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 IN OPPOSITION TO THE COMPANIES' BRIEF ON THE ISSUE OF BANNING PJM DEMAND RESPONSE PARTICIPATION

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I. INTRODUCTION

The PJM Interconnection ("PJM") demand response programs provide significant benefits to Ohio customers whether or not they directly participate in the programs. For those Ohio businesses directly participating in the programs by committing to load reduction, the PJM programs are a significant source of conservation revenues, particularly during the current drastic economic downturn. The record shows that last year *Ohio customers 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.*[1] Ohio businesses receive those revenues from PJM in

[1] Integrys Ex. 2, Wolfe Dir. Test. at pp. 9, 15.

exchange for a firm commitment to curtail their load at the direction of PJM in response to grid stress and emergency events, such that participants that do not respond to PJM interruption events have their revenues withheld. For the Ohio customers who do not participate, they receive, for example, the benefit of the added reliability to the grid, should conditions arise that threaten service.[2]

The Companies (Columbus Southern Power Company and Ohio Power Company) have the burden of proof to show that their proposal to ban PJM demand response participation is just and reasonable.[3] However, Ohio law and the record in this proceeding demonstrate that the Companies have failed to meet their burden of proof to sustain their request that the Commission prohibit participation by Ohio businesses in the PJM demand response programs. In their Initial Post-Hearing Brief ("Initial Brief"), the Companies raise two legal arguments to support their request. First, the Companies argue that the Federal Energy Regulatory Commission ("FERC") has granted state commissions the authority to ban retail customer participation in PJM demand response programs, implying (incorrectly) that the Ohio Commission has authority to implement such a ban.[4] This argument is fatally flawed because the General Assembly has not explicitly or implicitly granted authority to the Commission to implement such a ban, and therefore, the Commission has no authority under the FERC preemption grant to prohibit participation in the PJM demand response programs. Secondly, the Companies argue (incorrectly) that a standard service customer's participation in a PJM demand response

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[2] Integrys Ex. 2, Wolfe Dir. Test. at p. 8.
[3] Sections 4909.18 and 4928.143 (c)(1), Revised Code.
[4] AEP Initial Post-Hearing Brief at p. 119.

program constitutes an illegal resale of electricity.[5] For the reasons detailed below, PJM demand response – the reduction of consumption for the purpose of load reduction at wholesale[6] – is not a resale of power, and therefore, does not fall under the Companies' retail tariffs. Importantly, even if for the sake of argument a response to a PJM event were a resale of power (which it is not), the General Assembly explicitly forbids utilities from prohibiting or imposing unreasonable limits on the resale of electric generation. Section 4928.40(D), Revised Code. Therefore, the Companies' second legal argument is also fatally flawed and has no merit.

Like their legal arguments, the Companies' public policy arguments have no merit. The Companies argue that Ohio customers should not participate in the financially lucrative PJM programs because they are making no "investment, [taking] no financial risk or [providing] value added service."[7] This argument is not only contrary to common sense but is also contrary to the record and admissions of the Companies' witness, that establish the benefits the PJM programs provide to all Ohioans. Contrary to the record, the Companies also argue that participation in PJM programs by retail customers may raise costs for other non-participating customers.[8] The Companies present no evidence to support this argument, and the record shows that a customer participating in the PJM demand response programs taking service under schedules GS-2, GS-3 or GS-4 pays a monthly minimum demand charges regardless of whether the customer takes energy.[9] Lastly, the Companies incorrectly argue that participation in PJM demand response

[5] *Id.* at p. 118.
[6] Removing Obstacles to Increase Electric Generation and Natural Gas Supply in the Western United States, 94 FERC P 61272, 61972, March 14, 2001.
[7] AEP Initial Post-Hearing Brief at p. 121.
[8] *Id.* at 123.
[9] *See* Tr. IX, 60-61.

programs by retail customers will defeat the purposes of Amended Substitute Senate Bill No. 221's ("Senate Bill 221") energy efficiency and demand response provisions.[10] In raising this argument, the Companies miss the point that Senate Bill 221 contains nothing to prohibit participation in PJM demand response programs. Indeed, to the contrary, Senate Bill 221 requires that: (i) the Commission consider the effects of all mercantile customer demand response programs (including PJM demand response programs) when measuring an electric utility's compliance with the conservation benchmarks required under Section 4928.66; and, (ii) Senate Bill 221 does not require mercantile customers to integrate their demand response programs with the distribution utilities' programs.

