BEFORE THE
PUBLIC UTILITES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	:	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	:	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority	:	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders	:	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders	:	Case No. 10-344-EL-ATA
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
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	:	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	:	Case No. 11-4921-EL-RDR

MEMORANDUM OF OHIO POWER COMPANY IN OPPOSITION TO INDUSTRIAL ENERGY USERS- OHIO'S MOTION AND FIRSTENERGY SOLUTIONS' OBJECTIONS/REQUEST FOR RELIEF

MEMORANDUM IN OPPOSITION

On December 30, 2011, Industrial Energy Users – Ohio (IEU) filed a motion and request for expedited ruling seeking: (1) that the Commission order AEP Ohio to file a retail tariff reflecting the details associated with implementation of the two-tiered capacity charge modified and approved as part of the September 7, 2011 Stipulation and Recommendation filed in this proceeding (Stipulation), and (2) that the Commission direct AEP Ohio to order further modifications to the Detailed Implementation Plan (DIP) associated with Appendix C of the Stipulation, based on allegations that the revised Detailed Implementation Plan filed by AEP Ohio on December 29, 2011 (Revised DIP) does not conform to the December 14, 2011 Opinion and Order (Opinion and Order). Also on December 30, 2011, FirstEnergy Solutions Corp. (FES) filed objections to the Revised DIP and requested expedited Commission action: (1) to provide additional clarity on what FES asserts are the Opinion and Order's intended modifications of the DIP, (2) to delay implementation of the Stipulation's two-tiered capacity rate modified and adopted by the Opinion and Order, based on a claim that more information is needed, and (3) to delay implementation of the ESP rates since AEP Ohio has not "accepted" the Opinion and Order's modifications.

Given that the IEU and FES filings were made late in the day before a holiday and in light of the fact that both filings request expedited relief related to new rates and tariffs that became effective January 1, 2012, one would expect that both IEU and FES would give AEP Ohio notice of their filings. However, neither IEU nor FES notified AEP Ohio of its intention to file the expedited requests or sought agreement on an expedited ruling. Further, FES did not serve the attachment to its objections but AEP Ohio subsequently located the document on the Commission's website. Moreover, though FES seeks relief and requested an expedited ruling, it

did not make its filing in conformance to Rule 4901-1-12, OAC. These procedural defects apply with particular force to FES's second and third arguments referenced above, which effectively amount to unsupported stay requests. In any case, the objections and requests for expedited relief are without merit (as further discussed below) and should be rejected.

I. The Revised DIP properly reflects the Opinion and Order's modifications regarding Governmental Aggregation and should be implemented.

FES identifies (at 3-4) four aspects of the Revised DIP that it believes are inconsistent with the Opinion and Order. IEU alleged (at 8-9) three similar and overlapping conflicts. None of the identified features of the Revised DIP conflict with the Opinion and Order. AEP Ohio voluntarily filed the Revised DIP in order to help clarify application of the Opinion and Order's modifications affecting the Stipulation's RPM-priced set aside and the Company did so only after soliciting comments from all interested parties. AEP Ohio submits that the issues raised by IEU and FES are more properly addressed through the rehearing process.[1] At best, the changes advocated by IEU and FES amount to either modifications or clarifications of the Opinion and Order, not implementation of the existing decision. Further, none of the issues raised create a pressing need to address the matters prior to rehearing. AEP Ohio's Revised DIP is based on a straightforward reading and application of the Opinion and Order and the changes advocated by IEU and FES are based on a selective and awkward reading of the decision.

FES's first alleged conflict is that Section 4(a) of the Revised DIP improperly establishes an initial 2012 RPM set aside for residential and industrial customers below 21%, because "industrial and residential customers should receive their full 21% allotment regardless of what happens with the commercial class." IEU's filing does not share this concern of FES and no other party – opposing or supporting the Stipulation – has endorsed FES's interpretation in this

[1] FES acknowledges the overlap with rehearing arguments and thus attempts to reserve the right to subsequently file an application for rehearing even though it is presently raising such arguments through its "objections" filing.

regard. The reality is that FES's argument attempts to impose an additional modification of the Stipulation beyond the modification made in the Opinion and Order regarding the *pro rata* allocation.

