**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of )

Columbus Southern Power Company and )

Ohio Power Company for Authority to ) Case No. 11-346-EL-SSO

Establish a Standard Service Offer ) Case No. 11-348-EL-SSO

Pursuant to §4928.143, Ohio Rev. Code, )

in the Form of an Electric Security Plan. )

In the Matter of the Application of )

Columbus Southern Power Company and ) Case No. 11-349-EL-AAM

Ohio Power Company for Approval of ) Case No. 11-350-EL-AAM

Certain Accounting Authority. )

**INDUSTRIAL ENERGY USERS-OHIO’S**

**MOTION TO COMPEL DISCOVERY RESPONSES AND**

**MEMORANDUM IN SUPPORT**

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**MOTION TO COMPEL DISCOVERY RESPONSES**

On March 23, 2011, Industrial Energy Users-Ohio (“IEU-Ohio”) was granted intervention in the above-captioned matter. On April 27, 2012, IEU-Ohio served its Revised Second Set of Interrogatories and Requests for Production of Documents (“IEU-Ohio’s Second Set of Discovery”) (Attachment A) upon Ohio Power Company (“OP”). On May 9, 2012, OP responded to IEU-Ohio’s Second Set of Discovery with objections and responses. Particularly, in response to IEU-Ohio’s Interrogatory 2-001,[[1]](#footnote-1) OP objected to the question and did not provide an answer beyond its objection (Attachment B).

On May 9, 2012, following the receipt of OP’s objections to IEU-Ohio’s Second Set of Discovery, IEU-Ohio contacted OP to determine if it might be possible to resolve what has become a discovery dispute. Specifically, IEU-Ohio explained the reasons it felt that OP was required to provide discovery regarding IEU-Ohio Interrogatory 2‑001. Given the extremely limited timeframe to conduct discovery and the limited time before the hearing commences, IEU-Ohio requested OP provide discovery in response to IEU‑Ohio Interrogatory 2-001 by close-of-business on Thursday, May 10, 2012. IEU‑Ohio was unable to resolve the discovery dispute and was not provided the discovery requested in IEU-Ohio Interrogatory 2-001 by close-of-business on May 10, 2012.

Additionally, on April 20, 2012, the Ohio Consumers’ Counsel (“OCC”) served OP with OCC’s Fifth Set of Interrogatories and Requests for Production of Documents (“OCC’s Fifth Set of Discovery”). In IEU-Ohio’s First Set of Discovery, Request for Production 1-4, IEU-Ohio requested OP to provide to IEU-Ohio all discovery responses served upon other parties (Attachment C). OCC’s Fifth Set of Discovery included OCC’s Interrogatory 92 (Attachment D), which requested OP provide all documents related to OCC Interrogatory 1-12 (Attachment E) and “include the results of the tests which indicated that the undiscounted cash flows exceeded the carrying value and impairment was not applicable.” On May 1, 2012, OP responded to OCC’s Interrogatory-92 as follows:

The various documents supporting the OPCo generation asset impairment testing in accordance with ASC 360 referred to in OCC INT 1-12 [Attachment F] are provided in Attachments 1-13. The confidential level of the documents are currently being reviewed and Counsel for OCC has been notified. In the interest of not delaying the other responses the documents will be provided once labeled and *parties wanting copies, besides OCC, should contact the Company and request the documents.* (Attachment G) (emphasis added).

Notably, OP did not object to the discovery request. In an attempt to resolve the discovery dispute, IEU-Ohio contacted OP on May 2, 2012 and requested to see the confidential documents. IEU-Ohio was told that the documents could only be viewed at OP’s offices. On May 3, 2012, counsel and technical staff for IEU-Ohio went to OP’s offices to view the confidential documents. During that visit, IEU-Ohio requested copies of certain confidential documents. Counsel and technical staff for IEU-Ohio returned to OP’s offices on May 10, 2012 to view additional data not available on its first trip. IEU‑Ohio was told that it could not obtain copies of any of the confidential material, as OP would not let the material leave the building.