Unsupported by Ohio law and the record in this proceeding, the Companies are left with their philosophical opposition to standard service offer customers' participation in PJM demand response programs. However, just because the Companies' management objects – for philosophical, competitive, and shareholder profit reasons – to participation by Ohio businesses in PJM demand response programs, does not justify or make legal a ban on PJM demand response program participation. To the contrary, the United States Congress has clearly stated a goal of increasing demand response participation.[11] Additionally, Senate Bill 221 has imposed requirements to achieve demand response goals.[12] This is why any ban on PJM demand response participation must come, not from the Companies, but from the General Assembly that would look favorably on millions of dollars flowing into the Ohio economy from out of-state-sources. Accordingly, the

[10] AEP Initial Post-Hearing Brief at pp. 124-125.
[11] Energy Policy Act of 2005, Section 1252(f) stating "[i]t is the policy of the United States that ... unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized."
[12] *See* Section 4928.66, Revised Code.

Companies' proposal to ban participation in PJM demand response programs by Ohio businesses taking standard service offer service must be denied.

II. ARGUMENT

A. The Companies Incorrectly Claim That This Commission Has Authority To Ban Participation In PJM Demand Response Programs.

1. Nothing in Senate Bill 221 gives the Commission authority to ban retail customer participation in PJM demand response programs.

In their Initial Brief, the Companies take the position that this Commission has the authority to prohibit PJM demand response program participation by retail customers.[13] Specifically, the Companies claim that FERC has issued rules that allow state regulatory commissions to ban retail customers from participating in PJM demand response programs.[14] The Companies' argument misses the point, however, because FERC's directive prohibits any state regulatory interference in wholesale demand response participation by retail customers "unless the laws and regulations of the relevant electric retail regulatory authority expressly do not permit a retail customer to participate."[15] Thus, notwithstanding any argument made by the Companies (and which Integrys responds to below), the Ohio Commission simply has no authority to grant the Companies' request that Ohio retail customers be banned from participation in the PJM programs.

As fully discussed in Integrys' trial brief, FERC issued a final rule on October 17, 2008 regarding wholesale competition in regions with organized electric markets that, in

[13] AEP Initial Post-Hearing Brief at p. 119.
[14] *Id.*
[15] 18 CFR § 35.28(g)(1)(iii)(emphasis added).

part, removed certain barriers to retail customer participation in wholesale demand response programs.[16] As ordered by FERC:

> 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.[17]

The Companies acknowledge this language at page 119 of their Initial Brief, but then jump to the conclusion that the Commission has veto power over PJM program participation because the FERC stated that "we will not require a retail electric regulatory authority to make any showing or take any action in compliance with this rule."[18]

In doing so, the Companies misapprehend or ignore the confines of the FERC order setting forth the requirement that it is the General Assembly that must grant the Commission this veto authority. Indeed, the FERC order is consistent with settled ohio law that the Commission may act only as authorized by the General Assembly. *See 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") *and see State ex rel. Columbus S. Power Co. v. Fais* (2008), 117 Ohio St.3d 340, 343, 2008 -Ohio- 849, ¶18 (the Commission's jurisdiction is limited to the authority expressly granted to it under Title 49 of the Ohio

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[16] Final Rule on Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶61,071 at ¶16,073. As noted at pages 61-62 in the December 2008, Assessment of Demand Response & Advanced Metering Report by the Federal Energy Regulatory Commission Staff, this rule was implemented to remove barriers to third-parties offering demand response services and as a way to include smaller loads "that cannot individually participate in an organized market." *See* www.ferc.gov/legal/staff-reports/12-08-demand-response.pdf -

[17] *Id.* (emphasis added).

[18] *See* AEP Initial Post-Hearing Brief at p. 119, citing 125 FERC ¶61,071 at ¶155, Final Rule on Wholesale Competition in Regions with Organized Electric Markets.