Paragraph IV.2.b.3 of the Stipulation provides that the initial RPM-priced set aside allocation for each class will be established pursuant to Appendix C. The original DIP filed under the terms of Appendix C provided in Par. 4(a) that if the allotment to any customer class as of September 7, 2011 exceeds 21%, then the allocation to the remaining classes shall be reduced on a pro rata basis such that the total allotment does not exceed 21%. This provision was not modified by the Opinion and Order. Rather, the Opinion and Order (at 55) explicitly modified Paragraph IV.2.b.3's provision that as of January 2012 "any kWhs of RPM-priced capacity that have not been consumed by a customer class will be available for customers in any customer class based on the priority set forth in Appendix C." FES ignores the fact that the Opinion and Order explicitly quoted the above language which only involves the reversion to other classes of unused capacity allotments as of January 2012 – it does not relate to the initial calculation of the classes' set-aside. As the evidentiary record abundantly made clear and discussed, the initial set-aside for the residential and industrial classes was slightly lower than 21% for 2012 because of the pre-existing oversubscription of the commercial class as of September 7, 2011 (the date the Stipulation was executed).

The Opinion and Order's modification (at 55) explicitly changed the January 2012 reversion of capacity set-aside "to ensure that residential customers are not foreclosed from their share of the capacity at RPM rates." The modification did not go back to the initial allocation among the classes based on September 7, 2011 data. Expanding the initial set-aside to 21% for residential and industrial classes would exceed the overall limit of 21% -- this would be a material and costly modification that goes beyond anything discussed in the Opinion and Order.

FES's second alleged conflict between the Revised DIP and the Opinion and Order is (at 3) that "the governmental aggregation load should be additive to any pro rata allotment provided to residential or commercial customers." IEU takes a similar position (at 9) that the Revised DIP improperly treats customers served through a governmental aggregation program as first in the queue for the RPM set-aside capacity. In other words, FES and IEU believe that the governmental aggregation load for 2012 must be provided in addition to the 21% level established in the Stipulation for residential and commercial classes and cannot be included as part of the 21%, regardless of what shopping beyond aggregation may occur in those classes and when the shopping occurs. Those positions ignore the language deliberately used by the Commission in modifying the RPM-priced set aside level.

FES is wrong in claiming that the aggregation load cannot be included as part of the 21%, as there is no basis in the Opinion and Order to support the interpretation that the Commission intended to hard-wire the RPM set-aside to be "21% plus all aggregation load" in 2012. Rather, the Commission ordered (at 54) modification of the 2012 set-aside limitation "to accommodate" the load of any community that approved a governmental aggregation program in the November 8, 2011, election, provided that the aggregation programs complete the steps necessary to take service under the program in 2012. Similarly, the Commission (at 54) provided that the RPM set-aside level "shall be adjusted to accommodate such governmental aggregation programs for each subsequent year of the Stipulated ESP, *to the extent, and only, if necessary*." (Emphasis added.) The interpretation submitted by FES and IEU ignores the key qualification that the modification to the set-aside level be made to "accommodate" the actual aggregation load that meets the specified conditions and the set-aside levels be modified "to the extent, and only, if necessary." Thus, the Stipulation's set-aside level should only be expanded to the extent necessary to accommodate the December 31, 2012 completed governmental aggregation load. This concept is already captured in the Revised DIP.

