

**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; an Amendment to its Corporate)
Separation Plan; and the Sale or)
Transfer of Certain Generating Assets)

Case No. 08-0917-EL-SSO

and)

In the Matter of the Application of)
Ohio Power Company for Approval of)
its Electric Security Plan; and an)
Amendment to its Corporate)
Separation Plan)

Case No. 08-918-EL-SSO

PUCO

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Direct Testimony on Remand of David I. Fein

**Vice President, Energy Policy – Midwest
Director of Retail Energy Policy
Constellation Energy Group, Inc.**

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

Dated: June 30, 2011

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1 **I. INTRODUCTION**

2 **A. Identification of Witness**

3 **Q. Please state your name and your business address.**

4 **A.**My name is David I. Fein, and my business address is 550 West
5 Washington Boulevard, Suite 300, Chicago, Illinois 60661.

6
7 **Q. By whom are you employed?**

8 **A.**I am employed by Constellation Energy Group, Inc. ("Constellation").
9

10 **Q. Please describe your position with Constellation.**

11 **A.**I am Vice President of Energy Policy in the Midwest and Pennsylvania for
12 Constellation as well as Director of Retail Energy Policy. In my role as
13 Vice President of Energy Policy in the Midwest and Pennsylvania, I am
14 responsible for directing and implementing regulatory and legislative
15 policies for Constellation's retail, wholesale, and merchant business
16 interests in Illinois, Michigan, Ohio, and Pennsylvania. In my role as
17 Director of Retail Energy Policy, I am responsible for coordinating
18 Constellation's retail energy policy advocacy across the country.
19 Constellation, a FORTUNE 200 company, is the nation's largest
20 competitive supplier of electricity to commercial, industrial, and
21 governmental customers and the nation's largest wholesale power seller.
22 Constellation is also an active supplier of electric power and energy to
23 residential customers. Constellation also manages fuels and energy
24 services on behalf of energy-intensive industries and utilities. It owns a

1 diversified fleet of 78 generating units located throughout the United
2 States, totaling approximately 8,700 megawatts of generating capacity.

3
4 **Q. Please describe your educational and business experience.**

5 **A.** From an educational perspective, I earned a Bachelor of Arts in Political
6 Science and Behavioral Science & Law from the University of Wisconsin-
7 Madison in 1989 and a Juris Doctorate from DePaul University College of
8 Law in 1993. I am a member of the American, Chicago, Energy, and
9 Illinois State Bar Associations. I have more than 15 years of experience in
10 all facets of the energy industry. Previously, I served as Senior Regulatory
11 Counsel for Constellation and was responsible for providing legal and
12 regulatory support to all of the regulatory activities of Constellation
13 NewEnergy, Inc. ("CNE") before state and federal regulatory agencies
14 across the country and in Canada. In addition, I acted as Senior Counsel
15 providing primary legal support and counsel for all of CNE's commercial
16 activities in Illinois and Alberta, Canada as well as support for other
17 markets. My previous experience prior to joining Constellation includes
18 five-and-a-half years at DLA Piper, LLP, a 3,600-lawyer law firm,
19 specializing in energy and telecommunications law and regulation and
20 four-and-a-half years as an Assistant State's Attorney, in the Illinois Cook
21 County State's Attorney's Office, focusing on public utility law and
22 regulation.

23
24 **Q. On whose behalf are you testifying?**

1 **A.** I am testifying on behalf of CNE and Constellation Energy Commodities
2 Group, Inc. ("CCG").

3
4 **Q.** **Please provide some background on the Constellation**
5 **Companies on whose behalf you are testifying in the instant**
6 **proceeding.**

7 **A.** CNE provides electricity and energy-related services to retail customers in
8 Ohio as well as in 15 other states, the District of Columbia, and two
9 Canadian provinces and serves more than 15,000 megawatts of load and
10 more than 10,000 customers. CNE holds a certificate as a competitive
11 retail electric service ("CRES") supplier from the Public Utilities
12 Commission of Ohio ("PUCO" or "the Commission") to engage in the
13 competitive sale of electric service to retail customers in Ohio. CNE
14 currently provides service to retail electric customers in Ohio. CCG
15 provides wholesale power and risk management services to wholesale
16 customers (distribution utilities, co-ops, municipalities, power marketers,
17 utilities and other large load serving entities), throughout the United States
18 and Canada, in both regulated and restructured, competitive energy
19 markets. CCG is active in the PJM Interconnection, L.L.C. ("PJM") and
20 Midwest Independent System Operator wholesale power markets and has
21 sold power for wholesale delivery in Ohio. CNE and CCG are subsidiaries
22 of Constellation.

