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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) Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)
Company)

**MEMORANDUM CONTRA APPLICATION FOR REHEARING
CONSTELLATION NEWENERGY, INC. AND
CONSTELLATION ENERGY COMMODITIES GROUP, INC.**

On December 8, 2010 the Commission issued an Entry expressly adopting the current capacity charges Columbus Southern Power and Ohio Power (AEP Ohio) charges Competitive Retail Electric Service Suppliers for delivery of power to retail customers in their state franchised service areas as an interim capacity rate. The Commission in that Entry established a proceeding calling for public comments. Initial Public Comments were due January 7, 2011 and reply comments are due January 21, 2011. On January 7, 2011 eight parties filed initial comments including Constellation NewEnergy and Constellation Energy Commodities Group (Constellation). On January 7, 2011 AEP Ohio filed both its initial comments and an application for rehearing.

Constellation requests that the Commission consider its Initial Comments filed on January 7th as a memorandum contra to AEP Ohio's first assignment of error that the Commission's finding that the POLR charge established in Cases No. 08-917-EL-SSO and 08-918-EL-SSO created a capacity charge for retail loads served by Competitive Retail Electric Service ("CRES") providers was unreasonable.

As to AEP Ohio's Second and Fourth assignment of error that the Ohio Commission either lacks jurisdiction to establish a capacity rate or that it is preempted by the Federal Energy Regulatory Commission, the Commission requests that the Commission consider the arguments

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raised on that point by Constellation comments in Federal Energy Regulatory Commission Docket No. ER 11-2183-000. A copy of those comments is attached and hereby incorporated into this pleading.

WHEREFORE, Constellation respectfully requests that the Commission deny AEP Ohio's application for rehearing, maintain the interim rates and proceed with its investigation of permanent rates.

Respectfully Submitted,

Stephen M. Howard

M. Howard Petricoff (0008287)

Stephen M. Howard (0022421)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

P. O. Box 1008

Columbus, Ohio 43216-1008

Tel. (614) 464-5414

Fax (614) 464-6350

mhpetricoff@vorys.com

smhoward@vorys.com

Attorneys for Constellation NewEnergy, Inc. and
Constellation Energy Commodities Group, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 18th day of January, 2011 by electronic mail, upon the persons listed below.

Stephen M. Howard
Stephen M. Howard

Samuel C. Randazzo
Joseph Olikier
McNees, Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215-4228
sam@mwncmh.com
joliker@mwncmh.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 W. Lima Street
Findlay, OH 45839
drinebolt@ohiopartners.org
cmooney2@columbus.rr.com

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 E. Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

Jody M. Kyler
Jeffrey L. Small
Assistant Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215-3485
kyler@occ.state.oh.us
small@occ.state.oh.us

Steve Nourse
AEP Service Corp.
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com

William L. Wright
Assistant Attorney General
180 E. Broad St., 6th Floor
Columbus, OH 43215
william.wright@puc.state.oh.us

Richard L. Sites
Ohio Hospital Association
155 E. Broad St., 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.com

Thomas O'Brien
Lisa McAlister
Bricker & Eckler
100 S. Third Street
Columbus, OH 43215-4291
tobrien@bricker.com
lmcalister@bricker.com

Paul F. Wight
John N. Estes III
Skadden, Arps, Slate, Meagher &
Flom LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
Paul.wight@skadden.com
John.estes@skadden.com

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

American Electric Power Service
Corporation

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Docket No. ER11-2183-000

PJM Interconnection, LLC

**MOTION TO INTERVENE AND COMMENTS OF
CONSTELLATION ENERGY COMMODITIES GROUP, INC.
AND CONSTELLATION NEWENERGY, INC.**

Pursuant to Sections 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 214, and the Commission's Combined Notice of Filings dated November 23, 2010, Constellation Energy Commodities Group, Inc., ("CCG") and Constellation NewEnergy, Inc. ("CNE") (collectively, "Constellation") hereby move to intervene and provide comments in the above-captioned proceeding. In support, Constellation states as follows:

I. COMMUNICATIONS

All communications concerning this filing should be addressed to the following two Constellation representatives, who should be included on the proceeding's official service list:¹

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 W. Washington Street, Suite 300
Chicago, IL 60661
Phone: (312) 704-8518
Facsimile: (312) 795-9286

David Fein
Vice President, Energy Policy
Constellation Energy Resources, LLC
550 W. Washington Street, Suite 300
Chicago, IL 60661
Phone: (312) 704-8499
Facsimile: (312) 795-9270

¹ Constellation requests waiver of 18 C.F.R. § 385.203(b)(3) to include three names on the service list.

