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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Commission Review of the)
Capacity Charges of Ohio Power Company and)
Columbus Southern Power Company)

Case No. 10-2929-EL-UNC

2011 JAN 18 AM 9:56

PUCO

MEMORANDUM CONTRA OF FIRSTENERGY SOLUTIONS CORP.

FirstEnergy Solutions Corp. ("FirstEnergy") hereby submits this memorandum contra in response to the Application for Rehearing of Ohio Power Company and Columbus Southern Power Company (collectively, "AEP-Ohio"). AEP-Ohio seeks rehearing of the Commission's December 8, 2010 Entry which initiated a review of AEP-Ohio's current and proposed capacity charges associated with retail choice customers. We oppose AEP-Ohio's application.

Our comments, filed January 7, 2011, in this proceeding, anticipated and rebutted the arguments that AEP-Ohio raises on rehearing: AEP-Ohio is already collecting a retail rate to cover the capacity costs associated with retail switching in the form of its Provider of Last Resort ("POLR") Rider. AEP-Ohio has failed to show that it is entitled to any additional recovery, and its proposed new charges would devastate retail choice in Ohio. We refer the Commission to our comments. We will not repeat these arguments in this memorandum contra, but will briefly highlight the reasons why the Commission should reject AEP-Ohio's application for rehearing.

I. THE PUCO HAS THE JURISDICTION TO REVIEW AEP-OHIO'S RATES

AEP-Ohio asserts that the PUCO "lacks jurisdiction" or is "preempted" from reviewing AEP-Ohio's capacity charges associated with retail switching. See AEP-Ohio's "Memorandum in Support," at 18-21, 24-28. According to AEP-Ohio, "it is up to FERC, not this Commission, to decide whether Ohio properly or effectively adopted a 'state compensation mechanism' within the purview of Section D.8" of the PJM tariff. Memorandum in Support at 25. But under the plain terms of the PJM tariff, AEP-Ohio has no option to file at FERC for a wholesale rate if a state rate is in place. AEP-Ohio's jurisdictional arguments thus fail.

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To reiterate, under the PJM tariff, AEP-Ohio and other Fixed Resource Requirement (“FRR”) entities have no option for wholesale recovery of capacity costs associated with retail switching if a state compensation mechanism is in place:

In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, *such state compensation mechanism will prevail. In the absence of a state compensation mechanism*, the applicable alternative retail LSE shall compensate the FRR Entity at [rest-of-pool or “RTO” RPM clearing prices], provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity’s cost or such other basis shown to be just and reasonable....

Reliability Assurance Agreement, Schedule 8.1, Section D.8 (emphasis added). Thus, if a state has established a retail compensation mechanism for capacity—as the PUCO has with the POLR Rider—that compensation mechanism controls *and no wholesale capacity compensation is available*.

AEP-Ohio misstates the plain language of the PJM tariff. AEP-Ohio asserts that “*it is true* that Section D.8 [of the RAA] also references a ‘state compensation mechanism’ and suggests that a state mechanism *may* ‘prevail’ in lieu of a federally-approved alternative.” Memorandum in Support at 5-6 (emphasis added). This is not true. What the PJM tariff actually says is that the “state compensation mechanism *will* prevail.” Reliability Assurance Agreement, Schedule 8.1, Section D.8 (emphasis added). There is a big difference between “may” and “will.”¹ That difference means that AEP-Ohio improperly applied for a new wholesale charge at

¹ AEP-Ohio cites *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC (Oct. 15, 2009) (“*Eramet*”) for the proposition that the POLR Rider is not a capacity charge. That is incorrect, as we discuss below, but AEP-Ohio ignored another conclusion in *Eramet*, where this Commission found that “[i]f the General Assembly had intended to *require* the recovery of delta revenues, it would have use ‘shall’ or ‘must’ rather than ‘may.’” *Eramet* at 8 (emphasis added). The PJM tariff, by contrast, *did* intend to require a state

FERC even though the applicable wholesale tariff—the Reliability Assurance Agreement—denied it that option. Given this limitation in the wholesale tariff, it is nonsensical for AEP-Ohio to argue—as it does—that the PUCO has no jurisdiction to review its rates.

AEP-Ohio further asserts that FERC—not this Commission—should decide in the first instance whether a state capacity compensation mechanism exists. But AEP-Ohio erroneously asserted in its application for a new rate at FERC that “Ohio has not established a compensation mechanism for capacity sales.” *PJM Interconnection, L.L.C.*, Docket No. ER11-2183-000, Tariff Filing at 3 (Nov. 24, 2010) (“November 24 Filing”). And nowhere in its FERC application did AEP-Ohio even mention the existence of the POLR Rider. Clearly AEP-Ohio was not planning on FERC making any determination about whether a state capacity compensation mechanism exists.

Regardless, the PUCO is within its jurisdictional rights to “review ... the impact of [a] proposed change [on] AEP-Ohio’s capacity charges.” See Entry at ¶ 5 (Dec. 8, 2010). Indeed, “AEP-Ohio recognizes that the Commission has broad authority to investigate matters involving Ohio utilities and that it may explore such matters even as an adjunct to its own participation in FERC proceedings....” Memorandum in Support at 8.