Another conflict alleged by FES (at 4, labeled "d" in its list) is that the Revised DIP improperly limits the set-aside modification to only communities that passed ordinances during the November 2011 election. FES elaborates (at 4) that the Commission broadly modified the set-aside levels to accommodate governmental aggregation and did not provide any rational basis to distinguish between November 2011 ballot communities and others that have already completed the process. IEU (at 9) takes a similar position, arguing that completing the process by December 31, 2012 is the only condition in this regard. Contrary to these claims, the Opinion and Order clearly does tailor its set-aside modification to November 2011 ballot communities. The arguments advanced by FES and IEU plainly constitute rehearing requests seeking modification of the Opinion and Order rather than implementation of the existing decision.

The Opinion and Order explained the modification to the RPM set-aside:

> Although currently shopping customers will not be adversely affected by the capacity set-aside provisions, the Commission is greatly *concerned that governmental aggregations approved by communities across the state in the November 2011 election will be foreclosed from participation* by the September 7, 2011 Stipulation. It is the state policy to ensure the availability of unbundled and comparable retail electric service to all customer classes, including residential customers, and governmental aggregation programs have proven to be the most likely means to get substantial numbers of residential customers to become the customer of a CRES provider. For these reasons, we find it necessary to modify the proposed Stipulation to adjust the RPM set-aside levels *to accommodate the load of any community that approved a governmental aggregation program in the November 8, 2011, election* to ensure that any customer located in a governmental aggregation community will qualify for the RPM set aside, so long as the community or its CRES provider completes the necessary process to take service in the AEP-Ohio service territory by December 31, 2012.

Opinion and Order at 54 (emphasis added).

Thus, the modification made by the Commission was limited to accommodating the load associated with communities that approved a governmental aggregation program in the November 8, 2011 election, not any aggregation that may occur by the end of 2012. That the Commission's modification was limited to the November 2011 election is also unequivocally confirmed elsewhere in the Opinion and Order. *See e.g.*, page 64 (where the Commission

indicated it already addressed concerns about shopping caps "by modifying the Stipulation to include governmental aggregation ballots that passed this November."); and page 65 (referencing that the above "modification of the capacity plan allows for all of the communities and municipalities that recently passed governmental aggregation initiatives this November to take advantage of CRES suppliers' offers that may be lower than what AEP-Ohio is offering to its customers.") While AEP Ohio does not agree with the modification, it is obvious that the whole point of the Commission's change was to give communities who may have relied on RPM availability in pursuing ballot initiatives access to RPM-priced capacity. In addition, any opt-in aggregation could be done at any time under the normal set aside limits and do not require a modification of the Stipulation's set aside limits.

FES's remaining alleged conflict (at 3, labeled "c" in its list) is that the Revised DIP improperly eliminates non-mercantile customer load from the required aggregation accommodation. This overlaps with IEU's argument (at 8-9) that the RPM-priced set-aside should include capacity for mercantile customers served through a governmental aggregation program. The Revised DIP properly limits the qualifying aggregation load to non-mercantile customers, in conjunction with the requirement under Ohio law that opt-out aggregation programs exclude mercantile customers.

As already discussed above, the Opinion and Order's modification of the set-aside levels is focused on communities that adopted November 2011 ballot initiatives. Ballot initiatives are only required for opt-out aggregation initiatives – R.C. 4928.20(B) requires that any proposed opt-out initiative must be placed on the ballot and passed by a majority of the electors before it can be pursued. R.C. 4928.20(A) prohibits mercantile customers from being subjected to opt-out aggregation, providing that "aggregation of mercantile customers *shall occur only with the prior, affirmative consent* of each such person owning, occupying, controlling, or using an electric load center proposed to be aggregated." (Emphasis added.) To the extent that

mercantile customers can voluntarily opt in to an existing aggregation program after it is established should not change the nature and intent of the Commission's modification based on a concern for opt-out aggregation customers and the November 2011 ballot initiatives – all of which were necessarily opt-out programs.

