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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company For Approval of its Electric Security Plan Including Related Accounting Authority; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets	)	Case No. 08-917-EL-SSO
and	)	
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan Including Related Accounting Authority; and an Amendment to its Corporate Separation Plan	)	Case No. 08-918-EL-SSO

INTEGRYS ENERGY SERVICES, INC.'S BRIEF OPPOSING THE COMPANIES' PROPOSAL TO BAN PJM DEMAND RESPONSE PARTICIPATION

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TABLE OF CONTENTS

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I. INTRODUCTION

This proceeding addresses the statutory requirement that every electric distribution utility following the passage of Amended Substitute Senate Bill No. 221 ("SB 221") file an Electric Security Plan ("ESP") that provides for a bundled standard service offer and meets both the conservation requirements of Section 4928.66, Revised Code and the renewable energy portfolio standards of Section 4928.61, Revised Code. The ESP application offer by the Columbus Southern Power Company ("CSP") and the Ohio Power Company ("OPC"), collectively the "Companies" or "AEP", in the matter at bar seeks to fulfill these requirements.

However, the Companies have gone beyond what is required, or even what is

permitted by SB 221, by including as part of their Application the request that the Commission prohibit participation of all Ohio businesses receiving standard offer service in their service area from participation in all PJM Interconnection ("PJM") demand response programs beginning January 1, 2009. Other than the unwanted impact of competition on AEP's shareholder profits, the Companies have no reasonable basis for the broad request of such a ban that would not only put Ohio business at a significant competitive disadvantage to their competitors in other PJM states, but would also stop the flow of millions of dollars from out-of-state sources to Ohio businesses during difficult economic conditions. As further discussed in Section III-B(3) below, *considering that Ohio customers have enrolled over 580 MW into the PJM ILR program, this correlates to an average of $27,681,000.00 injected annually into the Ohio economy by just one PJM demand response program.* This is a source of revenue that Ohio businesses need to compete and potentially survive during the challenges arising from the steeply deteriorated economic conditions that Ohio businesses are facing.

This is not the time to deny Ohio businesses a viable source of actual and significant revenues flowing in virtually entirely from out-of-state sources. Stated differently, if the prohibition requested by the Companies is approved, then millions of dollars funded almost exclusively by non-Ohio load serving entities and paid by PJM to Ohio businesses will be lost to Ohio businesses. Simply put, the Companies seek to ban participation by their customers in the PJM programs because the PJM programs are more beneficial to the retail customer than participation in the Companies' proposed demand response programs. Rather than compete by offering a better program, the Companies seek to have the Commission compel customers to participate in their inferior

programs. Further, the Companies then plan on selling the capacity and energy freed up by its programs into the PJM markets without sharing the revenues with their retail Ohio customers, for the benefit of the Companies shareholders.

As detailed below, the Companies have admittedly had little success currently in attracting customers to their demand response programs including interruptible service. Integrys believes that the Companies' programs, like the PJM demand response programs, serve a useful goal. But unlike the Companies, Integrys does not ask that the Companies' programs be banned. The Commission should instead endorse and sponsor all programs (retail and wholesale) that reduce energy use, depress peak demands and assist innovation and technological advancement in the field of energy conservation.[1]

II. BACKGROUND

As of today, retail end-users served by the Companies can participate in a variety of demand response programs offered by PJM Interconnection ("PJM").[2] The programs can be categorized as either: (a) emergency load response programs (reliability based); (b) economic load response programs (price based); and (c) ancillary services, consisting of: (i) regulation, (ii) synchronous reserves; and (iii) day-ahead scheduling reserves.[3] The Federal Energy Regulatory Commission ("FERC") has recognized the important benefits of demand response programs, like the PJM programs, by stating that "[d]emand response can provide competitive pressure to reduce wholesale power prices; increases awareness of energy usage; provides for more efficient operation of markets; mitigates

[1] *See In re Duke Energy Ohio,* Case No. 08-920-EL-SSO, et al., Opinion and Order, December 17, 2008, p. 37.
[2] *See generally,* Integrys Ex. 2, Direct Testimony of Samuel R. Wolfe.
[3] *Id.* at p. 4.

market power; [and] enhances reliability . [.][4] Similarly, SB 221 also recognizes the important benefits and need for demand response programs by setting forth policies to achieve adequate and effective demand response, energy efficiency, and conservation."[5]

The PJM emergency load response and economic load response programs have many benefits. The PJM emergency load response programs are used to provide cost-effective capacity resources to help avoid system outages in cases of severe grid stress.[6] For the 2008 PJM planning year (June 1, 2008 through May 31, 2009), over 4,400 MW of load was registered under the PJM emergency load response programs.[7] Just as valuable, the PJM economic load response program is used to exert downward pressures on electricity prices.[8] For the 2008 PJM planning year, 3,263.2 MW of load was registered under the economic load response program.[9] Between the two types of programs, over 7,600 MW of load are available for demand response - of which 676.6 MW of load - are offered by Ohio-based customers.[10]

In addition to the benefits to the grid and market pricing, Ohio customers participating in PJM demand response programs receive significant economic benefits by their participation in the PJM programs. For example, through one type of capacity-based emergency load response program, the Interruptible Load for Reliability program ("ILR"), eighty-seven (87) Ohio located participants receive monthly payments based on the ILR clearing price for capacity multiplied by the load they have committed to PJM.[11]

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[4] 125 FERC ¶61,071 at ¶16, 73 FR 64167, Final Rule on Wholesale Competition in Regions with Organized Electric Markets.
[5] Section 4928.66, Revised Code.
[6] *See* Integrys Ex. 2, Wolfe Dir. Test. at p. 5.
[7] *Id.* at 5, 7.
[8] *Id.* at 5.
[9] *Id.*
[10] *Id.* at 5, 7, 18.
[11] *Id.* at 15.

