effective for bills rendered effective January 31, 2014. The requested rate was set to $0.00 because as of the end of the January 2014 revenue month the credit to the customers for the true-up of the TCRR had materially been exhausted.

On June 20, 2014, DE-Ohio filed a letter with the PUCO indicating that the final true-up of the TCRR resulted in an under-recovery for DE-Ohio of $42,000, and that DE-Ohio would forego collection of that amount.

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,[238] 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.[239] 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."[240]

The application sought three categories of relief. First, citing to Sections 4905.04, 4905.05, 4905.06, and 4909.18, Revised Code, the application asserted 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.[241] Second, citing Section 4905.13, Revised Code, the application asserted 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."[242] Third,

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

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

[240] *Id*. at 3.

[241] *Id*. at 2.

[242] *Id*.

citing Section 4909.18, Revised Code, the application sought an order approving a new non-bypassable tariff for the future recovery of the deferred amounts.[243]

Applying "the formulaic methodology recently approved by the PUCO for establishing a cost-based compensation mechanism" for AEP, DE-Ohio alleged that the total generation capacity service revenue requirement to achieve an 11.15% return on common equity, is $364.9 million annually.[244] Netting the revenue DE-Ohio was already collecting for generation capacity service, the application asserted that the PUCO must, based on the AEP-Ohio holdings, authorize DE-Ohio to collect $257 million in additional annual compensation for such service.[245] On a net basis, DE-Ohio sought 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 proposed to add a carrying charge to the deferred balance at a long-term debt rate.[246] The application sought 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.[247] DE-Ohio also stated that it expected 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."[248]

The PUCO set DE-Ohio's AEP-Ohio "copy-cat" 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 set the matter for hearing beginning in April 2013. The hearing concluded on May 21, 2013. Following hearing, parties submitted briefs to the PUCO on June 28 and July 30, 2013. The opposition to DE-Ohio's application was based on the view that Ohio law precluded the PUCO from awarding EDUs with above-market compensation for generation-related services and the commitments DE-Ohio made in the settlement approved by the PUCO in DE-Ohio's ESP II proceeding.

The PUCO issued an Order in this case on February 13, 2014. In its Order, the PUCO dismissed DE-Ohio's application, identifying three separate grounds for dismissal. First, the PUCO determined that the application was precluded by the settlement DE-Ohio entered when it resolved its last ESP application in 2011. In that application, it sought above-market compensation for its provision of capacity service but agreed to resolve the

[243] *Id*. at 4

[244] *Id*. at 7, 8.

[245] *Id*. at 8.

[246] *Id*. at 10.

[247] *Id*. at 9.

[248] *Id*. at 10.

case by pricing capacity at the price established through the auction process used by PJM (the RPM-Based Price). The PUCO found that the ESP stipulation was intended to resolve DE-Ohio compensation for the provision of capacity service. The PUCO specifically noted testimony provided by DE-Ohio in support of the ESP stipulation that stated that DE-Ohio was to be compensated at the RPM-Based Price for all capacity used to serve shopping and non-shopping customers. Further, DE-Ohio secured a non-bypassable rider generating an additional $110 million annually to satisfy its concern about financial integrity. The PUCO concluded that Duke should not be permitted to "renege" on the package deal approved by the PUCO.

The PUCO also concluded that the application operated as an untimely application for rehearing of the PUCO's approval of the ESP Stipulation. The final order on the ESP Stipulation was in 2011, making the application in this case untimely.

As a separate basis for denying the application, the PUCO held that DE-Ohio's application was barred by the legal doctrines of collateral estoppel and res judicata. Because Duke in the ESP case had asked for a cost-based capacity charge but settled the matter by agreeing to the RPM-Based Price, the PUCO concluded that DE-Ohio presented no issue that had not been previously considered and resolved in the ESP case.

O. Manufactured Gas Plant ("MGP") Remediation Costs

On July 9, 2012, DE-Ohio filed a base gas rate increase application.[249] The application requested authority to increase DE-Ohio annual revenue requirement by $44 million. Duke also requested authority to amortize approximately $65 million of deferred expenses associated with remediation of MGP sites. In a previous proceeding, the Commission authorized DE-Ohio to defer expenses associated with MGP remediation costs but required DE-Ohio to file subsequent applications for approval to amortize the deferred expenses through rates.

DE-Ohio and several intervenors filed a partial stipulation on April 2, 2013 through which DE-Ohio agreed to not increase its annual revenue requirement for its gas distribution rates. The stipulation resolved all outstanding issues in the proceeding except for DE-Ohio's request to amortize expenses associated with MGP remediation. The Stipulation, however, proposed a revenue allocation of MGP costs, in the event that the Commission approved DE-Ohio's application.

During the hearing, DE-Ohio's request to collect MGP remediation costs was contested by several intervenors because DE-Ohio's MGPs have not been in operation since the mid-1960s. A small portion of the MGP sites are on utility property that is currently used and useful and included in DE-Ohio's rate base. Because precedent holds that O&M expense may only be recovered if it is related to property that was used and useful in the

[249] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, PUCO Case Nos. 12-1685-GA-AIR, *et al*., Application (July 9, 2012) (hereinafter, "*DE-Ohio Gas Rate Case Proceeding*").

test year, Staff and customer parties argued that the majority of DE-Ohio's requested remediation expenses should not be recovered from customers.

DE-Ohio argued that it should be authorized to recover MGP remediation expenses because it is required by federal law to incur these costs; thus, remediation costs should be considered a cost of doing business as a utility in Ohio. Columbia Gas of Ohio filed an amicus brief in support of Duke's request.

In its Order issued on November 13, 2013, the Commission determined that "contrary to the positions espoused by Staff and the intervenors, the Commission views the recovery of the MGP costs proposed by Duke in these cases as separate and unique from the determination of used and useful on the date certain utilized for defining what will be included in base rates for rate case purposes."[250] The Commission further determined that "R.C. 4909.15(A)(1) and the used and useful standard applied to the date certain for rate base costs is [sic] not applicable to our review and consideration of whether Duke may recover the costs associated with its investigation and remediation of the MGP sites."[251]

The Commission then determined that, "[c]ontrary to the opinions of Staff and the intervenors, we find that the determinative factor is whether the remediation costs, which were deferred by Duke and amortized to expense during the test year in accordance with our decision in the *Duke Deferral Case*, are costs incurred by Duke for rendering utility service and, thus, costs that may be treated as expenses incurred during the test year, in accordance with R.C. 4909.15(A) (4)."[252] The Commission recognized that the remediation costs did not relate to plant that was used and useful for utility service, but instead the costs "were a necessary cost of doing business as a public utility in response to a federal law, CERCLA, that imposes liability on Duke … for remediation of the MGP sites."[253]

In total, the Commission authorized DE-Ohio to collect approximately $62.8 million for MGP site remediation. The Commission, however, denied DE-Ohio's request to collect carrying charges on deferred remediation expenses.

Several parties to the case, including OCC, appealed the decision to the Ohio Supreme Court on the basis that the ratemaking formula contained in Ohio law does not permit the PUCO to authorize the recovery of these costs in rates.[254]

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[250] *DE-Ohio Gas Rate Case Proceeding*, Opinion and Order at 53 (November 13, 2013) (hereinafter, "*DE-Ohio Natural Gas Rate Case Order*").

[251] *Id*. at 54.

[252] *Id*. at 58.

[253] *Id*. at 58-59.

[254] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Ohio Supreme Court Case No. 2014-0328.

In addition to filing an appeal, OCC and the others also filed a motion asking the Supreme Court to stay the enforcement of the order on March 17, 2014.

The Supreme Court granted the stay of the PUCO's order on May 14, 2014, authorizing the collection of remediation costs associated with MGP sites. The Court's order staying the PUCO's order did not require OCC and others to post a bond.

After the Court issued its order, DE-Ohio asked the Court to lift the stay.

On July 29, 2014, the Court issued an order leaving the stay in place but directing the parties to file recommendations as to the appropriate level of a bond.

On November 5, 2014, the Court ordered the appellants to post bond in the amount of $2,506,295 with the Clerk of the Court in order to continue the stay, and that if appellants failed to post the bond by November 17, 2014, the stay would be lifted. No bond was filed.

On November 18, 2014, DE-Ohio filed a motion to reinstate the tariff and request for expedited treatment such that DE-Ohio could reinstitute the Rider with the December 2014 billing cycle. In the motion, DE-Ohio indicated that the appellants had not posted the bond by the required deadline. The PUCO granted the motion to reinstate the tariff on January 14, 2015.[255] DE-Ohio filed a tariff to reinstate the charge the same day.

On June 29, 2017, the Court issued a decision affirming the PUCO. The Court determined that the statutory ratemaking formula allowed a utility to recover expenses incurred in the test year to provide public utility service even if those expenses were related to property that was not used and useful in rendering public utility service. The Court further found that the appellants had failed to identify any evidence in the record to support a reversal of the PUCO's conclusion that the MGP expenses were not related to providing public utility service. As such, the Court deferred to the PUCO's finding that the MGP remediation costs were expenses related to providing public utility service.

P. ESP III

On May 29, 2014, DE-Ohio filed an application for its third ESP ("ESP III").[256] Under DE-Ohio's proposal, ESP III would commence on June 1, 2015 and end on May 31, 2018. DE-Ohio proposed that it have the unilateral right to terminate the ESP after two years in the event of change in law, regulation or in the rules reflected in PJM's approved tariff.

SSO generation rates were proposed to be set through multiple auctions spread over the term of ESP III. The basic structure of the auctions was maintained from the current ESP,

[255] *DE-Ohio Gas Rate Case Proceeding,* Entry (Jan. 14, 2015).

[256] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, PUCO Case Nos. 14-841-EL-SSO, *et al*., Application (May 29, 2014).

but DE-Ohio proposed to convert rates for the capacity rider to “energy-only” rates, eliminating all existing demand charges currently applicable to that tariff.

DE-Ohio proposed to eliminate Rider LFA (Load Factor Adjustment Rider) and an interruptible service option available to customers served at transmission service voltage whose load is greater than 10 MW.

DE-Ohio proposed a distribution investment rider, Rider DCI, which would recover incremental capital investment and associated depreciation and property tax expense not recovered in base rates. DE-Ohio also requested a Distribution Storm Rider for amounts in excess of an amount embedded in base rates.

DE-Ohio also proposed a Price Stabilization Rider (“Rider PSR”) to “provide customers the net benefit of all revenues accruing to the Company as a result of its ownership interest and contractual entitlement in the Ohio Valley Electric Corporation.”

On April 2, 2015, the PUCO modified and approved DE-Ohio’s ESP III application and authorized an ESP to be effective from June 1, 2015 to May 31, 2018 (“ESP Order”). Under the approved ESP, DE-Ohio will continue to utilize competitive auctions to secure supply for non-shopping customers served under DE-Ohio’s ESP.

As in the AEP-Ohio ESP case decided in February 2015 (discussed below), the PUCO approved a non-bypassable rider that would permit DE-Ohio, through a separate application, to recover above-market generation-related costs (the PSR) related to DE-Ohio’s ownership in the Ohio Valley Electric Corporation (“OVEC”). The rider was approved as a placeholder at a rate of zero, pending consideration of any future proposal to the PUCO. DE-Ohio and the other Ohio electric utilities are shareholders in OVEC and have an entitlement to the output of the plants based on their ownership interest. Each utility is also responsible and is charged for a portion of the fixed and variable costs of the operation of OVEC. DE-Ohio proposed to liquidate its share of OVEC-related capacity and energy into PJM’s wholesale markets. The rider would be a charge or credit based on the difference between the costs DE-Ohio is charged for its interest in OVEC and the revenue DE-Ohio received from PJM for the OVEC-related capacity and energy. The PUCO identified several “factors” it would consider if DE-Ohio sought to recover costs under the PSR in a future application.

The PUCO also ordered that the LFA should be phased out rather than immediately terminated. The LFA was to be reduced 33% the first year, 33% the second year, and 34% the third year.

The PUCO also denied DE-Ohio’s request to terminate an interruptible service option. The level of the interruptible credit was set at 50% of the Net Cost of New Entry, a statistic/price established by PJM annually. DE-Ohio was authorized to recover the revenue to cover the credit under Rider DR-ECF. DE-Ohio was directed to bid the demand resources associated with interruptible service into PJM’s base residual auctions during the term of the ESP.

DE-Ohio also proposed Rider DCI to recover the incremental costs associated with new distribution facilities. The PUCO authorized DE-Ohio to implement Rider DCI with some modifications. The rate design was modified to be a uniform percentage increase applied to base distribution charges. The PUCO excluded "general plant" additions from the calculation of the rider and established revenue caps on the amount that DE-Ohio may collect under the rider of $17 million in 2015, $50 million in 2016, $67 million in 2017, and $35 million for the first five months of 2016.

The PUCO modified and approved DE-Ohio's request for a Distribution Storm Rider. As proposed, the rider would recover incremental storm damage expense that exceeds the annual level of expense recognized in current rates ($4.4 million). DE-Ohio proposed to defer the incremental portion of the expenses, with carrying costs at the company's long-term debt rate, until the level of deferred expenses reaches $5 million. DE-Ohio was authorized to seek recovery of deferred expenses through this rider.

The PUCO found that DE-Ohio's ESP III, as modified by the PUCO, was more favorable in the aggregate than an MRO. The PUCO found that the generation costs of the ESP were identical to those that would be expected under an MRO and found that the approved ESP advanced the state policy and would improve system safety and reliability.

The PUCO directed DE-Ohio to file an application for its next SSO (either an ESP or an MRO) no later than June 1, 2017.

DE-Ohio and several parties sought rehearing of the PUCO's orders. The PUCO granted rehearing for further consideration of the applications for rehearing on May 28, 2015. The PUCO has not issued an order addressing its grant of rehearing.

Q. Power Stability Rider Application

On March 31, 2017, DE-Ohio filed the application seeking authorization for a stability rider and to "populate" the rider.[257] The application did not state what the expected charges or credits would be, but the PUCO determined in a prior case, discussed above, that a similar rider would result in a charge to customers during the term of the current ESP, which runs through May 31, 2018. DE-Ohio asked that the rider continue through the term of the OVEC contract. That contract is scheduled to end in 2040. Duke also asked for authority to begin deferring the above-market costs for future recovery, beginning January 1, 2017.

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[257] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR*, Case Nos. 17-872-EL-RDR, *et al.*, Application (Mar. 31, 2017).

R. ESP IV

DE-Ohio filed an application for a new electric security plan (ESP IV) on June 1, 2017.[258] It proposed a plan that would run from June 1, 2018 to May 31, 2024. Under the plan, DE-Ohio would procure generation service for non-shopping customers through a CBP. It would procure generation service through RFPs for its low-income PIPP customers.

DE-Ohio proposed to end its program that encourages participation in the PJM demand response program and phase out the rider that recovers payments associated with that program (Rider ER-ECF).

In addition, the Load Factor Adjustment Rider ("Rider LFA") would be fully phased out as required by a prior PUCO order.

DE-Ohio proposed four new non-bypassable riders:

1. Regulatory Mandates Rider ("Rider RMR"): DE-Ohio sought to recover costs incurred in response to changes in law or regulation.
2. Incentive Ratemaking Mechanism Rider ("Rider IRM"): DE-Ohio would be permitted to adjust rates if its ROE moved outside a defined band of 200 basis points above or below the ROE approved in DE-Ohio's most recent base electric distribution case.
3. PowerForward Rider ("Rider PF"): This rider would authorize DE-Ohio to bill for new programs "reflective of the current intent of [the PUCO's] PowerForward [initiative]" and recover the incremental costs not included in its Distribution Capital Investment Rider ("Rider DCI"). The rider would be set as a percentage of base distribution charges.
4. Electric Service Reliability Rider ("Rider ESRR"): The rider would recover the costs associated with tree trimming and other vegetation management. The rate would be set as a percentage of base distribution charges.

DE-Ohio also sought to continue and extend the Power Stability Rider ("PSR"). In another proceeding discussed above, it was seeking to recover the above-market costs associated with its interest in the OVEC through 2040 through this rider.[259]

DE-Ohio proposed modifications to its net metering rider to reduce the payment for excess customer-generated electricity to only an energy component (i.e., it is recommending that the Commission remove compensation for capacity in the net

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[258] *In the Matter of the Application of Duke Energy Ohio, Inc., 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*, Case Nos. 17-1263-EL-SSO, *et al.*, Application (June 1, 2017).

[259] Separately, DE-Ohio is seeking legislation to authorize recovery of the OVEC costs.

metering rider). It is also seeking to modify its Rider DCI to include common, general, and intangible plant.

This case is still pending.

S. 2017 Rate Case

On March 2, 2017, DE-Ohio filed an application seeking a $15.4 million increase in its base distribution rates.[260] A substantial portion of the increase is to address the replacement of automated electric meters. DE-Ohio sought a return on investment of 7.82%.

In addition to its request to increase its distribution rates, DE-Ohio also requested authority to implement a new non-bypassable rider that would allow DE-Ohio to recover any costs it incurs to comply with legislative or regulatory mandates. DE-Ohio also proposed to collect a portion of the credits it provides to net metering customers through its non-bypassable uncollectible expense rider, Rider UE-GEN.

The Staff of the PUCO issued its Staff Report on September 26, 2017.[261] The Staff Report recommended a decrease in annual revenue of $18.3 million to $29.9 million. Besides several adjustments to the amounts sought by DE-Ohio, the Staff Report also rejected DE-Ohio's request to increase the amounts DE-Ohio can seek under Rider DCI. Further, the Staff Report recommended that the return on investment be set within a range of 7.22% to 7.74%.

This case is still pending at the PUCO.

[260] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case Nos. 17-32-EL-AIR, *et al.*, Application (March 2, 2017).

[261] *Id*., Staff Report (September 26, 2017).

Section III
FirstEnergy Corp.

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

A. Rate Stabilization Plan ("RSP")

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.[1] On February 11, 2004, an evidentiary hearing began and several parties submitted a partial Stipulation ("RSP Stipulation").[2]

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

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[1] *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*").

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

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 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.[3] 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.[4]

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.[5] 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.[6] 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.[7] 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

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[3] *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).

[4] *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).

[5] *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*").

[6] *FirstEnergy 2005 CBP Proceeding*, Entry at 2 (September 28, 2005).

[7] *FirstEnergy 2005 CBP Proceeding*, Entry at 9 (January 25, 2006).[8] *FirstEnergy 2005 CBP Proceeding*, Entry at 3 (September 6, 2006).

CBP process (no potential bidding party submitted an application to participate by the deadline). Accordingly, the PUCO closed the docket on September 6, 2006.[8]

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.[9] 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.[10]

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.[11] 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.[12] 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

[8] *FirstEnergy 2005 CBP Proceeding*, Entry at 3 (September 6, 2006).

[9] *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.

[10] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, at ¶19.

[11] *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*").

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

program. The PUCO approved the CBP Stipulation in its entirety on August 15, 2007.[13] FirstEnergy subsequently filed tariffs indicating that the REC for each 100 kWh block could be purchased for 50¢/month.

B. Rate Certainty Plan ("RCP")

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.[14] Additionally, on September 9, 2005, FirstEnergy filed a series of applications that collectively represented FirstEnergy's RCP proposal ("RCP Application").[15] 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.[16] 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.

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

[14] *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).

[15] *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*").

[16] *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.

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 than usual to compensate for the special accounting treatment given to such expenditures.[17]

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.[18] 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.[19]

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.[20] 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.[21] 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.[22]

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[17] *FirstEnergy RCP Proceeding*, Opinion and Order (January 4, 2006).

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

[19] *FirstEnergy RCP Proceeding*, Entry on Rehearing (January 25, 2006).

[20] *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.

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

[22] *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.

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.[23] 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.[24] FirstEnergy's application requested recovery of both the 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.[25]

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.[26] 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.[27] FirstEnergy proposed to recover the applicable fuel cost deferrals beginning with the first billing cycle in June

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[23] *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).

[24] *Id*. at 5.

[25] 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) (hereinafter, "*FirstEnergy Distribution Rate Increase Proceeding*").

[26] *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).

[27] *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).

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.

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. Ultimately, FirstEnergy proposed to resolve the outstanding issues in this proceeding in its ESP I proceeding.[28] Accordingly, the Commission granted FirstEnergy's motion to suspend the procedural schedule in this case.

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.[29] 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

[28] *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 I Proceeding*").

[29] *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*").

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.[30] 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 filing.[31] 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.[32] Multiple parties submitted a Stipulation and Recommendation ("RTO Cost Stipulation")[33] to the PUCO that recommended,

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

[31] *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.

[32] *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).

[33] *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

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.[34]

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 Guarantee ("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.[35] 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.[36]

On June 2, 2008, Staff filed its biennial review on controllable RTO costs included in FirstEnergy's TAS Riders.[37] Staff generally found that FirstEnergy should be authorized to include the presented costs/credits in its transmission rider update and recommended

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Stipulation included FirstEnergy, IEU-Ohio, OCC, OPAE, and PUCO Staff. Dominion Retail signed the Stipulation as a non-opposing party.

[34] *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 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.

[35] *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).

[36] *Id*. at 8.

[37] *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).

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.[38]

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.[39] 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.[40] 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.[41]

[38] 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*.

[39] *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).

[40] *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).

[41] *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).

E. Distribution Rate Case

On June 7, 2007, FirstEnergy filed an application for permission to increase its distribution rates.[42] 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.[43] The PUCO authorized a rate of return of 8.48% for each of FirstEnergy's 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.[44]

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 Roberto[45] and Centolella[46] 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.

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[42] *See FirstEnergy Distribution Rate Increase Proceeding,* Application (June 7, 2007).

[43] *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).

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

[45] Commissioner Roberto was appointed to the PUCO by Governor Strickland and her five-year term expired in April 2013.

[46] Commissioner Centolella was appointed to the PUCO by Governor Strickland and his five-year term expired in April 2012.

Chairman Schriber[47] 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 ("ESP I") 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 year of the ESP.[48] 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.[49] 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 case[50] 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

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

[48] *FirstEnergy ESP I Proceeding*, Application (July 31, 2008).

[49] *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*").

[50] 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.

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.[51] 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 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.[52]

On December 19, 2008, the PUCO issued its Opinion and Order in FirstEnergy's ESP I proceeding significantly modifying FirstEnergy's proposed ESP.[53] 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,[54] 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.[55] The PUCO determined that, except for CEI,[56] 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

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[51] *FirstEnergy MRO Proceeding*, Opinion and Order (November 25, 2008).

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

[53] *FirstEnergy ESP I Proceeding*, Opinion and Order (December 19, 2008).

[54] 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.

[55] *FirstEnergy ESP I 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.

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

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 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.[57] 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 requirements[58] and the PUCO would examine whether the costs were prudent at a later date. Finally, the PUCO permitted CEI to defer

[57] *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).

[58] 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).

its Rider FUEL costs for future recovery.[59] 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 prudency issues until the PUCO ordered otherwise. As required by the Attorney Examiner, FirstEnergy timely filed the final post-RFP report on February 2, 2009.

II. ESP I 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.[60] 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.[61] The limited term ESP provided that, for the April 1, 2009 through

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

[60] *FirstEnergy ESP I Proceeding*, Entry (January 29, 2009).

[61] *Id.*, Second Finding and Order (March 4, 2009).

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 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.[62] 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).[63] 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

[62] *Id.*, Second Opinion and Order (March 25, 2009).

[63] 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 and Commissioner Centolella's term expired in April 2012) joined an opinion that expressed a preference for a 65% bid cap. Commissioner Roberto (whose term expired in April 2013) filed a Dissenting Opinion, dissenting on the grounds that a bid cap of 50% should be imposed by the Commission.

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, 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.[64]

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[64] 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).

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 revenue[65] associated with reasonable arrangements approved by the Commission with a separate unavoidable rider for existing CEI reasonable arrangements that continued past December 31, 2008.

III. Auction to Set June 1, 2009 - 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.[66] 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.[67] 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

[65] 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.

[66] *FirstEnergy ESP I Proceeding*, Finding and Order (May 14, 2009).

[67] *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*").

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.[68] 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 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.[69] 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.[70] 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.[71] The ESP Application replaced the MRO Application in its entirety.

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

[69] *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).

[70] *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 ESP II Proceeding*").

[71] *Id*.

G. ESP II

As mentioned above, FirstEnergy filed an application and Stipulation for an ESP on March 23, 2010.[72] 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 II case.[73] 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.[74]

An evidentiary hearing in the ESP II 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.[75]

On September 8, 2010, FirstEnergy accepted the PUCO's modifications to the Combined Stipulation.[76] The approved ESP II 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 ESP II 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 ESP II are summarized below.

I. Competitive Bidding Process ("CBP")

For the period between June 1, 2011 through May 31, 2014 (the proposed term of ESP II), retail default generation rates for the SSO are determined by a descending-clock format CBP.[77] Through the CBP, FirstEnergy procured, on a slice-of-system basis, 100% of the aggregate wholesale full requirements SSO supply.[78] The CBP auctions were conducted by an independent bid manager, CRA International.[79] The bidding occurred

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[72] *FirstEnergy ESP II Proceeding*, Application and Stipulation (March 23, 2010).

[73] *FirstEnergy ESP II Proceeding*, Entry (April 6, 2010).

[74] *FirstEnergy ESP II Proceeding*, Entry (May 13, 2010).

[75] *Id*. at 47.

[76] *FirstEnergy ESP II Proceeding*, Notice of FirstEnergy (September 8, 2010).

[77] *FirstEnergy ESP II Proceeding*, Opinion and Order at 8 (August 25, 2010).

[78] *Id*.

[79] *Id*.

initially using three products of varying lengths and multiple bidding processes will be held over the term of the ESP.[80]

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.[81] The precise dates were set by the independent auction manager.[82] Additionally, the July 2011 and July 2012 auctions were rescheduled to October 2011, January 2012, October 2012, and January 2013 in order to alleviate concerns about having auctions during peak months.[83] 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.[84] 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.[85] The first CBP auction (for 50% of the SSO supply) was held on October 20, 2010.[86] 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.[87] 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.[88] CRA International and Boston Pacific again reported that the CBP auction was competitive.

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[80] *Id*.

[81] *Id.* at 33.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *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-EL-UNC, Finding and Order (October 22, 2010) (hereinafter, "*FirstEnergy CBP Auction Proceeding*").

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

[88] *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

On October 25, 2011, FirstEnergy conducted its third CBP auction.[89] 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.[90] 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.

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.[91] The auction, consisting of 11 rounds, resulted in a clearing price of $60.89/MWh.[92] 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.[93] The PUCO accepted the results of the auction on January 23, 2013.

On October 22, 2013, FirstEnergy's seventh wholesale auction was held. The CBP consisted of 22 rounds and resulted in a clearing price of $50.91/MWh for the delivery period of June 1, 2014 through May 31, 2015 and $59.99/MWh for the delivery period of June 1, 2014 through May 31, 2016. Five suppliers submitted winning bids.[94] The PUCO accepted the results of the auction on October 23, 2013.

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subject to a further conversion to establish retail rates to account for distribution losses and seasonal rates for specific rate schedules).

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

[90] *Id.* at 3.

[91] *In the Matter of the Procurement of Standard Service Offer Generation as Part of the Third Electric Security Plan for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, PUCO Case No. 12-2742-EL-UNC, Finding and Order (October 24, 2012) (hereinafter, "*FirstEnergy Second CBP Auction Proceeding*").

[92] The winning bidders of the CBP auction consisted of AEP Energy with 1 tranche, DTE Energy Trading, Inc. ("DTE") with 5 tranches, DECAM with 1 tranche, FES with 5 tranches and Exelon with 5 tranches.

[93] The winning bidders of the CBP auction consisted of AEP Energy with 6 tranches, DTE with 5 tranches, Exelon with 1 tranche and FES with 5 tranches.

[94] The winning bidders of the CBP auction for the June 1, 2014-May 31, 2015 delivery period consisted of AEP Energy with 1 tranche, DTE with 2 tranches, DECAM with 10 tranches and FES with 3 tranches. The winning bidders for the June 1, 2014-May 31, 2016 delivery period consisted of AEP Energy with 1 tranche, DTE with 6 tranches, DECAM with 9 tranches and Exelon with 1 tranche.