As referenced above, the Commission's modification was based in large part on the notion that "governmental aggregation programs have proven to be the most likely means to get substantial numbers of residential customers to become the customer of a CRES provider." This concern for residential customers has nothing to do with subsequent industrial opt-in to an existing program. And the electorate is made up of residential and small commercial customers, not large industrial customers. Large industrial customers were not part of the General Assembly's design for governmental aggregation and were not part of the November 2011 ballot initiatives approved by the communities that the Commission was concerned about. Expanding the Opinion and Order's modification for November 2011 opt-out aggregation programs to include subsequent opt-in decisions by industrial customers is not supported by the existing language in the Opinion and Order and would unnecessarily create a substantial additional financial burden and uncertainty for AEP Ohio. While AEP Ohio is opposed to such set-aside expansion under any circumstances, the only appropriate stage for considering such modifications and clarifications is through the normal rehearing process – not as part of addressing compliance issues related to the Opinion and Order.

In sum, none of FES's or IEU's suggested modifications to the Revised DIP should be adopted.

II. FES's request for additional information is already moot and does not provide the basis for delaying implementation of the two-tiered capacity charge.

FES states (at 4) that AEP Ohio has taken the position that it cannot, at this time, provide FES with information regarding which of FES's customers have received an allotment or where

those customers stand in the queue. This statement is based on an informal exchange that was initiated by FES on the afternoon of December 30, 2011 – late in the day on the last business day of the year. FES representatives sent a demand for same-day service of information identifying a list of FES's individual customers who have been allotted RPM capacity for 2012 and their status in the queue. AEP Ohio's counsel promptly responded to FES that "it is going to be difficult at this late hour in the afternoon on Friday December 30th to provide the level of specialized detail you are requesting .... We should be able to provide you more detail with more time next week when we have the appropriate people in the office." AEP Ohio, in fact, did provide the requested information on January 3, 2012 – the next business day following the request. In order to ensure that FES not gain any competitive advantage over other CRES providers, AEP Ohio also proactively sent the same information to all CRES providers.

Specifically, AEP Ohio sent a list of CRES customers in the capacity queue to each respective CRES provider, with the following message:

> On December 29, 2011, AEP Ohio provided information to all CRES providers registered with AEP Ohio and posted the same information to its Customer Choice website such that it could be determined whether a customer would be awarded an allotment of RPM-priced capacity beginning in 2012. To further aid you in determining whether your customers will be awarded an allotment of RPM-priced capacity beginning in 2012 the attached CRES specific customer list is being provided that indicates by Service Delivery Identifier (SDI) whether the customer will be awarded an allotment. This list only includes customers that you were serving as of December 22, 2011.

Thus, AEP Ohio has promptly fulfilled FES's request for information and the stated objection concerning its request is moot.

Obviously, this moot issue cannot form the basis of FES's resulting request (at 5) that "the Commission should require AEP Ohio to grant a one-month extension on the implementation of the $255/MW-Day capacity charge to allow for AEP Ohio to provide the necessary information to all CRES providers and to all affected customers." In substance, FES's request to delay implementation of the Opinion and Order is a request for stay of execution – yet

FES utterly fails to address, let alone satisfy, the requirements governing a stay. Without exception, R.C. 4903.16 requires an undertaking conditioned for the prompt payment of all damages caused by the delay in enforcement of the order complained of on appeal. R.C. 4903.16 reads:

> A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the *appellant shall execute an undertaking*, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, *conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of*, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

(emphasis added). The statutory prerequisite of an undertaking is not an option or suggestion. The Supreme Court has repeatedly reiterated the requirement to post a bond to secure a stay under 4903.16. *Office of Consumers' Counsel v. Public Util. Comm.* (1991), 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162; *City of Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 112, 163 N.E.2d 167, 172; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 258, 141 N.E.2d 465, 468.