For example, a customer (including Ohio retail customers) offering just one (1) MW of capacity into the ILR program received capacity payments of $40,851 in 2008-09, $37,245 in 2009-10 and $63,616 in 2010-11.[12]

These payments issue regardless of whether PJM calls for a curtailment under the ILR program - and significantly, no PJM curtailments have occurred in the Companies' PJM zone since the Companies joined PJM.[13] Further payments under these programs are funded by Load Serving Entities ("LSE") who procure power through the PJM reliability pricing model ("RPM") auction. The Companies do not procure their power through the RPM auction, and therefore, this means that the payments come virtually entirely from other Load Serving Entities ("LSEs") from outside the state of Ohio.[14] Therefore, as noted above, Ohio retail customers participating in PJM programs significantly benefit from funding provided by out-of-state entities. Indeed, for this reason alone, the Commission should not grant the Companies' request to bar Ohio customers from participating in the PJM demand response programs.

Although there is no dispute that the PJM programs provide significant economic benefits to Ohio customers, the Companies are proposing to ban their Ohio customers from participating in the PJM demand response programs. Specifically, on July 31, 2008, the Companies filed new tariff language as part of this proceeding that if approved would ban Ohio customers from participating in wholesale demand response programs (i.e., the PJM demand response programs). The Companies did not make this request in the main body of their ESP Application, did not provide any studies supporting this ban, and rely solely on the opinion of the American Electric Power Service Corporation's Manager for

[12] *Id.* at 9.
[13] *Id.* at 20.
[14] *Id.* at 17 *and see* Tr. IX, 52-53 (Companies' witness Roush testimony on cross).

Regulated Pricing and Analysis (David M. Roush) that it is "inappropriate" in his unsupported view for the customers to participate in PJM demand response programs.[15]

The proposed tariff revisions were attached to Mr. Roush's testimony and are identical for both CSP and OPC.[16] The proposed revision for Columbus Southern Power is as follows (underlined):

> Resale of energy will be permitted only by legitimate electric public utilities subject to the jurisdiction of the Public Utilities Commission of Ohio and only by written consent of the Company. In addition, resale of energy will be permitted for electric service and related billing as they apply to the resale or redistribution of electrical service from a landlord to a tenant where the landlord is not operating as a public utility, and the landlord owns the property upon which such resale or redistribution takes place. <u>This prohibition precludes customer participation, either directly or indirectly through a third party, in a wholesale demand response program offered by an RTO or other entity</u>.

If approved, the Companies' proposed tariff language would prohibit all of their Ohio customers from participating in PJM demand response programs.

As an alternative to the PJM programs, Mr. Roush offers the customers the opportunity to participate in the Companies' three interruptible service offerings. These programs exist today and are (1) an interruptible service schedule (Schedule IRP-D), (2) an emergency curtailable service rider (ECS Rider) and (3) a price curtailable service rider (PCS Rider). However, these are inferior programs that would not result in any adequate demand response being achieved; and indeed, as readily admitted by the Companies' participation in all three of these offerings has been "meager." [17]

The Companies' admission that participation in these offerings has been meager is an understatement. In fact, as Mr. Roush testified, only six OPC customers and only

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[15] Companies Ex. 1, Roush Dir. Test. at p. 7.
[16] Exhibits DMR-9 (p. 9 of 285) and DMR-10 (p. 21 of 295), Companies Ex. 1, Roush Dir. Test.
[17] Companies Ex. 1, Roush Dir. Test. at p. 5 *and see* Tr. IX, 35-37.

one CSP customer currently receive service under Schedule IRP-D.[18] Likewise, only one OPC customer currently participates in the PCS rider and no CSP customers participate in the PCS rider.[19] As to the ESC Rider, not one OPC or CSP customer has participated in that rider for years.[20] Clearly, reliance on the Companies' demand response offerings would not achieve the demand response policies required by SB 221.[21]

Although participation in its programs is low and the economic incentives relatively unattractive, the Companies have not hesitated to readily interrupt customers. For example, in 2007, the Companies issued curtailments to the seven customers taking service under Schedule IRP-D, totaling 246 hours for each of the seven customers.[22] This is significant considering that PJM has not curtailed any customers in AEP's zone since AEP joined PJM in 2004.[23] But what provides a significant insight into the Companies' state of mind and that should be noted by the Commission as it considers this issue is that the Companies can curtail under Schedule IRP-D and then proceed to make an off-system sale of the curtailed energy for the benefit of its shareholders (not customers).[24]

The Companies propose some modifications to their interruptible service offerings but have not made any projections as to whether participation will increase as a result. The Companies propose expanding the aggregate capacity enrolled in the Schedule IRP-D for OPC from 256 MW to 450 MW, but as admitted by Mr. Roush, the Companies have not made any forecasts as to how many new customers, in any, will take

[18] Tr. IX, 35.
[19] *Id.* at 36.
[20] *Id.* at 37.
[21] Section 4928.66, Revised Code.
[22] Integrys Ex. 3.
[23] *See* Integrys Ex. 2, Wolfe Dir. Test. at p. 20 *and see* Tr. III, 56.
[24] Tr. IX, 39-40.