On January 28, 2014, FirstEnergy's eighth wholesale auction was held. The CBP consisted of 21 rounds and resulted in a clearing price of price of $55.83/MWh for the delivery period June 1, 2014 through May 31, 2015 with five winning bidders. The CBP also resulted in a clearing price of $68.31/MWh for the delivery period June 1, 2014 through May 31, 2016 with four winning bidders. The winning bidders were ConocoPhillips Company, DECAM, Exelon, FES, and DP&L.

As in the case of CBP results for DE-Ohio discussed above, the use of a CBP in the service 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 ESP II continued the rate design that was in effect during its first ESP with a few modifications.[95] 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.[96] The cap remained in place for the first year of the Second ESP and was measured by reference to the system average rate increase.[97] 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.[98]

The Combined Stipulation rate design also adopted the seasonality factors proposed by FirstEnergy in PUCO Case No. 09-906-EL-SSO.[99] Capacity costs that resulted from the PJM capacity auctions were used to develop capacity costs for its Generation Service Rider ("Rider GEN").[100] The PUCO also modified the Combined Stipulation so that in the event of an overall average percentage decrease in FirstEnergy's customers' bills, all lighting schedules (Rate Schedules STL, POL, and TRF) would not be increased.[101] Finally, pursuant to the Combined Stipulation, Rate Schedule RS was changed to a flat-rate structure.[102]

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[95] *FirstEnergy ESP II Proceeding*, Opinion and Order at 8 (August 25, 2010).

[96] *Id.*

[97] *Id*.

[98] *Id*.

[99] *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.

[100] *Id*.

[101] *Id*.

[102] *Id*.

III. Renewable Energy Resource Requirements

Renewable energy resource requirements for the term of FirstEnergy's ESP II were met using a separate RFP process to obtain RECs.[103] If there was a deficiency of RECs after the RFP process, FirstEnergy was authorized to acquire additional RECs through bilateral contracts.[104] The costs related to procuring the RECs, including administration costs, were included in Rider AER.[105]

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.[106] Based on those commitments, FirstEnergy submitted and the PUCO approved FirstEnergy's applications to issue RFPs to secure both solar and non-solar RECs.[107]

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 peak demand reduction ("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.[108] Under FirstEnergy's ESP II, an AICUO[109] college or university member could elect to be treated as a mercantile customer for the purposes of Section 4928.66, Revised Code.[110] 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 Section 4928.66, Revised Code.[111] Additionally, under FirstEnergy's ESP II, FirstEnergy provided

[103] *Id*.

[104] *Id*. at 8-9.

[105] *Id.* at 9.

[106] *Id.* at 10.

[107] *See, e.g., 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.

[108] *Id.* at 14.

[109] AICUO stands for the Association of Independent Colleges and Universities of Ohio.

[110] *FirstEnergy ESP II Proceeding*, Opinion and Order at 15 (August 25, 2010).

[111] *Id*.

energy efficiency funding to the City of Cleveland, the City of Akron, and Lucas County.[112] Each was scheduled to receive $300,000 over the term of ESP II. FirstEnergy was authorized to recoup the funding through Rider DSE over the term of ESP II.[113]

Under FirstEnergy's ESP II, 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.[114] The first $70 million of the original cost of the plant and facilities installed to enable the Clinic's expansion at its main campus were included on a non-bypassable distribution rider for distribution customers, except those taking service under Rate Schedules STL, TRF, or POL.[115]

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 OMA.[116] The funding was in lieu of the fixed monthly compensation approved in PUCO Case No. 09-553-EL-EEC for energy efficiency project administrators.[117]

V. Smart Grid

Pursuant to the Combined Stipulation in its ESP II proceeding, FirstEnergy agreed to implement its Smart Grid project initially filed in PUCO Case No. 09-1820-EL-ATA.[118] Costs of the Smart Grid project were recovered from all of FirstEnergy's customers except those taking service under Rate GT. All costs were considered incremental and recovered through Rider AMI.[119] Included in the recovery were all reasonably incurred

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[112] *Id.*

[113] *Id*.

[114] *Id.* at 16.

[115] *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).

[116] *FirstEnergy ESP II Proceeding*, Opinion and Order at 14.

[117] *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"*).

[118] *FirstEnergy ESP II Proceeding*, Opinion and Order at 13 (August 25, 2010).

[119] *Id*.

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%).[120] 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.[121]

VI. Generation

FirstEnergy's ESP II 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 ESP II also continued the Generation Service Uncollectible Rider ("Rider NDU").[122] Rider NDU recovered non-distribution-related uncollectable costs associated with supply costs from the CBP arising from SSO customers.[123] The rider was avoidable. FirstEnergy's ESP II 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.[124] The PUCO modified the Combined Stipulation to require FirstEnergy to first obtain PUCO approval before FirstEnergy could modify Rider GCR.[125]

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, or in the case of an emergency situation under the provisions of Section 4909.16, Revised Code.[126] In its Opinion and Order approving the Combined Stipulation, the PUCO modified a provision relating to revenue neutral distribution rate changes.[127] The PUCO noted that it would consult with FirstEnergy before implementing any revenue neutral change in distribution rate design, but that rate design remained within the PUCO's

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[120] *Id*.

[121] *Id.* at 36.

[122] *Id.* at 10.

[123] *Id*.

[124] *Id.*

[125] *Id.* at 35.

[126] *Id.* at 11.

[127] *Id.* at 35.

discretion.[128] 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 ESP II.[129] FirstEnergy agreed to commit, during ESP II, $4 million towards a fuel fund to assist low-income customers.[130] The fuel fund was to be spent over the term of the current ESP.[131] 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 ESP II, 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.[132] Any discount provided was authorized for collection under Rider EDR from customers under Rate Schedules RS, GS, CP, and GSU.[133]

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 Rider ("Rider NMB") (which was non-bypassable), and not included in the CBP process that applied to generation supply.[134] Winning SSO bidders remained responsible for all other FERC/RTO imposed charges.[135] Additionally, all costs under the MTEP that were charged to FirstEnergy were to be recovered through Rider NMB.[136]

FirstEnergy agreed to not seek recovery through retail rates of any MISO exit fees or PJM integration costs.[137] 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 May 31,

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[128] *Id*.

[129] *Id.* at 8.

[130] *Id.* at 17.

[131] *Id*.

[132] *Id*.

[133] *Id*.

[134] *Id*. at 12.

[135] *Id*.

[136] *Id*. at 13.

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

2016; or (2) the time it would take FirstEnergy to pay out a total of $360 million of unrecouped legacy RTEP costs.[138]

The Combined Stipulation also recommended that the PUCO close its case related to FirstEnergy's RTO migration from MISO to PJM.[139] 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 would open a new proceeding if it determined one was needed.[140]

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.[141]

X. Delivery Capital Recovery Rider

The Combined Stipulation also created a new rider, the Delivery Capital Recovery Rider ("Rider DCR").[142] 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 were no net job losses at FirstEnergy as a result of involuntary attrition resulting from the merger between FirstEnergy and Allegheny Energy.[143] 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.

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[138] *Id*.

[139] *Id.* at 34.

[140] *Id*.

[141] *Id*.

[142] *Id.* at 11.

[143] *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 involved the regulated distribution companies providing service to more than six million customers in Pennsylvania, Ohio, Maryland, New Jersey, New York, Virginia, and West Virginia.

H. ESP III

On April 13, 2012, FirstEnergy filed an application[144] and simultaneously a Stipulation and Recommendation[145] to establish ESP III. ESP III was characterized as a two-year extension of ESP II, with certain additional features to capture additional customer benefits. As was the case under ESP II, ESP III proposed to obtain all generation supply necessary to provide the SSO through a CBP.

ESP III 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 BRA scheduled to occur in May 2012. Modeling a delivery zone as a separate LDA created 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 occurred.

ESP III 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 ESP II 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 ESP III, 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 ESP III 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 ESP II 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 ESP III 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.[146] The PUCO issued an Entry on Rehearing tolling several Applications for Rehearing of FirstEnergy's ESP III Order.[147]

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[144] *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 ESP III Proceeding*").

[145] *Id.*, Stipulation and Recommendation (April 13, 2012).

[146] *Id.*, Finding and Order (July 18, 2012).

[147] *Id.*, Entry on Rehearing (September 12, 2012)

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

Several parties appealed the PUCO's decision authorizing FirstEnergy's ESP III to the Ohio Supreme Court.[148] The appeal is discussed below.

I. Competitive Bidding Process

Under FirstEnergy's ESP III and ESP IV, retail generation rates were to 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. The CBP, including its associated contingency process, is conducted by an independent bid manager.

Typical of the process is the first CPB auction process. 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.[149] The results were blended with four previous auctions and five subsequent auctions to establish retail generation rates from June 1, 2013 through May 31, 2016.

II. Rate Design

ESP III continued the rate design in effect during ESP II, 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, were not to 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 was negative, all lighting schedules (Rate Schedules STL, POL and TRF) would be limited to a maximum increase of zero percent and then no cap shall be applied to Rate GT customers. This cap calculation was to be performed prior to June 1st of each year. Recovery of any revenue over the cap stated above was to occur through Rider EDR.

Any revenue shortfall resulting from the application of the interruptible credits in Rider OLR and Rider ELR was to be recovered from all non-interruptible customers as part of the non-bypassable DSM and energy efficiency rider ("Rider DSE").[150]

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[148] Supreme Court Case No. 2013-513.

[149] *FirstEnergy Second CBP Auction Proceeding,* Finding and Order at 2 (October 24, 2012).

[150] *FirstEnergy ESP III Proceeding*, Finding and Order at 8 (July 18, 2012).

The seasonality factors adopted in ESP II were continued.[151] Capacity costs that resulted from the PJM capacity auctions were to be used to develop capacity costs for Rider GEN.[152]

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) were to be met using a separate RFP process to obtain RECs. If there was still a deficiency of RECs after the RFP process, FirstEnergy would acquire additional RECs through bilateral contracts.[153]

IV. Energy Efficiency

The demand response capabilities of customers taking services under Riders ELR and OLR were to count toward FirstEnergy's compliance with PDR benchmarks as set forth in Section 4928.66, Revised Code.[154]

Under the Stipulation and Recommendation, FirstEnergy was 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.[155] The funding was in lieu of the fixed monthly compensation approved in PUCO Case No. 09-553-EL-EEC for energy efficiency project administrators.[156]

V. Generation

ESP III continued Rider NDU and Rider GCR without any changes.[157]

VI. Distribution

During ESP III, no proceeding would 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,

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[151] *Id*.

[152] *Id*.

[153] *Id.* at 7.

[154] *Id.* at 11.

[155] *Id.* at 13.

[156] *Id.*

[157] *Id.* at 8-9.

except in the case of an emergency, pursuant to the provisions of Section 4909.16, Revised Code.[158]

Rider DCR would continue to be in effect and would 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 was in effect, the revenue collected by FirstEnergy was capped at $195 million; for the following 12-month period, the revenue collected under Rider DCR is capped at $210 million.[159]

VII. Smart Grid

ESP III continued ESP II's provisions regarding Smart Grid.

VIII. Low-Income Assistance and other Discounts

FirstEnergy provided its PIPP customers with a 6% discount off the otherwise applicable price-to-compare ("PTC") during ESP III.[160]

FirstEnergy made available $1 million to OPAE for its fuel fund program, allocated as $500,000 in 2015 and $500,000 in 2016.[161] In order to assist low-income customers in paying their electric bills, the fuel fund provided by FirstEnergy was to be continued, consisting of $4 million to be spent in each calendar year from 2015 through 2016.[162]

IX. Appeal

The Northeast Ohio Public Energy Council ("NOPEC") and ELPC appealed the PUCO's decision approving the ESP. In part, NOPEC argued that the PUCO was required to apply a quantitative standard in judging whether the ESP was better in the aggregate than an MRO. The Court held otherwise, finding that Ohio law does not bind the PUCO to a strict comparison. The Court held that the appeal by ELPC failed because ELPC failed to show that the incomplete application filed by FirstEnergy prejudiced ELPC.[163]

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

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[158] *Id.* at 9.

[159] *Id.* at 10.

[160] *Id.* at 7.

[161] *Id.* at 16.

[162] *Id*.

[163] *In re Application of the Ohio Edison Co*., 146 Ohio St.3d 222, 2016-Ohio-3021.

$72.6 million in 2012 associated with meeting the EE/PDR benchmarks.[164] 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.[165] On January 7, 2010, the PUCO 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.[166]

On March 23, 2011, the PUCO approved FirstEnergy's portfolio plan with some reservations regarding a proposal to implement a shared savings mechanism.[167] The PUCO rejected implementation of FirstEnergy's shared savings mechanism as proposed.[168] 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 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

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[164] *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*").

[165] *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. 09-1004-EL-EEC, Application (October 27, 2009) (hereinafter, "*FirstEnergy EE/PDR Benchmark Proceeding*").

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

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

[168] *Id.* at 15.

the next several years that reliance as a percentage of total compliance would 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-assigned cost responsibility.[169] 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,[170] 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.[171] 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.[172] The PUCO also denied rehearing on FirstEnergy's request to include its street lighting program and energy efficient

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[169] *Id.* at 16.

[170] Chairman Snitchler was appointed to a five-year term on the Commission by Governor Kasich. Chairman Snitchler's term expired on April 10, 2014.

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

[172] *Id.* at 8.

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.[173] 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.[174] 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.[175] 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.

FirstEnergy also challenged the PUCO's "all-out" requirement, filing an Application for Rehearing on October 7, 2011.[176] 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.[177] 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.[178] 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.[179]

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.

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[173] *Id.* at 10.

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

[175] *See id.* at 5-6; *see also* Section 4928.66, Revised Code.

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

[177] *Id.* at 12-18.

[178] *Id.* at 17.

[179] Section 4903.10, Revised Code.

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.[180] 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 was $121.0 million for OE, $77.9 million for CEI, and $50 million for TE. FirstEnergy proposed to 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.[181]

On March 20, 2013, the PUCO issued an order approving the portfolio plans for 2013 through 2015, with modifications.

As a result of the adoption of SB 310, EDUs were authorized to amend their portfolio plans. On September 24, 2014, FirstEnergy filed an application to amend its EE/PDR plan for 2015 through 2016. The application was approved with minor modifications on November 20, 2014.

Because FirstEnergy had amended its compliance plan, larger customers now had an accelerated opportunity to use the "streamlined opt-out" provision in SB 310 to elect to avoid the EE/PDR rider effective January 1, 2015. Such election precluded the receipt of any benefits that the electing customer might otherwise receive under the plan (benefits that are often paid for by the customer through the applicable rider charges).

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[180] *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*").

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

On June 15, 2016, FirstEnergy filed an application to implement a three-year portfolio plan beginning January 1, 2017.[182] FirstEnergy's proposal was largely a continuation of the programs that existed in FirstEnergy's plan as of December 31, 2014 at increased spending levels. In 2014, FirstEnergy filed to modify its portfolio plan pursuant to SB 310 and suspended several programs for 2015 and 2016. A stipulation was filed in the case which reduced the overall scope of the programs and reduced the projected expenditures under the plan, consistent with the PUCO's decision on rehearing in FirstEnergy's ESP IV case. The stipulation also recommended a cap on FirstEnergy's collection of shared savings of $10 million per year consistent with the PUCO's decision in the ESP case.

The Staff filed testimony in the case recommending an overall cap on the costs FirstEnergy collects through the EE/PDR rider.

A hearing was held in January 2017. On November 21, 2017, the PUCO approved the Stipulation. On December 21, 2017, FirstEnergy filed a Stipulated EE/PDR Plan reflecting the Commission's ordered changes and modifications. Environmental Advocates and FirstEnergy filed Applications for Rehearing which were denied by the PUCO in its Entry on Rehearing issued on January 10, 2018.

J. EE/PDR Administrator Agreements

Under the Stipulation approved in FirstEnergy's ESP I proceeding, FirstEnergy was required to start a collaborative to develop EE/PDR programs to meet its benchmarks.[183] 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.[184] On rehearing in this case, the PUCO reversed its previous stance and approved the 1¢/kWh fee.[185] 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.[186]

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[182] *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*, PUCO Case No. 16-743-EL-POR, Application (June 15, 2016).

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

[184] *Id.,* Finding and Order (December 2, 2009).

[185] *Id.*, Entry on Rehearing (February 11, 2010).

[186] *Id.* at 4.

On September 17, 2010, FirstEnergy filed an application addressing two new fee structures for administrators.[187] 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.[188] 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 EE/PDR benchmarks.[189] 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.[190]

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.[191] On March 16, 2011, the PUCO approved FirstEnergy's application.

K. All-Electric Discount

FirstEnergy previously had 117 rate schedules which, over the past several years, have been consolidated into eight rate schedules as a result of ESP I 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 ESP I and the distribution rate cases. Following the implementation of ESP I 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.[192] On March 3, 2010, the PUCO approved FirstEnergy's

[187] *Id.*, Application (September 17, 2010).

[188] *Id.* at 3-5.

[189] *Id.* at 4.

[190] *Id*.

[191] *Id.* at 5.

[192] *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

application, but deferred much of the recovery associated with the credits. (FirstEnergy estimated the deferral to be roughly $80 million a year.) The discount was 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 marketing practices which had been alleged to have induced customers to build all-electric homes in its service territory.[193] 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.[194] For the first two years (June 2011 through May 2013), the all-electric discount remained the same. Starting June 1, 2013, the discount started being phased out. The "phase out" occurred through six equal annual reductions.[195] The Commission also held that the discount should only apply to customers who used electricity for heating purposes and only in the winter months (November through March). The cost of the discount was to 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.[196]

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.[197] 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

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Case No. 10-176-EL-ATA, Application (February 12, 2010) (hereinafter, "*FirstEnergy All-Electric Discount Proceeding*").

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

[194] *Id*., Opinion and Order (May 25, 2011).

[195] *Id.* at 20.

[196] *Id.* at 19-20.

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

were within the exclusive jurisdiction of the PUCO.[198] 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 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.[199] Under a prior PUCO decision, FirstEnergy was set to recover $282 million, with carrying costs, over a 25-year period. FirstEnergy's application sought to eliminate the existing charge 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 (the Residential Deferred Distribution Cost Recovery Rider or "Rider RDD") while the other would recover the costs attributable to non-residential customers (the Non-Residential Deferred Distribution Cost Recovery Rider or "Rider NDD"). FirstEnergy claimed that reducing the timeframe for recovery would save residential and non-residential customers $178 million and $142 million, respectively.[200] 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.[201] According to the terms of those contracts, the Customers received discounted

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[198] *Id.* at ¶ 59.

[199] *FirstEnergy Rider RDD Proceeding*, Finding and Order (August 19, 2010).

[200] *Id.* at 2.

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

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's ETP case.[202] The Customers each accepted the opportunity and their contracts were modified to expire on the date that TE stopped collecting its RTCs.[203]

Meanwhile, in a separate case stemming from SB 3, TE's RSP,[204] the PUCO approved another extension for TE's customers under a special contract.[205] However, in that 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.[206] Despite the lack of such direct notice, several other customers of TE opted for an extension.[207]

In TE's third case stemming from SB 3, its RCP case,[208] 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 TE 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.[209] Following the Stipulation in TE'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.[210]

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[202] *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*.

[203] *Id*.

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

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

[206] *Id*.

[207] *Id*.

[208] *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.

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

[210] *Id*.

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.[211] 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."[212] 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 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,[213] 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.[214] 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.[215] As such, the Court

[211] *Id.* at 6.

[212] *Id*. at 9.

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

[214] *Id.* at 2-3.

[215] *Id.* at 10.

held that Sunoco's special contract should have extended through December 31, 2008, saving Sunoco roughly $13 million.[216]

Pilkington North America ("Pilkington") also filed a complaint in 2008 alleging that TE had unlawfully terminated its special arrangement, and the case was consolidated with the others mentioned previously. After the PUCO denied Pilkington and the others' claims for relief, Pilkington did not join the appeals of the PUCO's decision. After the Court reversed the PUCO's order in August 2011, Pilkington sought additional relief from the PUCO in a motion seeking to reopen the case, arguing that the PUCO was required to apply the decision of the Court to the Pilkington complaint. The PUCO denied Pilkington's request, and Pilkington appealed to the Supreme Court. The Supreme Court affirmed the PUCO's decision. The Court held that Pilkington had failed to properly preserve its claim that the PUCO's initial order was without authority, that the PUCO had not violated the filed rate doctrine by refusing the vacate its prior order, or that that the PUCO had approved a discriminatory rate structure by permitting TE to change the rates it was charging Pilkington. Further, the Court held that the motion to vacate the prior order was an improper method of securing review because it cannot be used as a substitute for an appeal.[217]

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 required that securitization would result in cost savings to customers before being approved by the PUCO. Furthermore, HB 364 mandated that securitization could not be approved by the PUCO unless the PUCO found that customer savings would be measurably enhanced through this process. HB 364 also required that the securitization could only be approved after the PUCO issued a final order and all judicial appeals were exhausted concerning the deferral subject to securitization. Finally, HB 364 exempted governmental aggregation customers from the non-bypassable charges that would be used to fund the bonds approved in a PUCO securitization order.

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[216] *Id.* at 2.

[217] *In re Pilkington North America, Inc*., Slip Op. No. 2015-Ohio-4797 (Sept. 2, 2015).

On May 3, 2012, FirstEnergy filed an application to securitize regulatory assets on its books that the Commission had previously authorized for deferral.[218] 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 could not collect more than 15% of the estimated costs included in FirstEnergy's application. The next modification limited FirstEnergy's ability to allow a third party to bill or collect the phase-in recovery ("PIR") charges. The PUCO noted that its rules did 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 were in conformance with the PUCO's order.

The PUCO noted that it expected securitization to save FirstEnergy's customers roughly $104 million.

O. ESP IV[219]

On August 4, 2014, FirstEnergy submitted an application for approval of ESP IV. The ESP IV would continue the CBP for securing generation supply for those customers that remain on the SSO. However, the application also proposed a new charge called the Retail Rate Stability ("RRS") Rider that would be imposed on all customers as a non-bypassable rider. It is anticipated that the PUCO will issue a substantive decision on the application (and the stipulations that have been submitted to resolve the application) by the end of the first quarter of 2016.

As initially proposed, FirstEnergy would obtain the generation supply for SSO customers (non-shopping) through a CBP, including the use of an independent auction manager.

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[218] *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).

[219] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Application (August 4, 2014) ("hereinafter, "*FirstEnergy ESP IV Proceeding*").

The current cost recovery mechanisms for AMI and SmartGrid projects would be maintained.

FirstEnergy requested approval to phase out part of the EDR that was authorized under ESP III. This non-bypassable rider had the effect of reducing the rates charged to high load factor customers that take service under Rate GT, but increased the rates charged to low load factor customers served under Rate GT. FirstEnergy also proposed to discontinue Rider ELR, Rider OLR, and the additional interruptible credit provided through part b of the EDR.

As part of its application, FirstEnergy proposed to not seek a base distribution rate increase that would go into effect before June 1, 2019. Although base distribution rates would be "frozen", FirstEnergy proposed to retain the existing Rider DCR. The application proposed to cap the aggregate revenue for the three operating companies that may be collected through Rider DCR at $240 million for the period between June 1, 2016 and May 31, 2017, $270 million for the period between June 1, 2017 and May 31, 2018 and $300 million for the period between June 1, 2018 and May 31, 2019.[220]

The application also proposed to modify the current transmission rider, Rider NMB. Under FirstEnergy's ESP III, this rider recovered PJM transmission-related charges that were identified as non-market-based, including NITS. FirstEnergy proposed expanding recoverable costs to include costs associated with operating reserves.

The application proposed two new riders. The more significant of the two is Rider RRS. FirstEnergy proposed to enter into a contract with FES to purchase the generation attributes of the Davis-Besse and Sammis generating facilities and FES's portion of generation associated with its contract with OVEC. Each of these would be purchased at "cost." For Davis-Besse and Sammis, "cost" would include fuel, O&M expense, depreciation, taxes, and a return on investment. OVEC costs would be the amounts paid to OVEC under the current contract between OVEC and the Sponsoring Members. FirstEnergy would then sell the energy, capacity, and ancillary services associated with the Davis-Besse and Sammis generating facilities and the OVEC contract entitlement facilities into the PJM market. FirstEnergy would charge or credit all customers for the difference between costs incurred under the contract with FES and the revenues received from PJM through Rider RRS. FirstEnergy proposed that Rider RRS continue for a 15-year term. During the three-year term of ESP IV, FirstEnergy estimated Rider RRS would collect approximately $464 million from customers. However, over the entire 15-year term of the proposed Rider RRS, FirstEnergy estimated Rider RRS would produce approximately $2 billion in credits on a nominal basis, or approximately $800 million in credits based upon a net present value. The costs or credits to be charged or provided under Rider RRS would be based upon an energy-based allocation.

FirstEnergy also proposed a new rider to collect the costs associated with "*government directives*" such as compliance with new requirements concerning cyber-security, MGP

[220] Customers served under Rate GT are not subject to Rider DCR.

clean-up, and implementation of directives from the PUCO's retail market investigation.[221] The rider was to initially be set to $0, and FirstEnergy would file applications to seek to recover any revenues through the rider.

Finally, FirstEnergy proposed to provide $1 million annually toward economic development, including customer-owned transformers and line extensions as part of ESP IV. It also proposed to continue a $5 million per year program to address installation of energy efficiency projects for low-income customers.

I. Initial Stipulation

On December 22, 2014, FirstEnergy submitted a Stipulation and Recommendation ("Stipulation") to the PUCO.[222] Parties supporting the Stipulation included FirstEnergy, OP, OEG, the City of Akron, COSE, Cleveland Housing Network, Consumer Protection Association, Council for Economic Opportunities in Greater Cleveland, Citizens Coalition, Nucor, Material Science Corporation, AICUO, and the International Brotherhood of Electrical Workers Local 245.

The Stipulation modified FirstEnergy's ESP IV by extending the availability of service under Rider ELR but modified the requirements such that interruptions under the rider would only be triggered by actual emergency conditions. Rider ELR would be available to qualified shopping and non-shopping customers.

The Stipulation also provided specific funding commitments under FirstEnergy's EE/PDR programs. The City of Akron was designated to receive $100,000 in each year of the ESP. COSE was designated to receive $170,000 in 2016, and $25,000 in 2017, 2018 and 2019. COSE members would also be eligible to receive some ASHRAE Level II Energy Audits. AICUO would receive $50,000 in 2015, 2016, 2017 and 2018 and would also be eligible to receive up to $1 million in administrator payments.

FirstEnergy also committed to provide shareholder funding to assist low-income customers.

Because the Stipulation was filed contemporaneously with the deadline for submission of written direct testimony by intervenors, the PUCO delayed the evidentiary hearings and permitted parties to file supplemental testimony addressing the Stipulation.

On February 25, 2015, the PUCO issued an order addressing AEP-Ohio's ESP III. In that proceeding, the PUCO was considering a similar request for a non-bypassable rider associated with AEP-Ohio's OVEC entitlement. The PUCO denied AEP-Ohio's request but approved a placeholder rider with an initial rate of zero. The PUCO's order identified

[221] The primary directive resulting from the PUCO's retail market investigation was a requirement that electric distribution companies include CRES provider logos on consolidated bills.

[222] *FirstEnergy ESP IV Proceeding*, Stipulation and Recommendation (December 22, 2014).

the factors that an EDU would need to demonstrate to warrant approval of cost collection through a similar rider.

Based upon the PUCO's actions, the presiding Attorney Examiners assigned to FirstEnergy's ESP IV directed the parties to submit additional testimony to address whether FirstEnergy's application satisfied the conditions addressed in the PUCO's February 25, 2015 order.

II. Supplemental Stipulation

On May 28, 2015, FirstEnergy submitted a Supplemental Stipulation and Recommendation ("Supplemental Stipulation").[223] The Supplemental Stipulation was supported by signatories to the initial Stipulation. The Supplemental Stipulation proposed an additional modification to ESP IV to add a new pilot program to allow certain customers to opt out of Rider NMB. Customers opting out of the rider would be subject to invoicing from PJM for transmission service.

The Supplemental Stipulation also proposed to extend the availability of Rider ELR to more potential qualified customers.

III. Second Supplemental Stipulation

On June 4, 2015, a Second Supplemental Stipulation and Recommendation ("Second Supplemental Stipulation") was filed by the signatory parties to the Supplemental Stipulation and Kroger.[224] The Second Supplemental Stipulation reflected FirstEnergy's commitment to deploy a Commercial High Load Factor ("HLF") Experimental Time-of-Use rate proposed for commercial customers with certain operating characteristics.