The Supreme Court has only recently reiterated the unqualified requirement for posting a bond in order to obtain a stay, in rejecting an argument made by OCC:

> OCC concedes that it failed to post bond, but asserts that it is "not financially capable of posting any bond other than a nominal amount," a circumstance that makes "a stay * * * truly an illusory remedy at best unless the Court relieves OCC from filing a bond." To the degree that the bond requirement poses a barrier, however, it is one that must be cured by the General Assembly. Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation. *See, e.g., Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347, 359, 78 N.E.2d 890 ("the legislative branch of the state government may confer upon" the commission "very broad [powers]" for the "supervision, regulation and, in a large measure, control of the operation of public utilities"). And our "revisory jurisdiction" over agency proceedings is limited to that "conferred by law." Section 2(B)(2)(d), Article IV, Ohio Constitution.

In re Columbus S. Power Co., 128 Ohio St. 3d 512, 517 (Ohio 2011).

Concerning the substantive requirements for obtaining a stay of execution (beyond the financial undertaking requirement), parties before the Commission generally utilize the standard for establishing a stay that is set forth in *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604 (dissenting opinion of Justice Douglas):

> When the commission issues an order, after the thorough review generally given by the commission and its experts, a stay of that order should only be given after substantial thought and consideration -- if at all, and then only where certain standards are met. These standards should include consideration of [1] whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; [2] whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; [3] whether or not, if the stay is issued, substantial harm to other parties would result; and, [4] above all in these types of cases, where lies the interest of the public.

MCI Telecommunications Corp. v. Public Utilities Comm., 31 Ohio St. 3d 604, 606 (Ohio 1987) (numbering supplied). FES has not alleged, let alone demonstrated, that any of these factors are satisfied in the present circumstance. FES's overt attempt to short-circuit the integrated process for rehearing and appeal should not be entertained.

Under the seminal Ohio utility law decision in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957), the Supreme Court has established, among other things, that: (1) any rates set by the Commission are lawful until such time as they are set aside by the Supreme Court; (2) a utility has no option but to collect the rates set by the Commission, unless a stay order is obtained; and (3) there is no automatic stay of any order and it is necessary for an aggrieved party to affirmatively obtain a stay and post a bond. The Commission has lawfully established the new rates for AEP Ohio through the December 14 Opinion and Order and FES's remedy for challenging the decision is rehearing and appeal (where a stay of execution is available from the Court pursuant to R.C. 4903.16).

III. AEP Ohio has properly reserved its statutory right to withdraw from the modified ESP until after rehearing and there is no basis to stay execution of the Opinion and Order

In its third objection (at 5), FES raises an argument raised in AEP Ohio's previous ESP proceeding and denied by both the Commission and the Supreme Court of Ohio. FES argues that AEP Ohio should not apply the Commission-ordered rates if it has not accepted the Commission modifications. FES argues that AEP Ohio's proposal to apply the Commission-ordered rates in the ESP order, but wait until later to decide whether to accept the modifications is inappropriate. IEU did not share this concern in its filing as IEU already knows that this matter is already a decided point of law. The Commission and the Supreme Court of Ohio both refused to find that a utility's implementation of Commission-ordered rates modifying an ESP application, while maintaining its statutory right to withdraw the ESP is an improper result under the governing law.

The Commission was previously presented with FES' argument seeking a requirement that a utility affirmatively accept the modifications to an electric security plan before implementing the modified rates -- and the Commission denied the argument. In particular, in AEP Ohio's previous ESP proceeding (ESP I), IEU presented a similar argument on rehearing. Like FES here, IEU argued there that the pertinent Commission order was unlawful because it failed to prohibit AEP Ohio from "accepting the benefits of the rates approved in the ESP while simultaneously preserving its right to withdraw the ESP." (*08-917-EL-SSO* et al., November 4, 2009, 2nd Entry on Rehearing at 5-6). IEU argued that the prior rate plan should continue until a MRO or ESP is approved by the Commission and "accepted by the electric utility." (*Id.* citing IEU App. at 9-12).