IEU-Ohio has contacted OP by email several times, in addition to its two trips to OP’s offices, to try and obtain the confidential documents OP is required to produce under Rule 4901-1-16, Ohio Administrative Code (“O.A.C.”). Given the brief time remaining before the hearing in these proceedings begins, IEU-Ohio indicated to OP that it would be forced to file a motion to compel the confidential documents if it did not receive them by 3:00 p.m. on May 11, 2012. That deadline has since passed;[[2]](#footnote-2) however

Therefore, pursuant to Rule 4901-1-23, O.A.C., as supported by the attached Memorandum in Support and affidavit of Joseph E. Oliker, IEU-Ohio respectfully moves the Commission to order OP to provide a substantive response to IEU-Ohio Interrogatory 2-001 and Request for Production 2-001, order OP to provide copies of the confidential discovery related to OCC Interrogatory 92 (which is contained in an electronic excel file) and the underlying assumptions related to that file, and to provide such other relief as may be appropriate to prevent OP from abusing the discovery process in a proceeding that has a very tight procedural schedule.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

**I. Statement of Facts and Procedural Background**

On January 23, 2011, OP initiated this proceeding seeking to establish an electric security plan (“ESP”) for the next several years. Ultimately, the original application evolved into a new ESP as part of a Stipulation and Recommendation (“Stipulation”) filed with the Commission on September 7, 2011. The Stipulation was ultimately rejected on February 23, 2012. The current version of OP’s ESP (“the Modified ESP”) was filed with the Commission on March 30, 2012.

As part of the Modified ESP, OP is requesting above-market compensation for the generation portion of its business. OP has requested that the above-market compensation take one of two forms. First, OP has requested it be compensated at two different tiers, the higher tier at $255/megawatt-day (“MW-day”), the lower tier at $146/MW-day.[[3]](#footnote-3) OP’s alternate proposal is to be compensated at $355/MW-day, and in return will offer a shopping credit to customers.[[4]](#footnote-4) OP claims that above-market capacity compensation is required so that it can avoid financial duress.[[5]](#footnote-5)

While OP did not file an application for corporate separation and to transfer generation in this proceeding, OP claims that corporate separation and the transfer of the Mitchell and Amos plants is an important part of its Modified ESP Application.[[6]](#footnote-6) Although IEU-Ohio does not believe OP’s capacity costs/compensation should be discussed in this proceeding because they are not relevant, are illegal and the Commission is not otherwise authorized to approve them, OP claims otherwise.

**II. DISCOVERY STANDARDS**

Rule 4901-1-16(B), O.A.C., contains the Commission’s rules regarding discovery. That Rule provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. … It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission.

Thus, the Commission’s rules do not allow a party to avoid discovery on grounds that the information sought is confidential.[[7]](#footnote-7) The Rule allows a party to conduct discovery through a request for production so long as the information is not privileged and “appears reasonably calculated to lead to the discovery of admissible evidence.”

Additionally, Rule 4901-1-20, O.A.C., provides that, subject to the scope of discovery in Rule 4901-1-16, O.A.C., a party may request another party to “produce for inspection, ***copying***, sampling, or testing any tangible things which are in the possession, control, or custody of the party upon whom the request is served.” (emphasis added).

**III. Arguments**

**A. IEU-Ohio Interrogatory 2-001: OP Has Failed to Provide Discovery in Response to the Interrogatory on Grounds of Relevance Even Though OP Itself Has Asserted that the Issue is Relevant.**

IEU-Ohio properly served interrogatories and requests for production of documents on OP. OP has not claimed otherwise. To the extent the Commission deems it relevant to entertain testimony and evidence regarding OP’s requested capacity compensation (the two-tiered rate or the formula-rate/shopping-credit model), IEU-Ohio must be allowed discovery to present its case to rebut OP’s claims. On May 4, 2012, IEU-Ohio moved to strike portions of the Modified ESP Application and OP’s supporting testimony on grounds that the capacity compensation issue was beyond an ESP proceeding and the Commission could not otherwise authorize the compensation.[[8]](#footnote-8)

On May 9, 2012, OP filed a memo contra to various motions to strike filed by intervening parties, including IEU-Ohio. Specifically, in response to IEU-Ohio’s request to strike all of OP’s testimony regarding OP’s capacity costs and OP’s request for additional capacity compensation, OP stated:

[a]s part of the ESP/MRO comparison, it is necessary to include in the competitive benchmark price (CBP), a component that estimates the cost of capacity. AEP Ohio’s position is that the amount that it charges CRES providers is the appropriate estimate of that cost component.