Because of the two additional stipulations, the presiding Attorney Examiners assigned to FirstEnergy's ESP IV directed the parties (including the PUCO Staff) to submit additional testimony to address whether FirstEnergy's application should be approved.

When the PUCO Staff submitted its initial testimony in mid-September 2015, it recommended the PUCO deny Rider RRS.

Evidentiary hearings to consider FirstEnergy's application and the pending stipulations were held between August 31, 2015 and October 29, 2015. Following the evidentiary hearing, a briefing schedule was established.

IV. Third Supplemental Stipulation

On November 18, 2015, the PUCO Staff submitted a motion requesting an extension of the briefing schedule. The motion represented that PUCO Staff and other parties were

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[223] *Id*., Supplemental Stipulation and Recommendation (May 28, 2015).

[224] *Id*., Second Supplemental Stipulation and Recommendation (June 4, 2015).

engaged in settlement negotiations to resolve contested issues. On November 19, 2015, the presiding Attorney Examiners granted the request to delay the briefing schedule.

On December 1, 2015, a Third Supplemental Stipulation and Recommendation ("Third Supplemental Stipulation") was submitted to resolve contested issues.[225] In addition to the parties that had supported the prior stipulation, the Third Supplemental Stipulation was supported by the PUCO Staff, OPAE and EnerNOC. The Third Supplemental Stipulation proposed the modifications below to ESP IV.

- The term of ESP IV would be lengthened to eight years (June 1, 2016 to May 31, 2024). Rider RRS would be approved but limited to this eight-year term. During years five through eight of the plan, FirstEnergy would commit to a net credit totaling $100 million to offset any costs or be in addition to any credits under Rider RRS. The base distribution rate freeze would be extended to eight years. However, Rider DCR would be extended during this term as well.

- FirstEnergy agreed to advocate for certain changes to the capacity market operated by PJM.

- FirstEnergy agreed to invest in activities to upgrade its distribution system, including advanced metering.

- FirstEnergy agreed to reintroduce certain energy efficiency programs such as rebates for customer-funded improvements. This included a pilot program in conjunction with EnerNOC.

- FirstEnergy agreed to submit an application with the PUCO by April 3, 2017 to decouple residential customer rates.

- Rider ELR and the Commercial HLF Experimental Time-of-Use rate would continue during the eight-year term.

- Funding to COSE and AICUO for energy efficiency programs would be extended through 2024. OPAE would receive funding for administration of a low-income customer assistance program.

- FirstEnergy agreed to pursue CO_2 emission reductions by 2045 and evaluate investment in battery storage technology and 100 MW of wind and/or solar resources (assuming retail rate recovery).

A hearing on the Third Supplemental Stipulation began on January 14, 2016.

[225] *Id*., Third Supplemental Stipulation and Recommendation (December 1, 2015).

V. PUCO Decision

On March 31, 2016, the PUCO approved the stipulations with several minor modifications.[226] These modifications included excluding a couple costs proposed to be included in Rider RRS (related to plant closures and penalties assessed to the plants under PJM's capacity performance rules), requiring the rider be updated more frequently (quarterly instead of annually) and capping the impact that Rider RRS could have on customers' bills. The PUCO also clarified that it reserved the right to review any affiliated power sales, and any impact on the rider associated with plant outages that lasted longer than 90 days.

Subsequent to the PUCO's decision, FERC granted a complaint filed by several independent generators that alleged that FirstEnergy's PPA with its affiliate violated FERC's rules governing affiliate transaction.[227] FERC agreed that FirstEnergy's customers would be "captive" in the sense that they could not avoid the non-bypassable PPA Rider. In instances where a utility such as FirstEnergy has captive customers, the utility's interaction with any affiliates with authority to make market-based sales, which includes FirstEnergy's affiliate, FERC requires that the agreement be submitted for review. The review process is designed to ensure that a utility is not using its captive customers to subsidize the market-regulated affiliate.

VI. Rehearing

FirstEnergy and several parties sought rehearing. As part of its Application for Rehearing, FirstEnergy sought authorization of a modified RRS. The modified RRS would be calculated as the difference between the projected costs of the plants that it had included in its PPA proposal discussed above and revenue calculated based on the projected output times a defined set of wholesale energy and capacity prices. The PUCO Staff proposed an alternative rider, the Distribution Modernization Rider ("DMR"), that would produce a portion of the cash flow it determined was necessary to maintain the credit ratings of the parent of the FirstEnergy EDUs. Hearings on the two proposals were conducted in July 2016.

The Commission issued a Fifth Entry on Rehearing on October 12, 2016.[228] In the Entry, the PUCO rejected FirstEnergy's proposal to modify its PPA rider, Rider RRS. Instead, the PUCO adopted the Staff's proposed DMR. The PUCO authorized FirstEnergy to collect $132.5 million grossed up for taxes, for a total annual recovery of approximately $204 million annually for three years. FirstEnergy may seek to extend the charge for two years. The PUCO also adopted its Staff's proposed revenue allocation methodology (50% of the costs based on energy and 50% of the costs based on demand).

[226] *Id*., Opinion and Order (March 31, 2016).

[227] *Electric Power Supply Ass'n. v. FirstEnergy Solutions Corp*., 155 FERC ¶ 61,102 (2016).

[228] *FirstEnergy ESP IV Proceeding*, Fifth Entry on Rehearing (October 12, 2016).

The PUCO also clarified the scope of the Rider NMB Pilot Program and indicated that customers that were not eligible to participate in the Rider NMB Pilot Program pursuant to the stipulations in this case could petition the PUCO for permission to join the pilot program through the filing of a reasonable arrangement. The PUCO also directed its Staff to review the benefits of the Rider NMB Pilot Program on the participating members, to review whether the pilot program reduced transmission costs globally, and to review whether the pilot program resulted in any cost shifts to non-participating customers. Based on the Staff's ongoing analysis, the PUCO reserved the right to modify the Rider NMB pilot during the course of the ESP (the eight-year ESP term remained unchanged).

The PUCO clarified that customers participating in Rider ELR would not be precluded from utilizing the streamlined opt-out available under SB 310 to avoid the costs of FirstEnergy's EE/PDR plan. The PUCO also modified the recovery of the incremental increase in Rider ELR costs created by the expansion of Rider ELR under the stipulation. At the time of the PUCO's order, half of the costs of the Rider ELR credits were being recovered through the DSE1 charge and the other half were being recovered through part (e) of the EDR which is only applicable to customers on Rate GS and Rate GP. The new EDR provision recovers all of the new incremental ELR costs and is paid for by all customers.

Several parties sought rehearing of the PUCO's order. FirstEnergy requested the Commission to reconsider the formula for calculating the revenue requirement of the DMR. Other parties argued that the DMR was unlawful. The PUCO granted rehearing for further consideration of the Fifth Entry on Rehearing.[229] The DMR became effective on January 1, 2017.

On August 16, 2017, the PUCO issued its Eighth Entry on Rehearing. It denied applications for rehearing challenging the authorization of the DMR. It also denied FirstEnergy's alternative proposal regarding the calculation of the amount of the DMR. The PUCO granted rehearing to allow a distribution rider to continue if the ESP is withdrawn. It also granted rehearing on FirstEnergy's request that retention of the corporate headquarters be counted as a benefit of the ESP in the application of the ESP v. MRO test.[230]

FirstEnergy filed an additional Application for Rearing that challenged the requirement that the PUCO Staff monitor the use of DMR revenue and the PUCO's failure to restore a 50 basis point adder to Rider AMI. The PUCO denied FirstEnergy's Application for Rehearing on October 11, 2017.[231]

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[229] *FirstEnergy ESP IV Proceeding*, Sixth Entry on Rehearing (December 7, 2016).

[230] *FirstEnergy ESP IV Proceeding*, Eighth Entry on Rehearing (August 16, 2017).

[231] *FirstEnergy ESP IV Proceeding*, Ninth Entry on Rehearing (October 11, 2017).

Notices of appeal of the PUCO's decisions have been filed by OMAEG, OCC, Sierra Club, NOPEC, and NOAC.[232]

P. Application to Implement a Rider to Recover the Costs of Distribution Platform Modernization ("DPM")

On December 1, 2017, FirstEnergy filed an application with the PUCO for approval of a Distribution Platform Modernization Plan ("DPM Plan").[233] In its DPM Plan, the companies are proposing a portfolio of projects that it states will provide significant customer benefits, including:

(1) Enhanced reliability of the system and outage restoration for customers;

(2) Modernization of the FirstEnergy companies' existing distribution system, while supporting and enabling additional grid modernization initiatives; and

(3) More gradual rate impacts to customers than otherwise might occur to implement grid modernization initiatives.

The DPM Plan is proposed to be a three-year portfolio of work with total estimated capital expenditures by FirstEnergy of approximately $450 million. The application states that the projects are incremental to FirstEnergy's current work to maintain safe and reliable electric service and are outside of its current work plans.

FirstEnergy is proposing to recover the costs of the DMP Plan through their existing Advanced Metering Infrastructure/Modern Grid Rider ("Rider AMI"), which is currently assessed as a non-bypassable fixed monthly charge per month for non-residential customers on Rates GS, GP, and GSU.

The revenue requirement would include depreciation expense, property tax expense, ROE, taxes, interest expense, and O&M expense. The total estimated amount to be recovered from customers is $828 million, which includes the estimated $450 million of capital expenditures described above. FirstEnergy estimates that the benefits of the DPM Plan will total $2.849 billion on a nominal basis ($2.257 billion for reliability benefits and $592 million for storm restoration benefits).

The main projects identified in the application are:

(1) The reconductoring of 800 circuit miles of conductors;

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[232] Supreme Court Case Nos. 2017-1444 and 2017-1664.

[233] *In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan*, PUCO Case No. 17-2436-EL-UNC, Application (December 1, 2017).

(2) The creation of 300 circuit miles of new ties to create alternative routes for power flow;

(3) The installation of approximately 1,900 reclosers and the associated communication system infrastructure;

(4) The installation of approximately 2,600 additional Supervisory Control and Data Acquisition System ("SCADA") devices in substations and on circuits; and

(5) The installation of ADMS, a software platform that integrates all the SCADA information into one centralized software system.

FirstEnergy is requesting that that the Commission issue an order approving the DPM Plan and associated recovery no later than May 2, 2018.

Section IV
American Electric Power-Ohio

Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP")

A. Rate Stabilization Plan ("RSP")

OP and CSP (collectively referred to as "AEP-Ohio")[1] filed their proposed RSPs on February 9, 2004[2] 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.[3] 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.[4] 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."[5] 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.[6]

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[1] OP and CSP have since merged with Ohio Power Company being the surviving entity.

[2] *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) (hereinafter, "*AEP-Ohio RSP Proceeding*").

[3] *AEP-Ohio RSP Proceeding*, Opinion and Order (January 26, 2005).

[4] *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.

[5] *Id.* at 18.

[6] *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

On March 23, 2005, the PUCO denied all Applications for Rehearing.[7] On April 29, 2005, OCC filed an appeal to the Ohio Supreme Court.[8] 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.[9] 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.[10] 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.[11] 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.[12] 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 allowed to recover the administrative costs of running the program. The PUCO approved the CBP Stipulation in its entirety on May 2, 2007.[13]

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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 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.

[7] 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 Advocates ("LIA") [consisting of the Appalachian People's Action Coalition ("APAC"), Lima/Allen Council on Community Affairs, OPAE, and WSOS Community Action].

[8] *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.

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

[10] *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) (hereinafter, "*AEP-Ohio Customer Participation Proceeding*").

[11] *AEP-Ohio Customer Participation Proceeding*, Stipulation and Recommendation (March 23, 2007).

[12] *AEP-Ohio Customer Participation Proceeding*, Tariff Filing (August 27, 2007).

[13] *AEP-Ohio Customer Participation Proceeding*, Order on Remand (May 2, 2007).

B. Discretionary Generation Increase Applications Permitted by RSP

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.[14] 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 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.[15] 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 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

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[14] *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*").

[15] *Id.*, Opinion and Order (October 3, 2007).

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.[16]

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.[17] 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.[18] 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.[19]

On January 18, 2008, an unopposed Stipulation was submitted by multiple parties and was approved subsequently by the PUCO.[20] 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)

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

[17] *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*").

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

[19] *Id.* at Exhibit 2, page 1 of 4.

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

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.[21]

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").[22] 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.[23] 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 Companies' performance continues to deteriorate over time."[24] After reviewing AEP-Ohio's response to Staff's report and recommendations, the PUCO directed AEP-Ohio to

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[21] *Id*. at 10-11.

[22] *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).

[23] *Id*. at 11 (Attachment 1).

[24] *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, Correction to Commission Ordered Investigative Report Submitted by the Staff of the Public Utilities Commission of Ohio at 2 (April 18, 2006).

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.[25]

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)[26] could not support the continued increased expenditures that AEP-Ohio made during the previous two years.[27] 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.[28] 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.[29]

On April 18, 2007, multiple parties to this proceeding submitted a Joint Motion to Withdraw AEP's Self-Complaint.[30] The signatory parties cited their inability to agree on 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-

[25] *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).

[26] 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).

[27] *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*").

[28] *AEP-Ohio Self-Complaint Proceeding*, Entry at 2-3 (July 26, 2006).

[29] *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. *Id.*, 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.

[30] *AEP-Ohio Self-Complaint Proceeding*, Joint Motion to Withdraw Self Complaint (April 18, 2007).

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.[31] Additionally, the PUCO further required AEP-Ohio to cooperate with Staff;[32] 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.[33] 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.[34] 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 the initial 17-month period.[35] On June 27, 2007, the PUCO approved AEP-Ohio's

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[31] *AEP-Ohio Self-Complaint Proceeding*, Entry (May 16, 2007).

[32] 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.

[33] *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).

[34] *Id.* at 17-18.

[35] *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

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.[36]

E. Electric Security Plan (ESP I)

On July 31, 2008, AEP-Ohio filed its ESP Application at the PUCO to establish its SSO pursuant to Section 4928.141, Revised Code.[37] 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.[38] 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 bill caps were, in accordance with the PUCO's decision, deferred for future collection through a non-

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Case No. 07-333-EL-UNC, Application (March 28, 2007) (hereinafter, "*AEP-Ohio PAR Proceeding*"). See, also, *AEP-Ohio Self-Complaint Proceeding*, Correction to Application (March 30, 2007).

[36] *AEP-Ohio Self-Complaint Proceeding*, Opinion and Order (June 27, 2007).

[37] *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 I Proceeding*").

[38] 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.

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.[39] 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 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).[40]

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 additional carrying

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[39] *AEP-Ohio ESP I Proceeding*, Entry on Rehearing at 9, 31 (July 23, 2009).

[40] 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.

costs for anticipated environmental investments made during the ESP period after the investments have been made.[41]

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.[42] 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.

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 OVEC; and its ownership in the Lawrenceburg Generation Station ("Lawrenceburg"). 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 its first Entry on Rehearing, the

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[41] 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*").

[42] *AEP-Ohio ESP I Proceeding*, Entry on Rehearing at 40-41 (July 23, 2009).

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.[43]

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.[44] 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.[45] 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."[46]

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[43] *Id*. at 35-36.

[44] 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's and the PUCO's 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.

[45] *In re Application of Columbus S. Power Co*., 128 Ohio St.3d 402, 2011-Ohio-958.

[46] *Id.* at ¶ 21.

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 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.[47]

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.[48] 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.[49] 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

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[47] "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. R.C. 4928.143(C)(1). *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).

[48] *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788 (April 19, 2011).

[49] 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.

the evidence.[50] 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 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."[51] 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."[52]

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.

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[50] *In re Application of Columbus Southern Power Co. et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 29 (April 19, 2011).

[51] *Id.* at ¶ 30.

[52] *Id*.

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-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 allowed to continue to bill for its POLR charges and the 2001-2008 environmental costs 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.[53] 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.[54]

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.

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[53] *AEP-Ohio ESP I Proceeding*, Entry at 3-4 (May 25, 2011)

[54] *Id.*, Order on Remand (October 3, 2011).

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-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.[55] 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

[55] 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."

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 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.[56]

On February 1, 2012, IEU-Ohio appealed the PUCO's Order on Remand to the Ohio Supreme Court.[57] 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 above-market revenue that was deferred for future collection. Briefs and Reply Briefs were submitted to the Supreme Court and oral arguments were held on October 8, 2013.

The Supreme Court issued a decision on February 13, 2014 denying IEU-Ohio's appeal and affirming the PUCO's decision resulting from the remand of the order that was issued in 2011. The decision found that the PUCO properly authorized the 2001-2008 environmental carrying costs as part of the ESP and that the PUCO did not act unlawfully when it refused to adjust the deferred balance for POLR charges the Court and Commission subsequently determined could not be approved as part of the ESP. As the PUCO's Order on Remand was not reversed, it contributed to the maintenance of electric prices (paid by customers in AEP-Ohio's service area) at levels significantly above market.

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.[58] 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,

[56] *Id.*, Entry on Rehearing (December 14, 2011).

[57] *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*, Ohio Supreme Ct. Case No. 2012-187.

[58] *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).

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.[59]

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.[60] 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 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.[61] 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.

In the PUCO's Order approving AEP-Ohio's second ESP, discussed below, the PUCO authorized AEP-Ohio to file annual applications to recover the O&M costs associated with major storm damage in excess of the $5 million level embedded in AEP-Ohio's distribution service rates. On December 21, 2012, AEP-Ohio filed an application to establish an initial Storm Damage Recovery Rider ("Rider SDRR").[62] In its application, AEP-Ohio is seeking recovery of $62 million of distribution storm damage expenses which it has deferred since January 1, 2012. 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 increased base distribution charges for all customer classes by 9.67%.

A Stipulation was submitted to the PUCO on December 6, 2013, providing for a decrease in the amount of storm damage expense of approximately $6 million and a reduction in the carrying charge amount which AEP-Ohio proposed. Testimony was filed on

[59] *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).

[60] *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).

[61] *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).

[62] *In the Matter of the Application of Ohio Power Company to Establish Initial Storm Damage Recovery Rider Rates*, PUCO Case No. 12-3255-EL-RDR, Application (December 21, 2012).

December 6, 2013 in support of the Stipulation and testimony opposing the Stipulation was filed on December 30, 2013. On April 2, 2014, the PUCO issued an Opinion and Order approving the Stipulation. AEP-Ohio filed compliance tariffs to implement the Rider SDRR rates effective April 17, 2014.

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.[63] 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.[64] AEP-Ohio's proposal was 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.[65] 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.[66] 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.[67] 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.[68] In addition to denying the Applications for Rehearing, the PUCO ordered

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[63] *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).

[64] *AEP-Ohio IGCC Proceeding,* Application at 11 (March 18, 2005).

[65] *Id.*, Post Hearing Brief of PUCO Staff at 18-19 (September 20, 2005).

[66] *Id.*, Opinion and Order at 11 (April 10, 2006).

[67] *Id*. at 17.

[68] *Id.*, Entry on Rehearing (June 28, 2006).

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.[69]

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.[70] The Ohio Supreme Court, by a 4-3 vote, granted a Motion to Dismiss the Complaint for Writ of Prohibition on October 4, 2006.[71] Additionally, four parties, including IEU-Ohio, filed appeals to the Ohio Supreme Court and oral arguments were held on October 9, 2007.[72]

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.[73] 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 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.[74] 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.[75] On February 6, 2009, AEP-Ohio filed the update

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[69] *Id.* at 16-17.

[70] *State of Ohio ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, *et al.*, Ohio Supreme Court Case No. 2006-1257, Writ of Prohibition (June 29, 2006).

[71] *October 4, 2006 Case Announcements*, 2006-Ohio-5803.

[72] *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, OPAE, and FES on August 25, 2006.

[73] *Indus. Energy Users-Ohio v. Pub. Util. Comm*., 117 Ohio St.3d 486, 2008-Ohio-990.

[74] 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.

[75] *AEP-Ohio IGCC Proceeding*, Entry (January 8, 2009).

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 OPAE 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.

On August 11, 2014, the PUCO issued a procedural schedule in response to the joint motion. In Joint Comments of IEU-Ohio and OCC filed on September 5, 2014, these parties argued that the $24 million should be refunded to customers with interest, and that AEP-Ohio is prohibited from collecting competitive generation-related costs through non-competitive distribution rates. AEP-Ohio argued in its Comments that, at most, it should only have to refund approximately $4.7 million, consisting of the difference between the collections from customers and the expenditures by AEP-Ohio, plus interest.

A Stipulation resolving the remaining issues was filed by the parties on December 22, 2014. The PUCO approved the Stipulation on February 11, 2015. AEP-Ohio refunded $6 million to residential customers, $5.35 million to commercial and industrial customers, and direct payments to certain signatory parties.

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.[76] 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.[77] 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.[78] 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.[79] 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 monthly bill.[80] Further, the Stipulation included a mechanism for pricing the service Ormet would

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[76] *See In the Matter of the Application of the Joint Petition of Ohio Power Company and South Central Power Company for Reallocation of Territory*, PUCO Case No. 96-1000-EL-PEB, Finding and Order (November 14, 1996).

[77] *See In the Matter of the Application of The Ohio Power Company for Approval of a Special Contract Arrangement with Ormet Primary Aluminum Corporation*, PUCO Case No. 96-999-EL-AEC, Finding and Order (November 14, 1996).

[78] *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).

[79] 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*, Sup. Ct. 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.

[80] *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).

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.[81] 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.[82]

The PUCO issued a Supplemental Opinion and Order on November 8, 2006 adopting the Stipulation in its entirety.[83] 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,[84] which the PUCO approved on June 27, 2007.[85] Additionally, AEP-Ohio filed for approval of the 2008 Ormet generation rate on December 27, 2007, quoting a market rate of $53.03/MWh.[86]

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.[87] 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 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

[81] *Id*. at 10.

[82] *Id.* at 9-10.

[83] *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).

[84] *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).

[85] *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).

[86] *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.

[87] *In the Matter of the Joint Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify Their Accounting Procedure*, PUCO Case Nos. 08-1338-EL-AAM, *et al.*, Joint Application (December 29, 2008).

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.[88] 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 Ormet is to be treated as delta revenue credits, first against any deferred balances, with any

[88] *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) (hereinafter, "*Ormet Unique Arrangement Proceeding*").

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 could receive was $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.[89] The PUCO generally denied the 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

[89] *Id.*, Entry on Rehearing (September 15, 2009).

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.[90]

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.[91] The initial EDR proceeding established the initial level for Rider EDR. Subsequently, Rider EDR experienced two semiannual adjustments.[92] The initial EDR proceeding and the first adjustment were appealed to the Ohio Supreme Court.[93]

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[90] *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 L).

[91] *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*").

[92] *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.

[93] *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.[94] At the time, AEP-Ohio had two customers on reasonable arrangements, Ormet and Eramet Marietta Inc. ("Eramet").

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."[95]

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[94] *In re Application of Ormet Primary Aluminum Corp.,* 129 Ohio St.3d 9, 2011-Ohio-2377.

[95] *Id.* at ¶ 26.

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 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."[96] 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.[97] 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 ESP II proceeding. As a result of the PUCO's decision approving AEP-Ohio's Modified ESP II, Ormet claimed that its electric bill increased by $20 million annually.

On October 17, 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

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[96] *Id.* at ¶ 31.

[97] *Ormet Unique Arrangement Proceeding*, Motion for Expedited Approval of Payment Deferral and Memorandum in Support (October 12, 2012).

payment schedule approved today shall be considered a foregone revenue … and shall be recovered by AEP-Ohio through its Economic Development Rider."[98]

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."[99]

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."[100]

In February 2012, Ormet filed for bankruptcy protection under Chapter 11 of the Federal Bankruptcy Code. In June 2013, the Bankruptcy Court approved a plan of reorganization that was conditional on several changes in the unique arrangement. As part of Ormet's plan to emerge from bankruptcy, it proposed to sell its assets to an investment firm, Wayzata Investment Partners, LLC ("Wayzata").

In June 2013, Ormet filed a motion with the PUCO seeking to modify the unique arrangement. It requested that: (1) the end date of the reasonable arrangement be advanced from 2018 to 2015; (2) the current remaining potential discounts under the unique arrangement be accelerated and applied over the shortened term; and (3) Ormet be permitted to shop, and that it be given "shopping discounts" if it restarted idled production lines. Further, it requested that some of this relief be granted on an emergency basis.

The PUCO refused to grant the request for emergency relief and set the matter for hearing. The hearing was held on August 27 and 29, 2013.

The PUCO issued its Opinion and Order on Ormet's motion on October 2, 2013 and approved some modifications of the unique arrangement. Beginning in October 2013, AEP-Ohio was to bill Ormet at a rate not to exceed a fixed generation and fuel rate of $50/MWh, plus all applicable riders and distribution charges, excluding a discount. The rate cap would continue through the end of 2014. For years 2015 to 2018, AEP-Ohio was ordered to bill Ormet under the terms of the current unique arrangement as modified by the PUCO Order. The discounts would be accelerated so the rate would be discounted $66 million in 2013 and $54 million in 2014. After 2014, Ormet would not be eligible for any further discounts. The PUCO authorized AEP-Ohio to collect the full amount of delta

[98] *Ormet Unique Arrangement Proceeding*, Entry at 3 (October 17, 2013).

[99] *Id.* at 4.

[100] *Id*.

revenue approved in 2013, $66 million, in 2013 from ratepayers. (As noted above, the PUCO had capped delta revenue recovery in any one year to $54 million in its Order approving the 2009 unique arrangement.)

The PUCO concluded that Ormet could not shop for generation under its unique arrangement, finding that Ormet agreed that AEP-Ohio would be its exclusive supplier for the term of the unique arrangement. The PUCO authorized Ormet to seek additional relief at the point at which it established a continuous course of construction of an electric generation facility.

Additionally, the PUCO lowered the LME target price that would trigger a rate higher than the tariff rate. The target price for 2013 was lowered from $2805 to $2650/tonne and for 2014 through the first five months of 2015 to $2490/tonne. Beginning June 1, 2015 through December 2018, the target price would be set at $2200/tonne. Amounts paid that are above the tariff rate were to be applied to reduce or eliminate any deferred amounts and then applied to the EDR.

The PUCO authorized Ormet to assign its interest in the amended unique arrangement to Wayzata.

The PUCO denied the balance of the relief requested by Ormet, but retained jurisdiction over the unique arrangement to order further revisions of an executed agreement to assure that the agreement conforms to the modifications the PUCO ordered.

After the PUCO announced its decision, Ormet announced that it was terminating operations at the plant. It subsequently sought additional relief to lower its electric bill to account for the reduction in operations. The PUCO granted the relief that Ormet requested as a result of the reductions in operations.

Ormet and AEP-Ohio subsequently disagreed as to the scope of the relief that the PUCO had authorized for Ormet as it wound down operations. Specifically, they disputed the application of a monthly bill deferral of $5 million in August 2013 and up to $5.5 million in September 2013. Additionally, the parties disputed the application of a minimum bill requirement. Ormet filed a complaint against AEP-Ohio seeking to determine the extent of the relief.[101] AEP-Ohio and Ormet entered into a Stipulation that they asserted resolved all outstanding claims. AEP-Ohio agreed to reduce Ormet's bill for September 2013, Ormet agreed to withdraw its claim regarding the minimum demand charges, and AEP-Ohio would be permitted to recover amounts that Ormet was permitted to defer as delta revenue through the EDR. Ormet also agreed to make a one-time payment of $147,375 and any additional amounts up to $7.2 million if authorized to do so by the bankruptcy court. The settlement's resolution of the delta revenue amounts included the following: AEP-Ohio had a previous claim for delta revenue for deferred amounts in 2012 that was resolved for $20 million, the delta revenue would include $4.98 million in unpaid

[101] *In the Matter of the Complaint of Ormet Primary Aluminum Corp. v. Ohio Power Co.*, Case No. 13-2206-EL-CSS, Complaint (November 13, 2013) (hereinafter, "*Ormet Complaint Proceeding*").

bills in 2013, and AEP-Ohio would recover $13 million in discounts that remained deferred from 2010 and 2011. OCC filed testimony in opposition to the Stipulation, disputing the recovery of $4.98 million in unpaid bills from 2013.