The Commission found that it was unnecessary to address IEU's argument because AEP Ohio had not filed a notice that it intended to withdraw the ESP. (*Id.* at ¶ 16). The Commission's finding that a determination on the issue was not necessary, and its subsequent

defense of that decision, recognized that IEU's argument was without merit and that a right to withdraw from a modified ESP does not carry with it a requirement to accept a modified ESP, especially when the ESP is not a final nonappealable order that could change on rehearing or appeal. The Commission further supported its finding in its merit brief before the Supreme Court of Ohio. The Commission pointed out that the argument lacked merit without a notice of intent to withdraw the ESP. (*In re Application of Columbus S. Power Co*, 128 Ohio St.3d 512, 2011-Ohio-1788 (Supreme Court Docket 09-2022), March 5, 2010, Commission Merit Brief at 17). The Commission pointed out that any decision on the matter would amount to an advisory opinion because there was no case or controversy to resolve based on the facts. (*Id.* at 18). The Commission went on to state that,

> Should the Court nevertheless proceed to examine the merits of this argument, it should conclude that nothing in S.B. 221 precludes an electric utility from charging the rates approved in the ESP while retaining the right to withdraw the ESP. Ohio Rev. Code Ann. § 4928.143(C)(2)(a) (West 2010), App. at 14. The statute places no limitation on that right. There is no time limit placed on the right to withdraw, nor does the statute bar withdrawal if the utility exercises its right to apply for rehearing.

Id. The Commission has made its position clear in its decision and its defense of that position to the Court.

The Commission's rationale in defending its previous decision denying this argument is the correct application of law. The Commission pointed out that there is no support for the position that an electric utility forfeits its right to withdraw an ESP application if it implements the Commission-ordered rates in a decision modifying an ESP application. (*Id.*) The Commission cited *State v. Hughes* (1999), 86 Ohio St. 3d 424, 427, 715 N.E.2d 540, 543, urging the Court not to insert conditions not found in the statutory text. As the Commission argued before the Court, "an electric utility is required by statute to charge an approved ESP rate,

regardless of whether it is contemplating withdrawal of the ESP." (Id. at 18-19). The Commission cited R.C. 4905.32 that provides in pertinent part:

> No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

AEP Ohio is complying with its statutory duty in applying the Commission's order. FES' argument to the contrary violates the Companies' statutory requirements.

The Supreme Court agreed with the Commission in denying the argument now raised by FES in this proceeding. The Court determined that IEU's argument (now offered by FES) lacked merit. (*In re Application of Columbus S. Power Co*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶44). The Court found, "[t]he law permits utilities to withdraw modified ESPs, but does not require it, R.C. 4928.143(C)(2)(a), and IEU cites *no authority requiring "formal acceptance" of an ESP*. (Id. at ¶47) (emphasis added).

FES' argument was already denied by the Commission and the Supreme Court of Ohio and need not be revisited in this proceeding. The Commission should reject FES' attempts to dust off the argument and any associated alternative argument to deal with its concern that was previously found to be without merit. Further, to the extent that FES seeks to halt execution of the Opinion and Order through its request for delay, it is seeking a stay without any support or satisfaction of the applicable requirements and such a request should be rejected for numerous reasons as discussed above.

IV. The State Compensation Mechanism associated with the Stipulation's two-tiered capacity charge discount is appropriately pursued through the existing FERC and PJM tariff process.

IEU argues (at 10) that an intrastate tariff should be filed and approved by the Commission, in order to properly implement the Stipulation's two-tiered capacity charge

discount levied against CRES providers. IEU claims that customers face immediate and potentially harmful consequences due to the lack of transparency and lack of compliance regarding the governmental aggregation modifications. For reasons already explained above, AEP Ohio disagrees with IEU's underlying premises of lack of transparency and noncompliance with the governmental aggregation modifications. Beyond that, IEU has simply not demonstrated the need for a separate retail tariff to implement the revised State Compensation Mechanism (SCM) adopted by the Opinion and Order.