…

The correct price for capacity to include in the CBP is an issue in this proceeding, and AEP Ohio is entitled to advance its position on the matter. Similarly, the two-tiered capacity pricing proposal that AEP Ohio has included in its ESP provides a compelling basis for a very significant benefit of the ESP, compared to what an MRO would provide. IEU may not agree with AEP Ohio’s position, but that is not a basis for precluding AEP Ohio from presenting its case in the manner it has determined is accurate and appropriate.[[9]](#footnote-9)

On similar grounds, if the Commission determines the issue is relevant to this proceeding, as OP claims it is, IEU-Ohio must be able to “present[] its case in the manner it has determined is accurate and appropriate.”

IEU-Ohio’s Interrogatory 2-001 and Request for Production 2-001 seek information that is relevant to OP’s claim that it cannot recover its costs if it is compensated for capacity based on the RPM. Specifically, IEU-Ohio has requested OP provide its forecasts of the price of capacity that will result from future RPM auctions, and a list of which generating facilities OP forecasted to be bid into those RPM auctions.

To the extent the Commission determines OP’s requested above-market capacity charges are within the scope of the proceeding and are therefore relevant for OP to introduce testimony on the subject, then the price of capacity forecasted by OP over the short and long-term is relevant to this proceeding.  OP claims that capacity prices outside the ESP period are not relevant. First, OP’s objection is specifically designed to result in a CBP at the end of the ESP. Thus, OP’s forecast of capacity during the CBP period is relevant[[10]](#footnote-10) to this proceeding. Second, OP claims RPM prices over the short-term will cause financial duress to OP. OP has put its financial health at issue and therefore the long-term capacity prices are relevant to fully consider OP’s financial health.

Additionally, OP has stated that its corporate separation application, which includes the transfer of its generating assets, is “a foundation for a number of the provisions of the ESP.”[[11]](#footnote-11)  Any request to transfer generation requires a demonstration of the impact of the transfer on the current and future standard service offer (“SSO”) prices.[[12]](#footnote-12) The impact of not bidding versus bidding these units on the price of capacity is also relevant to impact of the transfer on the future SSO price.  It is further relevant[[13]](#footnote-13) to the time frame within the ESP and outside of it because any transfer of generating assets must demonstrate the impact of the transfer on the future SSO. Capacity prices will obviously have an impact, because the application proposes to set OP’s future SSO through a CBP.

To the extent that OP claims its capacity costs are relevant to this proceeding and is allowed to introduce evidence regarding its capacity costs, IEU-Ohio has a right to conduct discovery on those matters. The Commission’s rules allow discovery on any non-privileged matter to the extent that the discovery could reasonably lead to admissible evidence. OP claims the cost of capacity is relevant to this proceeding and IEU-Ohio’s Interrogatory 2-001, and Request for Production 2-001 request information about that cost of capacity. Thus, IEU-Ohio’s request is “reasonably calculated to lead to the discovery of admissible evidence.”[[14]](#footnote-14)

**B. OCC Interrogatory 92: OP Has Failed to Produce Discovery of Confidential Documents and Has Only Allowed In-Person Viewing of the Documents at its Offices in Violation of Commission Rule 4901‑1‑16, O.A.C.**

IEU-Ohio has unsuccessfully tried to obtain all of the documents requested by OCC in OCC Interrogatory 92. Specifically, OCC requested:

Please provide a copy of all documents pertaining to the testing of the OPCO generation assets for recoverability in accordance with Accounting Standard Codification 360, as referred to in response to OCC INT 1-012. Please include the results of the tests which indicated that the undiscounted cash flows exceeded the carrying value and impairment was not applicable. (Attachment D)