On November 18, 2015, the PUCO approved the Stipulation, finding that the Stipulation provided a resolution of open issues between AEP-Ohio and Ormet and the amount of remaining delta revenue under the Ormet unique arrangement that may be collected from retail customers through the EDR.[102]

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/was 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 CBP (like that used in the case of FirstEnergy and DE-Ohio) 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. 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 potentially 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.[103] 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.[104] On February 25, 2010, an evidentiary hearing was held, and on May 13, 2010, the PUCO approved the Stipulation with two modifications.

[102] *Ormet Complaint Proceeding*, Opinion and Order (November 18, 2015).

[103] *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*").

[104] *AEP-Ohio EE/PDR Proceeding*, Initial Objections and Recommendations of the Industrial Energy Users-Ohio (December 11, 2009).

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 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.[105]

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

[105] AEP-Ohio's website provides additional information about ongoing programs and is available at: https://www.aepohio.com/save/Default.aspx (last visited January 24, 2018).

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 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.[106] 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").[107] 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.

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[106] *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)

[107] *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*").

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-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.[108]

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.[109] 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.[110]

On September 7, 2011, AEP-Ohio's application to amend Rider ECS was consolidated with AEP-Ohio's ESP II 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.[111] 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.[112]

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[108] 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.

[109] *AEP-Ohio Rider ECS Proceeding*, Amended Application at 2 (February 2, 2011).

[110] *Id.* at 2.

[111] *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 ESP II Proceeding*").

[112] *AEP-Ohio ESP II Proceeding*, Opinion and Order (December 14, 2011).

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 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.[113] 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; and (8) the proceeds from any decision to ultimately sell these RECs should flow directly to the benefit of ratepayers via the FAC.

[113] *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).

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.[114]

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."[115] 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."[116]

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.'[117]

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."[118]

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[114] *In re Application of Columbus S. Power Co.,* 129 Ohio St.3d 46, 2011-Ohio-2383.

[115] *Id.* at ¶ 15.

[116] *Id*. at ¶ 17.

[117] *Id*. at ¶ 19.

[118] *Id*. at ¶ 23.

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 creates a goal (peak-demand reduction) but does not tell the commission how to get there."[119] 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 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."[120] 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.

V. Lost (and Found) Distribution Revenue

As a result of the Ohio energy efficiency mandate that forces EDUs to reduce their customers' electricity usage, EDUs have sought and obtained PUCO approval of "lost distribution revenue" collection mechanisms. These mechanisms allow the EDUs to impose new charges to make up the distribution revenue decline that might otherwise occur because of the mandated usage reduction. The "lost distribution revenue" charges are part of the reason why electric bills don't go down in line with reductions in energy

[119] *Id.* at ¶ 27.

[120] *Id*. at ¶ 34.

usage and why Ohio's mandates don't really work to reduce electric bills for the EDU customers that pay for the EDU's cost of complying with the Ohio mandates.

On November 18, 2010, AEP-Ohio filed a motion to extend recovery of its "lost distribution revenue".[121] 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. ("Revenue decoupling" is a rate design or rate structure means of delinking the recovery of distribution-related fixed costs from the amount of electricity usage.) 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.[122] 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.[123] 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.[124] 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 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.[125]

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.[126] 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.[127] The issue of AEP-Ohio's lost distribution

[121] *AEP-Ohio EE/PDR Proceeding*, Motion and Request for Expedited Treatment (November 18, 2011).

[122] *Id.*, Entry (January 27, 2011).

[123] *Id.* at 3.

[124] *Id*.

[125] *Id.*, Entry on Rehearing (March 23, 2011).

[126] *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*").

[127] *Id.*, Staff Review and Recommendation (June 24, 2011).

revenue was subsequently addressed in a base rate case. As discussed in greater detail in Section CC below, the PUCO approved new distribution rates for AEP-Ohio in December 2011 which include a new rate design that addressed the lost distribution revenue issue.

VI. 2012-2015 EE/PDR Plan

On November 18, 2011, AEP-Ohio filed a motion to extend its current EE/PDR Rider beyond its termination date of December 31, 2011.[128] 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.[129] 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 (providing AEP-Ohio with an earnings "bonus" related to its compliance with the Ohio mandates), (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 generate extra earnings as a result of energy efficiency efforts that AEP-Ohio undertakes and 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.[130] In any given year, the amount of AEP-Ohio's shared savings earnings are capped at $20 million.[131]

Regarding the rate design of the EE/PDR Rider, program costs were to 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.

Through three applications filed in November and December 2014 (one of which was withdrawn by AEP-Ohio), AEP-Ohio requested that the Commission approve a special

[128] *AEP-Ohio EE/PDR Proceeding*, Motion (November 18, 2011).

[129] *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*").

[130] *AEP-Ohio Second EE/PDR Proceeding*, Stipulation at 5 (November 29, 2011).

[131] *Id.* at 6.

arrangement between AEP-Ohio and Solvay Specialty Polymers ("Solvay")[132] and a special arrangement between AEP-Ohio and Kraton Polymers U.S. LLC ("Kraton").[133] Under the proposed arrangements, AEP-Ohio would make payments to each mercantile customer for the output of their combined heat and power ("CHP") projects in exchange for each company dedicating the efficiency gains to AEP-Ohio for compliance with AEP-Ohio's portfolio requirements. In each application and contrary to the Commission-approved Stipulation discussed above, AEP-Ohio requested that the Commission allow AEP-Ohio to count the efficiency achieved from a self-directed mercantile customer project towards its eligibility to recover shared savings and also requested that the Commission waive the $20 million cap on shared savings that AEP-Ohio agreed to. In an order addressing both the Solvay and Kraton applications issued on November 18, 2015, the PUCO approved the applications of Kraton and Solvay as they relate to including them in the EE/PDR plan. However, the PUCO denied AEP-Ohio's request to increase its cap on shared savings. The PUCO also found that authorizing these two applications did not trigger the availability of the streamlined opt-out option under SB 310 in AEP-Ohio's service area.[134]

VII. 2017-2020 EE/PDR Plan

On June 15, 2016, AEP-Ohio filed to implement its next portfolio plan beginning January 1, 2017 and continuing for three years.[135] As filed, the plan largely reflected a continuation of the existing programs at an increased spending level. A Stipulation was filed in the matter which was supported, or not opposed, by all the parties in the proceeding. Under the Stipulation, AEP-Ohio's total collection of costs through its EE/PDR Rider was capped at approximately $110 million/year. The Stipulation recommended that the Commission adopt a process that would allow parties to address whether the cost cap was a good policy decision, and if the Commission determined otherwise, to remove the cap for the final two years of the plan. The stipulation also recommended a continuation of the existing cap on shared savings of $20 million after-tax. Finally, the stipulation increased the term of the plan from three to four years.

The Commission approved the stipulation without modification on January 18, 2017. A hearing was further held on October 23, 2017 to address whether the Commission should

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[132] *In the Matter of the Joint Application of Ohio Power Company and Solvay Specialty Polymers for Approval of a Special Arrangement Agreement*, PUCO Case No. 14-2296-EL-EEC, Joint Application (December 22, 2014).

[133] *In the Matter of the Joint Application of Ohio Power Company and Kraton Polymers U.S. LLC for Approval of a Special Arrangement Agreement*, PUCO Case No. 14-2304-EL-EEC, Joint Application (December 22, 2014).

[134] *In the Matter of the Applications of Solvay Advanced Polymers, L.L.C., dba Solvay Specialty Polymers; and Kraton Polymers U.S.LLC, for Integration of Mercantile Customer Energy Efficiency and/or Peak-Demand Reduction Programs with the Ohio Power Company*, PUCO Case Nos. 14-2296-EL-EEC, *et al.*, Finding and Order (November 18, 2015).

[135] *In the Matter of the Application of Ohio Power Company for Approval of Its Energy Efficiency/Peak Demand Reduction Portfolio Plan*, PUCO Case No. 16-574-EL-POR.

remove the $110 million annual cost cap for the final two years of the plan. This issue is still before the Commission.

J. Fuel Adjustment Clause

In AEP-Ohio's ESP i 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."[136] 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.[137]

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 Application

[136] *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al*., Tariff Filing (December 1, 2009) (hereinafter, "*AEP-Ohio 2009 FAC Proceeding*").

[137] *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).

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).[138]

Subsequently, on May 14, 2010, EVA (the independent auditor assigned by the PUCO to audit AEP-Ohio's FAC) filed its 2009 m/p 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.[139] 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, 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,[140] 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

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[138] Ohio Supreme Court Case No. 2010-729.

[139] *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*").

[140] The proposed merger is discussed in more depth in Section V.

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.[141] 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.

[141] 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 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.[142]

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. 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

[142] *AEP-Ohio SEET Proceeding*, Notice of Withdrawal (December 16, 2010).

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.

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 were 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.[143] In a decision issued on September 3, 2014, the Ohio Supreme Court affirmed the PUCO's Order. The Court found that the Commission had correctly determined that AEP-Ohio's contract renegotiation in 2008 was within the proper audit scope because it affected the price for coal that customers paid in their 2009 FAC rates. It rejected IEU-Ohio's cross-appeal that the full amount of the consideration supporting the renegotiation should be credited to retail customers on procedural grounds.

III. PUCO Resolution of Remaining FAC Audits[144]

The 2011 and subsequent audit proceedings dealt with the carrying charges AEP-Ohio calculated on amounts that were deferred in its prior ESP, as well as AEP-Ohio's recovery of purchased power costs incurred with respect to OVEC and Lawrenceburg.

AEP-Ohio's rates during its ESP I included caps on the level of rate increases AEP-Ohio was permitted to recover from retail customers. The PUCO permitted AEP-Ohio to delay the collection of revenue not collected as a result of the caps. Applicable accounting rules

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[143] *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764.

[144] *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al*.

and the "matching principle" require that expenses equal to the delayed revenue be deferred for collection in the amount of the delayed revenue collection. Typically, a carrying cost is added to the amount of the expense deferral to recognize the delay and increase the ultimate impact on electric bills. AEP-Ohio is recognizing carrying costs on these revenue increase phase-in deferrals. The audit report in AEP-Ohio's 2010 and 2011 FAC cases concluded that AEP-Ohio had overstated its carrying costs by failing to recognize an offset for accumulated deferred income taxes ("ADIT") (a tax benefit for AEP-Ohio).

AEP-Ohio's ESP I permitted AEP-Ohio to recover non-fuel costs related to its purchase power entitlement with OVEC and Lawrenceburg. In its capacity charge proceeding (discussed below), the PUCO determined, based on 2010 vintage information, that a capacity price of $188.888/MW-day fully compensated AEP-Ohio for its entire cost of capacity and non-fuel purchase power expenses. AEP-Ohio's base generation rates provided AEP-Ohio with approximately $355/MW-day for capacity. Therefore, consumer advocates asserted that AEP-Ohio over-recovered non-fuel purchased power expenses through the FAC during 2010 and 2011.

Consumer advocates also challenged AEP-Ohio's recovery of non-fuel purchased power costs because the costs were not properly allocated between jurisdictional and non-jurisdictional customers (such as wholesale sales).

On December 4, 2013, the PUCO directed an auditor to review and investigate the double-recovery allegations raised by intervenors. The auditor concluded that there was a double-recovery and specified a methodology that would allow the PUCO to calculate the amount of the double-recovery.
After years of lying dormant, the Commission scheduled a hearing on AEP-Ohio's FAC audits for 2012 through 2015 to begin January 2017. With the case scheduled to finally move forward, a settlement was reached that resolved this proceeding and a number of other of AEP-Ohio proceedings. This stipulation is summarized in the "Global Settlement" section below.

K. SEET Proceedings

I. 2009 SEET Proceeding

With the revolting 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.[145] The PUCO ordered CSP to first apply the excessive earnings against CSP's FAC deferrals with any remaining amount of excess earnings

[145] *AEP-Ohio SEET Proceeding*, Opinion and Order (January 11, 2011).

credited to customers' bills.[146] 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).[147]

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%.[148]

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

[146] *Id.* at 35.

[147] *Id.*

[148] 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 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.

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 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.

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.[149]

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.[150] 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.

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 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.

II. 2010 SEET Proceeding

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.[151] 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.[152] 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.

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[149] *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*").

[150] *AEP-Ohio 2009 SEET Appeal*, Notice of Appeal of the Industrial Energy Users-Ohio (May 6, 2011).

[151] *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*").

[152] The indexed stock fund selected by the Staff was the SPDR Select Sector Fund – Utility (XLU).

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.

The PUCO issued a decision in the 2010 SEET case on October 23, 2013 (almost three years after 2010 had ended). The PUCO found that OP did not have significantly excessive earnings but held that CSP had "significantly excessive" earnings of $6.938 million. It ordered CSP to return the significantly excessive earnings to customers through a reduction in a deferred revenue/expense balance (described above) that arose because of the rate caps contained in AEP-Ohio's initial ESP. If the CSP deferred balance was less than the total significantly excessive earnings CSP was ordered to return, any remaining amount was to be credited to CSP rate zone customers on a per kWh basis, excluding all reasonable arrangement customers that received service under a discount rate supported by delta revenue.

In support of the result, the PUCO began with an estimate of earnings based on annual reports AEP-Ohio submitted to FERC. Based on those reports, CSP and OP had an adjusted ROE of 16.17% and 9.7%, respectively. The PUCO then adjusted the ROEs to exclude OSS. Based on the adjustments, the CSP and OP ROEs were 17.9% and 9.98%, respectively. Based on the recommendation of its Staff that the PUCO should use an indexed stock fund to establish the ROE for the comparable companies, the PUCO determined that a comparable group of companies would have ROEs in a range of 10.97% to 11.48%. Based on the comparable group, OP was deemed not to have significantly excessive earnings because its ROE was below that of the comparable group of companies.

Because CSP's ROE was found to be in excess of a safe harbor of 200 basis points above the range of ROEs for comparable companies, the PUCO determined an ROE threshold that would trigger a finding that earnings were significantly excessive. The PUCO reviewed several different approaches and reached a conclusion that the threshold should be set at 17.56%. Using 17.56% as the threshold, the PUCO calculated that CSP had significantly excessive earnings of $6.938 million.

AEP-Ohio filed tariffs that reduced its PIRR to zero and provided a one-month credit to bills issued during November 2013 of $0.000358/kWh for all CSP customers except those under reasonable arrangements.

The PUCO also stated that AEP-Ohio had to submit its filing for the 2011 earnings review by November 23, 2013, and that the review would be on an individual entity basis, i.e. the earnings of CSP and OP would be addressed separately even though the merger of the companies was completed at the end of 2011. Separate review will remove the averaging effect that would result from combining the historically higher ROE of CSP with the historically lower ROE of OP.

In its October 23, 2013 Order, the PUCO also reiterated its expectation that AEP-Ohio spend $20 million on the Turning Point solar project or another investment in a similar project, subject to Staff approval, by the end of 2013. In an Application for Rehearing and Request for Clarification dated November 22, 2013, AEP-Ohio asked the PUCO to hold the 2013 deadline in abeyance and permit AEP-Ohio to pursue its current efforts to satisfy the obligation to invest the $20 million. As noted below in the discussion of AEP-Ohio's gridSMART Phase 2 filing, AEP-Ohio had proposed to commit the $20 million to a Volt/VAR ("VVO") optimization project.

III. 2011 SEET Proceeding

On November 22, 2013, AEP-Ohio filed its 2011 SEET application.[153]

The 2011 filing presented results for CSP and OP separately, as requested by the PUCO, although the two companies were merged into OP as of December 2011. AEP-Ohio indicated that the ROEs for SEET purposes for CSP and OP were 12% and 8.56%, respectively. AEP-Ohio calculated an ROE of 11.97% for comparable companies and stated that adding 200 basis points to the 11.97% comparable companies' figure produced a "safe-harbor" limit of 13.97%, and since both companies' SEET ROEs were below that level, the ROEs were not subject to further SEET analysis (i.e. there were no excessive earnings). Staff and AEP-Ohio submitted a Stipulation to the Commission on February 24, 2014, indicating that OP's SEET ROE was 8.56% and CSP's SEET ROE was 12.12%, and that the comparable group of companies' ROE range was 11.03% to 11.97%. Adding 200 basis points to the comparable group's ROEs resulted in a safe harbor of 13.03% to 13.97%. The Stipulation indicated that neither CSP nor OP had significantly excessive earnings for 2011. The Commission approved the Stipulation on March 26, 2014.

IV. 2012 SEET Proceeding

On November 22, 2013, AEP-Ohio filed its 2012 SEET application.[154] The 2012 filing presented results for the merged OP and indicated an ROE for SEET purposes of 9.76%. AEP-Ohio calculated an ROE of 12.47% for comparable companies and stated that adding 200 basis points to the 12.47% comparable companies' figure produced a "safe-harbor" limit of 14.47%, and since OP's SEET ROE was below that level, the ROE was not subject to further SEET analysis (i.e. there were no excessive earnings). On April 16, 2014, Staff and AEP-Ohio filed a Stipulation with the Commission indicating that there were no significantly excessive earnings for 2012. The PUCO approved the Stipulation on May 28, 2014.

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[153] *In the Matter of the Application of 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*, PUCO Case Nos. 13-2249-EL-UNC, *et al.* (hereinafter, "*AEP-Ohio 2011 SEET Proceeding*").

[154] *In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings Test for 2012 Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, PUCO Case No. 13-2251-EL-UNC (hereinafter, "*AEP-Ohio 2012 SEET Proceeding*").

V. 2013 SEET Proceeding

On May 15, 2014, AEP-Ohio filed its 2013 SEET application.[155] The filing indicated an ROE for SEET purposes of 11.28% for OP. AEP-Ohio suggested that the SEET threshold should be 14.38%, using the methodology from previous SEET cases, and noted that in AEP-Ohio's last ESP proceeding, the Commission had approved a 12% SEET threshold. AEP-Ohio further noted that even using the lower 12% SEET threshold, there would be on significantly excessive earnings for OP. On October 10, 2014, a Stipulation was filed by the Staff and AEP-Ohio indicating that there were no significantly excessive earnings for 2013. On December 3, 2014, the Commission approved the Stipulation in its entirety.

VI. 2014 SEET Proceeding

On June 1, 2015, AEP-Ohio filed a letter and testimony that initiated its 2014 SEET review.[156] In the letter, AEP-Ohio reported that its current earnings calculation for 2014 was slightly above the 12% threshold established in the ESP II Order. OCC filed testimony in the case, stating that the correct threshold was 12%, and that AEP-Ohio had approximately $20.3 million in excess earnings that should be returned to customers In a Global Settlement filed on December 21, 2016, the Signatory Parties agreed that $20.3 million would be returned to customers on a kWh basis over 12 months, within 45 days of a final PUCO Order adopting the Global Settlement; to resolve AEP-Ohio's 2014 SEET proceeding. This case was resolved as part of the Global Settlement addressed in Part II.

VII. 2015 SEET Proceeding

AEP-Ohio initiated its 2015 SEET review by filing a letter and testimony on May 16, 2016. **[157]** AEP-Ohio reported that its earnings of 11.73% were below the threshold earnings level of 15.36%. In a Global Settlement filed on December 21, 2016, the Signatory Parties agreed that AEP-Ohio's earnings in 2015 were not significantly excessive. The PUCO issued an Order on February 23, 2017 approving the Global Settlement.[158]

[155] *In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10*, PUCO Case No. 14-875-EL-UNC,

[156] *In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings Test for 2014 under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, PUCO Case No. 15-1022-EL-UNC.

[157] *In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings Test Pursuant to R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10*, PUCO Case No. 16-1105-EL-UNC, Application (May 16, 2016) ("*AEP-Ohio 2015 SEET Proceeding*").

[158] *AEP-Ohio 2015 SEET Proceeding*, Order on Global Settlement Stipulation (February 23, 2017).

VIII. 2016 SEET Proceeding

AEP-Ohio filed its 2016 SEET review on May 15, 2017.[159] AEP-Ohio reported that its earnings of 14.97% were below the threshold earnings of 17.69%. Staff filed testimony on January 6, 2018 in which it calculated a threshold of 16.08%, which was still above the actual earnings of 14.97%, leading Staff to conclude that AEP-Ohio had no significantly excessive earnings for 2016. The case is still pending at the time of the report.

L. 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 unique arrangements." Delta revenue is the difference in the revenue produced by the otherwise applicable rate schedule and the approved unique 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 unique arrangements: one with Eramet, one with Ormet, one with The Timken Company ("Timken"),[160] 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. ("Severstal"); 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.[161]

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 ESP I.

[159] *In the Matter of the Application of Ohio Power Company for Administration of the Significantly Excessive Earnings Test Pursuant to R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10*, PUCO Case No. 17-1230-EL-UNC ("*AEP-Ohio 2016 SEET Proceeding*").

[160] *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 (hereinafter, "*Timken Unique Arrangement*").

[161] *In the Matter of the Joint Application for Establishment of a Unique Arrangement Between Ohio Power Company and Severstal Wheeling, Inc.*, PUCO Case No. 10-1461-EL-AEC, Application at 2 (October 1, 2010) (hereinafter, "*Severstal Unique Arrangement*").

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).[162]

AEP-Ohio filed two applications to adjust Rider EDR pursuant to the ESP, which established semiannual review of the EDR (in April and October).[163] 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.[164] On March 24, 2010, the PUCO approved the application. IEU-Ohio filed an Application for Rehearing asserting similar arguments to those made in the 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.[165]

On August 4, 2010, AEP-Ohio filed its second semiannual adjustment of Rider EDR.[166] 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.[167] CSP's rate was decreased to 9.663290% and OP's rate was increased to 8.72497% of base distribution rates.[168]

Additional updates to the Rider EDR rates were approved by the PUCO in orders dated October 20, 2011[169] and March 28, 2012.[170] This first update decreased CSP's EDR

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[162] *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.

[163] *See AEP-Ohio EDR Update Proceeding*; *AEP-Ohio Second EDR Update Proceeding*.

[164] *AEP-Ohio EDR Update Proceeding*, Finding and Order at 2 (March 24, 2010).

[165] *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.

[166] *AEP-Ohio Second EDR Update Proceeding*, Application (August 4, 2010).

[167] *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:l-38-08(A)(5), Ohio Administrative Code*, PUCO Case No. 11-705-EL-RDR, Finding and Order (April 13, 2011).

[168] *Id.* at 2.

[169] *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.

[170] *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.

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%. In that proceeding, AEP-Ohio proposed an EDR rate of 11.44664%, to become effective October 1, 2014. The Commission approved the current EDR rate of .00138% on September 27, 2017.[171]

I. Timken Unique Arrangement

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.[172] 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 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

[171] *In the Matter of the Application of Ohio Power Company to Adjust the Economic Development Cost Recovery Rider Rate*, PUCO Case No. 17-1714-EL-RDR.

[172] *Timken Unique Arrangement,* Application (December 20, 2010).

the open market, in which case the unique arrangement would terminate. On April 27, 2011, the PUCO approved the application without modification.

In 2014, Timken sought and received two modifications of the reasonable arrangement. The first amendment, approved by the PUCO on March 26, 2014, assigned Timken's interest to a new independent, unaffiliated entity, the TimkenSteel Corporation ("TimkenSteel"), to reflect the corporate separation of Timken's steel operations from its bearings and power transmission operations. The second amendment allowed TimkenSteel to shop for generation service beginning January 1, 2015, serve as an interruptible resource for AEP-Ohio and receive a credit for interruptible service through May 31, 2015.

On December 15, 2014, TimkenSteel filed for a third amendment which would authorize TimkenSteel to continue to receive an interruptible credit through the earlier of December 31, 2015 or the date the Commission approves or denies an application for a new reasonable arrangement that TimkenSteel intends to file in the first half of 2015. On February 3, 2015, the Commission approved the amendment.

On November 11, 2015, TimkenSteel filed for approval of a reasonable arrangement for its Stark County facilities that would run to May 31, 2021 during which it would receive generation supply from a CRES provider, receive a monthly discount on OP's tariff charges (except transmission charges), cap the amount of delta revenue that could be assessed to other customers, permit TimkenSteel to begin paying transmission service through a modified transmission rider based on its annual single transmission coincident peak, and allow TimkenSteel to serve as an interruptible resource for OP and receive an interruptible service credit regardless of whether that credit is available under OP's tariffs. TimkenSteel and the PUCO Staff entered into a Stipulation adopting the material terms of the application. The PUCO approved the Stipulation on December 16, 2015.[173]

II. Severstal Wheeling, Inc. Unique Arrangement

On October 1, 2010, OP and 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.[174] Severstal claimed that avoiding the two-year commitment would provide it with greater operational flexibility, without which it would not be restarting operations.[175] 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.

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[173] *In the Matter of the Application of TimkenSteel Corporation for Approval of a Unique Arrangement for the TimkenSteel Corporation's Stark County Facilities*, Case No. 15-1857-EL-AEC, Opinion and Order (December 16, 2015).

[174] *Severstal Unique Arrangement*, Application at 2 (October 1, 2010).

[175] *Id*.

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.[176] 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.[177]

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.[178] 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."[179] Second, the bill limits were set pursuant to Section 4928.144, Revise 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."[180] 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.

M. 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.[181] AEP-Ohio proposed to use the TCRR to recover costs it incurred to join an RTO and also suggested that the TCRR be annually trued-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

[176] *See* Section H regarding Ormet's Unique Arrangement.

[177] *In re Application of Ormet Primary Aluminum Corp.,* 129 Ohio St.3d 9 (2011).

[178] *In re Application of Columbus S. Power Co*., 129 Ohio St. 3d 568, 2011-Ohio-4129.

[179] *Id.* at ¶ 8.

[180] *Id.* at ¶ 10 (emphasis in original).

[181] *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.

and to update and true-up the rider. The PUCO specifically directed its Staff to ensure controllable costs were minimized.[182]

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.[183] The PUCO approved AEP-Ohio's application, making adjustments to preclude recovery of certain ancillary service costs and to reconcile AEP-Ohio's net RTO formation costs.[184] 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.[185] 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.[186]

[182] *Id*. at 5.

[183] *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*").

[184] *AEP-Ohio 2006 TCRR Proceeding,* Finding and Order (May 26, 2006).

[185] *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*").

[186] *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.

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.[187] 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.[188] 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.[189] AEP-Ohio 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.[190] 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.[191]

On April 16, 2009, AEP-Ohio filed an application to adjust its TCRR for the July 2009 through June 2010 time period.[192] 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.[193] The PUCO approved AEP-Ohio's TCRR adjustment on June 24, 2009.

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[187] *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*").

[188] *AEP-Ohio 2007 TCRR Proceeding,* Finding and Order (December 19, 2007).

[189] *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*").

[190] *AEP-Ohio 2008 TCRR Proceeding,* Finding and Order (December 17, 2008).

[191] 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.

[192] *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*").

[193] *AEP-Ohio 2009 TCRR Proceeding,* Staff Report (June 9, 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.[194] 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.[195]

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 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.[196] 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.[197] 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

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[194] *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, Application (April 14, 2010) (hereinafter, "*AEP-Ohio 2010 TCRR Proceeding*").

[195] *AEP-Ohio 2010 TCRR Proceeding,* Supplement to Application at 2-3 (June 10, 2010).

[196] *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).

[197] *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).

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. 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 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.[198]

On October 7, 2014, the Ohio Supreme Court affirmed the PUCO's decision regarding AEP-Ohio's non-bypassable TCRR.[199] Finding that the PUCO could rely on its phase-in authority, the Court held that the statute requires any deferred amounts to be collected through a non-bypassable charge and therefore "even if the commission's *TCRR Order* did amount to retroactive ratemaking, it was not *unlawful*" retroactive ratemaking (emphasis added). The Court also held that the Commission's precedent regarding true-ups of bypassable riders was distinguishable from this case, although the Court failed to explain the distinguishing facts.

On June 17, 2013, AEP-Ohio filed its annual TCRR update for 2013.[200] AEP-Ohio requested that the proposed revisions to the TCRR become effective on a bills rendered basis, beginning with the first billing cycle of September 2013, and would result in significant TCRR rate increases for some customers. AEP-Ohio stated in the application that the increases to the TCRR rates were due in part to a significant TCRR under-

[198] *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, Ohio Supreme Court Case No. 2013-154, Notice of Appeal of Appellant Industrial Energy Users-Ohio (January 25, 2013).