The SCM is ordered by the Commission pursuant to the terms of the FERC-approved Reliability Assurance Agreement (RAA) applicable to PJM Interconnection. Specifically, Section D.8 of Schedule 8.1 of PJM's RAA is the basis for a State commission such as the PUCO to adopt a SCM. IEU admits (at 5) that the Opinion and Order effectively modifies the existing SCM it had previously adopted through the December 8, 2010 Entry in Case No. 10-2929-EL-UNC. There has been no PUCO-approved tariff required in order to implement the SCM that has been in place for more than a year. There is no reason to conclude now that a State tariff is required.

AEP Ohio indicated in its December 22, 2011 compliance tariff filing implementing the Opinion and Order that subject to any further direction from the Commission regarding implementation of this aspect of the modified Stipulation, AEP Ohio was in the process of making a FERC filing in concert with PJM Interconnection to ensure that the SCM is administered as adopted by the Commission. That FERC filing was served on all parties of record in this proceeding and is attached to this memorandum in opposition. As indicated in the attached FERC filing made by AEP Ohio, PJM has advised AEP Ohio that under RAA Schedule 8.1, Section D.8, no additional filing with the FERC is necessary to incorporate the Ohio SCM as an appendix to the RAA. PJM further stated that it will put CRES Providers and other market participants on notice of the AEP Ohio capacity rate via a posting of the rate on PJM's website,

which, according to PJM, is the same manner in which PJM notifies market participants of network transmission service rates and other rates.

In sum, the SCM, as amended by the Opinion and Order, is already being implemented under a FERC-approved tariff for wholesale electric service. This is the same method used to implement the SCM that has been in place for more than a year. There is no need for a separate retail tariff to mirror the existing FERC tariff. To the extent that the Commission wants to exert additional oversight on these issues, it can approve (or modify and approve) the Revised DIP, which serves a comparable function as a filed tariff by being a detailed plan for implementation of the SCM's two-tiered capacity charge.

V. IEU's stated concern about determining capacity charges is contrived and amounts to a "red herring" argument.

IEU spends considerable time (at 6-8) complaining that the Revised DIP does not identify how the $255 charge will mechanically be applied to shopping load and usage characteristics. Specifically, IEU argues (at 7) that the Revised DIP must identify how a shopping customer's Peak Load Contribution (PLC) will be determined and how the resource adequacy obligation will be impacted. IEU maintains (at 8) that a given CRES should be invoiced for the integrated sum of the PLCs of the shopping customers it serves – effectively yielding a weighted average price of that CRES provider's customer load served under the RPM-priced set aside and any customer load served under the $255/MW-Day rate. IEU's concerns are contrived and lack a basis in any actual billing issue or problem.

As noted above, PJM will continue to administer the billing under the RAA for the capacity. The process of applying customer PLCs to shopping load associated with CRES providers has occurred for years (since the advent of the RAA in 2007) and the same billing determinants and method will continue to be used. For customers above 200 kW, AEP Ohio's tariff requires an interval meter and actual historical interval data issued to calculate the

customer's PLC. For customers that do not have interval meters (such as residential customers), a load profile is published by AEP Ohio on its website and used to calculate PLCs for such customers. The only difference under the two-tiered capacity charge system is that the load associated with individual customers will be billed at one of two different rates, rather than one. As referenced above, shopping customers are identified and a list is conveyed to the serving CRES provider designating each customer as either being eligible for RPM-priced set-aside capacity charge or for the $255/MW-Day charge. CRES providers thus will have information readily available to confirm the accuracy of their bills from PJM. There is no reason to think there will be a billing problem in administering the two-tiered rate. The Commission should not address such unripe and academic issues.

CONCLUSION

For the foregoing reasons, the Commission should deny IEU's motion and overrule FES's objections and both intervenors' requests for expedited relief.