Revised Code). Without a grant of authority by the General Assembly, the Commission can neither take any veto action nor can it enact rules limiting participation in PJM demand response programs. *Indeed, the Companies do not cite a single statute or rule giving the Commission veto authority over the PJM demand response programs, because no such statute or rule exists.*

In fact, the Commission recently recognized the limitations on its authority under Senate Bill 221. Specifically, the Commission recently modified a stipulation in its December 17, 2008 Opinion and Order, In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan, Case No. 09-920-EL-SSO *et. al,* which, as is, would have precluded mercantile customers with less than 3 MW per year of usage from applying for an exemption from cost recovery riders as permitted under Section 4928.66.[19] The Commission recognized that the stipulation's language was directly contrary to the statutory language of Section 4928.66 and the definition of a "mercantile customer" in Section 4928.01(A)(19). As stated by the Commission, "[w]e do not believe, therefore, that the legislature intended us to approve a rider that bases the availability of the exemption on a different usage level than that approved in the definition of 'mercantile customer.'"[20] The Commission's recognition of its limitations under Senate Bill 221 in its December 17, 2008 Opinion and Order applies equally to the Companies' proposal at bar.

As discussed in Integrys' trial brief, nothing in Senate Bill 221 gives the Commission veto authority over PJM program participation. Further, Senate Bill 221 recognizes the value of participation in non-utility sponsored demand response programs,

[19] December 17, 2008 Opinion and Order, In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan, Case No. 09-920-EL-SSO *et. al.*
[20] *Id.* at p. 36.

requiring the Commission to include the effects of such programs in its compliance measurements,[21] and therefore, demonstrating that the General Assembly neither intended to nor granted the Commission authority to prohibit participation in wholesale demand response programs. The General Assembly's support of demand response programs follows FERC's position that wholesale demand response programs should be additive to state demand response programs.[22] The General Assembly's support of demand response programs also follows Congress' policy statement that "unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated."[23] Nowhere in Senate Bill 221 did the General Assembly limit retail customer participation in demand response programs or grant the Companies a monopoly as a provider of demand response programs. If there was such any such limitation, the Companies would have cited it - but they have not provided any such citation, because it does not exist.

B. Contrary To The Companies' Argument, There Is No Resale Of Energy When A Retail Customer Participates In A PJM Demand Response Program – But Even If It Were A Resale of Energy (which it is not), Section 4928.40(D), Revised Code, Prohibits An Electric Distribution Utility From Preventing Or Unreasonably Limiting Resales Of Energy.

1. Participation in the PJM programs is not a resale of energy.

The Companies' proposed tariff to prohibit participation in PJM demand response programs is based on their incorrect contention that PJM demand response participation

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[21] *See* Section 4928.66(A)(2)(c) *and see* December 17, 2008 Opinion and Order, In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan, Case No. 09-920-EL-SSO *et. al.*, 35 (noting compliance with utility's benchmarks shall include effects of mercantile customer programs).

[22] *See* Removing Obstacles to Increase Electric Generation and Natural Gas Supply in the Western United States, 94 FERC ¶ 61,272 at 61,972, (March 14, 2001) ("[o]ur intention is not to undermine existing state DSM programs or other state rules governing retail sales, but to promote complementary wholesale programs").

[23] Section 1252(f), Energy Policy Act of 2005.

by retail customers taking standard service offer is a "resale of power" and, therefore, a violation of the Companies' tariff terms and conditions.[24] The Companies propose and rely entirely on the following for the purpose of banning retail customers from participating in PJM demand response programs:

> 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. . . . 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.[25]

However, even if the Companies could prohibit the resale of energy, a transactional analysis of the path of energy associated with a customer's participation in the PJM demand response program demonstrates that there is simply no actual resale of energy when a customer reduces consumption of energy in response to a demand response directive by PJM. This is a fictional argument raised by the Companies based on a tortured misapprehension of certain FERC orders, as discussed below.

Contrary to the Companies' claims, FERC views a customer's participation in a wholesale demand response program, such as the PJM programs, *not* as a resale of energy, but rather as the "reduction of consumption" to effectuate the resale of "load reduction at wholesale," as the following Order sets forth:

> It is widely accepted that dropping even a few megawatts off the system at peak periods is more efficient and economical than the incremental cost of generating them. Demand reduction offers a short-term and cost-effective means to provide additional resources during times of scarcity. Therefore, the Commission will allow, effective on the date of this order, retail customers, as permitted by state laws and regulations, and wholesale customers to reduce consumption for the purpose of reselling their load reduction at wholesale. By providing additional load resources when

[24] AEP Initial Post-Hearing Brief at p. 119.
[25] *See* Exhibits DMR-9 (p. 9 of 285) and DMR-10 (p. 21 of 295), Companies Ex. 1, Roush Dir. Test. (Emphasis Added).