OCC Interrogatory 1-12 requested:

Has the company written down the value (i.e. taken an accounting lose due to an impairment of value) of any of the assets which the company plans to transfer to its new generating affiliate?

a. If your answer is negative, please explain why an accounting loss for impairment was not recognized in light of the company’s recovery of stranded cost? (Attachment E).[[15]](#footnote-15)

OP did not object to the information sought in OCC Interrogatory 92 as not being relevant, or for any other ground. OP merely claims the information contains confidential trade secrets. On May 1, 2012, OP responded to OCC as follows:

The various documents supporting the OPCo generation asset impairment testing in accordance with ASC 360 referred to in OCC INT 1-12 are provided in Attachments 1 – 13. The confidential level of the documents are currently being reviewed and Counsel for OCC has been notified. In the interest of not delaying the other responses the documents will be provided once labeled and parties wanting copies, besides OCC, should contact the Company and request the documents. (Attachment G).

The information requested by OCC is relevant to OP’s financial duress claim as well as its claim that it needs a cost-based/formula-rate capacity charge in order to recover the book value of its generating assets. As discussed by OP in the non-confidential documents it produced in response to OCC Interrogatory 92, OP has conducted a test to determine if it can recover the book value of its generation assets.[[16]](#footnote-16) In the non-confidential documents provided in response to OCC Interrogatory 92, OP concluded:

[s]ince the Ohio companies generation assets are not cost-based rate regulated and do not fall under ASC 980 Regulated Operations, a recoverability test for these generating assets should be performed to determine if gross cash flows from the asset group are sufficient to recover the book value of the asset group as required under ASC 360. A discounted cash flow impairment test is necessary only if the gross cash flows fail to recover the book cost of the asset.

…

As shown below, the estimated generation function cash flows are sufficient to recover the companies’ generating assets. No further action is required. (Attachment H).

As discussed above, IEU-Ohio’s Request for Production of Documents 1-4 (Attachment C) requested OP to provide IEU-Ohio will all discovery responses served on another party to the proceeding. Since OP did not provide a complete production of its discovery response, claiming confidentiality, IEU-Ohio contacted OP to resolve the matter. Although OP indicated in its response to OCC Interrogatory 92 that it was in the process of reviewing additional documents to determine if they were confidential, OP did not indicate that it would not be providing further documents.

After contacting OP, IEU-Ohio was told that the confidential documents would be available for inspection, but that OP did not intend to produce the documents. IEU‑Ohio inspected the documents at OP’s offices on Thursday, May 3, 2012. During its inspection, IEU-Ohio notified counsel for OP that IEU-Ohio did not believe the documents provided were a complete response to OCC Interrogatory 92. IEU-Ohio also marked certain documents and requested OP make and provide copies to IEU‑Ohio of the requested documents, as well as make available the documents OP had failed to provide for inspection.

On May 10, 2012, IEU-Ohio again returned to OP’s offices to inspect the now more complete set of responses, but was limited to viewing the new documents in electronic form. IEU-Ohio requested OP to provide copies of the new documents that it viewed electronically (an excel file) and the assumptions associated with the excel file. OP indicated that it did not intend to provide hard copies of the excel file or an electronic copy. To date, OP has not produced copies of the confidential documents and refuses to provide the information based on its confidential nature. Thus, OP has not complied with IEU-Ohio Request for Production 1-4 by failing to produce to IEU-Ohio the documents contained in OCC Interrogatory 92.

**C. OP Has Confirmed That It Will Not Respond to IEU-Ohio's Discovery Requests Unless Ordered to Do So By the Commission**

The attached Affidavit demonstrates that IEU-Ohio has communicated with OP about the need for timely discovery, that OP objects to IEU-Ohio’s specific discovery requests identified herein, and that OP’s counsel has represented that OP will not respond to IEU-Ohio's outstanding discovery requests absent a Commission order to do so. As required by Rule 4901-1-23(C), O.A.C., IEU-Ohio has exhausted all other reasonable means of resolving any differences with the party from whom discovery is sought.