23
24 **B.** **Purpose of Testimony**

1 **Q. Please describe Constellation's interest in this proceeding.**

2 **A.** As a licensed CRES provider in the State of Ohio, a registered CRES
3 provider in the service territories of the Columbus Southern Power
4 Company ("Columbus Southern Power") and the Ohio Power Company
5 ("Ohio Power") (collectively, "AEP"), and the largest seller of wholesale
6 power in the U.S., Constellation has a direct pecuniary interest and is
7 extremely interested in this proceeding.

8
9 **Q. Was Constellation active in the original AEP ESP proceeding**
10 **before the PUCO that is the subject of this remand proceeding?**

11 **A.** Yes. Constellation submitted testimony, participated in the hearings, and
12 filed briefs in the proceeding. Among other things, Constellation
13 addressed the issue of the proposed provider of last resort ("POLR") charge
14 that AEP was seeking to make non-bypassable for all customers.

15
16 **Q. Why is Constellation submitting testimony in this remand**
17 **proceeding?**

18 **A.** On April 19, 2011, the Ohio Supreme Court issued a decision reversing and
19 remanding the PUCO decision in PUCO Docket Nos. 08-917 and 08-918
20 ("AEP ESP I proceeding").¹ The Ohio Supreme Court, among other things,
21 found that the PUCO's decision on the issue of the amount of the POLR
22 charge was not supported by the record. Specifically, the Court found that

¹ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655, 2011-Ohio-1788 (2011).

1 the legal authorization for the POLR charge was purportedly cost-based,
2 but that there was insufficient evidence of AEP's costs to support the
3 Commission's finding. The Court overturned the tariffed POLR charge and
4 gave the Commission the option of rehearing the case to allow AEP to
5 either substantiate the cost of the POLR or provide a legal theory that
6 permits AEP to raise its rates under Section 4928.143, Revised Code for
7 other than its costs.

8 Constellation believes that the Commission's decision on remand
9 will have a substantial effect on whether there is any development of a
10 competitive retail market in the AEP Ohio service area. In submitting its
11 testimony in this remand proceeding, AEP Ohio President and Chief
12 Operating Officer Joseph Hamrock included a cover letter that attempts to
13 show a grave and dire situation if the PUCO fails to allow AEP to impose
14 significant non-bypassable generation-related costs onto the backs of Ohio
15 consumers without regard for various other policies articulated by the Ohio
16 General Assembly. As such, the decision that the Commission will make in
17 this remand proceeding will send a signal to the marketplace whether
18 retail competition is viable in the AEP service territories and whether
19 CRES providers like CNE have an opportunity to provide customers with
20 an alternative to service with AEP. Due to its vast experience and
21 participation in the competitive retail and wholesale markets in Ohio and
22 across the country, Constellation will be able to assist in the development
23 of a full and complete record to assist the Commission in its consideration
24 of AEP's ESP Application.

1 **Q. Please summarize the issues that you will address in your Direct**
2 **Testimony.**

3 **A.** I will address the proposed POLR Rider. As will be discussed below, if the
4 Commission fails to alter AEP's proposal on remand, retail competition
5 and governmental aggregation will be severely handcuffed and may not
6 develop in AEP's service territory as envisioned by the General Assembly
7 in the codified state energy policy Section 4928.02, Revised Code and in
8 conflict with SB 221.