> generating resources are scarce, these "negawatts" should help maintain the reliability of the grid.[26]

A retail customer participating in a PJM demand response program agrees to shed its load by reducing its consumption upon a call from PJM. When a participating retail customer reduces its consumption it does not purchase any energy from the distribution utility, and title to that energy remains with the utility. Thus, the energy that the participating customer would have consumed remains in the possession of the Companies, who can then sell that energy to some other wholesale or retail customer. When a retail customer reduces consumption, there is no transfer of energy by the retail customer, unlike the resale of energy from a landlord to its tenants.

In fact, the Companies' current tariff clearly acknowledges that resale of energy involves the actual transfer of title to the energy, an event that does not occur when consumers participating in PJM programs reduce consumption.

> In addition, resale of energy . . . 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.[27]

It is clear that a PJM program participant that reduces its consumption in response to a demand response event does not purchase energy from the utility and therefore, cannot physically transfer energy to any other third party. Therefore, the Companies' framing of PJM demand response participation as involving a "resale of power" does not fit even under the Companies' existing tariff language, which, as noted above, requires the actual transfer of energy for a resale of energy to occur.

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[26] Removing Obstacles to Increase Electric Generation and Natural Gas Supply in the Wexstern Untied States, 94 FERC P 61272, 61972, March 14, 2001.
[27] *See* Company Ex. 1, DMR-10 at p. 21 of 295 (emphasis added).

Finally, even if participation in the PJM demand response program involved an actual energy sales transaction by the participating customer, as the Companies fictionalize that it does in the case of the PJM programs, that sale of energy would be a wholesale transaction subject to FERC's jurisdiction with which the Companies cannot interfere. In responding to objections relating to a specific NYISO demand response program, the same FERC orders that the Companies cite in their Initial Brief undercut the Companies' arguments and demonstrate that the FERC views demand response participation as involving two separate and distinct transactions, as set forth below:

> ... the Commission may deem a load reduction arrangement to involve two separate and independent transactions: the first being a "sale for resale" of power by the LSE to a retail customer that is participating in the programs (by generating electricity or reducing its electric consumption) (the "Retail Sale"), and the second involving the participating retail customer's sale of power back to NYISO and the LSE, which was also viewed by the Commission as a sale for resale (the Program Sale). [citing 98 FERC at 62,041]
>
> We clarified that the first of these two transactions (the Retail Sale) would not be considered FERC-jurisdictional. [citing 98 FERC at 62,041] We consider the second transaction (the Program Sale), however, to be within our jurisdiction. In effect, the end user is "selling" the energy that it could otherwise purchase to another party (whether an LSE or otherwise) for payment or credit, and the LSE or other purchaser will then resell that energy to other entities.[28]

The FERC makes it clear that if any resale of energy occurs under the Program Sale, such a sale is completely under the jurisdiction of the FERC. Moreover, as the FERC order indicates, even if a resale occurs (i.e., a Program Sale), the customer is selling that energy back to the load serving entity (i.e., the Companies). Stated differently, even if a customer's load reduction is considered a resale of energy (which it is not), the sale that is deemed to occur is one that sells the energy back to the Companies. This "sale" of

[28] April 30, 2002 Order Accepting Tariff Sheets as Modified, 99 FERC ¶ 61,139 at ¶61,573 (April 30, 2002).

energy back to the LSE, in this case the Companies, nullifies the Companies' claim that participating customers are somehow trading on energy owned by the Companies.[29] Accordingly, the Companies' position that PJM demand response participation is an impermissible "resale of power" subject to the Companies' tariffs must be rejected.

2. The Companies' proposed tariff prohibiting participation in PJM demand response programs as a "resale of power" violates the explicit limitation set forth in Section 4928.40(D), Revised Code.

The Companies have continuously stated in this proceeding that their current tariff language alone, prohibiting the resale of energy, should preclude retail customers from participating in PJM demand response programs.[30] As discussed above, this is because the Companies believe that PJM demand response program participation involves the "resale of power."[31] However, the Companies' reliance on such a prohibition to support their proposed tariff prohibiting participation in the PJM programs violates Section 4928.40(D), Revised Code.

Section 4928.40(D), Revised Code prevents electric distribution utilities from prohibiting the resale of electric generation service. Section 4928.40(D) states:

> [b]eginning on the starting date of competitive retail electric service, no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service.