[199] *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271.

[200] *In the Matter of the Application of Ohio Power Company to Update Its Transmission Cost Recovery Rider Rates*, PUCO Case No. 13-1406-EL-RDR (hereinafter, "*AEP-Ohio 2013 TCRR Update Proceeding*").

recovery (the under-recovery is separate from the $36 million under-recovery which AEP-Ohio was authorized to collect from customers over a three-year period through the non-bypassable Transmission Under-Recovery Rider in its previous TCRR proceeding).

The under-recovery was estimated by AEP-Ohio to be approximately $47.3 million, including carrying charges. AEP-Ohio indicated in the application that the under-recovery was due mainly to three factors: (1) a PJM tariff change in December 2012 that caused AEP-Ohio to incur approximately $11 million in Black Start Service costs that had not been forecasted; (2) implementation of the new TCRR rates created regulatory lag of about $7 million; and (3) AEP-Ohio had inadvertently omitted approximately $23 million of PJM Reactive Supply charges, plus carrying costs, from the current TCRR charges.

IEU-Ohio and the OCC filed comments in the case on July 29, 2013. In its Comments, IEU-Ohio recommended that the Commission reject AEP-Ohio's request to increase its future TCRR rates for the $23 million of PJM Reactive Supply charges, inclusive of carrying charges, for which AEP-Ohio failed to previously request recovery. IEU-Ohio argued that the doctrines of *res judicata* and collateral estoppel prevented AEP-Ohio from seeking to open the Commission's prior orders to increase its future revenue to account for revenue that AEP-Ohio failed to request in prior TCRR proceedings. IEU-Ohio also recommended that the Commission deny recovery of the unreasonable carrying charges caused by AEP-Ohio's failure to file an interim application to update its TCRR for the Black Start Service cost increase that stemmed from "a PJM tariff change" in December 2012.

OCC recommended that the Commission review carefully the $23 million in PJM Reactive Supply charges.

Staff submitted its Review and Recommendation on August 20, 2013, recommending that $13.3 million be disallowed for out-of-period Reactive Supply charges, including interest.

A Stipulation that included IEU-Ohio, Staff, OCC, and OEG was filed at the Commission on November 8, 2013, providing for a reduction in the TCRR revenue requirement of $18.5 million. The Stipulation was approved by the Commission on December 4, 2013. AEP-Ohio filed compliance tariffs reflecting reduced TCRR rates resulting from the Stipulation on December 18, 2013, and the rates were effective with bills rendered December 19, 2013.

AEP-Ohio filed its annual TCRR update for 2014 on June 16, 2014.[201] AEP-Ohio requested that the proposed revisions become effective on a bills-rendered basis, beginning with the first billing cycle of September 2014. The proposed rates resulted in significant TCRR rate increases for some customers.

[201] *In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates*, PUCO Case No. 14-1094-EL-RDR, Application (June 16, 2014).

AEP-Ohio indicated in the application that the increases in the TCRR rates were due in part to a TCRR under-recovery of $57.1 million, which included $4.4 million in carrying charges. AEP-Ohio indicated that a significant portion of the under-recovery was due to the differential between actual costs incurred and forecasted costs. Some of the costs identified where the actual costs exceeded the forecasted costs were PJM charges for net marginal losses, operating reserve charges, and regulation service charges. The increase in rates was also being driven by an increase in the NITS rate that is approved by FERC and a proposed nine-month recovery period for the TCRR costs (September 2014 through May 2015, when the then-pending ESP III rates were proposed to go into effect). In the ESP III proceeding, AEP-Ohio had proposed that Rider TCRR would cease as of May 31, 2015 and a new non-bypassable rider – the Basic Transmission Cost Rider ("Rider BTCR") would be implemented on June 1, 2015 to collect what AEP-Ohio classifies as non-market transmission costs from both shopping and non-shopping customers. Other so-called market-based transmission costs were to be included as part of the auction conducted to secure generation supply for SSO customers, and bidders were expected to include their projected market-based transmission costs in their bids. CRES providers would continue to be responsible for market-based transmission charges associated with their shopping customers.

Staff submitted its Review and Recommendation on August 13, 2014, finding that the appropriate costs and credits were included in the application, and recommending that Staff and AEP-Ohio meet by November 1, 2014, to help ensure that the under-recovery balance of the rider be eliminated by May 31, 2015. Staff recommended that the Commission direct AEP-Ohio to meet with Staff no later than November 1, 2014 and provide updated workpapers and support verifying that the rates the Commission approved in the instant case were accurately and reasonably designed to recover all appropriate costs and deferred amounts by May 31, 2015, based on known and reasonably projected costs. If it was determined by Staff that rates needed to be modified, the Staff recommended that the Commission direct AEP-Ohio to file interim rates no later than December 1, 2014 to become effective no later than January 1, 2015. All costs and recoveries were to be audited in AEP-Ohio's 2015 TCRR filing.

The Commission approved Staff's recommendation and the proposed TCRR rates on August 27, 2014, effective on a bills-rendered basis in the first billing cycle of September 2014.

As noted elsewhere, AEP-Ohio received authorization to substantially revise the manner in which it bills and collects transmission costs beginning June 1, 2015. The TCRR was terminated, subject to final true-up, and the collection of non-market based transmission costs was moved to the new Basic Transmission Cost Recovery Rider ("BTCR"), as discussed in the ESP III Section below.

N. Environmental Investment Carrying Cost Rider

In AEP-Ohio's ESP I 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.[202] 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.[203] 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 was 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.[204] AEP-Ohio also agreed to modify its carrying cost calculation slightly to conform to what was approved in its ESP proceeding.[205]

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

[202] *AEP-Ohio ESP I Proceeding*, Entry on Rehearing at 14 (July 23, 2009).

[203] *AEP-Ohio EICCR Proceeding*, Application at 5, 11 (February 8, 2010).

[204] *Id.*, Opinion and Order at 9-10 (August 25, 2010).

[205] 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.

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.[206] On October 22, 2010, the PUCO denied OCC's Application for Rehearing.[207]

II. Recovery of 2010 Expenditures

On March 18, 2011, AEP-Ohio filed an application to adjust the EICCR rates of CSP and OP to reflect incremental environmental investments made in 2010.[208] AEP-Ohio proposed that the 2010 carrying costs be collected over the six-month period of July 2011 through December 2011. The proposed EICCR 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, which 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 EICCR rates, effective July 2011, to collect revenue of $10.1 million for CSP and $6.1 million for OP.[209] 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 ESP I 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 requirements. The PUCO also directed AEP-Ohio to include a description of AEP-Ohio's long-term environmental compliance strategy.[210]

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[206] *AEP-Ohio EICCR Proceeding*, Entry on Rehearing at 2 (October 22, 2010).

[207] *Id.* at 7-8.

[208] *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*").

[209] *AEP-Ohio 2010 EICCR Proceeding*, Finding and Order at 3 (June 29, 2011).

[210] *Id*. at 5-6.

As part of its ESP II 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.

O. 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.[211] 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.[212] 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.[213] 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 March 18 filing be accepted. On June 15, 2011, the PUCO approved the filed ESRR rates, effective July 2011.[214]

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[211] This included a five-year transition period to facilitate end-to-end clearing of all of AEP-Ohio's circuits, after which AEP-Ohio would implement a four-year full cycle vegetation program. AEP-Ohio and Staff 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.

[212] The modification came as a result of several expenditures AEP-Ohio had inadvertently excluded in its application as well as several charges that the PUCO Staff concluded should have been excluded.

[213] *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).

[214] *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).

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.[215] On December 21, 2012, AEP-Ohio filed an application to update the ESRR rate, requesting a rate of 5.25993%.[216] On the same date, AEP-Ohio also filed a motion to hold in abeyance and consolidate this proceeding ("2011 ESRR") with the 2012 ESRR filing that AEP-Ohio planned to make in 2013. AEP-Ohio made the 2012 ESRR filing on April 29, 2013,[217] requesting an ESRR rate of 6.55776%. On September 6, 2013, Staff filed Comments recommending the April 29 filing be accepted with some minor modifications. On December 4, 2013, the PUCO issued an order approving AEP-Ohio's motion to consolidate the 2011 ESRR and 2012 ESRR filings. On February 26, 2014, the PUCO issued an order approving an ESRR rate of 6.5576%. The rate was effective with bills rendered for the first billing cycle of March 2014.

On November 1, 2016, AEP-Ohio filed to update the ESRR rider requesting a rate of 3.48459%, but those cases have not been resolved.[218] AEP-Ohio files regular updates to the rider. As of January 24, 2018, the approved rate is set at 7.34119% of base distribution charges.[219]

P. gridSMART Rider

Established in AEP-Ohio's ESP I 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 three 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).[220] 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.[221]

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[215] *AEP-Ohio ESP I Proceeding,* Opinion and Order (August 8, 2012).

[216] *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).

[217] *In the Matter of the Application of Ohio Power Company to Update Its Enhanced Service Reliability Rider*, PUCO Case No. 13-1063-EL-RDR, Application (April 29, 2013).

[218] *See, e.g., In the Matter of the Application of Ohio Power Company to Update Its Enhanced Service Reliability Rider*, PUCO Case No. 16-2154-EL-RDR, Application (November 1, 2016).

[219] *In the Matter of the Application of Ohio Power Company to Update Its Enhanced Service Reliability Rider*, PUCO Case No. 14-1578-EL-RDR, Finding and Order (June 3, 2015).

[220] *AEP-Ohio ESP I Proceeding*, Opinion and Order at 39 (March 18, 2009).

[221] 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 sought recovery of the amount in its next annual reconciliation case.

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.[222]

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 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.[223]

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.[224] 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 ESP II 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 ESP I expired. Staff further indicated that granting

[222] *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*").

[223] *AEP-Ohio SEET Proceeding*, Stipulation and Recommendation at 6 (November 30, 2010).

[224] *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).

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 ESP II 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 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.[225]

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.[226]

On September 13, 2013, AEP-Ohio made its Phase 2 gridSMART filing, requesting that new rates become effective January 1, 2014.[227] The technologies (projects) that were proposed to comprise Phase 2 are:

(1) AMI installations for another 894,000 customers with an estimated capital investment of $161 million.

(2) Distribution Automation Circuit Reconfiguration ("DACR") for approximately 250 priority circuits with an estimated capital investment of $107 million.

(3) VVO for approximately 80 circuits with an estimated capital investment of $20 million.

AEP-Ohio's estimated revenue requirement (cost to customers) associated with the gridSMART investments and expenses totaled $248 million over the five years

[225] *AEP-Ohio ESP II Proceeding,* Opinion and Order (August 8, 2012).

[226] *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).

[227] *In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of Its gridSMART Project and to Establish the gridSMART Phase 2 Rider*, PUCO Case No. 13-1939-EL-RDR (hereinafter, "*AEP-Ohio gridSMART Phase 2 Proceeding*").

commencing in 2014. AEP-Ohio proposed to maintain the current rate design to recover the gridSMART-related costs with separate "per month" charges for residential and non-residential customers. AEP-Ohio proposed a cap on the monthly charge for non-residential customers of $3.50 in year 1, $9.00 in year 2, $10.75 in year 3, $11.50 in year 4 and $13.50 in year 5. Any costs not recovered due to the rate caps could be recovered in a subsequent period.

The $20 million investment for the VVO project was in response to the PUCO's Orders in Case Nos. 10-501-EL-FOR, *et al.* and 10-1261-EL-UNC, where the PUCO directed AEP-Ohio to spend $20 million on Turning Point or another similar project, and to ensure that the benefits of the $20 million investment flow through to AEP-Ohio's customers.

Comments on AEP-Ohio's Phase 2 gridSMART application were filed by parties on November 1, 2013 and Reply Comments were filed on November 18, 2013. In its Reply Comments, IEU-Ohio recommended that because AEP-Ohio had failed to make the $20 million capital investment and likely would not find a suitable project subject to Staff's approval to make the capital investment by the end of 2013, the Commission should direct AEP-Ohio to credit the $20 million, plus interest, back to all of AEP-Ohio's customers. IEU-Ohio recommended that the Commission direct AEP-Ohio to refund the $20 million, plus interest, through a uniform cent per kWh credit to all of AEP-Ohio's customers.

IEU-Ohio also recommended that the Commission use this proceeding to address the failure of AEP-Ohio to return $24.24 million in customer funds provided for engineering costs of an IGCC electric generation facility proposed by AEP-Ohio but subsequently abandoned. More specifically, IEU-Ohio recommended that the Commission issue an order directing AEP-Ohio to refund the $24.24 million, plus interest, at the same carrying charge rate that AEP-Ohio requested in its application in the *IGCC Proceeding*; 12.78% for the amounts collected from customers in the CSP rate zone, and 12.73% for amounts collected from customers in the OP rate zone.

On May 21, 2014, AEP-Ohio made a filing with the Commission to request that an additional 22,000 AMI meters, as well as all AMI meters in stock, be included in the Phase 2 gridSMART Rider, in accordance with the Stipulation approved by the Commission on April 23, 2014.[228] The Commission subsequently approved as part of a settlement the installation of 894,000 AMI meters as part of an expansion of GridSmart.[229]

On April 7, 2016, a Stipulation was filed in this matter. The stipulation recommended that AEP-Ohio move forward with AMI meter deployment, institute distribution automation circuit reconfiguration ("DACR") on 250 circuits and move forward with Volt Var optimization projects. The stipulation also recommended that AEP-Ohio undertake a more comprehensive feasibility study for additional gridSMART initiatives. The stipulation

[228] *In the Matter of the Review of the Distribution Investment Rider Contained in the Tariffs of Ohio Power Company*, PUCO Case No. 13-419-EL-RDR, Opinion and Order (April 23, 2014).

[229] *Id*. at 26.

was initially opposed by OCC, but OCC withdrew its opposition as part of the Global Settlement discussed below.

Q. 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.[230] 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.[231]

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 Commission felt helped insulate the regulated companies from their non-regulated affiliates.[232]

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[230] *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*").

[231] *OHTCo Proceeding*, Initial Comments of IEU-Ohio (April 30, 2010).

[232] The conditions were:

(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.

R. 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").[233] 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 ESP I 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 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.

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(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.

[233] *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 was a 450 MW facility.

S. 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.[234] 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.

T. 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 charge.[235] In the application, AEP-Ohio indicated that the PUCO had authorized, in its ESP I 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

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[234] *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).

[235] *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).

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 ESP II 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.

On November 1, 2013, AEP-Ohio submitted a letter in the docket indicating that because the POLR charge was terminated as a result of the PUCO's October 3, 2011 Order on Remand in AEP-Ohio's ESP I proceeding, there was no longer a need to establish a market-based rate for customers that return to SSO after being served by a CRES provider; therefore, AEP-Ohio was withdrawing the application. The PUCO approved AEP-Ohio's request to withdraw the application on December 4, 2013.

U. Second ESP Proceeding (ESP II)

AEP-Ohio's ESP II 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. The next phase was the result of a Stipulation that proposed to resolve the issues in the ESP II proceeding and several other proceedings that were consolidated with the ESP II proceeding for purposes of considering the Stipulation (the "ESP II Stipulation"). The third and final phase was a result of the PUCO ultimately rejecting the ESP II Stipulation that it previously approved after finding that the ESP II Stipulation it had previously approved over the objections of IEU-Ohio, FES and OCC was, after all, not in the public interest. Once the ESP II Stipulation was ultimately rejected, the PUCO allowed AEP-Ohio to partially operate under the rejected ESP II Stipulation and allowed AEP-Ohio to file a new ESP application ("Modified ESP II"). 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 II application on August 8, 2012.

I. ESP II

On January 27, 2011, AEP-Ohio filed an application to establish an ESP (ESP II) for the period of January 1, 2012 through May 31, 2014.[236] The application was filed as a single-company filing anticipating approval of the proposed merger of CSP and OP.[237] 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.[238] AEP-Ohio's ESP II application included higher prices for many customers, more riders, many non-bypassable, to negatively affect the ability of customers to shop. The ESP II 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 ESP II application on grounds that the proposed rate increases were not lawful or reasonable and on grounds that the ESP II application contained proposals for unlawful non-bypassable riders. Shortly after many of these parties filed testimony opposing AEP-Ohio's ESP II application, these same parties joined a Stipulation and Recommendation recommending that the PUCO approve a successor ESP for AEP-Ohio that was described somewhat in the Stipulation and Recommendation.

II. ESP II Stipulation

On September 7, 2011, the Stipulation and Recommendation was filed ("ESP II Stipulation"). It was signed and supported by AEP-Ohio, the PUCO's Staff, and various stakeholders[239] (jointly "Signatory Parties") purporting to settle AEP-Ohio's ESP II as well as consolidate and settle several outstanding cases, including: AEP-Ohio's merger proceeding,[240] AEP-Ohio's Emergency Curtailment Service Rider proceeding,[241] AEP-Ohio's proceeding to increase the compensation its receives for providing capacity

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[236] *AEP-Ohio ESP II Proceeding*, Application (January 27, 2011).

[237] *Id.*, Exhibit 1 of Application at 3 (January 27, 2011).

[238] *Id.* at 3-4.

[239] 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, 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, ELPC, EnerNOC, Inc. ("EnerNOC"), NRDC, and PJM Power Providers Group ("P3").

[240] *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.

[241] *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.*

service to CRES providers,[242] and AEP-Ohio's fuel deferral proceeding.[243] The ESP II Stipulation also purported to authorize legal corporate separation and AEP-Ohio's transfer of generation assets to an unregulated affiliate; however, at the time the ESP II Stipulation 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 ESP II Stipulation 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.

III. ESP II Stipulation Terms

The ESP II Stipulation recommended an ESP beginning January 2012 and extending through May 2016.[244] The ESP II Stipulation eliminated AEP-Ohio's request to create and extend various riders,[245] 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 ESP II Stipulation 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.[246] 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.

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[242] *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.

[243] *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.*

[244] *AEP-Ohio ESP II Proceeding*, Stipulation at 4 (September 7, 2011).

[245] 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.

[246] The base generation rate excludes the FAC and other generation-related riders.

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 ESP II Stipulation conditioned this timeframe upon AEP-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.[247]

The ESP II Stipulation 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 ESP II 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 ESP II Stipulation 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 ESP II Stipulation also proposed a load factor provision ("LFP").[248] The LFP was a non-bypassable demand charge and a non-bypassable energy credit. For GS-3 and GS-4 customers, the ESP II Stipulation 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 ESP II Stipulation proposed a non-bypassable demand charge of $3.29/kW-month and an initial energy credit of $0.00228/kWh (adjusted quarterly). The ESP II Stipulation 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 ESP II Stipulation).

The ESP II Stipulation 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,[249] 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

[247] 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.

[248] *AEP-Ohio ESP II Proceeding*, Stipulation at 2 (September 7, 2011).

[249] Section 4928.143, Revised Code.

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.

The ESP II Stipulation 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 ESP II Stipulation was less favorable in the aggregate than an MRO.[250] The PUCO relied on Staff's testimony, as partially corrected.[251] To this end, the PUCO found the ESP II Stipulation was less favorable by $325 million and cut the base generation increase in half. With this modification, the PUCO found that the ESP II Stipulation, as modified, was slightly more favorable than an MRO by $42 million.[252] In all other regards, the PUCO approved the ESP II Stipulation. 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.

IV. 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 ESP II Stipulation. The Applications for Rehearing challenged most of the provisions of the ESP II Stipulation approved by the PUCO. As indicated above, the negative public reaction to the rate increases caused by the ESP II Stipulation 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 ESP II Stipulation.

On February 23, 2012, the PUCO issued an Entry on Rehearing reversing its decision approving the ESP II Stipulation 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

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[250] *AEP-Ohio ESP II Proceeding*, Opinion and Order at 31-32 (December 14, 2011).

[251] 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 ESP II Stipulation was less favorable, finding that an MRO would be more favorable by $22 million.

[252] *AEP-Ohio ESP II Proceeding*, Opinion and Order at 32 (December 14, 2011).

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, the PUCO found that the rate impacts of the ESP II Stipulation, particularly for smaller commercial customers, exceeded what had been represented by AEP-Ohio and undermined the evidence that provisions of the ESP II Stipulation provided rate stability and certainty. Therefore, the PUCO concluded that the parties supporting the ESP II Stipulation had not demonstrated that the ESP II Stipulation 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 vase." As discussed separately, AEP-Ohio successfully requested that it be authorized to continue the two-tiered capacity pricing contained in the ESP II Stipulation with some modifications.

V. Modified ESP II

After the PUCO rejected the ESP II Stipulation, AEP-Ohio filed an application for a modified ESP ("Modified ESP II") on March 30, 2012. The PUCO modified and approved the Modified ESP II on August 8, 2012 over the objections of every stakeholder with the exception of AEP-Ohio. As authorized, the Modified ESP II retained existing generation rates at the prior levels, but approved a new non-bypassable rider, the Retail Stability Rider ("RSR"), by which AEP-Ohio would collect $508 million over the term[253] of the Modified ESP II. 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 was any unamortized balance after the Modified ESP II 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 were 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 II.

The PUCO also approved several additional riders that raised electric bills and made them less predictable or stable. These included a DIR to fund the replacement of

[253] The term of AEP-Ohio's Modified ESP II extended through May 31, 2015. *Id*. at 7.

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 AEP-Ohio's application for corporate separation,[254] 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 had to eliminate its current 90-day shopping notice and 12-month minimum stay requirements that applied 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 transferred the related generation assets to its affiliate.

The case was appealed to the Ohio Supreme Court.[255] Among other things, customer advocates challenged the approval of the ESP under the ESP versus MRO test, the authorization of the above-market, generation-related non-bypassable riders, and the conditional authorization of the transfer of generation assets and pass-through of revenue, including non-bypassable charge revenue, to an unregulated competitive

[254] The PMR was set to zero and AEP-Ohio was directed to 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. *Id*. at 47-49.

[255] Supreme Court Case No. 2013-0521.

affiliate. AEP-Ohio appealed the PUCO's decision requiring AEP-Ohio to reduce its recovery of non-fuel base generation charges for service provided by successful auction bidders. In a decision issued on April 21, 2016, the Court held that the Commission's authorization of the RSR was unlawful to the extent that it authorized the recovery of transition revenue or its equivalent and remanded the case to the Commission for proceedings consistent with the Court's reversal of the Commission's decision. The Court directed that the Commission determine what amount of the deferred capacity charges, discussed below, remained properly collectible under the extension of the stability rider. The Court also reversed the Commission's establishment of a SEET threshold because the Commission failed to explain its decision.[256]

Following the Court's remand, AEP-Ohio sought to consolidate the remand of this case with two other proceedings; its FAC audits for 2012 through 2015 and the remand of its capacity charge case. The Commission consolidated the remands in this case and the capacity charge case setting the consolidated case for a hearing scheduled to take place in late 2016. Ultimately, a Stipulation was reached in this case, and a number of other open AEP-Ohio cases. The resolution is discussed in the "Global Settlement" section below.

V. CSP and OP Merger

On October 18, 2010, AEP-Ohio filed an application to merge CSP and OP into a single operating company.[257] This case was eventually consolidated with AEP-Ohio's ESP II proceeding as part of the ESP II Stipulation, which proposed a settlement of various cases.

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.[258]

Because the PUCO rejected the ESP II Stipulation 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 separately for CSP and OP. No party requested rehearing of the order.

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[256] *In re Application of Columbus S. Power Co.,* 147 Ohio St.3d 439, 2016-Ohio-1608.

[257] *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).

[258] *AEP-Ohio ESP II Proceeding*, Opinion and Order at 56 (December 14, 2011).

W. Proceedings Related to the Implementation of AEP-Ohio's Energy-Only Auctions

As discussed above, the PUCO authorized AEP-Ohio to auction off the energy portion of its SSO load in increasing portions over the term of its ESP II. The following two proceedings address the timing of AEP-Ohio's energy-only auctions, the terms and conditions of the auctions, and how AEP-Ohio would adjust its SSO rates during the auctions.

I. AEP-Ohio's CBP Case

On December 21, 2012, AEP-Ohio filed an application to establish the terms and conditions of its energy-only auctions.[259] Comments and Reply Comments were filed by parties on March 4, 2013, and March 14, 2013, respectively. In these Comments, parties raised several issues with AEP-Ohio's application. Specifically, parties addressed AEP-Ohio's failure to include a reserve price on the energy-only auctions, the size and timing of the energy-only auctions, whether there would be separate auctions for the CSP and OP rate zones, credit requirements for auction bidders, AEP-Ohio's proposal to only blend a portion of its FAC with the results of the energy-only auctions, and AEP-Ohio's failure to propose to reduce its base generation rates during the energy-only auctions. While the PUCO had previously held the energy-only auctions out as a means to mitigate the above-market and non-bypassable pricing authorized by the PUCO, the objections began to shine more light of the opposite effect.

The PUCO set the case for hearing to resolve the issues raised by parties in their comments. The evidentiary hearing commenced on June 24, 2013 and concluded on July 15, 2013. The evidentiary hearing established several notable issues and, as indicated above, documented the additional layer of negative consumer rate impacts that the PUCO put in motion through the energy-only auction aspect of its ESP-approval order. First, AEP-Ohio's SSO customers' total bills had increased by approximately 20% during the 11 months following the PUCO's approval of AEP-Ohio's ESP II in August 2012. Second, as predicted by IEU-Ohio in AEP-Ohio's ESP II proceeding, the energy-only auctions were expected to increase SSO customers' rates. In fact, OEG's witness testified that based upon the original energy-only auction schedule, SSO customers' bills would be expected to increase by $211 million over the remainder of AEP-Ohio's ESP II, which was scheduled to end on May 31, 2015.[260] And third, during the course of the hearing it was discovered that AEP-Ohio appeared to be charging customers twice for the above-market capacity prices authorized by the PUCO.

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[259] *In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support its Standard Service Offer*, PUCO Case No. 12-3254-EL-UNC, Application (December 21, 2012) (hereinafter, "*AEP-Ohio CBP Proceeding*").

[260] *AEP-Ohio CBP Proceeding*, Direct Testimony of Lane Kollen at 3-4 (June 14, 2013). Mr. Kollen's $211 million harm included a projected $47 million increase associated with the 10% energy-only auction (on an annualized basis for the 12 months ending June 1, 2014) and $164 million for the 7 months ending December 2014.

On November 13, 2013 the PUCO issued its Order modifying and approving AEP-Ohio's application.[261] The PUCO's Order modified the schedule of the energy-only auctions.[262] Specifically, the PUCO modified the start of the delivery of the energy for the 10% auction from six months after the final order in AEP-Ohio's corporate separation proceeding (this order was issued on October 17, 2012) to April 2014. The PUCO also shortened the duration of the 10% delivery period to 7 months, April through October 2014. The PUCO also modified the start date of the 60% auction from January 1, 2014 to November 1, 2014 and shortened the duration of the 60% delivery period from 12 months to 2 months, November and December 2014. An auction for 100% of the default service load would still be conducted for a delivery period of January through May 2015. These actions delayed the arrival of a more visible conflict between the as-advertised effect of the energy-only auction and the real negative electric bill impacts.

The PUCO also rejected AEP-Ohio's proposal to freeze its base generation rates until January 1, 2015.[263] The PUCO held that its orders in AEP-Ohio's ESP II were clear and required AEP-Ohio to reduce its base generation rates in proportion to the energy-only auctions. Specifically, the PUCO directed AEP-Ohio to blend its existing base generation rates of $355/MW-day to the $188/MW-day price of capacity established by the PUCO in AEP-Ohio's capacity charge proceeding. To accomplish this, the PUCO directed AEP-Ohio to weight its existing base generation rates at the $355/MW-day and $188/MW-day prices at a ratio of 90/10, 40/60, and 0/100 based upon the 10%, 60%, and 100% energy-only auction schedule.

The PUCO rejected the request by IEU-Ohio, OCC, and OEG to establish a reserve price for the energy-only auctions.[264] The reserve price proposal was designed to make sure that the energy-only auction did not harm consumers.