E-Mail: Cynthia.Brady@Constellation.com

Divesh Gupta
Senior Counsel
Constellation Energy
111 Market Place, Suite 500
Baltimore, Maryland 21202
Phone: (410) 470-3158
Facsimile: (443) 213-3556
E-Mail: Divesh.Gupta@Constellation.com

E-Mail: David.Fein@Constellation.com

Jason Barker
Vice President, Energy Policy
Constellation Energy
111 Market Place, Suite 500
Baltimore, Maryland 21202
Phone: (410) 470-5824
Facsimile: (410) 470-6200
E-mail: Jason.Barker@Constellation.com

II. DESCRIPTION OF CONSTELLATION

CCG is a power marketer authorized by the Commission to sell energy and capacity and certain ancillary services at market-based rates.² CCG focuses on serving the full requirements power needs of distribution utilities, co-ops and municipalities that competitively source their load requirements. CCG does not own any physical assets for the generation, transmission or distribution of electric power and has no retail electric customers or service territories. CCG is an active participant in various RTO/ISO markets and stakeholder groups.

CNE is a retail electricity supplier that provides customized energy solutions and comprehensive energy services – including, in some cases, demand response products – to residential, commercial and industrial customers. On October 8, 2010, CNE acquired CPower, Inc., a leading energy management and demand response provider, managing assets in New York, New England, the Mid-Atlantic States, California, Texas and Ontario, Canada. With the acquisition of CPower, CNE's portfolio currently includes approximately 1,500 MWs of demand response assets. CNE has been certified to act as a competitive retail electric supplier to serve

² *Constellation Power Source, Inc.*, 79 FERC ¶ 61,167 (1997) (order initially granting CCG market-based rate authority).

customers located within various service territories throughout the United States and Canada, and has been granted market-based rate authority by the Commission.³

III. BACKGROUND ON THIS PROCEEDING

On November 24, 2010, pursuant to a Deficiency Letter⁴ issued on November 19, 2010 in Commission Docket Numbers ER11-1995-000, ER11-1997-000 and 001 and ER11-2034-000, (together, "Initial Proceedings") American Electric Power Service Corporation ("AEPSC") on behalf of Columbus Southern Power Company ("CSPCo") and Ohio Power Company ("OPCo") (CSP and OPCo are herein collectively referred to as the "AEP Ohio Companies") resubmitted the formula rate templates under which each of the AEP Ohio Companies propose to calculate their respective capacity costs ("Capacity Compensation Formulas") under Schedule 8.1 – Appendix of the PJM Interconnection, L.L.C. ("PJM") Reliability Assurance Agreement ("RAA"). Specifically, AEP proposes that the AEP Ohio Companies recover capacity costs calculated pursuant to these Capacity Compensation Formulas from Competitive Retail Electric Service Providers ("Ohio CRES Providers") in Ohio, a retail choice state. AEP has requested that the Commission issue an order accepting the Capacity Compensation Formulas and permitting the new capacity rates to become effective on January 1, 2011. According to AEP, no changes were made to the formula rates that originally were submitted on November 1st in the Initial Proceedings. AEP has subsequently withdrawn all of their filings in the Initial Proceedings.

³ *NEV, L.L.C.*, 81 FERC ¶ 61,186 (1997) (order initially granting CNE market-based rate authority).

⁴ See *Deficiency Letter*, issued on November 19, 2010 in Docket Nos. ER11-1995-000, ER11-1997-000, ER11-1997-001 and ER11-2034-000. ("Deficiency Letter"). The Deficiency Letter instructed AEP to file the Capacity Compensation Formula templates under Attachment M-2 or whatever other section PJM designated for such provision in PJM's Tariff, with separate tariff sheets for each CSPCo and OPCo. PJM has designated Schedule 8.1 – Appendix to the RAA for the filing of the Capacity Compensation Formulae.

IV. MOTION TO INTERVENE

Constellation is an active participant in the electricity markets administered by PJM, a certified CRES Provider within the State of Ohio, with load serving obligations and demand response agreements that rely on PJM's capacity market and would be impacted by AEP's proposed formula rate templates. Accordingly, Constellation has a unique interest that will be directly affected by the outcome of these proceedings and that cannot be adequately represented by another party. Consequently, Constellation is an interested party within the meaning of the Federal Power Act Section 308(a) (16 U.S.C. ¶ 825g), and its intervention and participation will be in the public interest. Therefore, Constellation respectfully requests leave to intervene and participate in these proceedings.