service under Schedule IRP-D.[25] Mr. Roush claims the Companies propose "significant modifications" to the PCS and ECS riders. But yet, under Mr. Roush's proposal, customers participating in the ECS rider would not know the payment for curtailment up to at least 30 minutes before curtailment.[26] Moreover, that price could be lower than the price currently set under the ECS rider.[27]

The PCS rider also contains disincentives to participate. For example, under that rider if a customer is unable to curtail, the customer will not only pay for the energy used at the firm service tariff rate – but also must pay a penalty equal to the price of the energy if the customer would have curtailed.[28] And, as Mr. Roush noted in his cross-examination, a customer unable to curtail under this rider could actually pay more in penalties than any discounts received.[29]

Clearly, the Companies' programs are far too unattractive to customers, explaining the very low participation by customers, and, therefore, would not achieve the extent of demand response participation necessary to achieve the policy goals of SB 221.[30]

Hence, the question now facing the Commission is whether Mr. Roush's opinion that customers should not participate in PJM demand response programs has more merit than SB 221's policy requirements and FERC's recognition of the benefits associated with adequate demand response, the thousands of megawatts available for demand response in

[25] Tr. IX, 35.
[26] Tr. IX, 41-2.
[27] *Id.*, 42-3.
[28] Id., 46.
[29] *Id.*
[30] Section 4928.66, Revised Code.

PJM and the millions of dollars paid to Ohio customers under the PJM programs. The Commission should answer that question with a resounding no.

III. ARGUMENT

A. The Commission Lacks Jurisdiction Over The Companies' Proposal To Ban Private Entities From Participating In PJM Demand Response Programs.

The Commission can quickly resolve the Companies' proposed ban on PJM demand response participation by recognizing that it requests the Commission to act *ultra vires*. The Companies asks the Commission to bar individual Ohio businesses from participating in a wholesale electric program authorized by the FERC. The FERC clearly occupies this field, in which case federal preemption would prevent any state from interfering with the Regional Transmission Organization program.[31] The most recent pronouncement by the FERC allows states certain limited latitude with regard to demand response participation. On October 17, 2008, the FERC issued a final rule on wholesale competition in regions with organized electric markets that amended 18 C.F.R. § 35.28(g).[32] In that final rule, the FERC adopted the following requirement with the limitation noted in the underlined portion that:

> Each Commission-approved independent system operator and regional transmission organization must permit a qualified aggregator of retail customers to bid demand response on behalf of retail customers directly into the Commission-approved independent system operator's or regional transmission organization's organized markets, unless the laws and regulations of the relevant electric retail regulatory authority expressly do not permit a retail customer to participate.

Significant to this proceeding is that the FERC final rule expressly refers to the "laws and regulations" of the regulatory authority. Accordingly, under 18 C.F.R. § 35.28(g) as

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[31] *See e.g.* Docket No. ER03-262-010, *et al.*, Opinion on Initial Decision and Order on Rehearing (June 17, 2004), 107 FERC ¶ 61,271 (FERC finding Kentucky law prohibiting AEP participation in PJM preempted).
[32] 125 FERC ¶61,071 at ¶16, 73 FR 64167, Final Rule on Wholesale Competition in Regions with Organized Electric Markets.

adopted, this Commission can ban retail customer participation in PJM demand response programs only if it has the authority to do so based on an Ohio statute or rule. The requirement that such a prohibition be based on "laws" or "statutes" and "regulations" or "rules" demonstrate a requirement for a consistent and not unduly discriminatory statewide policy, after the state's General Assembly, or if the regulatory body has such authority, has fully considered the specific issue of participation in wholesale demand response programs by retail customers in that state.

In the context of the authority given up by FERC, no such statute exists today and the Commission has not issued regulations (nor could it in light of SB 221) that would allow the Commission to consider the Companies' request for approval of a "tariff" that would ban participation.

Furthermore, as discussed in this section, the General Assembly has not passed any law granting the Commission's jurisdictional authority over utility customers, only over utilities. Thus, while the Commission has the authority to order the utilities to integrate PJM program participation into the SB 221 mandated conservation and demand response programs for compliance purposes, the Commission has no authority to ban a non-utility from participating in an interstate response demand program. Yet, this is precisely what the Companies have requested the Commission do. Further, a tariff does not rise to the level of a "statute" or "rule". Hence, the Companies' request that this be done just in their service area and through a "tariff' application is in violation of the October 17 FERC Order which requires that any ban be based on statute or rule.

1. The General Assembly has not granted authority to the Commission to ban customers from participating in PJM demand response programs.

It is well established that this Commission may only exercise its authority pursuant to the jurisdiction granted to it by the General Assembly. *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097, 1101, 1996 -Ohio- 224 ("[t]he commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute"). Moreover, the Commission's jurisdiction is limited to the authority expressly granted to it under Title 49 of the Ohio Revised Code. *State ex rel. Columbus S. Power Co. v. Fais* (2008), 117 Ohio St.3d 340, 343, 2008 -Ohio- 849, ¶18. As noted by the Ohio Supreme Court,

> The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49.

State ex rel. Columbus S. Power Co. v. Fais, supra at ¶18 *quoting Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, 573 N.E.2d 655.

Nothing in Title 49 gives the Commission jurisdiction to regulate private entities participation in PJM demand response programs. In *State ex rel. Columbus S. Power Co. v. Fais*, issued in March 2008, the Court described the Commission's authority under Title 49 as follows:

> The Commission may fix, amend, alter or suspend rates charged by public utilities to their customers. R.C. 4909.15 and 4909.16. Every public utility in Ohio is required to file, for commission review and approval, tariff schedules that detail rates, charges and classifications for every service offered. R.C. 4905.30. And a utility must charge rates that are in accordance with tariffs approved by, and on file with, the commission. R.C. 4905.22.