9
10 **C. Summary of Recommendations**

11 **Q. Do you have any specific recommendations regarding the**
12 **proposed POLR Rider?**

13 **A.** Yes. Constellation has two specific recommendations. First, despite the
14 direction from the Ohio Supreme Court, AEP Ohio has failed to provide
15 any legitimate estimate of the costs it incurs due to the Company's POLR
16 obligation. Second, and regardless of the Commission's determination on
17 whether AEP Ohio has met its burden of proof, the Commission should
18 **reject** AEP's attempt to make the proposed POLR Rider non-bypassable
19 for consumers that do not wish to purchase generation supply from AEP.
20 AEP Ohio should not be allowed to utilize this remand proceeding as a
21 means to change the POLR charge from a bypassable to a non-bypassable
22 charge. This effort goes well beyond the scope of the remand proceeding
23 as ordered by the Supreme Court and, as such, is inappropriate and
24 unlawful.

1
2 **II. The Imposition of a Non-bypassable**
3 **POLR Charge Is Not Justified, Is Not**
4 **Necessary, and Will Frustrate Retail Competition**
5

6 **Q. Under Senate Bill 221, do retail customers still retain the right**
7 **to switch to a CRES provider to receive electric generation**
8 **service?**

9 **A.** Yes. SB 221 makes clear that the promotion of retail competition is one of
10 the policy goals of the State. We are hopeful that the Commission's
11 decision on remand will ensure that Ohio consumers retain a realistic and
12 meaningful opportunity to exercise that fundamental right to choose a
13 CRES provider and that retail competition has a chance to develop for the
14 benefit of AEP's customers. One central component of promoting
15 meaningful competition is limiting AEP's recovery to only its actual costs
16 required to serve customers of CRES providers.
17

18 **Q. Did the PUCO's original Order allow AEP to impose a non-**
19 **bypassable POLR Charge?**

20 **A.** No. In the Commission's final order in the matter at bar, AEP's request to
21 make the POLR charge non-bypassable was rejected and the Commission
22 permitted shopping customers to avoid the POLR charge so long as, if they
23 came back during the Electric Security Plan term, they purchased
24 generation at the higher of market rates or the bundled standard service
25 offer rate.
26

1 **Q. Is AEP now proposing to make the POLR non-bypassable?**

2 **A.** For all intents and purposes, yes. AEP witness Laura Thomas testifies that
3 customers who shop can avoid paying the POLR fee if they agree to return
4 at market rates.² What Ms. Thomas fails to mention is that AEP has
5 apparently interpreted the Commission's March 2009 Opinion and Order
6 in the matter at bar to mean that any customer who elected not to pay the
7 POLR fee had made a permanent election and could never take standard
8 service again at less than the higher of market price or the standard service
9 offer.³ Constellation's experience in the Ohio retail electric market is that
10 customers sign CRES supply contracts for a limited period of time,
11 generally one to three years. Few customers would be willing to trade the
12 avoidance of the POLR fee for 12 to 36 months in exchange for never being
13 able to return to the standard service offer price, should it ever be below
14 market again. That is why virtually nobody has elected to make the POLR
15 fee bypassable.

16
17 **Q. Has AEP Ohio correctly interpreted the Commission's Opinion**
18 **and Order as to who, when a retail customer who does not pay the**
19 **POLR charge, may return to standard service without penalty?**

20 **A.** No, the Commission's March 18, 2009 Order stated:

21 "As noted by several intervenors and Staff, the risk of returning customers may be
22 mitigated, not eliminated by requiring customers that switch to an alternative

² Direct Testimony of Laura Thomas at 6.

³ See the Response of CSP and OPC to the Staff Data Request, Turkenton Informal (June 7)
Set served June 13, 2011.

1 supplier (either through a governmental aggregation or individual CRES
2 providers) to agree to return to market price and pay market price, if they return to
3 the electric utility after taking service from a CRES provider, for the remaining
4 period of the ESP term or until the customer switches to another alternative
5 supplier. (Emphasis added).
6
7
8

9 **Q. What has been the effect of limiting the by-passability of the**
10 **POLR to the permanent loss of the right to purchase bundled**
11 **standard service at the higher of market or tariff rates?**

12 **A.** As a practical matter, imposing such a risk makes the POLR fee a non-
13 bypassable charge.
14

15 **Q. Should all charges be bypassable when a customer takes service**
16 **from a CRES provider?**