Indeed, as noted in the Commission's Opinion and Order of September 19, 2000 in the Dayton Power & Light Company Electric Transition Plan, Case Nos. 99-1687-EL-ETP *et*

[29] Moreover, any "sale" of energy back to the Companies resulting from a reduction in consumption due to a demand response event would occur during times of scarcity. Therefore, the Companies would have the opportunity to resell that energy not consumed by the load response participant in a rising energy marketplace, most likely at a premium relative to standard offer rates. The Companies are not harmed.
[30] *See e.g.* AEP Initial Post-Hearing Brief at p. 118.
[31] *Id.*

al., "Chapter 4928, Revised Code, prohibits unreasonable restrictions on resale."[32] Thus, even if participation in PJM demand response programs constituted the resale of energy, which it does not, the Companies are prevented by Section 4928.40(D) from prohibiting such a resale. Furthermore, inasmuch as participation in the PJM programs result in significant benefits to participating and non-participating customers and it is the policy of the General Assembly, the FERC, and the United States Congress to promote and encourage demand response, preventing participation in such programs is unreasonable. Therefore, again, even if participation in the PJM programs constituted the resale of energy (which it does not), the Companies are prevented by Section 4928.40(D) from imposing unreasonable restrictions on such a resale. Accordingly, the Companies' premise that PJM demand response participation constitutes the resale of power is fatally flawed and its proposed tariff language should not be approved.

C. The Companies' Public Policy Arguments Are Without Merit.

With no facts or law supporting their position, the Companies argue that public policy supports their proposed ban on PJM demand response participation. First, the Companies argue that Ohio customers should not participate in the financially lucrative PJM programs because they are making no "investment, [taking] no financial risk or [providing] value added service."[33] Next the Companies argue that PJM participation by retail customers may raise costs for other non-participating customers.[34] Lastly, the Companies argue that PJM demand response participation by retail customers will defeat the purposes of Senate Bill 221's energy efficiency and demand response provisions.

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[32] Opinion and Order of September 19, 2000 in the Dayton Power & Light Company Electric Transition Plan, Case Nos. 99-1687-EL-ETP et al. at ¶17.
[33] AEP Initial Post –Hearing Brief at p. 121.
[34] *Id.* at p. 124.

Each of these arguments fail and should be rejected, because they are contrary to the record and Ohio law set forth in Senate Bill 221.[35]

1. The record establishes that PJM participants make investments, take risks and that Ohio receives a significant economic benefit from PJM demand response programs.

As an initial point, the record demonstrates and the Companies admit in their brief that the PJM programs are financially lucrative to participating retail customers.[36] As well, the Companies admit that while interruptions have occurred in other PJM zones, no curtailments happen to have occurred so far in the AEP PJM zone.[37] The Companies point to these facts as justification for banning participation in the PJM programs, and to deny Ohioans from receiving the financial benefits associated with the PJM programs.[38] The Companies state that they do not "oppose entrepreneurial profit where a firm invests its own capital or takes financial risks using its own assets or provides some value-added service through its own efforts. But when retail customers merely resell, as the Companies claim, the Companies' generation into the wholesale market, there is no investment, no financial risk or value added service."[39] These statements are completely contrary to the record and contrary to what is best for Ohio.

There is no dispute that Ohio retail customers create significant value when committing load to PJM demand response programs. As noted in Integrys' trial brief, FERC has stated, ""[d]emand response can provide competitive pressure to reduce wholesale power prices; increase awareness of energy usage; provides for more efficient

[35] *Id.*
[36] *Id.* at p. 122.
[37] *Id.* at p. 120.
[38] AEP Initial Post-Hearing Brief at 121.
[39] *Id.*

operation of markets; mitigates market power; and enhances reliability[.]"[40] Integrys witness Wolfe noted the environmental and energy conservation aspect of the PJM programs, stating that during a four 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."[41] 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.[42] There should be no dispute in this matter that there is significant value in the over 676.6 MW of load currently offered by Ohio-based customers to the PJM demand response programs.[43] Customers are being compensated for the value they are providing.