Id. None of the statutory provisions cited by the Court make reference to regulation of PJM demand response program participation. Likewise, nothing in SB 221 granted the

Commission authority to prohibit PJM demand response participation by retail customers. Simply put, until the General Assembly takes action, this Commission cannot impose a ban on PJM demand response participation either on a statewide basis, and certainly not in this proceeding. Through a tariff application unsupported by authority of a statute or rule as required by FERC.

The Commission's lack of authority is also evidenced by the lack of any rules governing PJM demand response participation by retail customers. The Commission issues rules based on statutory authority, such as, for example, in Case No. 08-888-EL-ORD, the Commission issued rules as required by the mandates of SB 221. None of the rules issued pursuant to SB 221 allow the Commission authority to prohibit retail customers from participating in wholesale or PJM demand response programs. Indeed, as the opposite, it is worth noting, as discussed below in Section C, that the Commission does have authority to include the mercantile customer load committed to PJM demand response programs when measuring the Companies' compliance with the peak demand reduction goals of Section 4928.66, Revised Code. This is an alternative worth exploring that, in light of the unattractive programs offered by AEP, would enable the Companies to achieve their demand reduction targets through the PJM programs.

2. Any action by the Commission to ban PJM demand response programs in this proceeding is preempted.

The Commission has another legal basis for denying the Companies' proposed ban on PJM demand response participation. Specifically, FERC has completely preempted the field regarding participation in demand response programs at the regional transmission organization ("RTO") level.[33] As stated by FERC, "sections 205 and 206 of

[33] 16 U.S.C. §§ 824d and 824e; 18 C.F.R. § 35.28(g).

the FPA, 16 U.S.C. §§ 824d and 824e, give the Commission both the authority and responsibility to ensure that the rates, charges, classifications, and services of public utilities (and any rule, regulation, practice, or contract affecting any of these) are just reasonable and not unduly discriminatory, and to remedy undue discrimination in the provision of such services."[34] FERC cited this authority when recently exercising its authority to regulate demand response participation when amending 18. C.F.R. 35.28(g).[35]

In exercising its authority, the FERC expressly directed the RTOs to permit the aggregation of retail customers for demand response. However, as discussed above, FERC also exercised its authority to allow RTOs to recognize any statewide ban imposed by a state public utility commission pursuant specifically to authority based on a state law or regulation. As set forth in 18 C.F.R. 35.28(g) (emphasis added),

> Each Commission-approved independent system operator and regional transmission organization must permit a qualified aggregator of retail customers to bid demand response on behalf of retail customers directly into the Commission-approved independent system operator's or regional transmission organization's organized markets, *unless the laws and regulations of the relevant electric retail regulatory authority expressly do not permit a retail customer to participate.*

FERC's directive is clear and only allows the Commission to prohibit a retail customer from participating in demand response programs at the wholesale level, but only through law or regulation. An RTO is not required to honor a ban imposed through a tariff as that neither an act of the General Assembly nor a rule of the Commission. Accordingly, any attempt by the Commission to ban PJM demand response participation in this proceeding goes beyond the FERC's directive and will be preempted. *See*

[34] 65 FR 12088, Regional Transmission Organizations (January 6, 2000) (adopting final rule on Regional Transmission Organizations and discussing broad legal authority).
[35] *See* 73 Fed. Reg. 12576-01, 12577-12578, Wholesale Competition in Regions With Organized Electric Markets (March 7, 2008).

Mississippi Power & Light Co. v. Mississippi ex rel. Moore (1988), 487 U.S. 354, 377 ("[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject"). For this reason alone, the Commission cannot ban retail customers through the Companies' tariffs.

B. Even If This Commission Had Authority, (Which it Does Not), The Companies Have Not Met Their Burden Of Proof Justifying A Ban On PJM Demand Response Participation.

1. The Companies have the burden of justifying a ban on PJM demand response program participation.

Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges.

Section 4928.143, Revised Code, sets out the requirements for an ESP. Under paragraph (B), an ESP must include provisions relating to the supply and pricing of generation service. The plan, according to paragraph (B)(2) of Section 4928.143, Revised Code, may also provide for the automatic recovery of certain costs, a reasonable allowance for certain construction work-in-progress (CWIP), an unavoidable surcharge for the cost of certain new generation facilities, certain charges relating to customer shopping, automatic increases or decreases, provisions to allow securitization of any phase-in of the SSO price, provisions relating to transmission-related costs, provisions related to distribution service, and provisions regarding economic development.

The statute provides that the Commission is required to determine whether the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the

expected results that would otherwise apply under an MRO.[36] In addition, a surcharge for CWIP or for new generation facilities may not be authorized if the benefits derived for any purpose for which the surcharge is established are not reserved or made available to those that bear the surcharge.[37]

Pursuant to Section 4928.143(C)(1), Revised Code, the burden of proof in these proceedings shall be on the electric distribution utilities.

Although not referenced in either Section 4928.143, Revised Code, or the Application, the Companies seek to revise their tariff language by banning retail customers from participating in PJM demand response programs. Specifically, the Companies have proposed adding the following language:

> This prohibition precludes customer participation, either directly or indirectly through a third party, in a wholesale demand response program offered by an RTO or other entity.[38]

The proposed tariff language quoted above is not part of an ESP application; it could have been and should have been proposed as part of a Section 4909.18, Revised Code "application not for an increase in rates." If the Commission determines that such an application is not for an increase in rates, then it must apply the statutory test. That test is whether it appears to the Commission that the proposals in the application may be unjust or unreasonable. If the Commission answers in the affirmative, then it must set the matter for hearing and give notice of the hearing. Integrys concludes that the Commission must have found that this proposal appears to be unjust and unreasonable because a hearing was held.