II. THE POLR RIDER COLLECTS CAPACITY COSTS ASSOCIATED WITH RETAIL SWITCHING

AEP-Ohio asserts that the Commission erred in finding that the POLR Rider covered capacity charges for retail loads served by Competitive Retail Electric Service Providers (“CRES Providers”). Memorandum in Support at 12-17. It cites testimony and evidence that it previously submitted seeking to demonstrate that the POLR Rider does not collect capacity costs.

compensation mechanism for capacity to prevail over a wholesale mechanism, and thus used “will” rather than “may.”

It cites other PUCO cases purporting to show that the POLR Rider does not compensate AEP-Ohio for capacity. All of these arguments fail.

First, no amount of revisionist record re-examination can change the simple fact that AEP-Ohio plainly and unambiguously represented to this Commission at the time it sought approval of the POLR Rider that it would compensate AEP-Ohio for, among other things, “the challenges of providing *capacity and energy* on short notice.” *In re Application of Columbus S. Power Co.*, PUCO Case Nos. 08-918-EL-SSO & 08-918-EL-SSO, Direct Testimony of J. Craig Baker on Behalf of Columbus Southern Power Company and Ohio Power Company at 26:12-13 (emphasis added). The POLR Rider is a capacity charge, no matter how AEP-Ohio gussies it up.

Second, AEP-Ohio repeats earlier assertions in its initial answer at FERC that “[s]imply put, the PUCO’s approval of retail POLR charges do not [sic] compensate [the AEP-Ohio companies] for the wholesale capacity that they are required to make available as FRR Entities under the RAA.” Memorandum in Support at 9. Furthermore, according to AEP-Ohio, “[t]he POLR charges relate to an entirely different service and are based on an entirely different set of costs than the capacity rates provided for under” the PJM tariff. *Id.*

We rebutted these precise points in our earlier comments at the PUCO (at 9-10). In sum, contrary to AEP-Ohio’s assertion, there is no different set of costs. Both the POLR Rider and the proposed wholesale charge are designed to recover capacity costs associated with accommodating retail choice. There are no special generating units set aside solely to provide POLR service in the event that retail choice customers switch back to AEP-Ohio. The POLR Rider and the proposed wholesale capacity charge both ultimately pay for the same generating capacity. The simple question, which AEP-Ohio has not addressed, is how much does AEP-

Ohio's generation capacity actually cost and what revenues does AEP-Ohio already recover. AEP-Ohio is entitled to no more than the difference.

Third, AEP-Ohio cites two cases that it is actively challenging at the Supreme Court of Ohio that allegedly demonstrate that the POLR Rider is not a capacity charge. See Memorandum in Support at 17-18, citing *In the Matter of the Application of Ormet Primary Aluminum Corp for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC (July 15, 2009) ("*Ormet*"), and *Eramet*; see also Memorandum in Support at 18, n.6 (AEP-Ohio is seeking to overturn these cases at the Supreme Court of Ohio). These cases say nothing about whether the POLR Rider is a state compensation mechanism for recovering capacity costs. At most, *Ormet* and *Eramet* stand for the proposition that the POLR Rider is not the *exclusive* means for AEP-Ohio to recover capacity costs in retail rates.

In its initial comments, AEP-Ohio clarified that "AEP-Ohio's capacity charges for non-shopping customers are collected through the base generation and fuel adjustment clause (FAC) rates currently approved by the Commission. Customers that take service from a CRES provider avoid paying these base generation and FAC rates including associated capacity costs." Ohio Power Company's and Columbus Southern Power Company's Initial Comments (Jan. 7, 2011) at 4-5. In *Ormet*, AEP-Ohio collected energy and capacity costs as part of a "Unique Arrangement" rather than in the Standard Service Offer ("SSO") base generation charge. In *Eramet*, AEP-Ohio collected energy and capacity costs as part of a "Reasonable Arrangement" rather than in the SSO. Since there was no risk in either case of the customer switching away from AEP-Ohio, the Commission found (over AEP-Ohio's objection) that AEP-Ohio was not entitled to additional capacity compensation in the form of the POLR Rider.

As we have previously argued, if AEP-Ohio is unhappy with the *level* of capacity compensation that it is receiving in the POLR Rider, it can file a rate application at the PUCO and prove that it is entitled to greater compensation. AEP-Ohio cannot simply file for an additional wholesale charge on top of its retail recovery—as confirmed by the plain language of the PJM tariff.

III. THE POLR RIDER IS THE STATE CAPACITY COMPENSATION MECHANISM


Finally, AEP-Ohio seeks rehearing on the grounds that the Commission erroneously found that the combination of the POLR Rider and PJM auction clearing prices constituted the state capacity compensation mechanism. AEP-Ohio argues that there is no state capacity compensation mechanism. We disagree with AEP-Ohio for all of the reasons set forth in our initial comments and in this memorandum contra.

CONCLUSION

For the foregoing reasons, FirstEnergy respectfully requests that the PUCO reject AEP-Ohio's application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be served a true and correct copy of the foregoing Comments of FirstEnergy Solutions Corp. via electronic mail (when available) and by first-class postage prepaid mail, to all parties on this 18th day of January, 2011.

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