There is also no dispute that customers participating in PJM demand response programs must properly plan for and commit load to PJM demand response programs. Failure to curtail will result in loss of payments – rendering the customer's investment in equipment and time useless. This is a risk, no matter how the Companies elect to quantify the risk. And as to the Companies' point that PJM has yet to curtail in AEP's zone, there is no guarantee that there will not be a curtailment as agreed by the Companies' witness Mr. Roush.[44] Moreover, a person exercising common sense would recognize that the lack of a curtailment in the PJM programs is a significant benefit and another reason why the PJM demand response programs are far superior when compared

[40] 125 FERC ¶61,071 at ¶16, Final Rule on Wholesale Competition in Regions with Organized Electric Markets.
[41] *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).
[42] Tr. IX,. 29-34.
[43] *Id.* at 5, 7, 18.
[44] Tr. IX, 48.

to the Companies' interruptible service offerings (which averaged 176 hours of curtailment per customer over the last three years for the IRP-D program alone).[45]

The payments PJM makes to customers participating in the demand response programs should be viewed as insurance or availability payments to cover grid stress events. These are payments made to cover stressful events, with the hope that a stressful event never occurs. Indeed, if it is the Companies' view that customers receiving payments from PJM just in case PJM experiences grid stress are receiving payments without providing value to PJM, then the Companies should also take the view that the various revenue streams that the Companies receive from Ohio ratepayers in exchange for various insurance or availability type services they provide (e.g. POLR service) are also revenues to the Companies without providing value to Ohio ratepayers, and the Companies should be denied those streams of revenue. Clearly, the Companies hold themselves to a different standard.

2. The Companies' argument that retail customer participation in PJM demand response programs can cause additional generation costs is contrary to the evidence in the record.

Another erroneous statement by the Companies is that the PJM programs have a cost to the Companies' customers who do not participate in the programs.[46] First, Integrys witness Wolfe testified 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.[47] The Companies also ignore Congress' statement at Section 1252(f) of the Energy Policy

[45] *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).
[46] The Companies argue that because the Companies have to plan on "the load of PJM demand response participants as firm under the Fixed Resource Requirement (FRR) option and the cost of doing so is and will continue to be reflected in AEP Ohio's retail rates." AEP Initial Post-Hearing Brief at p. 122.
[47] Integrys Ex. 2, Wolfe Dir. Test. at p. 8.

Act of 2005 that "[i]t is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized."[48]

Further, contrary to the Companies' claim, participating customers in PJM demand response programs receiving service under schedules GS-2, GS-3 and GS-4 pay demand charges (i.e., demand that requires firm capacity) regardless whether the customer takes energy or curtails.[49] Specifically, customers under those schedules must pay a minimum monthly demand charge calculated based on past demand history regardless of energy actually taken.[50] Accordingly, the Companies' claim that retail customer participation in PJM demand response programs can cause additional costs for the generation supply portfolio being provided to SSO customers is simply wrong. The record is undisputed that all Ohioans benefit from the PJM demand response programs, that over $27,000,000.00 are pumped into the Ohio economy as a result of just one PJM demand response program, and that virtually all of that money comes from load serving entities located outside of Ohio.[51]

3. Senate Bill 221 does not distinguish between the types of demand response programs that can be implemented by customers.

Finally, the Companies erroneously argue that the General Assembly's design of Senate Bill 221 leaves no room for PJM demand response programs. The Companies claim that the General Assembly designed Senate Bill 221 to "harness mercantile customer-sited resources for demand response that could be committed to an electric

[48] Energy Policy Act of 2005, Section 1252(f) (emphasis added).
[49] See Companies' Ex. 1 at DMR-9, 225-237.
[50] *See* Tr. IX, 60-61.
[51] Integrys Ex. 2, Wolfe Dir. Test. at pp. 8-9, 15, 17 *and see* Tr. IX, 52-53 (Companies' witness Roush testimony on cross).

utility's compliance with the peak demand reduction benchmarks."[52] The Companies also argue that it is "not clear how interruptible capacity associated with PJM demand response programs would count toward the benchmarks without being under the control of the EDU and being 'designed to achieve' peak demand reductions."[53] For these reasons, the Companies conclude that PJM demand response program participation must not be allowed under Senate Bill 221.

This argument by the Companies lacks merit and reflects a misreading of Section 4928.66. As discussed above, FERC requires PJM to allow retail customers to participate in PJM demand response programs "unless the laws and regulations of the relevant electric retail regulatory authority expressly do not permit a retail customer to participate."[54] Senate Bill 221 contains no express prohibition on PJM program participation, and therefore, as a matter of law, the Companies cannot use a state public policy argument to trump the Ohio General Assembly's and the FERC's directives.