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[36] Section 4928.143(C)(1), Revised Code.
[37] Section 4928.143(B)(2)(c), Revised Code.
[38] *See* Company Exhibit DMR-9 (p. 9 of 285, Original Sheet No. 3-4) and Exhibit DMR-10 (p. 21 of 295, Original Sheet No. 3-12).

Whether this proposed tariff language is before the Commission under Section 4928.143, Revised Code, or 4909.18, Revised Code, the burden of proof is on the public utility to show that its proposal is just and reasonable.[39] Integrys submits that for the reasons set forth below, the Companies did not meet their burden of proof and that the Commission must reject the proposed tariff language which would ban retail customers from participating in PJM demand response programs.

2. The Companies have not submitted any evidence that the Companies' interruptible service offerings are more beneficial to Ohioans than the PJM demand response programs.

Having the burden of proof, one would think that the Companies would present evidence to the Commission that the Companies' interruptible service offerings are more beneficial to customers than the PJM demand response programs. To the contrary, the Companies have not presented any calculations or data comparing the two programs and have not submitted any testimony on behalf of the Companies comparing the two programs. Integrys, on the other hand, has presented both data and testimony to this Commission reflecting the advantage of the PJM demand response programs over the Companies' meager offerings that are unattractive to customers.

Integrys' comparison can be found in the direct testimony of Integrys witness Samuel Wolfe. Specifically, Mr. Wolfe testified that "[i]n general, the PJM programs are a better choice for retail customers than the alternatives proposed by CSP/OSP."[40] Mr. Wolfe noted that "[a]s compared to the PJM programs, the participation requirements, as well as penalties, are higher for the CSP/OPC programs."[41] He then presented a table comparing the PJM – Emergency Load Management Program (aka as the ILR program)

[39] Sections 4909.18 and 4928.143 (c)(1), Revised Code.
[40] Integrys Ex. 2, Wolfe Dir. Test. at p. 10.
[41] *Id.* at 11.

to CSP's IRP-D schedule. As reflected in that table, the ILR program is much more favorable as to the notification provisions, the maximum number of curtailments per year, the total hours of curtailment per year, the duration of curtailments on a daily basis, payment options, and penalties for non-compliance for curtailment events.[42]

Mr. Wolfe also presented a table (Attachment B-1 to his direct testimony) comparing payments under the existing ILR program (PJM) and the Companies' Schedule IRP-D.[43] As noted by Mr. Wolfe, "the PJM ILR program is more attractive financially than CSP's Schedule IRP-D, with the exception of customers near the 1 MW demand level."[44] Mr. Wolfe also noted that the PJM ILR program has a maximum of 60 hours of curtailment per year versus 200 hours of interruption per year under CSP and OPC's Schedule IRP-D.[45] This is significant as the Companies have interrupted all customers on average 176 hours over the last three years, while PJM has never issued a curtailment request in the AEP zone.[46] As stated by Integrys witness Wolfe in response to a question from the Attorney Examiner, "[a]s a combination of the financial benefits and the provisions of the programs, the combination of those have already shown to spur more participation than the AEP programs by themselves."[47]

The Commission should take note that the Companies' sole witness on this topic, Mr. Roush, did not present any testimony contradicting Integrys witness Wolfe's testimony. In fact, Mr. Roush testified that the PJM emergency capacity programs (including the ILR program) are very attractive to customers when compared to the

[42] *Id.* at 11-12.
[43] Integrys Ex. 2, Wolfe Dir. Test. at p. 21.
[44] *Id.* at 13.
[45] *Id.*
[46] *Id.* at 13 *and see* Tr. IX, 48. *See also* Tr. IX, 113 (interruptions under the Companies' Schedule IRP-D affect all enrolled customers at the same time).
[47] Tr. III, 59.

Companies' interruptible service offerings.[48] Mr. Roush admitted that PJM has not curtailed any customers since AEP joined PJM, and that this was very attractive because customers in PJM get paid regardless whether PJM calls for a curtailment.[49] Mr. Roush also agreed that the Companies do *not* fund payments made by PJM under the PJM ILR program, admitting that the payments to Ohio customers are funded virtually entirely by non-Ohio load serving entities participating in the PJM capacity markets. .[50]

Accordingly, the record in this matter is devoid of any evidence supporting the Companies' interruptible service offerings over the existing PJM demand response programs. For this reason alone, the Commission should deny the Companies' proposed tariff language.

3. The evidence in the record shows that the financial and grid reliability benefits of the PJM demand response programs inure to the benefit of Ohioans.