**IV. CONCLUSION**

For the reasons explained herein, IEU-Ohio respectfully urges the Commission to enter an order compelling OP to respond expeditiously to all outstanding discovery requests.

Respectfully Submitted,

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#### Certificate of Service

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio’s* *Motion to Compel Discovery Responses and Memorandum in Support* was served upon the following parties of record this 11th day of May 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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1. IEU-Ohio’s Request for Production 2-001 requested OP “Provide any documents identified in response to Interrogatory 2- 1(a) and (b).” OP responded by referencing its response to IEU-Ohio Interrogatory 2-1. [↑](#footnote-ref-1)
2. OCC Interrogatory 92 was served on April 20, 2012. OP’s response was due on April 30, 2012. As IEU-Ohio was in the process of filing this motion to compel with the Commission, counsel for OP indicated it may hand delivered some files associated with confidential documents that related to OCC Interrogatory 92 by the end on the day, Friday May 11, 2012. IEU-Ohio indicated to OP’s counsel that it would withdraw this portion of IEU-Ohio’s Motion to Compel on Monday May 14, 2012 if the files provided comply with OCC’s Interrogatory 92. As of 4:45 p.m. on Friday May 11, 2012 IEU-Ohio has still not received any of these documents. [↑](#footnote-ref-2)
3. Direct Testimony of William Allen at 6-9 (March 30, 2012). [↑](#footnote-ref-3)
4. *Id.* at 15-17. [↑](#footnote-ref-4)
5. *See* Direct Testimony of Robert Powers at 5, 10 (March 30, 2012) [↑](#footnote-ref-5)
6. Industrial Energy Users-Ohio’s Motion to Strike Ohio Power Company’s Application and Supporting Testimony and Memorandum in Support at 9 (May 4, 2012). [↑](#footnote-ref-6)
7. IEU-Ohio entered into a confidentiality agreement with OP in this proceeding on February 9, 2011. [↑](#footnote-ref-7)
8. Industrial Energy Users-Ohio’s Motion to Strike Ohio Power Company’s Application and Supporting Testimony and Memorandum in Support at 6-9 (May 4, 2012). [↑](#footnote-ref-8)
9. Ohio Power Company’s Memorandum Contra FirstEnergy Solutions Corp.’s, the Office of the Ohio Consumers’ Counsel’s, Duke Energy Retail Sales and Duke Energy Commercial Asset Management’s, and Industrial Energy Users-Ohio’s May 4, 2012 Motions to Strike at 7-8 (May 9, 2012). [↑](#footnote-ref-9)
10. Subject to the Commission’s determination that OP’s capacity charges are relevant to this proceeding. [↑](#footnote-ref-10)
11. *Id.* at 9. [↑](#footnote-ref-11)
12. Rule 4901:1-37-09, O.A.C. [↑](#footnote-ref-12)
13. Subject to the Commission’s determination that OP’s corporate separation plan and request to transfer generation are relevant to this proceeding. Again, IEU-Ohio moved to strike these portions of OP’s testimony; however, OP has claimed they are relevant to this proceeding. Ohio Power Company’s Memorandum Contra FirstEnergy Solutions Corp.’s, the Office of the Ohio Consumers’ Counsel’s, Duke Energy Retail Sales and Duke Energy Commercial Asset Management’s, and Industrial Energy Users-Ohio’s May 4, 2012 Motions to Strike at 9 (May 9, 2012). [↑](#footnote-ref-13)
14. Subject to the Commission’s determination that OP’s capacity charges are relevant to this proceeding. [↑](#footnote-ref-14)
15. OP’s response to OCC Interrogatory 1-012 is provided in Attachment F. [↑](#footnote-ref-15)
16. An “impairment test” tests “for recoverability whenever events or changes in circumstances indicate that its carrying amount may not be recoverable. The following are examples of such events or changes in circumstances.” OP Discovery Attachment to OCC INT-92, *1 Cross-State Air Pollution Rule Recoverability Test* (included as Attachment H). [↑](#footnote-ref-16)