Moreover, the plain language of Senate Bill 221 (Section 4928.66(A)(2)(c)) clearly gives mercantile customers the discretion to participate in any type of demand response program, which, therefore, includes PJM demand response programs. First, Senate Bill 221 gives the mercantile customer the choice of whether or not to commit its demand response programs to the utility. As clearly reflected in the third sentence of Section 4928.66(A)(2)(c) (emphasis added):

> If a mercantile customer makes such existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility pursuant to division (A)(2)(c) of this section, the electric utility's baseline under division (A)(2)(a) of this section shall be adjusted to exclude the effects of all such demand-response, energy

[52] AEP Initial Post-Hearing Brief at p. 124.
[53] *Id.*
[54] 18 CFR § 35.28(g)(1)(iii) (emphasis added).

efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline.

Secondly, the first sentence of 4928.66(A)(2)(c) requires the Commission to include the effects of all mercantile customer programs when determining the utility's compliance with the peak demand benchmarks. This requirement applies regardless of whether the mercantile customer decides to commit its demand response programs to the utility. As stated by the Commission in its recent December 17, 2008 Opinion and Order, In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan, Case No. 09-920-EL-SSO *et. al.*:

> As referenced at the start of our analysis of this issue, division (A)(2)(c) of Section 4928.66, Revised Code, includes four sentences, the first three of which have relevance to our discussion or were referenced by parties. While we will not repeat the text of those sentences here, we will summarize them. The first sentence provides that calculation of the electric utility's compliance with the benchmarks should include the effects of all mercantile customers' programs. That first sentence includes no reference to whether or not such programs are capabilities that have been "committed" to the electric utility's own programs. The second sentence allows the Commission to approve a rider that exempts, from its coverage, mercantile customers who commit their capabilities to the electric utility's programs, if the Commission finds that the exemption encourages the customers to commit their capabilities. The third sentence goes back to the calculation methodology and requires the electric utility's baseline to be adjusted to exclude the effect of committed capabilities of mercantile customers.[55]

Thus, contrary to the Companies' assertion, the General Assembly designed Senate Bill 221 to promote all demand response programs, including wholesale demand response programs, and left the decision of what programs to implement to the customers.

Accordingly, consistent with the General Assembly's intent, Integrys respectfully requests the Commission to consider including all demand response programs for

[55] December 17, 2008 Opinion and Order, In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan, Case No. 09-920-EL-SSO *et. al.* at p. 35 (emphasis added).

compliance purposes. One example would be to require curtailment service providers, by definition aggregators and electric service companies (Section 4928.01, Revised Code), to register with the Commission and record loads committed to the PJM demand response programs.[56] As well, the Commission could require curtailment service providers to notify the Commission as to any load reductions resulting from PJM curtailments. Such action by the Commission would help further the goals of Senate Bill 221.

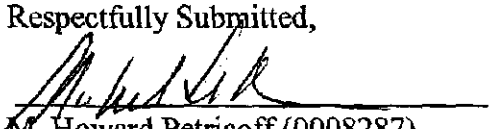
III. CONCLUSION

For all the reasons detailed in the foregoing brief and its initial trial brief, Integrys respectfully requests that the Commission reject the Companies' proposal to ban PJM demand response participation by standard service customers. It is certainly not the policy of this State to remove over 580 MW from PJM demand response programs – load that is available in the time of grid emergency and load that can reduce the need to build new generation. That may explain why not one party in this proceeding other than the Companies supports a ban on PJM demand response participation. FERC does allow states to ban retail customers from participating in wholesale demand response programs, based on an express statute or rule, but no such statute or rule exists in Ohio. Therefore, the Commission cannot take any action banning participation in PJM demand response programs until the General Assembly gives the Commission the authority to do so. For the General Assembly to consider such a ban, it will have to grapple with the loss of millions of dollars in program revenues from out-of-state sources injected annually into the Ohio economy. Nevertheless, the issue of PJM participation by retail customers rests with the General Assembly and not with the Commission. The Commission's role,

[56] Dayton Power and Light Company, in its recent ESP application (Case No. 08-1094-EL-SSO), made a similar suggestion that the Commission register curtailment service providers.

rather, is to determine how to measure the effects of the PJM demand response programs for purposes of Section 4928.66(A)(2)(c).

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 14th day of January, 2009.

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