The record demonstrates that there should be no dispute in this matter that the PJM demand response programs have significant benefits to Ohioans. As the FERC has stated, ""[d]emand response can provide competitive pressure to reduce wholesale power prices; increase awareness of energy usage; provides for more efficient operation of markets; mitigates market power; and enhances reliability[.]"[51] Integrys witness Wolfe noted that even customers not participating in demand response programs receive the indirect, but significant, benefits of improved grid reliability and improved efficiency of market due to competition and positive environmental benefits.[52] He also noted the environmental and energy conservation aspect of the programs, stating that during a four

[48] Tr. IX, 47-48.
[49] *Id.* at 48.
[50] Tr. IX, 52.
[51] 125 FERC ¶61,071 at ¶16, Final Rule on Wholesale Competition in Regions with Organized Electric Markets.
[52] Integrys Ex. 2, Wolfe Dir. Test. at p. 8.

day period in the summer of 2006 voluntary load reduction resulted in "the reduction in fuel consumption of 1,367 tons of coal, 15,855 barrels of oil and 227,965 MCF of natural gas."[53] The Companies' witness, Mr. Roush, also agreed that the PJM programs benefit wholesale market pricing, improve grid reliability, can be used to avoid rolling blackouts and improve awareness of energy usage.[54] There should be no dispute in this matter that Ohioans benefit both directly and indirectly from the PJM demand response programs.

There also is no dispute that Ohio customers benefit financially from PJM demand response programs. Customers receive significant financial payments from PJM – payments funded virtually entirely by LSEs from outside the state (and not by the Companies).[55] For example, under the PJM ILR emergency demand response program, customers can designate the load they wish to commit to the PJM ILR program each PJM planning year. Once committed, the customers will receive monthly payments from PJM regardless whether PJM calls for curtailment.[56] The monthly price per megawatt is based on the ILR clearing price for capacity set at the beginning of each PJM planning year, and therefore, the payments to customers are attractive and promote participation.[57]

These payments are substantial. Mr. Wolfe of Integrys presented data (not disputed by the Companies) showing that the per MW annual payment in the PJM ILR program to customers in the AEP zone for 2008 was $40,851, $37,245 in 2009 and $63,616 in 2010.[58] Considering that Ohio customers have enrolled over 580 MW into the PJM ILR program, this correlates to an average of $27,681,000.00 injected annually into

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[53] *Id.* at 15 *citing* Bladen, J., 2006. PJM Demand Response: Case Studies from the summer of 2006 (available at www.peaklma.com/new%20folder/documents/covino.ppt).
[54] Tr. IX,. 29-34.
[55] Integrys Ex. 2, Wolfe Dir. Test. at pp. 8, 17.
[56] Tr. III, 52.
[57] Integrys Ex. 2, Wolfe Dir. Test. at p. 7.
[58] *Id.* at 9.

the Ohio economy by just one PJM demand response program. And again, these payments are not funded by the Companies. Rather, payments come from LSEs virtually entirely from outside of Ohio procuring capacity in the PJM market.

With this evidence in the record, there should be no dispute in this matter that the PJM demand response programs provide significant benefits to Ohio customers. For this reason alone, the Commission should deny the Companies' proposed tariff language. Anything contrary would be duly unjust and unreasonable, and indeed harmful to Ohio consumers, given the undisputed evidence in the record.

4. The evidence in the record also establishes that the Companies would be the sole beneficiaries of a ban on PJM demand response program participation.

Given the benefits and advantages of the PJM demand response programs over the Companies' interruptible service offerings, the Commission may ask itself why the Companies are seeking such a ban. The answer, based on the undisputed facts in the record, is that the Companies seek the ban to the detriment of Ohio consumers to increase off-system sales of capacity for the purpose of increasing shareholders' returns.

The starting point for this answer is understanding how the Companies satisfy their capacity obligations to PJM. The Companies, as Load Serving Entities, satisfy their resource adequacy obligation to PJM as a Fixed Resource Requirements ("FRR") entity.[59] As described by the Companies' witness, this means that the Companies have to demonstrate that they have adequate capacity to meet their load obligations, including reserve requirements.[60] Also, as FRR entities, the Companies do not fund payments to

[59] Tr. IX, 118.
[60] Tr. IX, 119-120.

the PJM demand response programs.[61] Payments are funded by LSEs (virtually all of which are outside Ohio) who procure capacity in the reliability pricing model market. [62]

The next point is understanding how the Companies allocate revenue from off-system capacity sales. Although the Companies do not procure their capacity through the reliability pricing model market, the Companies can still offer generation resources into the market. Revenue from those sales is shared among all AEP East operating companies on a member load ratio basis[63] and in Ohio, the revenue accrues to the benefit of the Companies' shareholders, not Ohio customers.[64]

The link between the Companies' proposal to ban PJM program participation and off-system capacity sales is as follows: As the Companies' witness (Mr. Roush) testified, the Companies can count any load enrolled in their interruptible service offerings (including Schedule IRP-D) in the PJM ILR demand response program.[65] The Companies do not get payments, but rather receive a credit against their FRR commitment. To the extent the Companies can enroll additional firm load in their interruptible service offerings, the Companies can further reduce their FRR obligation freeing up capacity for off-system sales. Where will this firm load come from? The Companies hope it will come from the over 600 MW of firm load currently committed to the PJM demand response programs by Ohio customers. And the only way to get this load is to ban customers from participating in PJM demand response programs, with the hope that they can have those customers select the AEP programs instead.

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[61] *Id.* at 52-53.
[62] Integrys Ex. 2, Wolfe Dir. Test. at p. 17 *and see* Tr. IX, 52-53 (Companies' witness Roush testimony on cross).
[63] Tr. IX, 55.
[64] *Id.* at 58.
[65] Tr. IX, 53-54.

The Companies may argue that there is no financial motivation on the part of the Companies to ban PJM participation because the PJM tariff imposes a cap on off-system sales.[66] However, as admitted by Mr. Roush, the Companies are pursuing raising that limit with the PJM working group.[67] With the cap lifted and PJM participation banned, the Companies can make additional off-system capacity sales for the sole benefit of their shareholders. That is why the Companies want to ban customer participation in PJM demand response programs.