The PUCO also declined, in this proceeding, to address AEP-Ohio's double charging for capacity.[265] Instead, and kicking the can down the road, the PUCO held that the issue would be more appropriately addressed in the audits of AEP-Ohio's FAC. Subsequently, the PUCO issued an Entry in Case Nos. 11-5906-EL-FAC, *et al.* involving the audits of AEP-Ohio's FAC for 2012-2014 and directed the FAC auditor to investigate the allegations of AEP-Ohio's double charging for capacity and to make appropriate recommendations to the PUCO. By placing the double-charge issue in a future FAC case, the PUCO interposed significant lag on any corrective measure that may have been useful to consumers. The double charging was addressed as part of the Global Settlement, discussed elsewhere in this summary.

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[261] *AEP-Ohio CBP Proceeding*, Opinion and Order (November 13, 2013).

[262] *Id.* at 5.

[263] *Id.* at 13-14.

[264] *Id.* at 18.

[265] *Id.* at 16.

Applications for Rehearing were filed by AEP-Ohio, FES, and OEG. The PUCO denied rehearing and confirmed that AEP-Ohio was required by the PUCO's orders in AEP-Ohio's ESP II proceeding to reduce its base generation rates, confirmed that it would address the double-charge issue in the upcoming audits of AEP-Ohio's FAC, and deferred ruling on issues regarding how AEP-Ohio would translate the PUCO's Order into rates.[266] The PUCO noted that it had already opened a separate docket (discussed below) to address AEP-Ohio's SSO rates once it began SSO auctions.[267]

On October 6, 2014, the FAC auditor issued its report concerning the double-recovery issue.[268] As discussed above in the FAC section of this report, the auditor confirmed that there was a double-recovery of capacity costs; however, the auditor did not include the magnitude of the double-recovery in the audit report but instead proposed a formula to calculate the double-recovery amount. The double charging was addressed as part of the Global Settlement, discussed elsewhere in this report.

II. Market Rate Impact Case

On June 27, 2013, the PUCO opened the *Market Rate Impact Proceeding* and requested comments by interested parties regarding potential adverse rate impacts during what the PUCO labeled as AEP-Ohio's "transition to market based rates."[269] Comments and reply comments were filed on August 12, 2013, and September 6, 2013. These comments identified that the PUCO already had an open and ongoing litigated proceeding, *AEP-Ohio's CBP Case*, where many of the issues regarding potential adverse rate impacts could be addressed. AEP-Ohio's comments, for example, referenced and summarized the litigation position it had taken in *AEP-Ohio's CBP Proceeding*. IEU-Ohio and Staff also identified that due to the lack of finality in the rules, procedure, and structure of the energy-only auctions, along with an unknown clearing price of the energy-only auctions, it would be impossible to propose effective methods to mitigate the unknown adverse impacts. In other words, the *Market Rate Impact Proceeding* was a waste of time and a duplication of effort.

On November 13, 2013, the PUCO issued an order in *AEP-Ohio's Market Rate Impact Proceeding* and found that its Order in *AEP-Ohio's CBP Proceeding* (issued the same day) resolved many of the outstanding issues. The PUCO also agreed with its Staff that additional information was necessary to evaluate any potential adverse rate impacts. Accordingly, the PUCO directed AEP-Ohio to file additional information within 60 days

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[266] *AEP-Ohio CBP Proceeding*, Entry on Rehearing at 4-12 (Jan. 22, 2014).

[267] *Id.* at 7

[268] *In the Matter of the Fuel Adjustment Clauses for Ohio Power Company*, PUCO Case Nos. 13-1892-EL-FAC *et al.*, Auditor Report of Baker Tilly Virchow Krause, LLP (October 6, 2014).

[269] *In the Matter of the Commission's Review of Customer Rate Impacts from Ohio Power Company's Transition to Market Based Rates*, PUCO Case No. 13-1530-EL-UNC, Entry at 1 (June 27, 2013) (hereinafter, "*AEP-Ohio Market Rate Impact Proceeding*").

that addressed how AEP-Ohio would reduce its base generation rates and which included typical customer bill impacts.

On January 10, 2014, AEP-Ohio submitted additional information to the PUCO, as updated and revised on February 4, 2014. AEP-Ohio's filing detailed how it planned to reduce its base generation rates and identified typical customer rate impacts under different assumed clearing prices for the energy-only auctions. AEP-Ohio's typical bill impacts, however, assumed clearing prices lower than what the evidence in *AEP-Ohio's CBP Proceeding* indicated were likely.

In comments filed on February 24, 2014, IEU-Ohio argued that the information in AEP-Ohio's compliance filing indicated that customers would be adversely impacted by AEP-Ohio's double-recovery of purchased power costs, in the amount of approximately $110 million annually, and that this issue should be addressed as quickly as possible. In its Order issued on March 19, 2014, the PUCO indicated that the double-recovery issue would be reviewed by an independent auditor in the FAC audit case, with rates subject to reconciliation as a result of the audit. As noted above under *AEP-Ohio's CBP Proceeding*, on October 6, 2014, the FAC auditor issued its report concerning the double-charge issue in Case No. 13-1892-EL-FAC.

AEP-Ohio filed final compliance tariffs on March 24, 2014, which were effective with bills rendered in the first billing cycle of April 2014. AEP-Ohio's FAC rates were cancelled effective April 1, 2014 and the costs formerly reflected in the FAC, including the final reconciliation during 2015, were reflected in the Auction Phase-In Rider ("APIR") and the Fixed Cost Recovery Rider ("FCR") going forward as of April 1, 2014.

X. 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 FRR Alternative option of PJM's RAA.[270] 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.

[270] *See* FERC Docket ER11-2183 (hereinafter, "*AEP-Ohio FERC Capacity Charges Proceeding*").

On January 20, 2011, following the PUCO's decision, FERC rejected AEP's proposal.[271] FERC noted that the RAA[272] 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).[273] Because the PUCO confirmed the use of the RPM auction process to set the price under the state compensation mechanism,[274] the FERC Order stated that AEP was not permitted to submit its proposed formula for collecting capacity costs.[275]

In the capacity proceeding that was ongoing at the PUCO, the Commission also requested public comment on: (1) what changes to the current state compensation 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.[276] Comments and reply comments were filed by various parties.

On September 14, 2011, the PUCO's capacity proceeding was consolidated with AEP-Ohio's ESP II proceeding. Through the ESP II Stipulation 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 ESP II Stipulation 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 ESP II Stipulation, 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 ESP II Stipulation to address two issues.

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[271] *AEP-Ohio FERC Capacity Charges Proceeding*, Order (January 20, 2011).

[272] 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 RPM auction process.

[273] *AEP-Ohio FERC Capacity Charges Proceeding*, Order at 4 (January 20, 2011).

[274] *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 Southern Power Company*, PUCO Case No. 10-2929-EL-UNC, Entry (December 8, 2010) (hereinafter, "*AEP-Ohio PUCO Capacity Charges Proceeding*").

[275] *AEP-Ohio FERC Capacity Charges Proceeding*, Order at 5 (January 20, 2011).

[276] *AEP-Ohio PUCO Capacity Charges Proceeding*, Entry at 1 (December 8, 2010).

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 ESP II Stipulation they could not benefit from RPM-priced capacity. The PUCO also modified the ESP II Stipulation to ensure that unallocated capacity from each customer class would not be applied to other customer classes.[277]

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 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.,* began 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 ESP II Stipulation 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 ESP II Stipulation. Despite the fact that this proceeding was consolidated with AEP-Ohio's ESP II proceeding

[277] The ESP II Stipulation had proposed to allocate any unused RPM-priced capacity to over-subscribed classes as of January 1, 2012.

for the sole purpose of considering the ESP II Stipulation, the PUCO held that the record from the hearing on the ESP II Stipulation 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 was in place through May 31, 2015, at which time AEP-Ohio began participating in the RPM auctions and received 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 II (set to expire on May 31, 2015) through additional non-bypassable charges that became effective after the ESP II expired.

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 did nothing to discourage DP&L and DE-Ohio 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.

IEU-Ohio and others, including AEP-Ohio, appealed the PUCO's decision to the Ohio Supreme Court.[278] Because several parties, including IEU-Ohio, withdrew their appeals, the issues before the Court were limited to OCC's argument that the Commission had exceeded its authority to conduct an investigation under Section 4905.26, Revised Code, and AEP-Ohio's claim that the Commission had not supported its findings of fact concerning the setting of the capacity price. The Court issued its decision on April 21, 2016. The Court affirmed that the Commission could conduct an investigation of capacity charges under its authority provided by Section 4905.26, Revised Code. The Court reversed and remanded the case to the Commission because the Court found that the Commission failed to address the merits of AEP-Ohio's challenges with respect to the accuracy of the Staff's estimate of the capacity price.[279]
The Commission consolidated the Court's remand of this case, with the Court's remand of AEP-Ohio's ESP II. Ultimately, a Stipulation was reached in this case, and a number of other open AEP-Ohio cases. The resolution is discussed in the "Global Settlement" section below.

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[278] *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. Subsequently, OCC filed an additional Application for Rehearing with the Commission; parties filed an additional Notice of Appeal to the Ohio Supreme Court in Case No. 2013-228. The Supreme Court consolidated the appeals.

[279] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* 147 Ohio St.3d 59, 2016-Ohio-1607.

Y. Fuel Deferrals & the Phase-In Recovery Rider

On September 1, 2011, AEP-Ohio filed an application to implement a recovery mechanism to begin collecting the revenue authorized but subject to delayed collection as a result of the PUCO's decision in AEP-Ohio's first ESP proceeding.[280] The phase-in recovery application was consolidated with the proceeding dealing with the ESP II Stipulation filed in AEP-Ohio's ESP II proceeding on September 16, 2011. The ESP II Stipulation provided that AEP-Ohio could begin charging customers for the delayed increase on January 1, 2012. Also beginning on January 1, 2012, the ESP II Stipulation proposed to reduce the carrying charges on the delayed revenue collection balance to a long-term debt rate of 5.34% instead of the much higher WACC (weighted average cost of capital including a return on equity) rate that it had been previously authorized. The ESP II Stipulation also deferred collection of the PIRR from residential customers until 2013. Finally, the ESP II Stipulation 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 ESP II Stipulation without modification.[281] 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 ESP II Stipulation 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.

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 II 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

[280] *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).

[281] *AEP-Ohio ESP II Proceeding*, Opinion and Order at 57-59 (December 14, 2011).

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 to the Ohio Supreme Court by IEU-Ohio, OCC and AEP-Ohio.[282] The Court reversed the PUCO's decision to reduce the carrying charge to the long-term debt rate but upheld the PUCO's decision refusing to adjust the deferral balance for tax savings.[283]

As noted previously, the PUCO found that CSP had significantly excessive earnings in the 2010 SEET proceeding of $6.9 million. The PUCO ordered that the significantly excessive overearnings be returned to customers through a reduction of the deferred amount collected through the PIRR applicable to customers in the CSP rate zone of AEP-Ohio, with any remaining amount of overearnings credited customers other than those with special arrangements, through a bill credit. Beginning with bills in November 2013, the CSP-zone PIRR was reduced to zero as a result of the 2010 SEET Order.

On May 23, 2016, AEP-Ohio filed proposed tariffs to implement the Supreme Court's decision reversing and remanding the case to the Commission. AEP-Ohio's proposed tariffs adjusted the going-forward PIRR charges to account for the revenue AEP-Ohio lost as a result of the Commission's reduction of the carrying charges from the WACC rate to the long-term debt rate. On June 29, 2016, the Commission authorized AEP-Ohio's compliance tariffs. OCC, OMAEG, and OEG sought rehearing of the Commission's decision, arguing that the Commission was engaged in unlawful retroactive ratemaking by allowing AEP-Ohio to collect the revenue lost during the pendency of its appeal. Ultimately, a stipulation was reached in this case, and a number of other open AEP-Ohio cases. The resolution is discussed in the "Global Settlement" section below.

Z. Corporate Separation and Generation Asset Transfer

Although corporate separation and generation divestiture were included as terms in ESP II, 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 ESP II Stipulation.[284] At the start of the hearing on the ESP II Stipulation, however, the Attorney Examiner denied AEP-Ohio's motion to consolidate the corporate separation application with the consolidated ESP proceeding.

[282] *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.

[283] *In re Application of Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056.

[284] *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).

The PUCO conditionally authorized AEP-Ohio to divest its generation in its Order in the ESP II 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 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 ESP II Stipulation, 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 ESP II Stipulation).

Finally, the PUCO prohibited OP from providing any loan guarantees for the generating assets once the assets were 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 was that while the generation assets themselves would be transferred to AEP-Ohio's affiliated generation company, it was possible that the liabilities associated with the assets would 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 ESP II Stipulation, 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.[285] 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 ESP II decision.

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 ESP II 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 violated 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 April 24, 2013, the PUCO denied IEU-Ohio's Application for Rehearing.[286]

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[285] *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) (hereinafter, "*AEP-Ohio Corporate Separation Proceeding*").

[286] *AEP-Ohio Corporate Separation Proceeding*, Entry on Rehearing (April 24, 2013).

On October 31, 2012, AEP Service Corporation ("AEPSC") filed 12 applications at FERC, two of which were directly related to AEP-Ohio and the PUCO's decisions in the Modified ESP II, capacity charge, and corporate separation cases.

The first application proposed to transfer all 15 of AEP-Ohio's generation facilities to Genco.[287] The application called for the transfer of a total about 11,700 MW and included 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 stated that the transfer of these facilities would close on or about December 31, 2013. Through a separate application, AEPSC sought to transfer the Amos and Mitchell facilities to Kentucky Power Company and Appalachian Power Company.

In an order issued on April 29, 2013, FERC found that the transfer of the assets to Genco did not create concerns with regard to horizontal or vertical market power. FERC also found that the internal transfer did not threaten increased market concentration or inappropriate cross-subsidization. FERC concluded that the transfer would not affect vertical competition because AEP-Ohio had transferred control over transmission to PJM. FERC also concluded that the transfer would not have an adverse effect on rates, in part because transmission rates were governed by PJM tariffs and in part because AEPSC and the other applicants had made commitments to hold harmless transmission customers from transaction-related costs. FERC further found that the transaction would not adversely affect federal or state regulation because AEP-Ohio would remain subject to FERC regulation and the PUCO had previously approved the transfer of generation assets. Finally, FERC determined that the transaction would not result in unlawful cross-subsidy because the transaction would not result in the transfer of benefits from captive customers to Genco and because the PUCO had approved the transfer of assets. FERC required that all debt associated with the assets to be transferred to Genco or that Genco otherwise become responsible for the payment of the related debt.

IEU-Ohio and others filed Requests for Rehearing. IEU-Ohio's Request for Clarification or, Alternatively, Request for Rehearing sought a clarification that FERC did not intend to preempt the ongoing proceedings in Ohio involving the transfer of assets at net book value. In the alternative, the Request for Rehearing requested that FERC independently evaluate the transfer price of the assets. The Request for Rehearing also requested that FERC find that the transfer was governed by the affiliate transaction rules because AEP-Ohio's customers are captive and, therefore, the assets could be transferred only at the higher of market or current value, and that AEP-Ohio's application must be rejected or the transfer price adjusted because AEP-Ohio did not comply with the affiliate transaction requirements. FERC granted rehearing for the purpose of affording itself additional time to consider the Requests for Rehearing on June 27, 2013.

[287] *Ohio Power Company*, FERC Docket No. EC13-26-000.

On January 16, 2014, FERC granted IEU-Ohio's Request for Clarification. It confirmed that the approval of the transfer of the generation assets was not intended to preempt the ongoing proceedings in Ohio in which IEU-Ohio had challenged the PUCO's determination to permit the transfer of the generation assets at net book value.[288] Having clarified its order, FERC declared the balance of IEU-Ohio's Request for Rehearing moot. As a result, the valuation of the assets and its effect on non-bypassable generation-related charges remained issues to be resolved through state proceedings.

The second application requested 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, 2015.[289] The stated purpose of the PSA was 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).[290]

In return, AEP-Ohio would pay a capacity charge for the capacity supplied for non-SSO customers, which was 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 would be 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.

On November 13, 2013, the PUCO modified the timing and duration of the 10% and 60% energy-only auctions that would be used to set the price of default service under its ESP. Specifically, the PUCO modified the start of the delivery of the energy for the 10% auction from six months after the final order in AEP-Ohio's corporate separation proceeding (this order was issued on October 17, 2012) to April 2014. The PUCO also shortened the duration of the 10% delivery period to 7 months, April through October 2014. The PUCO modified the start date of the 60% auction from January 1, 2014 to November 1, 2014 and shortened the duration of the 60% delivery period from 12 months to 2 months, November and December 2014. An auction for 100% of the default service load would still be conducted for a delivery period of January through May 2015.

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[288] *Ohio Power Company*, FERC Docket No. EC13-26-000, Order Granting Clarification and Dismissing Rehearing (January 16, 2014).

[289] *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").

[290] *Id*. at 1-2.

In response to the PUCO's modification, AEPSC filed a proposed amendment to the PSA on November 15, 2013 that incorporated the modified auction schedule ordered by the PUCO. FERC conditionally approved the application on December 24, 2013.[291] In support of its decision, FERC relied on a prior case involving Public Service Electric and Gas Company in which FERC approved an interim agreement that allowed for the pass-through of the generation portion of the retail rates authorized by the New Jersey commission. FERC found that the PSA is a similar short-term agreement and concluded that the short-term arrangement was reasonable. It further found that the PSA was not a serious risk to the market.[292]

FERC modified the application to require AEP-Ohio to refile its tariffs within 30 days if the Ohio retail rates were changed so that the Ohio changes were reflected in Genco's rates or rate structure.[293]

AA. Amended Corporate Separation Application

AEP-Ohio submitted an application at the PUCO seeking approval to amend its corporate separation plan so that it could retain ownership of its entitlement to purchase power from OVEC.[294] The corporate separation plan initially approved by the PUCO required AEP-Ohio to transfer its generating assets and purchase power entitlements to Genco. AEP-Ohio indicated that transfer of its generating assets and generation entitlements was a necessary step to establishing its SSO at full market pricing. AEP-Ohio subsequently requested authority to retain its purchase power entitlement under the OVEC contract because it claimed that OVEC owners would not consent to AEP-Ohio transferring its entitlement to Genco. Thus, AEP-Ohio proposed to leave the current OVEC purchase power entitlement in place "with AEP Ohio continuing to take generation under the contract."[295] AEP-Ohio claimed that it would liquidate the power from OVEC into the PJM energy markets. AEP-Ohio, however, also suggested that the continued OVEC entitlement might impact retail rates in its next ESP.

Several parties opposed AEP-Ohio's proposal to residually encumber itself with liabilities and obligations under the OVEC contract without guaranteeing that customers would be held harmless. On December 4, 2013, the PUCO issued an Order authorizing AEP-Ohio to retain the OVEC contractual entitlement subject to certain conditions proposed in the application. Specifically, the PUCO required AEP-Ohio to sell energy from OVEC into the PJM market "during AEP-Ohio's current ESP period and beyond, until the OVEC contractual entitlement can be transferred to AEP Genco or otherwise divested, or until

[291] *AEP Generation Resources Inc.,* Docket No. ER13-232-000, Order Conditionally Accepting Tariff Revisions (December 24, 2013).

[292] *Id*. at 8-9.

[293] *Id*. at 10-11.

[294] *AEP-Ohio Corporate Separation Proceeding*, Amended Application (October 4, 2013).

[295] *Id.* at 4.

otherwise ordered by the Commission."[296] Further, the Commission held that "with respect to the retail rate impact of AEP Ohio's retention of the OVEC contractual entitlements, we agree with the Company's request to defer and address the retail rate issues related to OVEC in the next ESP proceeding."[297] The PUCO also stated that concerns "noted by IEU-Ohio and OMAEG, which pertain to the impact of AEP Ohio's proposal on ratepayers, may be raised in the Company's forthcoming ESP proceeding."[298]

BB. Pool Modification

As part of the ESP II Stipulation, 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 or Pool Modification Rider.[299] AEP-Ohio argued that the pool had to be modified or terminated before AEP-Ohio could participate in the CBP auctions that were set to occur for the 2015-2016 delivery period.[300]

Over objections, the PUCO approved a modified PMR in its December 14, 2011 Opinion and Order. The ESP II Stipulation, 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 ESP II Stipulation 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 extent that pool modification or termination costs should be allocated to Ohio ratepayers.[301]

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 ESP II Stipulation in February 2012.

As part of AEP-Ohio's Modified ESP II, 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

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[296] *AEP-Ohio Corporate Separation Proceeding*, Finding and Order at 8-9 (December 4, 2013).

[297] *Id.* at 9.

[298] *Id*.

[299] *AEP-Ohio ESP II Proceeding*, Opinion and Order at 49-50 (December 14, 2011).

[300] *Id.* at 49.

[301] *Id.* at 50 (December 14, 2011).

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. The legality of the PMR was on appeal as part of the Ohio Supreme Court's review of the PUCO's ESP II Order, but that appeal was withdrawn under a settlement.

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.[302] 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.[303] 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 customer charges and decreasing the variable volumetric kWh charges.[304] 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.

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[302] *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*").

[303] *AEP-Ohio Distribution Rate Increase Proceeding*, CSP Staff Report at 67; OP Staff Report at 68 (September 15, 2011).

[304] *Id.* at 34-36.

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 ESP II 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 revenue that would otherwise be collected by the DARR.[305] At the time AEP-Ohio filed the application, it had a deferred balance of $291 million that was being collected through the DARR. AEP-Ohio estimated that customers would save between $12 million and $20 million if the deferred balance was securitized.[306] AEP-Ohio proposed to replace the DARR with the Deferred Asset Phase-In Recovery Rider ("DAPIR"). The DARR had been approved in *AEP-Ohio's Distribution Rate Increase Proceeding* in an Order issued by the Commission on December 14, 2011.

[305] *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*, PUCO Case No. 12-1969-EL-ATS, Application (July 31, 2012).

[306] *Id.* at Exhibit A.

The proposed rate for the DAPIR was 7.4597% of a customer's base distribution charges, compared to the then-current DARR rate of 8.5012% of a customer's base distribution charges. The carrying charge rate that applied to the DARR was AEP-Ohio's cost of long-term debt of 5.34%. On March 20, 2013, the PUCO issued an order approving the issuance of Phase-In Recovery Bonds to securitize the deferred balance and approved the DAPIR at a rate of 7.83%, to be effective August 1, 2013.

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.[307] 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

[307] *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*").

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 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 might 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 ESP II 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.

FF. Third ESP Proceeding (ESP III)

On December 20, 2013, AEP-Ohio filed an application to establish its SSO in the form of an ESP for the term June 1, 2015 to May 31, 2018.[308] AEP-Ohio's application stated that it reserved the right to terminate the ESP III one year early based on changes in law or PJM tariffs and rules by giving notice before October 1, 2016. If it did so, AEP-Ohio

[308] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan*, PUCO Case Nos. Case No. 13-2385-EL-SSO, *et al*. Application (December 20, 2013) (hereinafter, "*AEP-Ohio ESP III Proceeding*").

indicated that it would file a new application for an SSO for the period of June 2017 to May 2018. The significant provisions of the proposed ESP are summarized below.

AEP-Ohio proposed to procure the SSO supply (energy, capacity, and market-based transmission) through auctions for varying supply periods. The periods would be synchronized to the PJM planning year (June to May). AEP-Ohio proposed to disaggregate the auction clearing price into two riders, the bypassable Generation Energy and Capacity Riders, which would replace AEP-Ohio's bypassable base generation rates, bypassable FAC, and bypassable TCRR. The bypassable Generation Energy Rider would also collect the market-based transmission costs. AEP-Ohio also proposed a new rider, the Auction Cost Reconciliation Rider, which would permit AEP-Ohio to recover any over- or under-recovery difference between what is billed to SSO customers and what is paid to auction winners. The Auction Cost Reconciliation Rider would also recover the costs of the CBP. Additionally, AEP-Ohio proposed to eliminate its interruptible service rate schedule IRP-D and to eliminate standby service and time-of-use tariffs.

AEP-Ohio also proposed significant modifications to the riders included in the ESP, including nine new riders (this included the three bypassable riders discussed above and six new non-bypassable riders). AEP-Ohio noted that it planned to continue the non-bypassable RSR authorized in its current ESP. After its current ESP ended, and beginning June 1, 2015, the non-bypassable RSR would amortize the deferral balance associated with *AEP-Ohio's PUCO Capacity Charges Proceeding* where the PUCO authorized AEP-Ohio to defer the difference between $188/MW-day and the prevailing prices established by PJM's RPM ("RPM-Based Price") for wholesale capacity service associated with the shopping load served by CRES providers in AEP-Ohio's service territory. AEP-Ohio was currently amortizing a portion of this deferred amount ($1/MWh) through the revenue collected by current RSR rates. In the ESP III application, AEP-Ohio stated that it would seek authority in a separate case to extend authorization of the RSR in its current form (non-bypassable) and at the effective rate at the end of the current ESP ($4/MWh). AEP-Ohio further stated that it would use the full amount collected under the RSR (post-June 1, 2015) to amortize the remaining deferred balance. AEP-Ohio estimated that the deferred balance would be $463 million as of June 1, 2015 and it would require three years to amortize the deferred balance.

AEP-Ohio also proposed to continue the DIR and the Storm Damage Cost Recovery Rider ("Storm Rider") that the PUCO authorized in the ESP II Order. The application sought to expand the accounts (including the recovery of gridSMART 1 costs) that may be included for recovery in the DIR. The application also sought to modify the Storm Rider to permit annual true-ups. (The current rider authorized AEP-Ohio to defer major storm-related costs and make a filing to collect the costs if such a filing was "necessary." There was no definition as to when a filing might be necessary.) The collection of the Storm Rider is proposed to be on a percentage of base distribution revenue.

The ESP III application also requested the extension of the non-bypassable DAPIR, which recovers deferred costs associated with various PUCO-ordered projects, such as customer education, that have been securitized. The underlying deferred costs were previously approved for recovery under the discontinued DARR in *AEP-Ohio's Distribution Rate Increase Proceeding*.

AEP-Ohio also proposed the continuation of riders approved in its ESP I case and continued by the ESP II Order. These included the non-bypassable EDR, which collected the delta revenue associated with unique arrangements, the non-bypassable ESRR, which recovers costs of projects to improve service reliability such as increased maintenance of rights-of-way, the non-bypassable (certain exemptions apply for mercantile customers) EE/PDR Rider, which recovers the cost of compliance with Ohio EE/PDR mandates, and the bypassable AER, which recovers the cost of RECs.

In addition to its request to continue the non-bypassable RSR, DIR, Storm Rider, DAPIR, EDR, ESRR, EE/PDR Rider and the bypassable AER, AEP-Ohio requested authorization of six additional non-bypassable riders: the Power Purchase Agreement Rider, the Basic Transmission Cost Rider, the gridSMART Phase 2 Rider, the NERC Compliance and Cybersecurity Rider, the Sustained and Skilled Workforce Rider, and the Bad Debt Rider. These riders are summarized below.

I. Power Purchase Agreement Rider

The Commission approved the transfer of a PPA agreement with OVEC to Genco as part of the ESP II corporate separation plan, but AEP-Ohio secured an amendment to the corporate separation plan that authorizes it to retain the PPA. The authorization contained a provision that required AEP-Ohio to liquidate the power delivered under the PPA into the PJM market. AEP-Ohio proposed that the PPA Rider permit it to charge or credit customer bills with the difference between what it is charged under the OVEC PPA and the amount recovered through sales in the wholesale market of AEP-Ohio's energy and capacity entitlements under the OVEC contract. AEP-Ohio also proposed that it be permitted to petition the PUCO to allow the inclusion of other PPAs or "similar" products. (As discussed below, AEP-Ohio petitioned the PUCO on October 3, 2014 for an affiliate PPA to be included in the PPA Rider.) The collection of the rider was proposed to be on a per kWh basis.

In its Opinion and Order issued on February 25, 2015 modifying and approving the ESP II, the PUCO authorized the PPA Rider, but set the rate at zero. Although the PUCO found that it could authorize a rider, it also found that AEP-Ohio had failed to demonstrate how much the proposed PPA Rider would cost customers and whether customers would ever benefit from the rider. The PUCO also concluded that AEP-Ohio would be required to justify any future recovery under the rider through a separate application. In such an application, AEP-Ohio would need to address the following factors: the financial need of the generating plant; the necessity of the generating facility in light of future reliability concerns, including supply diversity; the facility's compliance with environmental requirements and plans for future compliance; and the impact that closure of the plant would have on electric prices and economic development in Ohio. The PUCO also reserved the right to require a study by an independent third party of the reliability and pricing issues presented by a future application. The PUCO also required that AEP-Ohio permit rigorous PUCO oversight of the rider. Finally, AEP-Ohio must include a severability provision in a proposal that recognizes that all other provisions of its ESP will continue in the event that the rider is invalidated by a court.[309]

Both AEP-Ohio and intervenors sought rehearing of the PUCO's authorization of the PPA Rider. The PUCO denied rehearing of its authorization of the PPA Rider on November 3, 2016.[310] An appeal was taken to the Ohio Supreme Court.