V. COMMENTS

With no notice and no justification, AEP Ohio seeks to fundamentally and dramatically alter capacity charges applied within its service territories, a change that will have significant and untold impacts on Ohio consumers and on the competitive landscape for years to come. AEP's proposed Capacity Compensation Formulas represents a radical departure from existing practice. AEP's filing contains virtually no documentation demonstrating the validity of the figures it claims, and no supporting testimony or affidavits. Rather, AEP relies on its unsupported claims of results of negotiated agreements in other jurisdictions as support for its hollow assertions that could have a serious and long-lasting impact on the wholesale and retail markets within AEP Ohio service territories. AEP has failed to demonstrate, as it must, that its proposal is just and reasonable, and it must therefore be rejected.

A. AEP Failed to Demonstrate Its Actual Permissible Costs

AEP's filing failed to demonstrate that the figures contained in attachments to its request are its actual, permissible costs under the Fixed Resource Requirement ("FRR") Alternative. According to AEP's filing, its Attachment A represents OPCo's and CSP's Capacity Compensation Formula populated with 2009 costs derived from each of the companies' FERC Form 1. However, the inclusion of a line item from a FERC Form 1 does not mean that the figures have been analyzed, verified, and approved, by FERC, by the Public Utilities Commission of Ohio, or by the CRES Providers that would be subject to those costs. Indeed, no interested parties, particularly load serving entities, have had the opportunity to examine with particularity many of the figures that AEP provides to determine the accuracy of those figures. However, the burden shall not be on parties opposing the request. Rather, the burden is and must remain on AEP to affirmatively demonstrate the accuracy of its purported capacity costs.

In addition to a failure to provide verified costs, AEP includes components that are inappropriate as capacity charges. As noted in its filing, AEP seeks recovery of 100% of CWIP expenditures for Pollution Control Facilities and Fuel Conversion Facilities (as defined in Section 35.25 of the Commission's regulations), and 50% of all other CWIP expenditures. AEP has failed to justify the inclusion of any aspect of CWIP as a recognized and approved cost of capacity under PJM's tariffs, or under broader FERC guidelines. AEP also seeks recovery of costs related to Post-Employment Benefits other than Pensions ("PBOPs") and Post Employment Benefits ("PEBs"). As with its scheme to recover CWIP costs, AEP has failed to demonstrate that such costs are appropriate as purely capacity costs under the FRR Alternative.

Additionally, AEP has sought an excessive return on equity ("ROE"). AEP contends that an ROE of 11.1% is appropriate, solely on the basis of the fact that the same percentage ROE

was included in *Southwestern Electric Power Co.*, Docket Nos. ER10-207 and ER10-208. Of course, that docket has nothing whatsoever to do with the current docket. It is in a different jurisdiction, for different facilities and service territories. Moreover, the ROE in that case was based upon a negotiated settlement; there has been no such settlement here. In fact, AEP made its Initial Filings without any notice to, much less input from, Ohio stakeholders.

B. AEP's Proposal Is Not Just and Reasonable

Even assuming, *arguendo*, that the figures AEP contends are its costs are accurate, AEP has nevertheless failed to provide explanation or justification showing that those costs are just and reasonable. A review of AEP's purported costs versus capacity costs resulting from the RPM auctions demonstrates AEP's failure to meet this fundamental tenet of the FRR Alternative. According to AEP's own filing, shifting to its proposed methodology in Columbus Southern Power Company would result in capacity prices that are 48.9% higher than the current capacity price in the unconstrained portions of the PJM region. Even more shocking, shifting to its proposed methodology in the Ohio Power Company would result in capacity prices that are 92.6% higher than the current capacity price in the unconstrained portions of the PJM region. There is no explanation or justification by AEP as to why its costs so grossly exceed the RPM auction clearing prices.

In addition to the costs that are excessive on its face, AEP has failed to provide sufficient information regarding the impact that those exorbitant rates would have on customers that take service from a competitive supplier. AEP has failed to calculate the impact that the increased capacity rates would have on customers taking service from competitive suppliers. AEP should be required to provide that documentation. Moreover, AEP should be required to demonstrate

that the capacity rates that it proposes to charge to those taking supply from a competitive supplier are identical to those that are charged to customers taking supply service from AEP itself. To do otherwise constitutes discriminatory and unlawful treatment, effectively depriving Ohio customers of access to wholesale electricity markets, and must be rejected.