17 **A.** No, only those costs associated with the service they receive from a CRES
18 provider should be bypassable. This prevents customers from having to
19 pay the utility for services they no longer and do not wish to receive. For
20 example, services which are distribution-related or non-generation supply
21 related should continue to be paid by all customers regardless of whether
22 they choose to select a CRES provider or remain with the utility.
23 Customers should only pay for the costs they cause from the services that
24 they purchase.
25

26 **Q. How do non-bypassable charges potentially cost customers**
27 **more when their supply offer is lower than the utility standard**
28 **service offer (“SSO”) supply?**

1 **A.** It is fairly simple. When a customer takes supply from a CRES provider,
2 they are receiving all of their generation-related service from that
3 company. They are no longer taking generation-related service from the
4 utility. If a shopping customer is forced to continue to pay the utility for
5 generation-related supply charges plus pay their CRES provider for
6 generation service, they are effectively paying twice for the same service.
7 Paying the utility for a service the customer is already receiving from the
8 CRES could cause the customer to pay more for electric power than had
9 they not switched to the CRES provider – even if the CRES supplier’s
10 generation is at a lower cost than the standard service offer.

11
12 **Q.** **Has the General Assembly addressed the issue of whether**
13 **generation-related expenses can be collected in a utility**
14 **distribution fee?**

15 **A.** Yes, in Senate Bill 221 the General Assembly amended Section 4928.02
16 (H), Revised Code which addresses anti competitive subsidies by
17 specifically: “...prohibiting the recovery of any generation-related costs
18 through distribution or transmission rates”.

19
20 **Q.** **What is the effect on the competitive retail market when**
21 **shopping customers are required to pay the utility for**
22 **generation services they do not receive?**

23 **A.** Making shopping customers pay AEP for generation service that they do
24 not receive has the potential to destroy the development of the competitive

1 retail market, and in fact was a major contributing factor in the collapse of
2 retail competition and governmental aggregation programs in other Ohio
3 service territories in 2005.
4

5 **Q. What is AEP's support on remand for making the proposed**
6 **POLR charge non-bypassable?**

7 **A.** AEP does not support its proposal to impose a non-bypassable POLR
8 charge of any amount on all customers, even if that customer is taking
9 generation service from someone other than AEP, much less support the
10 amount that it seeks to charge customers.
11

12 **Q. What was AEP's justification for imposition of the POLR Charge**
13 **on a non-bypassable basis in the original proceeding?**

14 **A.** In the original AEP ESP proceeding, then AEP Witness Baker based the
15 justification for a non-bypassable POLR charge on his belief that the
16 Governor, General Assembly, and/or the Commission will not stand by an
17 approved ESP plan if returning governmental aggregation customers have
18 to pay market prices. (AEP Witness Baker Direct, p. 27.)
19

20 **Q. How do other competitive retail markets address the POLR risk**
21 **of the default supplier?**

22 **A.** In other well-functioning competitive retail electric markets, where
23 customers have the ability to select someone other than the incumbent
24 default supplier, we do not see the imposition of POLR charges of the

1 nature that AEP is continuing to propose in this proceeding. Rather,
2 suppliers are asked to take on the risk that AEP describes, and the only
3 source of recovery for this risk for any supplier is (appropriately) within
4 the generation rate. Therefore, AEP's charge should be able to function in
5 similar fashion. In other markets, there is no fee charged to shopping
6 customers for the cost of electric generation, let alone the lost opportunity
7 value of such generation. AEP should be precluded from doing so here.

8
9 **Q. If utilities in other states are not imposing a POLR charge on**
10 **customers that wish to select a competitive retail supplier, how**
11 **do they protect themselves from the POLR risks outlined by the**
12 **various AEP witnesses?**

13 **A.** It has been our experience that such risks are addressed through switching
14 rules, enrollment windows or notice provisions, and default service rates
15 that compensate the POLR supplier for their actual costs to serve a
16 returning customer. Other states require returning customers to take
17 service that mimics or tracks a verifiable index -- such as the PJM West
18 Hourly or Day-Ahead price for on-peak and off-peak power. For example,
19 this approach is utilized as the default rate for customer classes that are
20 declared "competitive" in the Commonwealth Edison Company service
21 territory in Illinois.

