**Before**

**The Public Utilities Commission Of Ohio**

In the Matter of the Commission Review of )

the Capacity Charges of Ohio Power Company ) Case No. 10-2929-EL-UNC

and Columbus Southern Power Company. )

**Industrial Energy Users-Ohio’s**

**Memorandum in Partial Opposition to FirstEnergy Solutions Corp.’s Application For Rehearing**

Samuel C. Randazzo, Esq.

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, Suite 1700

Columbus, OH 43215-4228

Telephone: 614-469-8000

Telecopier: 614-469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**August 7, 2012 Attorneys for Industrial Energy Users-Ohio**

**Before**

**The Public Utilities Commission Of Ohio**

In the Matter of the Commission Review of )

the Capacity Charges of Ohio Power Company ) Case No. 10-2929-EL-UNC

and Columbus Southern Power Company. )

**Industrial Energy Users-Ohio’s**

**Memorandum in Partial Opposition to FirstEnergy Solutions Corp.’s Application For Rehearing**

Pursuant to Rule 4901‑1‑35(B), Ohio Administrative Code (“O.A.C.”), the Industrial Energy Users-Ohio (“IEU-Ohio”) respond to the Application for Rehearing (“Application”) filed by FirstEnergy Solutions Corp. (“FES”) on August 1, 2012. While IEU-Ohio generally supports the positions of FES on questions regarding the lawfulness and reasonableness (or lack thereof) of the Opinion and Order issued by the Public Utilities Commission of Ohio (“Commission”) on July 2, 2012 (“July 2 Order”), FES’ claim that rehearing is warranted because the July 2 Order “… fails to establish that any charge for the recovery of deferred capacity costs should be nonbypassable”[[1]](#footnote-1) invites the Commission to further ignore Ohio law. An unlawful and unreasonable charge cannot be made lawful and reasonable by turning it into a non-bypassable charge.

FES’ principled advocacy in this and other proceedings and regarding the methodology that must be used to establish generation service capacity prices has been, unlike most other competitive retail electric service (“CRES”) providers, consistently well aligned with the interest of ultimate customers. Indeed, the bulk of FES’ Application provides forceful support for the full restoration of RPM-Based Pricing and demonstrates why, as a matter of law, the Commission cannot use a “cost-based” ratemaking methodology to uniquely authorize a generation service capacity price. However, FES’ claim that the Commission erred because it did not make the portion of the $188.88 per megawatt-day (“MW‑day”) generation service capacity price that is not contemporaneously charged to CRES providers non-bypassable reflects an unprincipled disregard for the law, the evidence and the interest of consumers (shopping and non-shopping alike).

Predictably, the Commission’s July 2 Order has ignited a fight between some stakeholders over which stakeholders (including CRES providers) the Commission must or should victimize with the unlawful, unjust and unreasonable consequences of such Order. This unfortunate fight may be seen by some as being a form of self-defense against the Commission’s indulgence of Ohio Power Company’s[[2]](#footnote-2) demands for things that the law precludes or that justice should have long ago foreclosed. Whatever the provocation, this fight is the latest symptom of a Commission process and Commission decisions that are detached from the rule of law and fundamental fairness.

The purpose of economic regulation is to simulate the forces of a competitive market.[[3]](#footnote-3) The regulatory structure in Ohio is designed to let competition do directly what prior forms of economic regulation did poorly or not at all. Instead of serving the fundamental purposes of economic regulation and following Ohio law, the Commission has acted to provide AEP‑Ohio with above-market compensation for generation capacity service and imposed Ohio’s monopoly rent on somebody else. Collecting unwarranted and unlawful monopoly rent through a non-bypassable charge, as FES (and others) now stoop to favor, cannot and will not fix what is so fundamentally wrong with the July 2 Order.

Accordingly, FES’ assertion that rehearing is warranted because the July 2 Order “… fails to establish that any charge for the recovery of deferred capacity costs should be nonbypassable”[[4]](#footnote-4) invites the Commission to further ignore Ohio law. An unlawful and unreasonable charge cannot be made lawful and reasonable by turning it into a non-bypassable charge. To the extent FES’ Application asserts otherwise, it is without merit.

