**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 CORRECTED**

**MOTION TO COMPEL DISCOVERY RESPONSES AND**

**MEMORANDUM IN SUPPORT**

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Certain Accounting Authority. )

**CORRECTED[[1]](#footnote-1) MOTION TO COMPEL DISCOVERY RESPONSES**

On March 23, 2011, Industrial Energy Users-Ohio (“IEU-Ohio”) was granted intervention in the above-captioned matters. On April 26, 2012, IEU-Ohio served its First Set of Interrogatories (“IEU-Ohio’s First Set of Discovery”) (Attachment A) upon AEP Retail Energy Partners LLC (“AEP Retail”). On May 14, 2012, seven days after AEP Retail’s responses were due, AEP Retail responded to IEU-Ohio’s First Set of Discovery with general and specific objections and responses (Attachment B). Particularly, in response to IEU-Ohio’s Interrogatory 1, AEP Retail objected to the question on grounds of relevance and answered half of IEU-Ohio’s Interrogatory (Attachment B). AEP Retail referenced its response to IEU-Ohio Interrogatory 1 for its remaining 3 responses.

IEU-Ohio followed up with AEP Retail by e-mail explaining that AEP Retail had only answered part of the discovery request, which prompted AEP Retail to supplement its responses on May 15, 2012 (Attachment C). AEP Retail’s supplemental response, however, is still incomplete. IEU-Ohio notified AEP Retail on May 15, 2012 that it would file a motion to compel if it had not been provided a full discovery response by noon on May 16, 2012. IEU-Ohio has not yet received a full discovery response to IEU-Ohio’s First Set of Discovery and therefore submits this motion to compel.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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

On January 23, 2011, Ohio Power Company (“OP”, also referred to as “AEP Ohio”) 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.[[2]](#footnote-2) OP’s alternate proposal is to be compensated at $355/MW-day, and in return will offer a shopping credit to customers.[[3]](#footnote-3) OP claims that above-market capacity compensation is required so that it can avoid financial duress.[[4]](#footnote-4)

**II. DISCOVERY STANDARDS**

Rule 4901-1-16(B), Ohio Administrative Code (“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.[[5]](#footnote-5) 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.”

**III. Arguments**

1. **IEU-Ohio First Set of Discovery is Reasonably Calculated to Lead to the Discovery of Admissible Evidence**

As briefly discussed above, OP is seeking a two-tiered above-market capacity charge in this proceeding. Revenue that would flow to OP from the above-market two-tiered capacity charges will inevitably make their way to American Electric Power Co., Inc. (“AEP”), OP’s parent company and sole shareholder. Another of AEP’s subsidiaries, AEP Retail, actively competes as a competitive retail electric service (“CRES”) provider throughout Ohio.

AEP Retail operates inside and outside AEP Ohio’s service territory. Competing as a CRES provider, AEP Retail must supply generation service to the customers it serves and must obtain that generation somewhere. IEU-Ohio’s First Set of Discovery seeks to uncover the sources of AEP Retail’s generation supply (either self-owned or through contractual rights). AEP Retail’s contractual rights to capacity are relevant inasmuch as OP has made the price and supply of capacity one of the core issues of this proceeding. AEP Retail is a competitor inside and outside of OP’s service territory. Accordingly, AEP Retail’s contractual rights to generating capacity are relevant or may lead to the discovery of relevant information in this proceeding.

AEP Retail’s initial response, which was seven days late, simply stated it did not own any generation. The next day, AEP Retail supplemented its response to answer the portion of IEU-Ohio Interrogatory 1 seeking information on contractual rights, and stated that it “does not own a generation facility or have a tolling agreement related to a generation facility.” AEP Retail has still not responded to the interrogatory, inasmuch as a tolling agreement is only one of many contractual rights AEP Retail might have.

1. **AEP Retail Asserts Several General Objections That Are Not Applicable**

AEP Retail objected to IEU-Ohio’s First Set of Discovery based on the specific relevance objection as well as nine general objections.[[6]](#footnote-6) The general objections are contained in Attachments B & C and do not apply to IEU-Ohio’s First Set of Discovery. IEU-Ohio *offered to enter*[[7]](#footnote-7) into a confidentiality agreement with AEP Retail; does not seek legal conclusions, and has not asked AEP Retail to produce any of its contracts, therefore limiting any burden on AEP Retail. AEP Retail’s remaining general objections are in fact not objections, *e.g.* reserving the right to challenge relevance at the hearing or reserving the right to supplement its responses.

**IV. CONCLUSION**

As discussed above, AEP Retail has not asserted any appropriate grounds for not responding to IEU-Ohio’s First Set of Discovery. IEU-Ohio has been more than accommodating; IEU-Ohio notified AEP Retail by e-mail that it had forgotten to timely respond to discovery, and IEU-Ohio twice notified AEP Retail that it had provided less than complete discovery responses. Because IEU-Ohio’s discovery is reasonably calculated to lead to the discovery of admissible evidence, because IEU-Ohio has a confidentiality agreement with AEP Retail, and because IEU-Ohio has tried to reach a reasonable solution outside of filing this motion, the Commission should grant IEU‑Ohio’s motion to compel AEP Retail and order AEP Retail to respond to all outstanding discovery requests.

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#### Certificate of Service

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio’s* *Corrected* *Motion to Compel Discovery Responses and Memorandum in Support* was served upon the following parties of record this 18th day of May 2012, *via* electronic transmission.

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1. IEU-Ohio’s Motion to Compel contained an error on page 6. The error stated that IEU-Ohio has entered into a confidentiality agreement with AEP Retail. The sentence should have read IEU-Ohio “offered to enter” into a confidentiality agreement. The Affidavit of Joseph E. Oliker filed with the May 17 Motion to Compel correctly stated that IEU-Ohio had offered to enter into a confidentiality agreement. This revised motion corrects this error. In all other aspects the motion remains unchanged. [↑](#footnote-ref-1)
2. Direct Testimony of William Allen at 6-9 (March 30, 2012). [↑](#footnote-ref-2)
3. *Id.* at 15-17. [↑](#footnote-ref-3)
4. *See* Direct Testimony of Robert Powers at 5, 10 (March 30, 2012) [↑](#footnote-ref-4)
5. IEU-Ohio entered into a confidentiality agreement with OP in this proceeding on February 9, 2011. [↑](#footnote-ref-5)
6. In fact, AEP Retail stated, “AEP Retail Energy Partners LLC objects to the Interrogatory because it seeks information that is [not] relevant to the instant matter…” [sic] (Attachment B). [↑](#footnote-ref-6)
7. This emphasized language is IEU-Ohio’s only change to the Motion to Compel filed May 17, 2012 and replaces the incorrect language that read “has entered”. [↑](#footnote-ref-7)