22
23 **Q. Do all Ohio POLR suppliers apply a POLR or Standby Charge on**
24 **customers to address this POLR risk?**

1 **A.** No. Neither the FirstEnergy Companies nor Duke Energy - Ohio (“DE-
2 Ohio”) impose a non-bypassable POLR charge. DE-Ohio does not impose
3 any penalty on customers who elect not to pay the POLR charge and
4 return after the Electric Security Plan term has ended. Further, if a
5 customer who has elected not to pay the POLR charge does come back for
6 standard service during the term of the Electric Security Plan, the rate is
7 set at the standard service price plus 15%. Cleveland Electric Illuminating,
8 Toledo Edison and Ohio Edison (“FE-Ohio”) do not have a POLR charge.
9 Customers are free to come and go from standard service and that
10 migration risk is simply incorporated in the bid price. That is typical of all
11 competitive procurements for full requirements – the supplier does not get
12 additional funds for customers that switch back to utility load. Rather, by
13 bidding out the responsibility for POLR to the wholesale providers, FE-
14 Ohio has used the market to find the overall lowest cost provider of
15 service.

16
17 **Q.** **What is your opinion regarding the manner in which FE-Ohio**
18 **and DE-Ohio address their POLR risks, as compared to that**
19 **proposed by AEP?**

20 **A.** As a CRES provider to Ohio customers in the FE-Ohio and DE-Ohio
21 service territories, the manner in which these other Ohio EDUs address
22 the issue is preferable to the mandatory imposition of a non-bypassable
23 POLR charge. Further, given the language of the Commission’s March 18,

2009 Opinion and Order in this case, I believe the Commission thought it was implementing a somewhat uniform approach.

Q. What would be a reasonable POLR charge?

A. The basic POLR charge should be only the cost for the Company to stand ready to purchase generation for the customer in the open market. That should be nominal, if it exists at all. AEP should not be permitted to charge a reserve payment based on forecasted costs, based on a variety of assumptions that may be inaccurate. Instead, AEP should receive recovery of their actual costs, as those costs are incurred. In sum, if a customer switches back to utility service, AEP should only at that time be entitled to recovery, and should be limited to recovery of their actual costs. In accordance with the Remand Order from the Ohio Supreme Court, that POLR charge cannot be a black box calculation or option model if authorized under Section 4928.143, Revised Code; it must be based on actual costs.

III. Conclusion

Q. Please summarize why the Commission should consider the effects of ESP pricing, which includes non-bypassable generation-related charges, on shopping customers.

A. When reviewing the benefits of the ESP, the Commission must include in their analysis the fact that S.B. 221 retained the right of customers to select someone other than the utility for their electricity supply. The

1 Commission must consider the economic reality for customer choice and
2 customer switching when evaluating AEP's POLR testimony.

3
4 Customers who shop with a CRES provider have a variety of products to
5 choose from, including the ability to fix a rate at any point in the market.
6 The imposition of non-bypassable charges, such as AEP's proposed POLR
7 Rider, is detrimental to the ability of customers to shop – especially when
8 market prices are competitive with or below the utility SSO price. At that
9 point, the benefits of paying a lower price for generation outweigh any
10 benefit of deferrals which may artificially lower prices in the short term
11 but cost more in the long term. As I explained earlier, the imposition of a
12 number of inappropriate non-bypassable charges only benefits AEP – to
13 the detriment of customers. AEP should not be permitted to charge a
14 reserve payment based on forecasted costs, based on a variety of
15 assumptions that may be inaccurate. Instead, AEP should receive not
16 more than recovery of their actual costs, as those costs are incurred.

17
18 **Q. Please summarize your recommendations regarding AEP's**
19 **remand testimony in support of its' proposed POLR charge.**

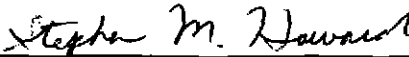
- 20 • **A.** The Commission should **reject** AEP's attempts to impose
21 generation-related costs, such as the proposed POLR Rider, onto
22 consumers that do not purchase generation supply from AEP.

23 **Q. Does this conclude your testimony?**

24 **A.** Yes.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served upon the following persons via email this 30th day of June, 2011.



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