II. Basic Transmission Cost Rider ("BTCR")

This proposed non-bypassable rider was designed to collect what AEP-Ohio refers to as non-market-based transmission costs. At that time RES providers were responsible for all PJM-related transmission costs associated with transmission service provided to shopping customers. AEP-Ohio proposed that it bill and collect for non-market-based PJM transmission charges for all customers. AEP-Ohio stated that customers would be responsible for working out problems associated with shopping customers having these charges removed from their bills with their CRES providers. The non-market-based transmission costs would be allocated based on both energy and demand. The PUCO approved a modified version of the AEP-Ohio proposal (adding another PJM charge to those identified by AEP-Ohio to the costs that could be collected through the rider), stating that the proposed rider was sufficiently similar to those that it had approved for other electric utilities and that the likelihood of double-billing was small. It also stated that AEP-Ohio and CRES providers should work together to ensure that customers do not pay twice for the same transmission-related expenses. If problems arise, the PUCO suggested that customers file a complaint with the PUCO.[311]

The PUCO denied IEU-Ohio's Application for Rehearing relative to its approval of a non-bypassable transmission rider. The PUCO held that its prior determination to allow for a non-bypassable rider was reasonable on the merits.[312]

Since the initial authorization of the BTCR effective June 1, 2015, the BTCR rates have been updated effective September 1, 2015 in Case No. 15-1105-EL-RDR, in Case No. 16-1409-EL-RDR, effective September 1, 2016, and in Case No. 17-1461-EL-RDR effective September 1, 2017.

In Case No. 16-1409-EL-RDR, the BTCR rates increased by approximately 9.2% effective September 1, 2016, due mainly to increased NITS costs.

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[309] *AEP-Ohio ESP III Proceeding,* Opinion and Order at 8-27 (February 25, 2015).

[310] *Id.,* Fourth Entry on Rehearing at 6-38 (November 3, 2016).

[311] *Id.,* Opinion and Order at 65-68 (February 25, 2015).

[312] *Id.,* Second Entry on Rehearing at 30-35 (May 28, 2015). In a Stipulation filed on December 22, 2015, AEP-Ohio agreed to propose a modification of the non-bypassable transmission rider. The modification would provide GS-3 and 4 customers with interval metering capability the opportunity to opt-in to a pilot mechanism based on each eligible customer's single annual transmission coincident peak demand.

The increase in the revenue requirement in Case No. 17-1461-EL-RDR was $120 million (approximately 25.3%) and was due mainly to higher NITS costs and an under-recovery of rider costs from the prior period.

Recently, on January 16, 2018, AEP-Ohio filed its latest update to the BTCR (Case No. 18-96-EL-RDR), requesting an increase in the BTCR revenue requirement of approximately $146.3 million, or about 24.6%, effective April 2018. The main drivers of the proposed increase are an under-recovery of costs from the prior period, a 23% increase in NITS, and an increase in Transmission Enhancement charges. The proposed rate increase continues the trend of significant rate increases that have been taking place in the BTCR, as discussed above. As of this time, this case is still pending.

III. gridSMART Phase 2 Rider

AEP-Ohio had previously filed a separate application seeking authority to implement this non-bypassable rider and requested that the rider become effective January 1, 2014. AEP-Ohio's previous request remains pending; however, several parties including the PUCO Staff and OCC noted that AEP-Ohio's pending application lacked sufficient detail to fully evaluate AEP-Ohio's request. The ESP III application proposes to continue this rider if it is approved. The collection of the rider is proposed to be a fixed charge per month for residential customers and a fixed charge per month for non-residential customers. This approach is similar to the current gridSMART rate design. The PUCO approved AEP-Ohio's request to continue the rider and transfer gridSMART 1 costs to the DIR mechanism. It also determined that it would evaluate the Phase 2 program and charges in the gridSMART 2 case.[313]

IV. NERC Compliance and Cybersecurity Rider

This proposed non-bypassable rider was designed to recover the costs of compliance with new regulations imposed for system reliability and security if regulations changed and affected providers were permitted to impose charges for the costs of compliance. The rider would be set to $0 initially. AEP-Ohio would track and defer its costs of compliance; it would then seek PUCO approval to recover the deferred costs. The application indicated that the rider would be assessed as a percentage of a customer's base distribution charges. The PUCO refused to authorize the rider because AEP-Ohio could not identify the costs that would be recovered and indicated that the costs were more appropriately sought in a distribution rate case.[314]

V. Sustained and Skilled Workforce Rider

This proposed non-bypassable rider would recover the incremental O&M costs associated with labor costs of new jobs created to address an anticipated shortfall of distribution labor (linemen). The collection of the rider was proposed to be on a

[313] *AEP-Ohio ESP III Proceeding*, Opinion and Order at 50-52 (February 25, 2015).

[314] *Id*. at 62.

percentage of base distribution charges. AEP-Ohio's estimated revenue requirement under the proposed rider follows:

2015 - $1.6 million
2016 - $4.9 million
2017 - $7.9 million
2018 - $8.0 million

The PUCO denied authorization of the rider, finding that AEP-Ohio had failed to demonstrate that the rider was necessary to facilitate the hiring of new skilled construction workers and that the labor expense was more appropriately reviewed in a distribution rate case.[315]

VI. Bad Debt Rider

This proposed non-bypassable rider would recover bad debt expense above the level of the bad debt expense embedded currently in base distribution rates. The incremental bad debt would be reduced by revenue from a new late payment charge applicable to residential customers (commercial and industrial customers are already subject to a late payment charge). The amount of incremental bad debt would include amounts associated with a proposed purchase of receivables program. The collection of the rider is proposed to be on a percentage of base distribution charges. AEP-Ohio linked the Bad Debt Rider to the proposed purchase of receivables program and stated that it reserved the right to withdraw the proposed purchase of receivables program and Bad Debt Rider if the PUCO modified the proposed ESP. AEP-Ohio was authorized to establish a Bad Debt Rider with an initial rate of zero. The PUCO limited the Bad Debt Rider to the collection of receivables of CRES providers and the amount of generation-related uncollectible expense above the amount currently collected by AEP-Ohio in its distribution rates.[316]

VII. Interruptible Program (IRP-D Provision)

In the ESP II case, the PUCO continued the IRP-D provision. This provision allows customers with a minimum of 1 MW of interruptible demand to offer the demand reduction capability to AEP-Ohio for a credit of $8.21/kW per month. In the ESP III application, AEP-Ohio sought to terminate the IRP-D provision. The PUCO, however, refused to accept that request and directed AEP-Ohio to file a tariff that continued the IRP-D during the term of the ESP III. It further directed AEP-Ohio to revise the IRP-D provision to permit shopping customers to participate and ordered AEP-Ohio to bid the demand response capabilities into the PJM capacity market and credit the revenue against the amounts recovered through the EE/PDR rider from retail customers. The current total load limitation of 525 MW for all customers in the program remains as well as a

[315] *Id*. at 59.

[316] *Id*. at 70-82.

requirement that an individual customer have at least 1 MW of interruptible load to be eligible.[317]

In its Second Entry on Rehearing, the PUCO modified its Order regarding the terms of the IRP-D schedule. It limited availability to existing customers only. The PUCO also eliminated AEP-Ohio's option to issue discretionary interruptions. Requests by existing interruptible load customers to include additional load would be handled on a first-come first serve basis. The revenue shortfall caused by the IRP-D credit would be collected through the EE/PDR rider.[318]

AEP-Ohio also sought revision of the PUCO's Order that AEP-Ohio bid capacity resources associated with the IRP-D schedule into the PJM capacity auctions. In part, it sought to require customers to bid the resources and notify AEP-Ohio of the bids that cleared and the revenue received from emergency events called by PJM. The PUCO limited the order to a requirement that AEP-Ohio bid any previously uncleared capacity resources into the remaining incremental auctions and credit the amounts received from PJM against the EE/PDR rider. Customers that previously bid their capacity resources would retain the benefits they receive from PJM.[319]

VIII. Fourth Entry on Rehearing

AEP-Ohio and several other parties sought rehearing of the Commission's decision in the Second Entry on Rehearing. As to its authorization of the PPA Rider, the PUCO reaffirmed its authority to authorize the PPA Rider in its Fourth Entry on Rehearing. The PUCO found that the charge could be authorized under the ESP statute because it was a limitation on shopping that had the effect of providing stability or certainty regarding retail electric service. The PUCO also denied AEP-Ohio's Application for Rehearing regarding the directive to bid demand response capabilities associated with customers taking interruptible service under AEP-Ohio's IRP tariff.[320]

GG. Proposed Expansion of PPA Rider

On October 3, 2014, AEP-Ohio filed an application at the PUCO requesting inclusion of a new affiliate PPA between AEP-Ohio and AEP Generation Resources, Inc. ("AEPGR") for inclusion in the PPA Rider.[321] The new PPA would include the power produced for the following coal fired generation units:

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[317] *Id*. at 36-40.

[318] *AEP-Ohio ESP III Proceeding,* Second Entry on Rehearing at 7-16 (May 28, 2015).

[319] *Id.*

[320] *Id*., Fourth Entry on Rehearing (November 3, 2106).

[321] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, PUCO Case Nos. 14-1693-EL-RDR, Application (October 3, 2014) ("*AEP-Ohio PPA Proceeding*").

Cardinal 1;
Conesville Units 4, 5 and 6;
Zimmer 1; and
Stuart Units 1, 2, 3, and 4.

Like the OVEC PPA discussed above under the ESP III, AEP-Ohio proposed that the PPA Rider permit it to charge or credit customer bills with the difference between its charges it incurred under the affiliate PPA and the amount recovered through sales in the wholesale market of AEP-Ohio's energy and capacity entitlements under the affiliate PPA.

On May 15, 2015, AEP-Ohio filed an amended application seeking to add the OVEC units to the PPA Rider.

The case went to hearing in September 2015. After the conclusion of the hearing, AEP-Ohio and several intervenors entered into a Joint Stipulation and Recommendation that was filed on December 14, 2015.[322] The Joint Stipulation sought approval of a modified PPA with a term ending May 31, 2024, included a provision that indicated that AEP-Ohio would seek an extension of the current ESP III, and provided for up to $100 million in customer credits in the last four years of the PPA Rider. Other provisions of the Stipulation included an expansion of the interruptible load that could qualify for the IRP credit and allow subscription to the IRP by shopping customers, the creation of a "pilot mechanism" that would allow GS-3 and GS-4 customers to be billed for transmission service based on each customer's single annual transmission coincident peak demand, and modifications of AEP-Ohio's energy efficiency portfolio plan cost recovery mechanism that moved a portion of the cost recovery from the EE/PDR rider to the EDR. Additional agreed terms addressed EE/PDR program support for hospitals, support for community assistance weatherization programs, the co-firing of some PPA units with natural gas, and a process to address the closure or refiring of Conesville and Cardinal. The Stipulation also included a process commitment to consider the development of solar and wind renewable resources.

On March 31, 2016, the PUCO approved the Stipulation in this matter with several minor modifications.[323] These modifications included excluding a couple costs proposed to be included in the PPA Rider (related to plant closures and penalties assessed to the plants under PJM's capacity performance rules) requiring the rider be updated more frequently (quarterly instead of annually) and capping the impact that the PPA Rider could have on customers' bills. The PUCO also clarified that it reserved the right to review any affiliated power sales, change in the depreciation rates used to calculate how much AEP-Ohio was billed by its affiliate, and any impact on the retail rider associated with plant outages that lasted longer than 90 days. The PUCO also modified a term in the Stipulation that limited its authority to modify the PPA Rider in the event that a federal court or agency rejected the wholesale purchase power agreement between AEP-Ohio and its affiliate.

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[322] *Id*., Joint Stipulation and Recommendation (December 15, 2015).

[323] *Id*., Opinion and Order (March 31, 2016).

Subsequent to the PUCO's decision, FERC granted a complaint filed by several independent generators that alleged that AEP-Ohio's PPA with its affiliate violated FERC's rules governing affiliate transaction. FERC agreed that AEP-Ohio's customers would be "captive" in the sense that they could not avoid the non-bypassable PPA Rider. In instances where a utility such as AEP-Ohio has captive customers, the utility's interaction with any affiliates with authority to make market based sales, which includes AEP-Ohio's affiliate, FERC requires that the agreement be submitted for review. The review process is designed to ensure that a utility is not using its captive customers to subsidize the market-regulated affiliate.[324]

Following FERC's decision, AEP-Ohio and various parties sought rehearing of the PUCO's March 31, 2016 Order. In its Application for Rehearing, AEP-Ohio agreed to remove its request to include its affiliate plants in the PPA Rider and instead sought the inclusion of only its interest in the OVEC plants in the Rider. On November 3, 2016, the Commission granted, in part, the Applications for Rehearing. Among other items, the Commission granted AEP-Ohio's request to only include OVEC in the PPA Rider.[325]

Additional Applications for Rehearing were filed regarding the PUCO's authorization for AEP-Ohio to include its OVEC interest in the PPA Rider. The Commission denied the Applications for Rehearing.[326] An appeal was taken to the Ohio Supreme Court.

HH. Fourth ESP Proceeding (ESP IV)

As required by the Stipulation in the PPA case, on November 23, 2016, AEP-Ohio filed to revise and extend its ESP. AEP-Ohio's ESP IV application proposed changes to its generation, transmission, distribution, and other charges.[327]

AEP-Ohio proposed to continue to rely on an auction process to secure generation service for SSO customers. AEP-Ohio also proposed to modify the PPA Rider to make the charge bypassable. If approved, AEP-Ohio would then dedicate the power from the OVEC plants to SSO customers. AEP-Ohio also sought to implement a non-bypassable placeholder rider, the Renewable Generation Rider, which would allow AEP-Ohio to collect for the life of the plant its investment in renewable generation projects. Power from these renewable projects would be dedicated to customers.

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[324] *Electric Power Supply Assoc. v. AEP Generation Resources*, 155 FERC ¶ 61,102 (April 27, 2016).

[325] *AEP-Ohio PPA Proceeding*, Fifth Entry on Rehearing (April 5, 2017).

[326] *Id*., Third Entry on Rehearing (January 20, 2017).

[327] AEP-Ohio initially filed for the extension in the PUCO docket for its ESP III. The PUCO directed AEP-Ohio to file the application in a separate docket. AEP-Ohio complied and filed what it termed an amended application on November 23, 2016. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, *et al*., Ohio Power Company's Application to Amend its Electric Security Plan (November 23, 2017) ("*AEP-Ohio ESP IV Proceeding*").

AEP-Ohio also proposed in its application to continue to provide non-market-based transmission services to all customers through the non-bypassable BTCR. However, pursuant to the settlement in the PPA case, AEP-Ohio also proposed a pilot program that would permit any customer taking service under AEP-Ohio's GS-3 or GS-4 rate schedules to opt-in to the pilot program. The transmission pilot program would bill for the non-market based transmission services in a manner that better reflected how transmission costs were assigned and billed to customers prior to AEP-Ohio's implementation of the non-bypassable BTCR.

AEP-Ohio also proposed to continue the DIR (with increased annual caps on spending), the ESRR, the gridSMART Rider, the PTBAR, the EE/PDR Rider, and the EDR. AEP-Ohio also requested to implement a new non-bypassable charge, the Distribution Technology Rider, designed to collect certain costs of implementing several new smart technologies (*e.g.*, electric vehicle charging stations). AEP-Ohio further requested to implement a non-bypassable placeholder rider, the Sub-Metering Rider, to collect any new costs associated with submetering arrangements (this rider is associated with a separate PUCO investigation into submetering practices where the PUCO is deciding whether certain types of submetering arrangements are subject to its jurisdiction). AEP-Ohio has not identified any potential costs for inclusion in its submetering rider at this time. Finally, AEP-Ohio sought to implement the Competitive Incentive Rider which would remove costs associated with SSO service from distribution rates and recover those costs from SSO customers (resulting in a non-bypassable credit and a bypassable charge).

Finally, as required by the PPA Stipulation, AEP-Ohio sought to expand the availability of its interruptible credit to shopping customers.

Several parties and the Staff of the PUCO entered a Stipulation on August 25, 2017. The Stipulation provided for the continuation of the auction for pricing the SSO, provided for the collection of above-market costs associated with OVEC on a non-bypassable basis, and proposed the creation of a placeholder rider to address AEP-Ohio's prior commitment to expand its support of renewable projects. The Stipulation also recommended the expansion of the transmission pilot (though it limited the number of participants from that originally proposed) and recommended the extension and expansion of the IRP for new participants. The Stipulation also proposed a limited amount of support for electric vehicle recharging stations and the creation of a placeholder rider for the PUCO's initiatives related to PowerForward. The DIR is proposed to be continued with increasing rate caps, but AEP-Ohio was required to file a new rate case. If it failed to file the rate case, the DIR would be set to zero. AEP-Ohio dropped its request for a Sub-Metering Rider.

The case was submitted to the PUCO in December 2017 following a hearing in which the OCC contested the terms of the Stipulation. A decision from the PUCO is expected in early 2018.

II. Global Settlement

On December 21, 2016, a Stipulation was filed that recommended a resolution of a number of open AEP-Ohio cases. The Stipulation resolved open issues in AEP-Ohio's capacity charges case, ESP II case, RSR Extension case, PIRR case, 2009 FAC case, 2012 through 2015 FAC cases, the 2014 SEET case, and the 2015 SEET case.[328]

As noted above, the Supreme Court reversed the Commission in the AEP-Ohio Capacity Case and ESP II Case. AEP-Ohio's position in these remands was that its cost of capacity was well in excess of the $188/MW-day rate authorized by the Commission. AEP-Ohio argued that netting its claimed increased capacity costs against the credit the Court ordered in the ESP II Case appeal would result in a significant increase in its RSR deferral and therefore RSR rates. The Stipulation recommended a reduction to AEP-Ohio's litigation position on the RSR deferral of approximately $40 million. The Stipulation capped collections of theRSR from residential customers at $43.7 million and recommended a two-step rate for non-residential customers.

In addition, AEP-Ohio agreed to reduce its outstanding PIRR deferral by approximately $97.4 million resulting in a $2/MWh reduction to PIRR rates. The Stipulation further required AEP-Ohio to credit $100 million to customers who were served under AEP-Ohio's SSO during August 2012 through May 2015 to address claims that AEP-Ohio double-recovered certain capacity costs from SSO customers. OCC further agreed to withdraw its opposition to the pending gridSMART Phase II Stipulation. The Stipulation also recommended that the Commission find that AEP-Ohio's earnings for 2014 and 2015 were not significantly excessive. Finally, AEP-Ohio agreed to implement its BTCR pilot program agreed upon in the PPA case to move customers participating in the pilot to a billing outcome that better reflected how costs are assigned by PJM and how transmission costs were billed to customers before AEP-Ohio's non-bypassable BTCR was implemented.

The Commission approved the global settlement without modification on February 23, 2017. The SEET Credit Rider was implemented effective with the first billing cycle of April 2017 at a credit of $0.004659/kWh applicable to both shopping and non-shopping customers and will remain in effect for 12 months. As to the FAC refund, AEP-Ohio indicated that the credit would be $0.00203/kWh multiplied by a customer's load for the portion of time between August 2012 and May 2015 that the customer was taking SSO service. In the aggregate, AEP-Ohio indicated that this credit would flow back approximately $83.6 million of its refund obligation. Pursuant to the Stipulation, AEP-Ohio will dedicate the remaining portion of its refund obligation to a public purpose as determined by the PUCO Staff.

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[328] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, *et al*., Joint Stipulation and Recommendation (December 21, 2016).

Section V
General Electricity Matters

A. 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 Plan), 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.

I. Aggregation

In 2015, the General Assembly passed Amended Substitute House Bill 64 ("HB 64"), which, among other things, required the Director of the Ohio Development Services Agency ("ODSA") to aggregate PIPP customers for the purpose of establishing a competitive procurement process for the supply of competitive retail electric service for those customers. Prior to the passage of HB 64, the Director of ODSA had the discretion to aggregate PIPP customers. Competitive procurement processes have been utilized to establish the price for the Ohio EDUs' SSOs, as discussed above, and have successfully reduced the otherwise applicable price for retail electric generation service. In some instances, the savings from reliance on a competitive procurement process have been dramatic. For example, when DE-Ohio conducted its first competitive procurement to establish its SSO price, residential rates decreased by approximately 19%.

HB 64 also authorized the Director of ODSA to request the PUCO to oversee the PIPP aggregation. On January 5, 2016, the Director of ODSA made that request to the PUCO and on March 2, 2016, the PUCO issued a decision outlining how the PIPP load would be aggregated.[1] The PUCO indicated that PIPP load would be aggregated proximate to the SSO auctions for each EDU and in an amount equal to the SSO load being auctioned. The PUCO also determined that the PIPP load would be auctioned off as a one-year product. Because DP&L had already held all of its SSO auctions for delivery through May 31, 2017 when the PUCO issued its order, DP&L's PIPP load was not separately auctioned off until June 1, 2017. DE-Ohio, AEP-Ohio, and FirstEnergy all held auctions on their PIPP load resulting in decreases in price of $3.36/MWh, $1.35/MWh, and $0.62/MWH, respectively.[2] The PUCO Staff estimated that the first round of PIPP

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[1] *In the Matter of the Implementation of Sections 4928.54 and 4928.544 of the Revised Code*, Case No. 16-247-EL-UNC, Finding and Order (March 2, 2016) (hereinafter, "*PIPP Auction Rules Proceeding*").

[2] *PIPP Auction Rules Proceeding*, Staff Report at 6 (September 2, 2016).

auctions resulted in direct savings of $4.7 million and net savings of approximately $4 million after the costs of the PIPP auctions was taken into account.[3]

II. Annual Update to USF Riders

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. That annual revenue requirement necessary to fund the USF programs continues to experience significant year-over-year increases. The statewide revenue requirement for the 2016 USF was approximately $470 million, representing an increase of approximately $110 million over the 2015 revenue requirement.

During the course of 2016, however, customer enrollment and overall PIPP costs tracked significantly less than the ODSA's projections that drove the $470 million revenue requirement for 2016. When it filed its application to establish rates for 2017, ODSA noted that there was an over-collection of approximately $210 million. ODSA projected total costs for 2017 of approximately $300 million which, after accounting for the over-collection, resulted in a revenue requirement of $90 million for 2017.

When ODSA filed to implement the 2018 USF rates, it projected a cost for 2018 of PIPP of approximately $205 million. However, the USF riders remained substantially over-collected, bringing the statewide revenue requirement for the 2018 USF riders down to approximately $150 million.

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 made by ODSA, the administrative agency responsible for overseeing the USF.

Included below is a table of the USF rates for each EDU for 2017 and 2018.

Company	Current USF Rider		Proposed USF Rider	
	First 833,000 kWh	Above 833,000 kWh	First 833,000 kWh	Above 833,000 kWh
CEI	$0.0010497	$0.0005680	$0.0010366	$0.0005680
DE-Ohio	0.0002896	0.0002896	0.0005368	0.0001681
CSP	0.0001430	0.0001430	0.0025116	0.0001830
DP&L	0.0007710	0.0005700	0.0000978	0.0000978
OE	0.0014456	0.0010461	0.0009914	0.0009914
OP	0.0010772	0.0001681	0.0034648	0.0001681
TE	0.0004615	0.0004615	0.0002991	0.0002991

[3] *Id.*

B. Contract Disclosure Requirements

Since the adoption of SB 3, the PUCO has had authority to issue rules governing minimum service requirements and consumer protection rules applicable to CRES providers and governmental aggregators.[4] The rules shall include requirements that provide consumers with adequate, accurate, and understandable pricing and terms and conditions of service. After becoming aware that certain CRES providers were flowing through fixed-price contract charges related to the 2014 Polar Vortex, the PUCO initiated an investigation and solicited comments. In its Order, the PUCO held that "fixed means fixed" and directed CRES providers to stop marketing contracts as fixed-price contracts if they contain a pass-through provision, effective January 1, 2016. The PUCO declined to make any ruling as to whether existing fixed-price contracts that were entered into with a pass-through provision would be deemed deceptive and directed any customer who believed it had been misled into entering such a contract to file a complaint with the PUCO. Additionally, the PUCO stated that it believed that the "fixed means fixed" axiom should be balanced by continuing to permit regulatory-out clauses that would be available to CRES providers in very limited circumstances. Regulatory-out clauses allow a supplier to revise a contract by proposing new contract terms to the customer. If the customer affirmatively consents to the new terms, the contract would remain in place with the new terms, but the customer may affirmatively reject or passively reject the proposed terms by inaction. A customer rejecting the terms would then be permitted to pursue another CRES provider or the default service without being subjected to any penalty. The PUCO also found that regulatory-out clauses must be clearly and conspicuously stated in the contract.[5]

In a case related to the CRES marketing practices case addressed in the PUCO investigation discussed above, the PUCO issued a decision holding that it has jurisdiction to address a complaint by various school associations that claim that FES's attempt to bill customers for costs it was charged by PJM associated with the 2014 Polar Vortex violates PUCO rules concerning disclosure of terms. FES denied the allegations in the complaint and also moved to dismiss the complaint on the ground that the PUCO lacked jurisdiction to "to set CRES prices" and that the matter presented by the complaint was a pure contract matter that could be addressed only in Ohio courts. The PUCO found that the complaint alleged grounds for it to assert jurisdiction because it found that it had authority to address how FES was administering the contract and its practices related to contract disclosures. The PUCO further found that the matter required the PUCO's expertise over statutes and regulations administered by it.[6]

[4] Section, 4928.10, Revised Code.

[5] *In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI, Finding and Order at 13 (November 18, 2015).

[6] *In the Matter of Ohio Schools Council, et al., v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry at 7 (November 18, 2015).

C. Public Utility Status and Submetering

The PUCO recently returned to a question of the scope of its jurisdiction over entities that may provide utility services that are ancillary to their main businesses. These cases typically arise in situations in which a landlord secures and rebills utility services used by tenants. Under the so-called *Shroyer* test, the PUCO applies a three-part test to determine if the entity is subject to its jurisdiction:

(1) Does the landlord intend to be a public utility by availing himself of the special benefits available to public utilities such as accepting a public franchise grant, the use of a public right-of-way, or the right to use eminent domain in the construction or operation of its service?

(2) Does the landlord only provide the utility service to his tenants rather than the general public?

(3) Is the provision of the utility service clearly ancillary to the landlord's primary business?[7]

Under this test, not all arrangements that allow an ultimate consumer of electricity, natural gas, water, or wastewater treatment services to obtain such service from or through another consumer or separate entity have a purpose, nature, or scope that is sufficient to cause the arrangement to fall within the common law or statutory definition of a "public utility." It is often the case in Ohio that multiple non-residential consumers are located on property, such as a campus, which includes facilities, plant, and equipment that allow each consumer to receive electricity, natural gas, water or wastewater treatment services through a "master-meter," or jointly or individually owned facilities, plant, or equipment. These arrangements arise voluntarily and have become more common over time because corporations have spun off or separated individual business units that may have separate corporate identities even if commonly owned. Typically, these arrangements are ancillary to and not the primary purpose of the relationship between the individual non-residential consumers.

In a case testing the scope of the PUCO's jurisdiction to address submetering, Mark Whitt sued Nationwide Energy Partners, LLC ("NEP"), a company that provides utility-related services, including metering for a condominium complex in which Mr. Whitt owns a unit. Mr. Whitt alleged that NEP was operating illegally as a public utility. Several parties sought intervention, including IEU-Ohio. IEU-Ohio sought to intervene in the case because many industrial sites operate under shared services agreements that might be put at risk by a PUCO decision. NEP opposed intervention by several other parties, including OCC, but did not oppose the intervention of IEU-Ohio. The PUCO denied the motions of IEU-Ohio, OCC and OPAE because their interests in the case were limited to the precedential value of the case, which was an insufficient ground for granting intervention.