Respectfully submitted,

/s/ Samuel C. Randazzo

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

sam@mwnmch.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**Attorneys for** **Industrial Energy Users-Ohio**

#### Certificate of Service

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio’s Memorandum in Partial Opposition to FirstEnergy Solutions Corp.’s Application for Rehearing* was served upon the following parties of record this 7th day of August 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Samuel C. Randazzo

Samuel C. Randazzo

Steven T. Nourse

Matthew J. Satterwhite

Yazen Alami

American Electric Power Service Corporation

1 Riverside Plaza, 29th Floor

Columbus, OH 43215

stnourse@aep.com

mjsatterwhite@aep.com

yalami@aep.com

Daniel R. Conway

Christen M. Moore

Porter Wright Morris & Arthur

Huntington Center

41 S. High Street

Columbus, OH 43215

dconway@porterwright.com

cmoore@porterwright.com

Derek Shaffer

Quinn Emanuel Urquhart & Sullivan, LLP

1299 Pennsylvania Avenue, NW, Suite 825

Washington, DC 20004

derekshaffer@quinnemanuel.com

**Counsel for Columbus Southern Power Company and Ohio Power Company**

David F. Boehm, Esq.

Michael L. Kurtz, Esq.

Boehm, Kurtz & Lowry

36 East Seventh Street, Suite 1510

Cincinnati, OH 45202

dboehm@BKLIawfirm.com

mkurtz@BKLIawfirm.com

**Counsel for the Ohio Energy Group**

Kyle L. Kern, Counsel of Record

Melissa R. Yost

Assistant Consumers’ Counsel

Office of the Ohio Consumers’ Counsel

10 West Broad Street, Suite 1800

Columbus, OH 43215-3485

kern@occ.state.oh.us

yost@occ.state.oh.us

**Counsel for the Office of the Ohio**

**Consumers' Counsel**

Lisa McAlister

Thomas J. O’Brien

Bricker & Eckler LLP

100 South Third Street

Columbus, OH 43215

lmcalister@bricker.com

tobrien@bricker.com

**Counsel for The Ohio Manufacturers’ Association**

Richard L. Sites

General Counsel & Senior Director of Health Policy

Ohio Hospital Association

155 E. Broad Street, 15th Floor

Columbus, OH 43215-3620

ricks@ohanet.org

Thomas J. O’Brien

Bricker & Eckler LLP

100 South Third Street

Columbus, OH 43215

tobrien@bricker.com

**Counsel for Ohio Hospital Association**

M. Howard Petricoff

Stephen M. Howard

Lija Kaleps-Clark

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

PO Box 1008

Columbus OH 43216-1008

mhpetricoff@vorys.com

smhoward@vorys.com

lkalepsclark@vorys.com

**Counsel for Direct Energy Services, LLC and Direct Energy Business, LLC and Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc., Retail Energy Supply Association**

Mark A. Hayden

FirstEnergy Service Company

76 South Main Street

Akron, OH 44308

haydenm@firstenergycorp.com

John N. Estes III

Paul F. Wight

Skadden, Arps, Slate, Meagher

& Flom LLP

1440 New York Avenue, N.W.

Washington, DC 20005

john.estes@skadden.com

paul.wight@skadden.com

James F. Lang

Laura C. McBride

N. Trevor Alexander

Calfee, Halter & Griswold LLP

1400 KeyBank Center

800 Superior Ave.

Cleveland, OH 44114

jlang@calfee.com

lmcbride@calfee.com

talexander@calfee.com

David A. Kutick

Jones Day

North Point

901 Lakeside Avenue

Cleveland, OH 44114

dakutik@jonesday.com

Allison E. Haedt

Jones Day

P.O. Box 165017

Columbus, OH 43216-5017

aehaedt@jonesday.com

**Counsel for FirstEnergy Solutions Corp.**

Dorothy Kim Corbett

Associate General Counsel

Duke Energy Business Services LLC

139 East Fourth Street

Cincinnati, OH 45202

Dorothy.Corbett@duke-energy.com

Jeanne W. Kingery

Associate General Counsel

155 East Broad Street, 21st Floor

Columbus, OH 43215

Jeanne.Kingery@duke-energy.com

**Counsel for Duke Energy Retail Sales, LLC**

David M. Stahl

Eimer Stahl LLP

224 S. Michigan Avenue, Suite 1100

Chicago, IL 60604

dstahl@eimerstahl.com

Sandy I-ru Grace

Assistant General Counsel

Exelon Business Services Company

101 Constitution Avenue N.W.

Suite 400 East

Washington, DC 20001

sandy.grace@exeloncorp.com

**Counsel for Exelon Generation Company, LLC**

Mark A. Whitt

Melissa L. Thompson

Andrew J. Campbell

Whitt Sturtevant LLP

PNC Plaza, Suite 2020

155 East Broad Street

Columbus, OH 43215

whitt@whitt-sturtevant.com

thompson@whitt-sturtevant.com

Campbell@whitt-sturtevant.com

Vincent Parisi

Matthew White

Interstate Gas Supply, Inc.