C. AEP's Proposed Effective Date Is Not Supported

AEP's request that FERC make its proposed new capacity charges effective on January 1, 2011 is not supported. Although the FRR Alternative permits an FRR Entity to file at any time, the PJM tariff does not mandate that the proposed alternative capacity compensation mechanism is appropriate for an almost immediate effective date in the middle of a delivery year. That is certainly the case where the AEP capacity charges are concerned. Seeking the extraordinary increase in capacity charges for customers taking service from competitive suppliers ignores the realities of wholesale and retail competition – that competitive electric suppliers have entered into contracts based on disclosed capacity costs for varying lengths of time which may extend for years to come. AEP's proposal harms those that have entered into contracts for service in reliance on the PJM capacity costs, for which prices are known through 2013.

In accordance with the PJM Reliability Assurance Agreement addressing the FRR Alternative, Schedule 8.1D, load serving entities may self-supply capacity. However, in seeking an effective date of January 1, 2011, AEP has effectively deprived LSEs of the ability to self-supply at the PJM auction clearing price (or to otherwise make an informed hedge) for the term of the contract. That harm is magnified by the fact that AEP seeks to implement its proposed change in the middle of a delivery year.

D. AEP's Request is Precluded By The State Compensation Mechanism

In accordance with the PJM Reliability Assurance Agreement addressing the FRR Alternative, Schedule 8.1.D.8, the FRR Entity may only propose to change the basis for compensation if a state compensation mechanism does not otherwise exist, as is reflected in the following:

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.

Per PUCO Order issued on December 8, 2010⁵, the PUCO's approval of charges for Provider of Last Resort ("POLR") services in AEP's service territories constitute a state compensation mechanism for recovery of capacity charges. As noted in the PUCO Order:

(4) Prior to the filing of this application, the Commission approved retail rates for the Companies, including recovery of capacity costs through provider-of-last resort charges to certain retail shopping customers, based upon the continuation of the current capacity charges established by the three-year capacity auction conducted by PJM, Inc., under the current fixed resource requirement (FRR) mechanism. *In re Columbus Southern Power Company*, Case No. 08-917-EL-SSO; *In re Ohio Power Company*, Case No. 08-917-EL-SSO. See also, *In re Columbus Southern Power Company and Ohio Power Company*, Case Nos. 05-1194-EL-UNC, etc. However, in light of the change proposed by the Companies, the Commission will now expressly adopt as the state compensation mechanism for the Companies the current capacity charges established by the three-year capacity auction conducted by PJM, Inc. during the pendency of this review.

Accordingly, to the extent that there was any previous doubt as to whether the POLR charges approved for recovery by AEP were a state compensation mechanism, the PUCO removed all doubt by its express finding. Given the existing state compensation mechanism for capacity, AEP is without authority under Section 205 of the Federal Power Act to seek alteration of that

⁵ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, PUCO Case No. 10-2929-EL-UNC.

mechanism from the Commission. In its December 8, 2010 Order, the PUCO also initiated a review to determine the impact of AEP's proposed change would have, and whether any change in the state compensation mechanism is warranted.

VI. CONCLUSION

WHEREFORE, Constellation respectfully requests that the Commission grant Constellation's motion to intervene, designate CCG and CNE as parties to this proceeding, with all the rights appropriate to that status, and consider Constellation's comments in their review of AEP's proposal to recover capacity costs calculated pursuant to these Capacity Compensation Formulas. Specifically, Constellation requests that the Commission deny AEP Ohio's request. In the alternative, Constellation requests that the Commission stay the matter pending the outcome of the PUCO-initiated review and investigation into the state compensation mechanism.

Respectfully submitted,

/s/ Cynthia Fonner Brady
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Street, Suite 300
Chicago, IL 60661

*On behalf of
Constellation Energy Commodities Group, Inc.,
and Constellation NewEnergy, Inc.,*

Dated: December 10, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served on this 10th day of December, 2010 the foregoing document in accordance with the requirements of the Commission's Rules of Practice and Procedure.

/s/ Cynthia Fonner Brady
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Street, Suite 300
Chicago, IL 60661