[7] *Inscho, et al. v. Shroyer's Mobile Homes*, PUCO Case No. 90-182-WS-CSS, Opinion and Order (February 27, 1992).

Although the PUCO denied intervention, it did open a Commission investigation to provide parties an opportunity to address whether third-party agents or contractors such as NEP are operating as public utilities. According to the PUCO, this investigation "will provide OCC, OPAE, and IEU-Ohio an opportunity to contribute to the full development and equitable resolution of the underlying legal issue."[8] The PUCO solicited comments from interested parties that were due in late January 2016.[9]

After parties filed comments in the investigation, the PUCO issued a decision addressing its jurisdiction to regulate submetering on December 7, 2016.[10] The PUCO stated that it would continue to apply the *Shroyer* test, but would extend its application to condominium associations, submetering companies, and other similarly situated entities on a case-by-case basis. Additionally, the PUCO found that, if a landlord or other entity resells or redistributes utility services and charges the end user a threshold percentage above the total bill charges for a similarly situated customer, served by the utility's tariffed rates, SSO, of natural gas choice offer, then the high bill charges will create a rebuttable presumption that the provision of service is not ancillary to the landlord or other entity's business. The PUCO did not set the percentage in the decision.

The PUCO requested comments and reply comments from interested parties regarding the threshold percentage that would trigger a presumption that the provision of utility service is not an ancillary service of the party reselling or distributing utility services. Comments and Reply Comments were filed in January and February 2017, respectively.

On June 21, 2017, the PUCO issued an entry on rehearing that also set the percentage that it would use to establish a presumption that an entity is operating as a utility subject to PUCO jurisdiction.[11] The PUCO stated that a reseller of utility services would be presumed to be a public utility if the rate the reseller charged was above the rate charged by the default service provider. To determine if the amount charged was greater than that charged by the default service provider, the customer could include any administrative fees charged by the reseller but must exclude any fees charged for services provided to common areas. The PUCO also created a "safe harbor" for those resellers that are rebuttably presumed to be utilities. The reseller would avoid PUCO jurisdiction if: (1) the reseller is passing through its annual costs of providing a utility service charged by a public utility and competitive retail service provider to its submetered residents at a given premises; or (2) the reseller's annual charges for a utility service to an individual submetered resident do not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the utility's default service tariffs.

[8] *In the Matter of the Complaint of Mark A. Whitt v. Nationwide Energy Partners*, LLC, Case No. 15-697-EL-CSS, Entry at 6 (November 18, 2015).

[9] *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Entry (December 16, 2015).

[10] *Id*., Finding and Order (December 7, 2016).

[11] *Id*., Second Entry on Rehearing (June 21, 2017).

Additionally, the PUCO clarified that the price test and safe harbor will apply to only arrangements involving submetered residential customers.

Both electric utilities and a customer continue to challenge the PUCO's decision to create a safe harbor and to clarify the effect of Certified Territory Act on resale. The Commission's order remains subject to an entry granting rehearing for the purpose of further consideration.[12]

In a related matter, on April 12, 2016, OCC filed a complaint against AEP-Ohio seeking an order directing AEP-Ohio to enforce the resale provisions of its current terms and conditions of service or directing AEP-Ohio to amend the terms and conditions of service to include restrictions on submetering and resale of electric service provided to residential customers.[13] The amendment that OCC sought would limit the availability of submetering to residential landlord-tenant arrangements "where the landlord is not otherwise operating as a public utility."[14] Further, the tariff revision would prohibit the resale or redistribution of utility service "at a charge that is above the landlord's cost of purchasing the service."[15]

In response to the complaint, AEP-Ohio filed an Answer and a Motion for Tariff Amendment on April 27, 2016.[16] In its motion, AEP-Ohio requested that the PUCO amend AEP-Ohio's terms and conditions of service to "clarify" the resale restrictions contained in its Terms and Conditions of Service. The amendments would permit AEP-Ohio to terminate service to customers and restrict resales of electricity service "where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges without markup to such occupants or tenants and where such charges are allocated based on each occupant's or tenant's actual usage."[17]

IEU-Ohio opposed AEP-Ohio's motion on the ground that the amendments that AEP-Ohio was seeking unlawfully imposed restrictions on resale of electric service and could impair the use of shared service arrangements. The matter remains pending.

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[12] *Id*., Third Entry on Rehearing (August 16, 2017).

[13] *OCC v. Ohio Power Company*, Case No. 16-782-EL-SSO, Complaint *passim* (April 12, 2016).

[14] *Id*., Attachment A.

[15] *Id*.

[16] *Id.*, Ohio Power Company's Motion for Tariff Amendment (April 27, 2016).

[17] *Id*. at 7.

D. PowerForward

In 2017 the PUCO kicked off its PowerForward initiative holding the first of phases of workshops.[18] These workshops were titled "A Glimpse of the Future" and "Exploring Technologies." The final phase of workshops is titled "Ratemaking and Regulation" and will be held at the PUCO on March 6-8 and 20-22, 2018.

E. Net Metering

After a multi-year review of proposed net metering rules, on November 8, 2017, the PUCO adopted final rules.[19] The final rules require each EDU to offer net metering exclusively to SSO customers. CRES providers may offer net metering to their customers. If a shopping customer is securing net metering through a CRES provider under a utility tariff, that arrangement may continue for a year after the effective date of the amended rule. The PUCO required utilities seeking to be treated as net metering customers by owning and operating facilities on a customer's premises to file an application seeking such status. The PUCO rejected a rule change sought by AEP and DE-Ohio to define a customer-generator to accomplish the outcome of allowing an EDU to construct and own net metering facilities. The PUCO also adopted a provision that allows for the construction of a facility on a contiguous lot over the objection of the utilities that claimed that this allowance would violate their exclusive service rights. EDUs may still challenge a project if the project would create an unsafe or hazardous condition.

The PUCO retained the presumption that a net metering project designed to meet up to 120% of the customer's requirements, determined at the time of interconnection, satisfied the statutory requirement that the facility was designed to offset the customer's own usage. The EDUs were required to provide consumption data or a consumption estimate to customers so that customers could design their facilities to meet the 120% requirement.

Costs of installing the necessary metering are borne by the customer. If the customer is in an area served by smart meters, the cost will be covered by the smart grid rider. Otherwise, the utility may charge the customer for the meter upgrade.

The PUCO limited the net metering credit to the energy-only component of the EDU's SSO. The PUCO also adopted two rules that could provide additional benefits to net metering customers based on its finding that "customer-generators may generate electricity at times of peak demand, and with advanced meters capable of measuring hourly interval usage data, these peak load contributions should be incorporated into a customer-generator's bill. Accordingly, customer-generators using advanced meters should receive the benefit of their peak load contributions in the form of lower bills for electric service, instead of in the form [of] a higher credit for excess generation." The

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[18] The workshops are webcast and can be viewed live or through archived copies. http://www.puco.ohio.gov/industry-information/industry-topics/powerforward/.

[19] *In the Matter of the Commission's Review of Chapter 4901:1-10 of the Ohio Administrative Code*, PUCO Case No. 12-2050-EL-ORD, Finding and Order (November 8, 2017).

PUCO removed the annual cash-out of net metering credits that was contained in the draft rules.

Finally, the PUCO found that EDUs may file an application to defer the costs of providing net metering. Cost recovery will be through a base rate case or some appropriate application.

Section VI

2017 Summary of Key Energy Legislation in the 132nd Ohio General Assembly

A. House Bill 114 – Reasonable Energy Mandate Reform

In 2008, Ohio adopted aggressive electricity portfolio mandates with compliance requirements that commenced in 2009, with a sharp upward sloping requirement curve of a 22% mandated reduction in electricity demand by 2025 and the requirement of 12.5% of supply-side alternative energy resources. These electricity supply and demand-side mandates are codified in Sections 4928.64 and 4928.66, Revised Code, with implementation details provided by rules adopted by the PUCO.

As the energy and economic landscape has substantially changed since 2008, Substitute Senate Bill 310 ("SB 310") was introduced in the Ohio Senate on March 28, 2014 to reform Ohio's energy portfolio mandates. SB 310 passed the Ohio General Assembly on June 4, 2014 and was subsequently sent to the Governor and signed on June 13, 2014. The reforms contained in SB 310 included disclosure of the costs of Ohio's mandates to customers, counting reforms and a streamlined ability of larger mercantile customers to opt out of the cost of compliance with Ohio's mandates.

The General Assembly continues to consider additional legislative changes to reform Ohio's energy efficiency and renewable portfolio mandate through its work on Ohio House Bill 114 ("HB 114"). Listed below is a summary of the reforms contained within HB 114.

- It decreases the cumulative energy efficiency mandate from 22.7% to 17.2%.
- It clarifies that energy efficiency and peak demand reduction mandates terminate by the end of 2027.
- It clarifies "counting" for purposes of implementing provisions approved by the PUCO that provide utilities with "incentives" for complying with the energy efficiency and peak demand reduction mandates.
- It requires that the PUCO count, for mandate compliance purposes: energy intensity reductions resulting from heat rate improvement; energy efficiency and peak demand reductions resulting from consumer reductions in water use and improvements in wastewater treatment; non-electric energy efficiency and peak demand reductions that result from a utility's PUCO-approved compliance plan; and energy efficiency and peak demand reductions achieved since 2006 and associated with generating plant heat rate or other energy intensity improvements if proposed by a utility where the generating plant is owned and operated by the utility or an affiliate.

- It expands the “streamlined opt-out” so that all “mercantile customers” on January 1, 2019may elect to avoid the costs (and benefits, if any) of the energy efficiency and peak demand reduction mandates. Current law makes this opt-out election available to customers served “above primary” as well as customers that self-assess the kWh tax.

HB 114 was introduced in the Ohio House on March 7, 2017 and referred to the House Public Utilities Committee on March 14, 2017. The Committee adopted a substitute bill on March 30, 2017. HB 114 was passed by the Ohio House on March 30, 2017 by a vote of 65 to 31. It was introduced in the Ohio Senate on April 5, 2017 and referred to the Senate Energy and Natural Resources Committee on April 26, 2017.

B. House Bill 49 – Biennial Budget Provisions

Governor John Kasich (R-Westerville) proposed his $65.4 billion Biennial Budget in early February of 2017. It was introduced as House Bill 49 (“HB 49”).

In terms of tax revisions there were no increases proposed or made to the kWh, Natural Gas Consumption (MCF), or Public Utility Excise Taxes in HB 49. HB 49 did include tax policy language that permits Ohio businesses to opt in to a centralized collection of municipal income taxes through the Ohio Business Gateway, administered by the Ohio Department of Taxation.

Finally, the Severance Tax on horizontal oil and gas drilling was again proposed to be increased by the Governor in his introduced version of the state budget and, again, the General Assembly rejected this proposed increase on the extraction of oil and gas in Ohio.

The final version of HB 49 also added energy and utility policy items which included language allowing the use of small hydro facilities to be counted for meeting Ohio’s renewable energy mandates and the elimination of a proposed revision to Ohio’s windfarm setback requirements—revisions which would have shortened the setback requirements in Ohio. The state budget also eliminated the Governor’s proposed language which would have changed Ohio’s Energy Policy to specifically permit the PUCO to research and implement issues associated with the electric distribution system.

C. House Bill 239/Senate Bill 155 – Ohio Valley Electric Corporation (“OVEC”)

House Bill 239 and Senate Bill 155 (“HB 239/SB155”) would allow an EDU to recover costs through a non-bypassable charge which they incur as a result of their retention of interests in OVEC-related generating units.

HB 239 and SB 155 were written for the Ohio electric utilities that hold an equity interest in OVEC. This equity interest allows the utilities to purchase the generation output of OVEC at a cost-based price through a wholesale transaction and resell the output into the wholesale market. The OVEC generating units (one of which is in Indiana) have no connection to Ohio retail customers.

Historically, the cost-based price paid for the OVEC output was less than the market-based resale price and the OVEC relationship was earnings positive for the utilities. More recently, the market price available for the resale of the OVEC output has dropped and is, at times, less than the cost-based purchase prices. Now that the OVEC relationship is earnings negative, HB 239/SB 155 propose to make Ohio retail customers pay non-bypassable charges to ensure that the utilities' relationship with OVEC is earnings positive.

HB 239/SB155 places a cap on the monthly non-bypassable rate charge of $2.50 for residential customers and $2,500 for industrial customers. The legislation ends the non-bypassable charge by December 31, 2030.

HB 239 was introduced into the Ohio House of Representatives on May 23, 2017 and is currently pending in the Ohio House Public Utilities Committee. SB 155 was introduced into the Ohio Senate on May 24, 2017 and is currently pending in the Ohio Senate Public Utilities Committee.

D. House Bill 381/Senate Bill 128 – Zero-Emissions Nuclear Credit ("ZENC")

HB 381 and SB 128 establish a zero-emissions nuclear resource ("ZENR") program that requires EDUs with a ZENR located in its certified service area to purchase ZENCs, at an initial price of $17.00 per ZENC, and compels retail customers to pick up the "direct and indirect" cost of the ZENCs through non-bypassable charges payable over a period of 16 years divided into two-year segments (minimum duration is four years absent intervention by the General Assembly per Article II, Sections 1 and 15 of the Ohio Constitution). The ZENC charge is capped at the lesser of $3,500 or 5% of the customer's bill per month for commercial and industrial customers and $2.50 per month for residential customers. The ZENC program is limited to twelve years – ending in 2030.

House Bill 381 and Senate Bill 128 ("HB 381/SB 128") define "nuclear energy resource" ("NER") as a generating facility fueled, in whole or part, by nuclear energy which is licensed by the Nuclear Regulatory Commission ("NRC"). Davis-Besse and Perry generating facilities (operated by FirstEnergy Nuclear Operating Company or "FENOC") fall within this definition. Out-of-state nuclear generating facilities may be able to qualify as a NER but the qualification criteria for any out-of-state facilities is left up to the PUCO.

A ZENR must be interconnected with PJM, judged by PJM to be deliverable into the zone of the EDU participating in the ZENR program for capacity planning purposes. To qualify, a NER cannot receive a state tax exemption, deferral, exclusion, allowance, payment, credit, deduction, or reimbursement from another state. An in-state NER is a ZENR if it has benefited, relative to other technologies, Ohio's air quality profile as of the time it commenced operation and negative environmental consequences would result if the NER ceased operating. Out-of-state NERs cannot qualify as a ZENR unless they provide the same or more environmental benefits to Ohio as an in-state NER.

An entity that operates a ZENR which has its corporate headquarters in Ohio must keep the headquarters in Ohio during the period it receives ZENC payments and maintain employment levels.

The bills establish a process for the owner of a ZENR to notify the PUCO of its intent to provide ZECs. For an in-state NER, interested persons may file comments, but the PUCO must act within 50 days to designate the NER as a ZENR in accordance with the statutory criteria. If the PUCO does not act within the 50-day period, the NER is deemed a ZENR. For an out-of-state NER, the opportunity to obtain ZENR status is left, without guidance, to the PUCO.

ZENCs are transferred to the PUCO subject to mandatory purchase by any EDU. The PUCO must allocate the ZENCs to the EDUs required to purchase the credits based on total end user consumption. The PUCO pays for the ZENCs based on a non-bypassable charge revenue which is remitted to the PUCO by EDUs required to purchase the ZENCs. The ZENC revenue collected by the PUCO is deposited with the Treasurer and any earnings on the ZENC revenue deposited with the Treasurer go to the benefit of Ohio's General Revenue Fund (are not used to reduce the cost to customers). To the extent that the cost of the ZENCs increases total electric bills (generation, transmission and distribution) by more than five percent (5%), the excess above 5% plus carrying charges must be deferred for future recovery.

HB 381 was introduced into the Ohio House of Representatives on October 11, 2017 and is currently pending in the House Public Utilities Committee. SB 128 was introduced into the Ohio Senate on April 6, 2017 and is currently pending in the Senate Public Utilities Committee.

E. House Bill 247 – Electric Consumer Protection Act

House Bill 247 ("HB 247") eliminates the ESP option currently used to determine the SSO which contains the generation supply pricing applicable to customers not obtaining generation supply from a CRES provider. HB 247 requires the PUCO to ensure that an SSO of the MRO variety does not have an adverse effect on large-scale government aggregation.

However, HB 247 allows currently-approved ESPs to be used as the SSO for customers not obtaining generation supply from a CRES provider until the customer is supplied by a CRES provider or until the an SSO of the MRO variety is in place. The legislation also requires the use of a CBP for an ESP of the MRO variety.
HB 247 leaves a modified version of the MRO in place to establish the generation supply pricing mechanism applicable to customers not obtaining generation supply from a CRES provider.

HB 247 modifies current corporate separation requirements by precluding an "electric utility"[1] and its affiliates from providing a CRES except as it may be included in the SSO of the MRO variety and precluding, effective January 1, 2019, an electric utility and its affiliates from owning and controlling any installed generating capacity in Ohio. To the extent a service is declared or classified competitive in the future, an electric utility is permitted to provide such newly determined competitive service outside an SSO.

Each electric utility must also submit a "market power mitigation plan" to the PUCO for the PUCO's review, modification and approval. If a market power mitigation plan is not approved by the PUCO prior to January 1, 2019, the PUCO may require an electric utility to auction any generation capacity entitlements it may hold until such a plan is approved by the PUCO.

Additionally, HB 247 gives the PUCO broader authority to address violations of corporate separation requirements as they may be reflected in the legislation's mandatory divestiture requirement. Finally, this legislation requires that all charges paid by customers that are subsequently held, by the Ohio Supreme Court, the PUCO or another authority, to be unreasonable, unlawful, imprudent or otherwise improper to be refunded promptly to the customers who paid such charges.

HB 247 was introduced into the Ohio House of Representatives on May 24, 2017 and is currently pending in the House Public Utilities Committee. There is no companion legislation in the Ohio Senate.

[1] The bill modifies the current definition of "electric utility" so that it fits with other changes proposed in the legislation. If the legislation is enacted, it would mean an "…electric light company that has a certified territory and is engaged on a for-profit basis in the business of supplying at least a non-competitive retail electric service in this state." An "electric distribution utility" is also an "electric utility."

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.

Acronym	Definition
A&G	Administrative & General
AAC	Annually Adjusted Component
ADIT	Accumulated Deferred Income Taxes
AEP	American Electric Power
AEP Energy	AEP Energy Retail, Inc.
AEP Retail	AEP Retail Energy Partners LLC
AEP-Ohio	American Electric Power-Ohio
AEPGCR	AEP Generation Resources, Inc.
AEPS	Alternative Energy Portfolio Standards
AEPSC	AEP Service Corporation
AER	Alternative Energy Rider
AER-B	Alternative Energy Rider-Bypassable
AER-N	Alternative Energy Rider-Non-Bypassable
AES	AES Corporation
AICUO	Association of Independent Colleges and Universities of Ohio
Airgas	Airgas, Inc.
AK Steel	AK Steel Corp.
AMI	Advanced Metering Infrastructure
APAC	Appalachian People's Action Coalition
APCo	Appalachian Power Company
APIR	Auction Phase-In Rider
Appleton	Appleton Papers, Inc. (now known as Appvion)
Appvion	Appvion, Inc. (formerly Appleton Papers)
ARR	Auction Revenue Rights
ATSI	American Transmission Systems, Inc.
BGS	Basic Generation Service
BRA	Base Residual Auction
BTCR	Basic Transmission Cost Rider
C&I	Commercial & Industrial
CAP	Community Action Partnership of the Greater Dayton Area
Cargill	Cargill, Inc.
CAT	Commercial Activity Tax
Caterpillar	Caterpillar, Inc.
CB Rider	Competitive Bidding Rider
CBP	Competitive Bidding Process
CBT Rider	Competitive Bid True-Up Rider
CEI	Cleveland Electric Illuminating Company
CFL	Compact Fluorescent Light
CG&E	Cincinnati Gas & Electric Company (predecessor of DE-Ohio)
CHP	Combined Heat and Power
COH	Columbia Gas of Ohio
Commission	Public Utilities Commission of Ohio
Constellation	Constellation NewEnergy, Inc./Constellation Energy Commodities Group, Inc.
COSE	Council of Smaller Enterprises

Acronym	Definition
CPP	Clean Power Plan
CRES	Competitive Retail Electric Service
CSP	Columbus Southern Power Company
CWIP	Construction Work in Progress
DA	Distribution Automation
DACR	Distribution Automation Circuit Reconfiguration
DAPIR	Deferred Phase-In Recovery Rider
DARR	Deferred Asset Recovery Rider
DECAM	Duke Energy Commercial Asset Management, Inc.
DENA	Duke Energy North America
DE-Ohio	Duke Energy Ohio, Inc.
DFR	Deferred Fuel Rider
DIP	Detailed Implementation Plan
DIR	Distribution Investment Rider
DMR	Distribution Modernization Rider
DOE	Department of Energy
Dolphin	Dolphin Sub, Inc.
DP&L	Dayton Power & Light Company, The
DPL	DPL Inc.
DPM	Distribution Platform Modernization
DRP	Demand Response Programs
DSM	Demand-Side Management
DTE	DTE Energy Trading, Inc.
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
EMC	EMC Development Company, Inc.
Energy Alliance	The Greater Cincinnati Energy Alliance, Inc.
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 Ventures Analysis, Inc.
EWG	Exempt Wholesale Generator
Exelon	Exelon Generation Company
FAC	Fuel Adjustment Clause
FCCRR	Facility Cost Closure Recovery Rider

Acronym	Definition
FCR	Fixed Cost Recovery Rider
FERC	Federal Energy Regulatory Commission
FES	FirstEnergy Solutions Corp.
FFG	Fuel Fund Grant Program
FirstEnergy	FirstEnergy Corporation
FIT	Federal Income Tax
FMV	Fair Market Value
FPP	Fuel and Economy Purchased Power
FR	Fuel Rider
FRM	Fuel Recovery Mechanism
FRR	Fixed Resource Requirement
FTR	Financial Transmission Rights
GATS	Generation Attribute Tracking System
GCAF Rider	Generation Charge Adjustment Factor Rider
GCRR	Generation Cost Recovery Rider
Genco	AEP-Ohio Generation Resources
Globe	Globe Metallurgical, Inc. (subsidiary of Globe Specialty Metals, Inc.)
GRR	Generation Resource Rider
HAN	Home Area Network
HB 364	House Bill 364 (129th General Assembly)
HB 554	Substitute House Bill 554 (131st General Assembly)
Honda	Honda of America Manufacturing, Inc.
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
Kraton	Kraton Polymers U.S. LLC
Kroger	The Kroger Company
kV	Kilovolts
kWh	Kilowatt-hour
Larkin	Larkin & Associtės
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
MGP	Manufactured Gas Plant
MISO	Midcontinent Independent System Operator (formerly Midwest Independent Transmission System Operator)
Mon Power	Monongahela Power Company
MR6	Muskingum River 6
M-RETS	Midwest Renewable Energy Tracking System

Acronym	Definition
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
NEP	Nationwide Energy Partners, LLC
NER	Nuclear Energy Resource
NERA	National Economic Research Associates Inc.
NERC	North American Electric Reliability Corporation
NITS	Network Integration Transmission Services
NOPEC	Northeast Ohio Public Energy Council
NRC	Nuclear Regulatory Commission
NRDC	Natural Resources Defense Council
Nucor	Nucor Steel Marion, Inc.
O&M	Operation & Maintenance
O.A.C.	Ohio Administrative Code
OCC	Office of the Ohio Consumers' Counsel
OCEA	Ohio Consumer and Environmental Advocates
ODNR	Ohio Department of Natural Resources
ODOD	Ohio Department of Development (now known as Ohio Development Services Agency or "ODSA"))
ODSA	Ohio Development Services Agency (previously Ohio Department of Development or "ODOD")
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
Ohio AEE	Ohio Advanced Energy Economy
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
PDR	Peak Demand Reduction
Pilkington	Pilkington North America

Acronym	Definition
PIPP	Percentage of Income Payment Plan
PIR	Phase-In Recovery
PIRR	Phase-In Recovery Rider
PJM	PJM Interconnection, L.L.C.
PMR	Pool Modification Rider
POLR	Provider of Last Resort
PPA	Purchase Power Agreement
PSA	Power Supply Agreement
PSR	Power Stability Rider
PTC	Price-to-Compare
PTR	Pool Termination Rider
PUCO	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
RER	Reliable Electricity Rider
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 BTCR	Basic Transmission Cost Rider
Rider BTR	Base Transmission Rider
Rider DCI	Distribution Capital Investment Rider
Rider DCR	Delivery Capital Recovery Rider
Rider DFC	Deferred Fuel Cost Recovery Rider
Rider DGC	Deferred Generation Cost Recovery Rider
Rider DR	Distribution Reliability Rider
Rider DR-SAW	Distribution Rider - Save-a-Watt 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 ESRR	Electric Service Reliability Rider
Rider ESSC	Electric Service Stability Charge Rider
Rider FRT	Facilities Relocation and Transportation Tariff Rider
Rider GEN	Generation Service Rider
Rider GCR	Generation Cost Reconciliation Rider
Rider GDR	Government Directives Recovery Rider
Rider IRM	Incentive Ratemaking Mechanism
Rider LFA	Load Factor Adjustment Rider
Rider LTR	Litigation Termination Rider
Rider NDU	Generation Service Uncollectible Rider / Non-Distribution Related Uncollectible
Rider NMB	Non-Market-Based Services Rider
Rider OLR	Optional Load Response Program Rider
Rider PF	PowerForward Rider

Acronym	Definition
Rider PMR	Regulatory Mandates Rider
Rider PSR	Price Stabilization Rider
Rider RRS	Retail Rate Stability Rider
Rider PTC-AAC	Price-To-Compare Annually Adjusted Component Rider
Rider PTC-FPP	Price-to-Compare Fuel and Purchased Power Rider
Rider PTC-SRT	Price-to-Compare System Reliability Tracker Rider
Rate 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 SRA-CD	DE-Ohio's Capacity Dedication Rider
Rider SRA-SRT	System Resource Adjustment, System Reliability Tracker 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
RSC	Rate Stabilization Charge
RRS	Retail Rate Stability
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
RUMA	Road Use Maintenance Agreements
SB 221	Amended Substitute Senate Bill 221 (127th General Assembly)
SB 3	Amended Substitute Senate Bill 3 (123rd General Assembly)
SB 310	Substitute Senate Bill 310 (130th General Assembly)
SCADA	Supervisory Control and Data Acquisition System
SCP	South Central Power Company
SEET	Significantly Excessive Earnings Test
SER	Solar Energy Resource
Severstal	Severstal Wheeling, Inc.
SFV	Straight-Fixed Variable
SO_2	Sulfur Dioxide
Solsil	Solsil, Inc. (subsidiary of Globe Specialty Metals, Inc.)
Solvay	Solvay Specialty Polymers
SOX	Sarbanes-Oxley
SREC	Solar Renewable Energy Credits
SRT	System Reliability Tracker

Acronym	Definition
SSO	Standard Service Offer
SSR	Service Stability Rider
SSR-E	SSR Extension
Staff	Public Utilities Commission of Ohio Staff
Sunoco	Sunoco, Inc.
TAS	Transmission and Ancillary Service
TCRR	Transmission Cost Recovery Rider
TCRR-B	TCRR-Bypassable
TCRR-N	TCRR-Non-Bypassable
TDP	Time-Differentiated Pricing
TE	Toledo Edison Company
TEC	Transmission Enhancement Charges
Timken	The Timken Company
TimkenSteel	TimkenSteel Corporation
TRC	Total Resource Cost
TRM	Technical Reference Manual
UCT	Utility Cost Test
USF	Universal Service Fund
VEDO	Vectren Energy Delivery of Ohio, Inc.
VEIC	Vermont Energy Investment Corporation
VEP	Voluntary Enrollment Procedure
VVO	Volt/VAR Optimization
WACC	Weighted Average Cost of Capital
Wal-Mart	Wal-Mart Stores East, LP and Sam's East, Inc.
Wayzata	Wayzata Investment Partners, Inc.
WER	Waste Energy Recovery
WPAFB	Wright-Patterson Air Force Base
WPS	WPS Energy Services
ZEC	Zero-Emissions Credits
ZENC	Zero-Emissions Nuclear Credit
ZENR	Zero-Emissions Nuclear Resource