C. An Alternative To The Companies' Proposed Ban Is To Count PJM Demand Response Programs For Inclusion In The Companies' Peak Demand Reduction Goals Under Section 4928.66, Revised Code.

Section 4928.66, Revised Code requires an EDU to implement peak demand reduction programs designed to achieve a one percent reduction in peak demand in 2009 and an additional 0.75 percent reduction each year through 2018. The Companies have proposed counting the load enrolled in their interruptible service offerings (as little as it is) towards the Companies' peak demand reduction goals. The Companies believe that any load capable of being curtailed should count towards those goals. Integrys believes that rather than banning PJM demand response program participation, the Commission should not prohibit participation in these programs that provide real results and count the load committed to these programs towards the Companies' peak reduction goals.

As an initial point, the General Assembly, in enacting Section 4928.66, clearly recognized the need for peak demand reduction, and imposed concrete reduction goals on utilities. At the same time, the General Assembly recognized the value of mercantile customer demand response programs and the need to count those programs toward a

[66] Tr. IX, 55.
[67] Tr. IX, 66.

utility's peak demand reduction goals. Specifically, the General Assembly stated in Section 4928.66(c) that a utility's compliance with the peak demand reduction goals of Section 4828.66 "shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors." This statutory language should be distinguished from the remaining provisions of Section 4928.66 which (confusingly) require the effects (i.e., reductions) of any mercantile customer's demand response programs to be removed from the EDU's baseline (i.e., increase the baseline) if the mercantile customer seeks to be exempt from any mechanism to recover the costs of the Companies' programs. The first sentence of Section 4928.66 is independent of the remaining sections and only relates to compliance measurement – not integration of a mercantile customer's programs so that the mercantile customer can be exempt from recovery costs.

Given the General Assembly's directive, it would appear that the Commission has no choice but to adjust the Companies' actual peak demand by the effect of mercantile customer load committed to PJM demand response programs. Staff may be concerned that this load cannot be measured or registered with the Commission. However, as noted during the cross examination of Integrys witness Wolfe, the Companies today certify the load committed to PJM demand response programs. Alternatively, the Commission could require a curtailment service provider, by definition an aggregator and an electric service company (Section 4928.01, Revised Code) to register the committed load with the Commission. Regardless of the method selected, the key is to ensure that the load

committed to PJM demand response programs by the Companies' mercantile customers is shared with the Commission.

Integrys respectfully submits to the Commission that the foregoing alternative is best for all stakeholders, achieving a result beneficial to the Companies and Ohio consumers. The Companies can count PJM demand response participation towards their peak demand reduction goals and Ohio customers can continue to benefit from the PJM demand response programs. As well, data sharing with the Commission (and the Staff) will help in developing future programs as demand response evolves. And as recently stated by the Commission in regards to Section 4928, Revised Code, "[w]e are also aware that the legislature has deemed it important to encourage innovation, to provide incentives to technologies that can adapt successfully to environmental mandates, and to encourage the education of small business owners to encourage their use of energy efficiency programs."[68] Accordingly, the Commission should encourage demand response programs by rejecting the Companies ban and exercising its authority to implement this alternative.

D. Any Ban On PJM Demand Response Participation Must Be Implemented Prospectively To Prevent Interference With Existing PJM Demand Response Contracts and Commitments.

It is well established that the Commission cannot exercise its authority retroactively in regards to rate making. *See Lucas County Commissioners v. Public Utilities Commission of Ohio* (2007), 80 Ohio St. 3d 344, 686 N.E.2d 501 ("In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme). Not only does this principle of law apply to ratemaking, but it is equally applicable to any

[68] *See In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Opinion and Order, December 17, 2008.

action taken on the part of the Commission that would affect existing contracts between curtailment service providers, their customers and commitment contracts made to PJM. *See, e.g., In re Ohio Edison Company,* Case No. 07-548-EL-ATA, Case No. 07-549-EL-ATA, Case No. 07-550-EL-ATA, Finding and Order (July 11, 2007) (refusing to grant tariff extension as to customers already contracting with utility as that would amount to retroactive rate making); *see also Sandusky Marina Ltd. P'ship v. Ohio Dep't of Natural Resources* (1998), 126 Ohio App.3d 256, 263, 710 N.E.2d 302, 306 (attempted adjustment of lease by regulation was unconstitutional retroactive application of regulation and violative of Section 28, Article II of the Ohio Constitution).

The basis for the Commission's refusal to apply its authority retroactively to existing contracts has its origin in both the U.S. Constitution and the Ohio Constitution. Specifically, Article 1, Section 10 of the U.S. Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. CONST. art. I, § 10. In general, "[c]ontracts between individuals or corporations are impaired within the meaning of the Constitution . . . whenever the right to enforce them by legal process is taken away or materially lessened." *Lynch v. United States* (1934), 292 U.S. 571, 580. Likewise, Article II, Section 28 of the Constitution of Ohio prohibits the passage of laws impairing the obligation of contracts. To determine if an unconstitutional impairment of contract exists, the Commission has adopted the test set forth in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459 U.S. 400, 411-412.[69]

Just as the Commission did in *In re Ohio Edison Company,* Case No. 07-548-EL-ATA, Case No. 07-549-EL-ATA, Finding (8), and Case No. 07-550-EL-ATA, Finding and Order, July 11, 2007, it should refuse to implement the Companies' ban as to

[69] *See In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC, Opinion and Order, April 9, 2008 at p. 16.

customers with current demand response contracts (either directly with PJM or curtailment service providers).