6100 Emerald Parkway

Dublin, OH 43016

vparisi@igsenergy.com

mswhite@igsenergy.com

**Counsel for Interstate Gas Supply, Inc.**

Dane Stinson

Bailey Cavalieri LLC

10 West Broad Street, Suite 2100

Columbus, OH 43215

dane.stinson@baileycavalieri.com

**Counsel for The Ohio Association of School Business Officials, The Ohio School Boards Association, The Ohio Schools Council and The Buckeye Association of School Administrators**

Chad A. Endsley

Chief Legal Counsel

Ohio Farm Bureau Federation

280 North High Street, P.O. Box 182383

Columbus, OH 43218-2383

cendsley@ofbf.org

**Counsel for the Ohio Farm Bureau Federation**

Mark S. Yurick

Zachary D. Kravitz

Taft Stettinius & Hollister LLP

65 East State Street, Suite 1000

Columbus, OH 43215

myurick@taftlaw.com

zkravitz@taftlaw.com

**Counsel for The Kroger Co.**

Jeanne W. Kingery

Associate General Counsel

Amy B. Spiller

Deputy General Counsel

139 E. Fourth Street, 1303-Main

P.O. Box 961

Cincinnati, OH 45201-0960

Jeanne.Kingery@duke-energy.com

Amy.Spiller@duke-energy.com

**Counsel for Duke Energy Commercial Asset Management, Inc.**

Barth E. Royer

Bell & Royer Co., LPA

33 South Grant Avenue

Columbus, OH 43215-3927

BarthRoyer@aol.com

Gary A. Jeffries

Assistant General Counsel

Dominion Resources Services, Inc.

501 Martindale Street, Suite 400

Pittsburgh, PA 15212-5817

Gary.A.Jeffries@dom.com

**Counsel for Dominion Retail, Inc.**

Roger P. Sugarman

Kegler, Brown, Hill & Ritter

65 East State Street, Suite 1800

Columbus, OH 43215

rsugarman@keglerbrown.com

**Counsel for the National Federation of Independent Business**

C. Todd Jones

Gregory H. Dunn

Christopher L. Miller

Asim Z. Haque

Ice Miller LLP

250 West Street

Columbus, OH 43215

Gregory.dunn@icemiller.com

christopher.miller@icemiller.com

asim.haque@icemiller.com

**Counsel for the Association of Independent Colleges and Universities of Ohio and the City of Grove City, Ohio**

David C. Rinebolt

Colleen L. Mooney

Ohio Partners for Affordable Energy

231 West Lima Street

PO Box 1793

Findlay, OH 45839-1793

drinebolt@ohiopartners.org

cmooney2@columbus.rr.com

**Counsel for Ohio Partners for Affordable Energy**

Steven Beeler

Werner Margard

John Jones

Public Utilities Section

Ohio Attorney General's Office

180 East Broad Street, 6th Floor

Columbus, OH 43215

werner.margard@puc.state.oh.us

steven.beeler@puc.state.oh.us

john.jones@puc.state.oh.us

**Counsel for the Staff of the Public Utilities Commission of Ohio**

Greta See

Sarah Parrot

Attorney Examiners

Public Utilities Commission of Ohio

180 East Broad Street, 12th Floor

Columbus, OH 43215

Greta.See@puc.state.oh.us

Sarah.Parrot@puc.state.oh.us

**Attorney Examiners**

1. FirstEnergy Solutions Corp.’s Application for Rehearing of the July 2, 2012 Opinion and Order at 1 (August 1, 2012). [↑](#footnote-ref-1)
2. (“OP”) (now merged with Columbus Southern Power Company or “CSP” as “AEP‑Ohio”). [↑](#footnote-ref-2)
3. Principles of Utility Corporate Finance, Leonardo R. Giacchino, Ph.D. & Jonathan A. Lesser, Ph.D., Public Utility Report, Inc. [↑](#footnote-ref-3)
4. FirstEnergy Solutions Corp.’s Application for Rehearing of the July 2, 2012 Opinion and Order at 1 (August 1, 2012). [↑](#footnote-ref-4)