Respectfully Submitted,

//s/ Steven T. Nourse

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December 22, 2011

The Honorable Kimberly D. Bose
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Re: *American Electric Power Service Corporation*
Docket No. ER11-2183
American Electric Power Service Corporation
v. PJM Interconnection, L.L.C.
Docket No. EL11-32

Dear Secretary Bose:

On September 16, 2011, American Electric Power Service Corporation, on behalf of its public utility affiliates Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio"), provided a status report on proceedings pending before the Public Utilities Commission of Ohio ("Ohio Commission") that involve, among other things, issues that bear upon the matters pending before this Commission in the above-referenced dockets. That report noted that on September 7, 2011, AEP Ohio, together with representatives of the Ohio Commission's Staff and nearly twenty other parties participating in the Ohio Commission proceedings, had entered into a "Stipulation and Recommendation" intended to resolve many of the issues pending in those proceedings, including the state compensation mechanism referenced in Section D.8 of Schedule 8.1 of the PJM Interconnection, LLC Reliability Assurance Agreement ("RAA"). RAA Section D.8 applies to the Fixed Resource Requirement ("FRR") alternative under PJM's capacity market design; *i.e.*, the Reliability Pricing Model ("RPM").

By this second status report, AEP Ohio reports that on December 14, 2011, the Ohio Commission issued an "Opinion and Order" that adopted and approved, with certain modifications, the Stipulation and Recommendation.[1] Among other things, the Ohio Commission's Opinion approved a state compensation mechanism under which AEP Ohio will

[1] A copy of the Opinion is available at:
http://dis.puc.state.oh.us/TiffToPDf/A1001001A11L14B41654E58708.pdf

be compensated under the RAA for capacity made available to Ohio Competitive Retail Electric Service ("CRES") Providers. As discussed at pages 50-55 of the Opinion, the approved state compensation mechanism will apply from January 1, 2012, through May 31, 2015, after which AEP Ohio will transition from being an FRR Entity to participating in the RPM auctions. The state compensation mechanism further provides that during this period, CRES Providers will pay the applicable RPM auction price for retail shopping load within designated set-aside percentages of AEP Ohio's total retail load. For any load above those set-aside percentages (which increase in 2013 and 2014), the Ohio Commission-approved state compensation mechanism sets the wholesale capacity charge at $255 per megawatt-day.

AEP Ohio has notified PJM of the Ohio Commission's approval of the above-described state compensation mechanism and the approved effective date of January 1, 2012. PJM has advised AEP Ohio that under RAA Schedule 8.1, Schedule D.8, no additional filing with this Commission is necessary to incorporate the Ohio state compensation as an appendix to the RAA. PJM further stated that it will put CRES Providers and other market participants on notice of the AEP Ohio capacity rate via a posting of the rate on PJM's web site, which, according to PJM, is the same manner in which PJM notifies market participants of network transmission service rates and other rates. Subject to any further direction from the Commission, AEP Ohio intends to follow PJM's advice and not submit for filing an appendix to the RAA setting out the FRR capacity rates that will go into effect on January 1, 2012.

Finally, as the earlier status report discussed, the Stipulation also provides for AEP Ohio to request that this Commission defer action in the above-referenced dockets pending approval of the Stipulation by the Ohio Commission. The Stipulation further provides that AEP Ohio will file to withdraw the request for rehearing pending in Docket No. ER11-2183 and the complaint pending in Docket No. EL11-32 no later than thirty days after the Ohio Commission's Opinion becomes final and is no longer subject to appeal. In the meantime, therefore, AEP Ohio requests that the Commission continue to defer action in these dockets.

If you have any question concerning this letter, please do not hesitate to contact the undersigned.

Respectfully submitted,

Steven J. Ross

Counsel for
American Electric Power Service
Corporation

cc: All parties

CERTIFICATE OF SERVICE

I hereby certify that a copy of Memorandum in Opposition was served by electronic mail upon the individuals listed below this 3rd day of January, 2012.

//s/ Steven T. Nourse
Steven T. Nourse

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Summary: Memorandum of OhioPower Company electronically filed by Mr. Steven T Nourse on behalf of American Electric Power Service Corporation