As Integrys witness Wolfe testified, customers are presently participating in PJM demand response programs and the record is clear that CSP and OPC retail customers are actively planning for and participating in PJM demand response programs.[70] For example, customers participating in the PJM ILR program will be committing themselves to PJM for the 09-10 Planning Period as early as January 5, 2009, through March 2, 2009.[71] In addition to these contractual commitments to PJM, curtailment service providers, like Integrys, have contracts with their customers.[72] In the event the Commission approves the Companies' proposed ban on PJM demand response participation, customers would be forced into default as to their commitments to PJM as well as their commitments to curtailment service providers. Such retroactive regulation by the Commission cannot be justified under the test set forth in *Energy Reserves Group,* and would result in a constitutional violation.

Rather than implement the ban retroactively, the Commission should follow its holding in *In re Ohio Edison Company,* Case No. 07-548-EL-ATA, Case No. 07-549-EL-ATA, Case No. 07-550-EL-ATA, Finding and Order, July 11, 2007, Finding (8). In that case, the Commission was faced with a request by FirstEnergy to extend a line extension surcharge for an additional year to coincide with its companies' distribution rate freeze extension (through December 31, 2008). The Commission granted the extension but refused to apply it to customers who had entered into contracts or paid line extension costs on the basis that the costs would end on December 31, 2007. The Commission

[70] *See* Integrys Ex. 1 at p. 15 (noting significant Ohio participation in PJM programs) *and see* Tr. III, 20.
[71] *See* Tr. III, 24 *and see* Integrys Ex. 1 at p. 3.
[72] *See* Tr. III, 54.

refused to do so because of those existing arrangements and the Commission's inability to take action impairing those arrangements. As stated by this Commission at Finding 8 of its July 11, 2008 Finding and Order (emphasis added):

> However, to apply the one-year extension to current residential and general service line extension customers would be unfair and amount to retroactive rate making. Since early 2003, line extension customers have entered into contracts or paid line extension costs on the basis that they would end at a specific date, in FirstEnergy's case, December 31, 2007. We are not inclined to alter those arrangements after the fact because FirstEnergy has now agreed to an extension of its distribution rate freeze as part of its RCP. Accordingly, we find it reasonable to allow FirstEnergy to revise its line extension tariffs to recover the monthly surcharge to the end of 2008 for line extension projects entered into after the tariff change becomes effective. Residential and general service customers being charged a line extension surcharge pursuant to line extension projects entered into prior to the effective date of the tariff change shall have that surcharge end on December 31, 2007 . . .

To the extent the Commission determines to prohibit participation in the PJM demand response programs (which it should not for the reasons set forth herein), the Commission should not interfere with any existing tariff and/or contractual commitments of customers currently participating or committed to participate in the PJM demand response programs. To the extent the Commission determines to prohibit participation in the PJM demand response programs (which it should not), it can avoid such interference by including in its final order in this proceeding the following affirmative findings:

1. That customers currently committed (to PJM and/or to demand response providers) to participate in the PJM programs for the 08-09 Planning Period, as well as those that have committed to participate in the 09-10 Planning Period be entitled to honor their commitments through the 09-10 Planning Period, notwithstanding any adverse final determination on the underlying proceeding with regard to CSP and OPC's proposal to bar participation in the PJM demand response programs; and

That customers currently committed (to PJM and/or to demand response providers) to participate in PJM programs beyond the 09-10 Planning Period will be entitled to honor their commitments through the duration of the applicable tariff and/or contractual commitment, in accordance with those obligations, notwithstanding any adverse final determination on the underlying proceeding with regard to CSP and OPC's proposal to bar participation in the PJM demand response programs.

2. In the event the Commission determines to prohibit participation (which it should not), the foregoing findings by the Commission would avoid a constitutional violation and comport with Commission policy of avoiding retroactive regulation. Failure by the Commission to protect against retroactive regulation would result in the unduly unjust and unreasonable outcomes of subjecting CSP and OPC retail customers to the risk of default relating to their PJM demand response commitments and adversely affect PJM's operational planning and flexibility by denying PJM access to over 500 megawatts of demand response load for purposes of maintaining grid reliability and stability.

IV. CONCLUSION

For all reasons detailed in the foregoing brief, Integrys respectfully requests that the Commission reject the Companies' proposal to ban PJM demand response participation. As Integrys witness Wolfe testified, "... if customers are denied access to PJM's programs, hundreds of megawatts of load response will no longer be available. That equates, for example, to a power plant being removed from service, or making unnecessary the construction of a new power plant."[73] As noted in Section III B(3) above, considering that Ohio customers have enrolled over 580 MW into the PJM ILR

[73] Integrys Ex. 2, Wolfe Direct Testimony at p. 16.

program, this correlates to an average of $27,681,000.00 injecting annually into the Ohio economy by just one PJM demand response program. Therefore, rather than shutting down the PJM programs, the equitable alternative for all stakeholders is to allow customers to participate in both the PJM programs as well as any similar programs offered by the Companies. The Companies should be permitted to rely on the load committed to the PJM demand response programs to achieve their peak demand reduction goals and Ohioans can continue to receive the many direct and indirect benefits of the PJM programs.

Respectfully Submitted,

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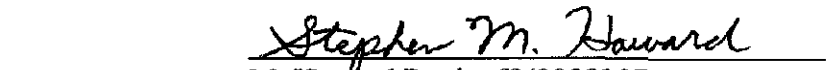
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Document was served upon the following parties by E-mail or First-Class U.S. Mail this 30th day of December, 2008.



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